UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 331

September Term, 2016

CANEI DONTRE WILLIAMS

v.

STATE OF MARYLAND

Arthur,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: May 2, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Canei Dontre Williams was one of seven occupants of a vehicle that was stopped for traffic violations. Police officers searched the vehicle and recovered two handguns. Williams told the officers that one of the guns belonged to him.

An indictment in the Circuit Court for Charles County alleged that, on the day of the traffic stop, Williams "did wear, carry and transport a handgun upon and about his person." Based on that indictment, Williams was tried, convicted, and sentenced for "transporting a handgun in a vehicle while on the public roads or highways." On appeal, Williams contends that the circuit court lacked power to convict him and sentence him for a crime that was never charged. We conclude that the judgment against Williams should be reversed.

BACKGROUND

A. Williams's Arrest and Indictment for Wearing, Carrying, or Transporting a Handgun "Upon or About His Person"

At around 1:00 a.m. on September 16, 2014, Charles County police officer Andrew Fenlon spotted a car that was traveling at 35 miles per hour where the speed limit was 25 miles per hour. As Officer Fenlon followed the vehicle to initiate a traffic stop, he noticed that the tag light and a brake light were not working. According to Officer Fenlon, he also smelled "a strong odor of marijuana" when a plastic bag flew out of a window on the passenger side and when he walked up to the driver's-side window.

Officer Fenlon called for additional officers after he noticed that there were seven men in the car. Macon Ryland was the driver; Canei Williams and another man were sharing the front passenger seat; and four other men were sharing the back seat. With

help from several other officers, Officer Fenlon removed the men from vehicle, handcuffed them, searched them, and read them *Miranda* warnings. The officers placed both Williams and Ryland in the back seat of Officer Fenlon's cruiser, which was parked directly behind Ryland's vehicle.

Officer Fenlon then searched the vehicle. He found an unloaded .38 caliber revolver under the front passenger seat. He found a fully loaded nine-millimeter semi-automatic handgun, with a laser sight, wedged between the glass sunroof and its plastic sunroof cover.

While the officers were inspecting the nine-millimeter handgun, Williams called out to get an officer's attention. Williams told the officer that the gun was his. One of the other men claimed ownership of the .38 caliber revolver.

The entire traffic stop was recorded on video. One camera on the dashboard of Officer Fenlon's cruiser faced outward, at Ryland's vehicle; another camera recorded Williams and Ryland in the back seats of the cruiser.

Officer Fenlon initially applied for charges against Williams in the District Court of Maryland for Charles County. The statement of charges alleged that Williams had committed 11 separate weapon and drug offenses, including transporting a handgun on his person and transporting a handgun in a vehicle.

On October 10, 2014, a Charles County grand jury issued a three-count indictment against Williams.[1] The first two counts alleged that Williams had stolen the nine-millimeter handgun and had possessed it while knowing or having reason to believe that it was stolen. The third count of the indictment alleged that, on the day of the traffic stop, Williams "did wear, carry and transport a handgun upon or about his person, in violation of Criminal Law Article, Section 4-203 of the Annotated Code of Maryland[.]" A summary on the final page of the indictment identified the charge as: "Wear, Carry And Transport Handgun Upon Their Person."

The corresponding portion of the statute provides: "a person may not . . . wear, carry, or transport a handgun, whether concealed or open, on or about the person[.]" Md. Code (2002, 2012 Repl. Vol., 2016 Supp.), § 4-203(a)(1)(i) of the Criminal Law Article ("CL"). A different subparagraph of section 4-203 provides that a person may not "wear, carry, or knowingly transport a handgun, whether concealed or open, in a vehicle traveling on a road or parking lot generally used by the public, highway, waterway, or airway of the State[.]" CR § 4-203(a)(1)(ii). Unlike the statement of charges in the district court, the indictment did not allege that Williams wore, carried, or "knowingly" transported a handgun "in a vehicle traveling on a road or parking lot generally used by the public, highway, waterway, or airway of the State" in violation of CR § 4-203(a)(1)(ii).

[1] The circuit court indictment, which superseded the initial statement of charges, was the relevant charging document for the eventual prosecution. *See Johnson v. State*, 358 Md. 384, 392 (2000).

B. <u>Trial, Conviction, and Sentence for Transporting a Handgun "In a Vehicle . . . While Traveling on the Public Roads or Highways"</u>

On February 23, 2016, the first day of trial, the court considered Williams's written motion to suppress his statement that the handgun belonged to him. In the motion, Williams had asserted that his statement was involuntary because he had been too intoxicated to understand what he was saying. At the hearing, the State presented Officer Fenlon's testimony alongside the recording of the traffic stop. The defense called Ryland, who claimed that Williams was drunk and incoherent at the time of the traffic stop. The court denied the motion to suppress the statement, but ruled that Williams could argue to the jury that the statement was involuntary.

As another preliminary matter, Williams rejected the State's offer to plead guilty to "transporting a handgun" under count three of the indictment. The Assistant State's Attorney nevertheless notified the court that the State planned to withdraw the other two charges, which related to the alleged theft of the handgun, if the gun's alleged owner failed to appear at trial. The Assistant State's Attorney did not mention any of the charges during the opening statement, except to say that Williams "ha[d] been charged with multiple counts[.]"

The State's case against Williams relied on police testimony and the recording of the traffic stop. Officer Fenlon testified that, after he found the nine-millimeter handgun, he heard Williams call out to get the attention of one of the officers and heard Williams tell the officer, "'That's mine right there,' or something along the lines of that." Another officer testified that he heard Williams say something "in the nature of '[t]he 9 millimeter

is mine.'" Officer Fenlon further testified that he did not observe signs that Williams was drunk or intoxicated.[2]

The State introduced the nine-millimeter handgun into evidence, as well as photographs showing the handgun where it had been found – between the vehicle's sunroof and sunroof cover. A forensic technician testified that he recovered no fingerprints from the handgun and that he had test-fired the handgun to confirm that it was operable.

The alleged owner of the handgun did not appear on either of the two trial days. Consequently, the State entered a *nolle prosequi* on the counts for theft and possession of stolen property.

Williams moved for a judgment of acquittal "as to Count 3," the only remaining count. Defense counsel argued that the State had failed to produce evidence "with regard to the possession knowingly of the firearm." The State argued that the jury could conclude that Williams constructively possessed the handgun even if he did not have actual possession of it. The court denied the motion, reasoning that the State had produced sufficient evidence as to "the essential elements of the crime charged." This short discussion about the motion for judgment of acquittal included no express mention of the actual charge against Williams (wearing, carrying, or transporting a handgun on or about his person) or the elements of that charge.

[2] During cross-examination, Officer Fenlon acknowledged that "at some point" during the traffic stop, he heard Williams ask "if anyone had taken the charges." Defense counsel told the jury that Williams said that the gun was his to "take the charges" for his friends.

In his defense, Williams called Ryland, the driver of the vehicle. Ryland testified that, on the night of the traffic stop, he and his friends drove to 7-Eleven to "get [Williams] some food and some milk, because . . . he was drunk and kept throwing up." Ryland claimed that Williams was "confused" and "out of it" during the traffic stop.

At the close of all evidence, defense counsel renewed the motion for judgment of acquittal on what he called the "wear, carry, and transport" charge. Defense counsel again asserted that the State had produced no evidence that Williams actually "possessed" the handgun. The State responded that possession was not an element of "transporting a handgun" and that, in any event, the jury could conclude that Williams constructively possessed the handgun. At the end of his argument, the Assistant State's Attorney added the following comment: "And he admitted it was his. And it was in a vehicle in a roadway."[3] The court denied the motion, again concluding that the State had produced sufficient evidence as to "the essential elements of the only remaining charge."

Although the indictment had alleged that Williams wore, carried, and transported a handgun "upon or about his person," the State requested a jury instruction based on Maryland Criminal Pattern Jury Instruction 4:35.3, which is titled "Weapons – Transporting a Handgun in a Vehicle." The court instructed the jury as follows:

[3] The State's appellate brief incorrectly asserts that "all the parties here, from opening statement forward, treated the original charge exclusively as a vehicle possession charge," i.e., as a charge of carrying or transporting the weapon in a vehicle. Throughout the trial, the attorneys and the court had mentioned that Williams was on trial only for "transporting" a handgun. No one suggested that transporting a handgun "in a vehicle in a roadway" was part of the charge until the State made that comment, after the close of all evidence.

> The defendant is charged with the crime of carrying or transporting a handgun in a vehicle while on a public roads or highways [sic]. In order to convict the defendant, the State must prove that the defendant wore, carry [sic], or knowingly transported a handgun in a vehicle, and that the defendant did so while traveling on the public roads or highways.

Williams's attorney not only failed to object to that instruction, but affirmatively stated that the defense was satisfied with the instructions as given.

The State's closing argument stressed the court's instructions about the elements of the offense. After reciting the instructions, the prosecutor argued:

> Well, he admits it. You can see it. And he did so while traveling . . . and I actually underlined that . . . on the public roads or highways. It doesn't mean he is driving the vehicle, it doesn't mean the handgun is on him in a holster, it doesn't mean it's in his pocket right here, or in his back pocket, or tucked in his pants. That's not what it is.

Later that afternoon, the jury announced that it had found Williams guilty "as to question number one, wear, carry, and transport a handgun in a vehicle." The jury marked a line for "Guilty" on the single item of the verdict sheet that read: "Wear, Carry and Transport a Handgun in a Vehicle."

On April 4, 2016, the court sentenced Williams to three years of imprisonment, with all but nine months suspended, followed by five years of probation. At the sentencing hearing, the court identified the charge simply as "Count 3." On the same day, the judge signed a "Probation/Supervision Order," which stated that Williams had been convicted under "Count 3 – wear, carry & transport a handgun in a vehicle."

Thereafter, Williams noted this timely appeal.

QUESTIONS PRESENTED

Williams presents three questions in his appeal:

1. Must the conviction and sentence for wearing, carrying, or knowingly transporting a handgun in a vehicle traveling on a road, pursuant to Md. Code Ann., Crim. Law § 4-203(a)(ii), be vacated because [Williams] was not charged with that crime?

2. Did the trial court err in denying [Williams's] motion to suppress his statement?

3. Was the evidence sufficient to sustain [Williams's] conviction?

For the reasons discussed below, we conclude that Williams's conviction and sentence for a crime not alleged in the indictment were illegal. We reverse the judgment on that ground.

The parties to this appeal have not briefed the issue of whether the State may retry Williams, under a different indictment, for the same acts on which his conviction was based. Although we express no opinion on that issue, we shall address the second and third questions presented by Williams to provide guidance in the event that those issues might recur in some future proceeding. We conclude that the circuit court did not err when it denied Williams's motion to suppress his statement to the police and that the evidence would have been sufficient to support a conviction on the uncharged offense of transporting a handgun in a vehicle.

DISCUSSION

I. Conviction and Sentence for an Uncharged Offense

Two facts are of central importance in this appeal: (1) Williams was charged with one crime, but erroneously convicted of another; and (2) Williams did not bring that error to the trial court's attention. Williams contends that Maryland law permits him to seek

relief from the judgment even though he did not identify the error until his appeal. He is correct.

Article 21 of the Maryland Declaration of Rights guarantees "[t]hat in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence[.]" The main purposes of this provision are: "'(i) to put the accused on notice of what he is called upon to defend by characterizing and describing the crime and conduct; (ii) to protect the accused from a future prosecution for the same offense; (iii) to enable the defendant to prepare for his trial; (iv) to provide a basis for the court to consider the legal sufficiency of the charging document; and (v) to inform the court of the specific crime charged so that, if required, sentence may be pronounced in accordance with the right of the case.'" *Counts v. State*, 444 Md. 52, 57-58 (2015) (quoting *Ayre v. State*, 291 Md. 155, 163 (1981)).

"'[I]t is elementary that a defendant may not be found guilty of a crime of which he was not charged in the indictment.'" *Johnson v. State*, 427 Md. 356, 375 (2012) (quoting *Turner v. State*, 242 Md. 408, 414 (1966)). Even more fundamentally, convicting a defendant on a charge that was never made amounts to "'a sheer denial of due process.'" *Stickney v. State*, 124 Md. App. 642, 646 (1999) (quoting *De Jonge v. Oregon*, 299 U.S. 353, 362 (1937)); *accord Johnson*, 427 Md. at 376 (citing *Dunn v. United States*, 442 U.S. 100, 107 (1979); *Turner v. New York*, 386 U.S. 773, 775 (1967); *Landaker v. State*, 327 Md. 138, 140 (1992)).

The Maryland Rules implement the protections of Article 21 by providing that "[a]n offense shall be tried only on a charging document." Md. Rule 4-201(a). The term "'[c]harging document' means a written accusation alleging that a defendant has committed an offense." Md. Rule 4-102(a). The charging document must "contain a concise and definite statement of the essential facts of the offense with which the defendant is charged[.]" Md. Rule 4-202(a). In addition, "[t]he statute or other authority for each count shall be cited at the end of the count, but error in or omission of the citation of authority is not grounds for dismissal of the charging document or for reversal of a conviction." *Id.*

The court may amend a charging document on motion or on its own initiative at any time before a verdict, "except that if the amendment changes the character of the offense charged, the consent of the parties is required." Md. Rule 4-204. This rule "gives effect" to a defendant's rights under Article 21 (*Counts*, 444 Md. at 57) by prohibiting unilateral changes to the substance of the charges.

Williams was tried in the circuit court based on a three-count indictment issued by a Charles County grand jury. The third count of the indictment read as follows:

> And the Jurors aforesaid, upon their oath aforesaid, do further present the said **CANEI DONTRE WILLIAMS**, late of said County, on or about the 16th day of September, two thousand and fourteen, at the County aforesaid, unlawfully did wear, carry and transport a handgun upon or about his person, in violation of Criminal Law Article, Section 4-203 of the Annotated Code of Maryland, and against the peace, government and dignity of the State (Wear, Carry and Transport Handgun Upon Person, Criminal Law Article, Section 4-203).

The statute cited at the end of count three contains several prohibitions. In relevant part, it provides:

> (a)(1) Except as provided in subsection (b) of this section, a person may not:
>
> > (i) wear, carry, or transport a handgun, whether concealed or open, on or about the person;
> >
> > (ii) wear, carry, or knowingly transport a handgun, whether concealed or open, in a vehicle traveling on a road or parking lot generally used by the public, highway, waterway, or airway of the State;
> >
> > (iii) violate item (i) or (ii) of this paragraph while on public school property in the State; or
> >
> > (iv) violate item (i) or (ii) of this paragraph with the deliberate purpose of injuring or killing another person.
>
> (2) There is a rebuttable presumption that a person who transports a handgun under paragraph (1)(ii) of this subsection transports the handgun knowingly.

Md. Code (2002, 2012 Repl. Vol., 2016 Supp.), § 4-203(a) of the Criminal Law Article (“CL”).

Subsection (b) lists various “exceptions,” which cover the circumstances under which a person may lawfully wear, carry, or transport a handgun, such as when the person has obtained a permit to do so. *See* CR § 4-203(b)(2). Subsection (c) sets forth the penalties for violations of subsection (a).

Although the penalties for violating CR § 4-203(a)(1)(i) are the same as the penalties for violating CR § 4-203(a)(1)(ii), those two offenses are by no means identical. “Plainly,” those two offenses “contain distinct elements that are not included in the other;

respectively, wearing, carrying, or transporting a handgun 'on or about the person,' and wearing, carrying, or knowingly transporting a handgun 'in a vehicle traveling on a road.'" *Clark v. State*, 218 Md. App. 230, 255 (2014); *compare* Maryland Criminal Pattern Jury Instructions (MPJI-Cr) 4:35.2 (2d ed. 2013) (recommending instruction for "Carrying a Handgun Concealed or Openly" where a defendant is charged under CR § 4-203(a)(1)(i)), *with* MPJI-Cr 4:35.3 (recommending instruction for "Transporting a Handgun in a Vehicle [While on the Public Roads, Highways, Waterways, Airways, or Parking Lots]" where a defendant is charged under CR § 4-203(a)(1)(ii)).

Among its many contentions, the State asserts that Williams "was arguably charged" with violating CR § 4-203(a)(1)(ii). Without supporting authority, the State posits: "although the language of the indictment borrowed from CR § 4-203(a)(1)[i], the citation within the indictment cited broadly to CR § 4-203 and not to either subsection, and that language did not eliminate the possibility of an original charge under subsection (ii)." The State's argument assumes that the statute cited in a count of a charging document prevails over the description of the offense. In fact, the opposite is true. The determination of whether a charging document adequately charges a particular offense depends upon "what is stated in the body of an indictment, not the statutory reference or caption." *Thompson v. State*, 371 Md. 473, 489 (2002) (citing *Busch v. State*, 289 Md. 669, 678 (1981)). The statutory reference in a charging document "exists as a matter of convenience to the parties and the court, and thus possesses no substance of its own." *Ayre*, 291 Md. at 168 n.9.

By alleging that Williams "did wear, carry and transport a handgun upon or about his person[,]" count three charged an offense only under CR § 4-203(a)(1)(i). It did not charge an offense for wearing, carrying, or "knowingly" transporting a handgun "in a vehicle traveling on a road or parking lot generally used by the public, highway, waterway, or airway of the State," under CR § 4-203(a)(1)(ii). Nor did it allege that Williams committed an act "while on public school property in the State" under CR § 4-203(a)(1)(iii), or "with the deliberate purpose of injuring or killing another person" under CR § 4-203(a)(1)(iv).

The charging document gave adequate notice that Williams was charged with violating CR § 4-203(a)(1)(i), but it did nothing to notify him that he was charged with violating the other provisions of that section. *See Beckwith v. State*, 320 Md. 410, 414-15 (1990) (explaining that a reasonable defendant would conclude that he was charged under a particular subsection to the exclusion of another subsection where the document charged the defendant "in a way which clearly appeared to exclude" a charge under another subsection); *Tapscott v. State*, 106 Md. App. 109, 133-36 (1995) (holding that indictment charging violation of particular section of a statute charges "only the conduct and circumstances proscribed by that section"), *aff'd*, 343 Md. 650 (1996).

Williams's trial occurred over 16 months after the filing of his indictment. The parties did not move to amend the indictment, nor did the court amend the indictment on its own motion.

During the arguments on the motions for judgment of acquittal, defense counsel did not specifically address the elements of the offense charged in the indictment. Later,

defense counsel failed to object when the State requested a jury instruction incorrectly stating that he had been "charged with the crime of carrying or transporting a handgun in a vehicle while on the public roads or highways," when the court erroneously instructed the jury that he had been charged with that offense, when the jury found him guilty of that uncharged offense, and when the court sentenced him based on that verdict.

Despite his failure to raise the issue in the circuit court, Williams contends that three separate rules authorize him to challenge his conviction for the uncharged offense. First, he contends that his appeal involves the type of jurisdictional issue that may be raised at any time under Rule 4-252(d), which states: "A motion asserting failure of the charging document to show jurisdiction in the court or to charge an offense may be raised and determined at any time." Second, he contends that his conviction and sentence for the uncharged offense are illegal and that a court "may correct an illegal sentence at any time" under Rule 4-345(a). Finally, he contends that the trial court's submission of the uncharged offense to the jury amounts to plain error, which this Court can review under Rule 4-325(e) despite a failure to object.

Williams cites *Stickney v. State*, 124 Md. App. 642 (1999), in support of his theory that the error here was "jurisdictional" in some sense of that term. In *Stickney* the defendants had not been charged with felony theft, but the trial court submitted that offense to the jury on the erroneous premise that it was a lesser-included offense of robbery with a dangerous and deadly weapon, which had been charged. *Id.* at 645. Stickney and a co-defendant were each convicted of one count of felony theft. *Id.* They appealed, contending "that the trial court did not have jurisdiction to try them for felony

theft, because the charging documents failed expressly to charge them with [that] offense." *Id.* at 645-46. This Court concluded that the "convictions for felony theft in the absence of a charging document charging them with that offense were a clear violation of Maryland law." *Id.* at 647.[4]

In *Stickney*, the State argued that the trial court had "effectively amended the indictment to include the offense of felony theft" during discussions with counsel about the jury instructions. *Id.* This Court rejected that argument, because the trial court did not "in any way indicate that it was actually amending the indictment." *Id.* at 648. The Court concluded that the trial court had not "effectively amend[ed] the indictment pursuant to Rule 4-204, and, consequently, it did not have jurisdiction to try [Stickney and his co-defendant] for the uncharged offense of felony theft." *Id.*

In referring to the trial court's lack of "jurisdiction," the *Stickney* Court did not elaborate on whether it meant that the trial court had no power to try Stickney and his co-defendant for felony theft, or whether the court had improperly exercised its power in trying them for an uncharged offense. In addition, the *Stickney* opinion is silent as to whether Stickney and his co-defendant had objected to the submission of the felony theft charges to the jury and whether the State contended that they had not preserved the issue for appeal. If Stickney and his co-defendant had not preserved the issue, it is at least

[4] As the Court explained, "a defendant who is charged with a greater offense can be convicted of a lesser included offense that was not specifically charged." *Stickney*, 124 Md. App. at 646 (citing *Hagans v. State*, 316 Md. 429 (1989)). The *Hagans* exception was inapplicable, however, because felony theft is not a lesser-included offense of robbery with a dangerous and deadly weapon. *Stickney*, 124 Md. App. at 647 (citing *Spitzinger v. State*, 340 Md. 114, 121 (1995)).

arguable that they could still employ Rule 4-252(d) to raise it on appeal if the court lacked "jurisdiction" in the sense of lacking power to conduct a trial in the first instance.

Williams suggests, however, that this Court need not decode *Stickney* and decide whether his claim of error here is "jurisdictional" within the meaning of Rule 4-252(d), because this Court has power to correct his illegal sentence at any time under *Johnson v. State*, 427 Md. 356 (2012), and Rule 4-345(a).

In *Johnson* the defendant was indicted for attempted murder, assault, and two weapons offenses. *Id.* at 362. The trial court included the uncharged offense of assault with intent to murder in the jury instructions and on the verdict sheet. *Id.* at 363. The jury acquitted Johnson of attempted murder, but found him guilty of assault with intent to murder and the other charged offenses. *Id.* The court sentenced him to 30 years of imprisonment for assault with intent to murder. *Id.* Although Johnson failed to raise the issue in his direct appeal, 16 years later he filed a motion to correct an illegal sentence, arguing that the conviction and resulting sentence for assault with intent to murder were illegal because the indictment had not charged that crime. *Id.* The circuit court denied his motion, and this Court affirmed that judgment. *Johnson v. State*, 199 Md. App. 331 (2011).

The Court of Appeals reversed. The Court rested its decision on two central conclusions. First, the Court concluded that Johnson's sentence for assault with intent to murder "was illegal because that crime was not contained in the indictment returned by the Grand Jury." *Johnson*, 427 Md. at 362. Second, the Court concluded that he had not

waived his right to seek correction of that illegal sentence by failing to raise that ground in the trial court. *Id.*

The *Johnson* Court pointedly declined to decide whether Johnson's claim of error was "'jurisdictional' in any sense of that word." *Id.*; *see id.* at 367 (stating that the Court was "uncertain" about whether Johnson had asserted the type of jurisdictional challenge that could be raised under Rule 4-252(d)). Nonetheless, in the Court's view, Johnson's contention that "the trial court 'did not have the power to render a verdict and impose a sentence on the uncharged offense'" was the type of contention that could be "raised 'at any time' under Rule 4-345(a)." *Johnson*, 427 Md. at 370-71. Because Johnson's request was cognizable as a challenge to an illegal sentence, the Court held that his claim was "not subject to waiver" even though he "may have acquiesced to his conviction and sentence at trial[.]" *Id.* at 371-72.

In a variation on a waiver argument, the State had also contended that Johnson's conviction for the uncharged offense was proper "because the indictment was 'constructively amended' to include that charge." *Id.* at 372. The Court rejected that argument, explaining that Rule 4-204 sets forth the "exclusive means" for amending an indictment. *Id.* at 373. The Court explained that Rule 4-204 permits certain technical modifications to existing charges, but that the rule does not permit amendments that charge new offenses. *Id.* at 375. The Court emphasized: "To allow a charge to be implied by the conduct of the parties and the trial court, though absent from the indictment, would create an unfair guessing game for defendants, in which they would be required to defend not only the charges in the indictment, but also any other crimes

discussed on the record or argued to the jury." *Id.* at 377-78. "Such a procedure[,]" the Court said, "would eviscerate the constitutional and prudential reasons for indicting defendants." *Id.* at 378.

The *Johnson* Court held that the "grave" procedural error in that case "clearly caused [Johnson's] sentence to be illegal under Rule 4-345(a)." *Id*. at 378. Because the illegality in the sentence resulted from an illegality in the underlying conviction, the Court concluded that the proper remedy was to vacate both the sentence and the conviction. *Id*.

Even though *Johnson* involved an appeal from the denial of a motion to correct an illegal sentence, Williams can seek review of the legality of his sentence in his direct appeal without filing a separate motion. *See, e.g.*, *Waker v. State*, 431 Md. 1, 8 (2013) ("when the trial court has allegedly imposed a sentence not permitted by law, the issue should ordinarily be reviewed on direct appeal even if no objection was made in the trial court") (citations and quotation marks omitted). Indeed, "where a defendant has been charged and convicted under an entirely inapplicable statute," but the defendant has not raised the issue on appeal, the Court of Appeals has still "reviewed the issue on the theory that the resulting sentence under the inapplicable statute is an illegal sentence which may be challenged at any time." *Moosavi v. State*, 355 Md. 651, 662 (1999) (citing *Campbell v. State*, 325 Md. 488, 508-09 (1992) (vacating illegal sentence on appeal, where the defendant "d[id] not raise the issue," but where it was "quite obvious" that the statute under which he was convicted did not apply to the defendant's conduct,

and so "as to the count of which he was convicted, the [defendant] received an illegal sentence")).

Rather than concede the error, the State advances the same assortment of arguments that the Court of Appeals rejected in *Johnson*. The State argues that Williams failed to preserve the illegal-sentence issue for appellate review by failing to object at trial, but that argument fails because Williams's claim is not subject to that preservation requirement. *See Johnson*, 427 Md. at 371-72.[5] The State argues that the circuit court had jurisdiction to impose judgment against Williams, but that argument is unavailing, because Williams need not demonstrate a "jurisdictional" error to obtain relief from his illegal sentence under Rule 4-345(a). *See Johnson*, 427 Md. at 366-71. The State argues that the parties' conduct at trial resulted in a "de facto amendment" to the indictment, but that argument also fails, because Rule 4-204 does not permit the court to add new or different charges in that manner. *See Johnson*, 427 Md. at 372-75 (rejecting State's argument that indictment had been "'constructively amended'" to include a charge not alleged in indictment); *see also Stickney*, 124 Md. App. at 647-48 (rejecting State's argument that the trial court had "effectively amended" the indictments to include charges not alleged in indictments).

The State attempts to distinguish *Johnson* on the ground that the alleged "amendment" in that case added a new charge, while the alleged "amendment" in this case substituted one charge for another. The State asserts that this "de facto amendment"

[5] Because normal preservation rules do not apply to the issue raised here, we need not decide whether the error is reviewable under the doctrine of plain error.

of the indictment was permissible under Rule 4-204 and did not violate Williams's rights, because it "did not change the character of the offense charged, and instead merely changed or clarified the form of the offense[.]" The State's argument misconstrues the meaning of the phrase "the character of the offense."

In its brief, the State quotes the following proposition: "Matters relating to the character of the offense are those facts that must be proved to make the act complained of a crime." *Tapscott*, 106 Md. App. at 134. An amendment changes the character of the charged offense when it "'change(s) the basic description of the offense,'" which occurs "when an entirely different act is alleged to constitute the crime." *Thanos v. State*, 282 Md. 709, 716 (1978) (quoting *Gray v. State*, 216 Md. 410, 416 (1958)). "After an offense has been charged, another offense that requires proof of a different or additional act may not be substituted for the offense originally charged on the theory that such an amendment is simply a matter of form." *Busch*, 289 Md. at 673.[6]

As mentioned previously, the separate offenses codified in CR § 4-203(a)(1)(i) and CR § 4-203(a)(1)(ii) each "contain distinct elements that are not included in the other[.]" *Clark*, 218 Md. App. at 255. Here, a mid-trial amendment alleging that Williams wore, carried, or transported a handgun "in a vehicle traveling on a road or parking lot generally used by the public," instead of "on or about the person," would have

[6] By contrast, an amendment does not change the character of the offense if it merely amounts to "a clerical correction with respect to the name of a defendant, the substitution of one name for another as a robbery victim, a change in the description of money, [a change in] the name of the owner of property in a theft case, [or a change in] the date of the offense." *Albrecht v. State*, 105 Md. App. 45, 68 (1995).

changed the character of the offense by altering the essential elements of the crime charged. *See Counts*, 444 Md. at 65-66 (holding that the amendment substituting felony theft for misdemeanor theft changed character of offense because it required "proof of an element the original offense did not require"); *Busch*, 289 Md. at 679 (holding that the amendment substituting charge of resisting arrest for charge of resisting, obstructing, or hindering an officer in performance of his duties changed character of offense because "[t]he charge as amended required proof of an arrest while the original charge did not").

The substitution of an allegation of one specific criminal act for an allegation of another act changes the character of the charged offense even where the same statute proscribes both acts. *See Johnson v. State*, 358 Md. 384, 390-92 (2000) (holding that amendment substituting "cocaine" for "marijuana" changed an element of the offense, and thus changed the character of the offense, notwithstanding that defendant was charged with violating the same sections of the Code before and after the amendment); *Thanos*, 282 Md. at 715-16 (holding that amendment substituting allegation that defendant "remove[d]" a price tag for allegation that defendant "alter[ed]" a price tag changed the character of the offense even though defendant was charged with violating the same section of the Code before and after amendment). Consequently, there is no merit to the State's assertion that the character of the offense remained unchanged between the grand jury's indictment and the petit jury's verdict.

In sum, *Johnson v. State*, 427 Md. 356 (2012), controls the outcome here. Williams was never charged with the crime of wearing, carrying, or knowingly transporting a handgun in a vehicle traveling on a public road or highway. The court did

not amend the indictment. Indeed, the court could not have amended the indictment without Williams's consent, which the State neither sought nor obtained. Williams's conviction and sentence for that crime are illegal, and he may seek relief from the erroneous judgment even though he may have acquiesced in the error at trial and sentencing. *See id.* at 362, 380.

II. Williams's Remaining Challenges to the Judgment

Williams has asked this Court to reverse the judgment against him and to vacate his conviction and sentence. He is entitled to that relief. *See Johnson*, 427 Md. at 378; *Stickney*, 124 Md. App. at 648.

From the record, it appears that Williams may have already served the executed portion of his sentence. In its brief, the State did not specifically argue that this case should be remanded for a new trial. The State has not indicated whether it plans to continue to pursue charges against Williams, whether in the existing case or on a new indictment. Under the circumstances, we shall reverse the judgment without remanding this case to the circuit court.

Neither Williams nor the State have addressed whether, after the reversal of Williams's conviction and sentence, the State might be prevented from prosecuting Williams again for the same conduct at issue at his first trial, whether on double jeopardy grounds,[7] speedy trial grounds, or some other grounds. It would be imprudent for this

[7] A defendant may take an immediate appeal from the denial of a pretrial motion to dismiss criminal charges based on double jeopardy. *See, e.g.*, *Scriber v. State*, 437 Md. 399, 406-07 (2014).

Court to decide those potentially complex issues without the benefit of adversarial briefing. *See* Md. Rule 8-131(a) ("[o]rdinarily, the appellate court will not decide" a non-jurisdictional issue "unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal").

Although we express no opinion about whether the State might be able to subject Williams to another trial, we have considered the merits of the two remaining questions in the interest of affording guidance in the event that the State can and does attempt to try Williams again. Williams contends that the circuit court erred in denying his pretrial motion to suppress a statement to the police and in denying his motion for judgment of acquittal. For the reasons discussed below, his remaining contentions are unpersuasive.

A. Suppression of Statement to Police

Williams contends that the circuit court erred in denying his pretrial motion to suppress his statement to police officers that the nine-millimeter handgun belonged to him. Williams argues that his statement was involuntary because some evidence indicated that he was under the influence of alcohol and may have been under the influence of marijuana when he made the statement.

Specifically, Officer Fenlon testified at the suppression hearing that he smelled marijuana when he stopped the vehicle in which Williams was traveling. Officer Fenlon stated, however, that he did not notice anything unusual about Williams's behavior during the stop. The driver, Ryland, denied that there was any marijuana in the vehicle, but testified that Williams had been drinking liquor that night. According to Ryland,

Williams was "just like talking, drunk, not understanding what was going on[,]" and "didn't even know where he was at." Ryland also claimed that he heard Williams say that the .38 caliber revolver was his, not the nine-millimeter handgun. Williams did not testify at the hearing.

Although a prior attorney for Williams had filed a written motion arguing that the statement was involuntary, his counsel during the suppression hearing did not specifically ask the court to make a determination on the issue of voluntariness. Defense counsel vaguely moved "to suppress the statement and the stop," mentioned Williams's rights under *Miranda*, and asserted that "the weight of the evidence is in favor of suppression." As a result of counsel's failure to present the theory of involuntariness at the suppression hearing, Williams effectively abandoned any contention that he was too intoxicated to make a voluntary statement. *See Jones v. State*, 213 Md. App. 483, 493-94 (2013); *Johnson v. State*, 138 Md. App. 539, 560 (2001) ("[t]he failure to argue a particular theory in support of suppression constitutes a waiver of that argument on appeal").

Even if Williams had preserved his contention, the court appears to have disagreed that his statement was involuntary. In addressing the admissibility of the statement, the court commented that Williams had received a *Miranda* warning. Based on the video recording, the court concluded that Williams initiated the conversation with the officers about the handgun and that the officer asked only one clarifying question in response to Williams's unprompted statement. The court denied the motion to suppress the

statement, but ruled that defense counsel could argue to the jury whether the statement was voluntary or not and request a jury instruction about voluntariness.[8]

Assuming that the court determined that Williams made the statement voluntarily, we conclude that the evidence supported that determination. The court was not required to credit Ryland's testimony that Williams was drunk during the traffic stop. *See Knight v. State*, 381 Md. 517, 535 (2004). In any event, even if the court had found that Williams was under the influence of alcohol or drugs, that fact alone would not compel the conclusion that he was too impaired to know and understand what he was saying to the police officers. *See Hof v. State*, 337 Md. 581, 597 (1995) (explaining that "being under the influence of narcotics does not automatically render a confession involuntary," and it is merely "a factor to be considered along with all the other applicable circumstances").

The video and audio recording of the traffic stop, as well as Officer Fenlon's observations, supported the conclusion that Williams had sufficient mental capacity to make an inculpatory statement. *See Ringe v. State*, 94 Md. App. 614, 621 (1993) (upholding conclusion that defendant had sufficient mental capacity to make confession where officer testimony and video showed that officers had no problem communicating with defendant). Williams demonstrated awareness and understanding of his situation when he asked whether any of the other occupants of the vehicle were "taking charges,"

[8] Williams ultimately declined to request an instruction that the jury was required to disregard the statement unless the State proved beyond a reasonable doubt that the statement was voluntary.

monitored the officers as they searched the vehicle, and called to get an officer's attention after they recovered the handguns.

In light of that evidence, we see no error in a conclusion that Williams's alleged intoxication was not so great as to make his statement involuntary. *See Harper v. State*, 162 Md. App. 55, 82-85 (2005) (holding that court did not err in finding that defendant was mentally capable of making confession, despite evidence that defendant was sleep-deprived and under the influence of alcohol, marijuana, and cocaine); *McCray v. State*, 122 Md. App. 598, 614-16 (1998) (holding that court did not err in concluding that defendant was mentally capable of understanding what she was saying to detectives, despite testimony "that she was under the influence of alcohol, that she slurred her speech and paused before answering the detectives' questions, that some of her answers were 'off base,' that she urinated on herself, and that she disrobed in front of the male detectives"). The court did not err in concluding that the statement was admissible and that Ryland's testimony at most generated a jury question about whether Williams made the statement voluntarily.

B. Sufficiency of Evidence for Charge of Wearing, Carrying or Transporting a Handgun in a Vehicle on a Public Road

Finally, Williams contends that the evidence at trial was insufficient to sustain his conviction for "wear[ing], carry[ing], or knowingly transport[ing] a handgun, whether concealed or open, in a vehicle traveling on a road or parking lot generally used by the public, highway, waterway, or airway of the State" in violation of CR § 4-203(a)(1)(ii). Williams was never charged with that offense, but instead was charged with "wear[ing],

carry[ing] and transport[ing] a handgun upon and about his person" in violation of CR § 4-203(a)(1)(i).

As discussed previously, Williams's central thesis in this appeal is that the circuit court lacked power to enter a judgment against him on the offense that was not charged in the indictment. That premise is in some tension with his further contention that the court should have granted a judgment of acquittal on that uncharged offense. Defense counsel specifically asked the court to grant a judgment of acquittal as to "count 3" of the indictment. Granting that motion would have resulted in a judgment of acquittal for the charged offense (under CR § 4-203(a)(1)(i)) and not for the uncharged offense (under CR § 4-203(a)(1)(ii)).

Setting aside the inherent tension in Williams's arguments, we nevertheless conclude that the evidence at trial would have been sufficient to generate a jury question on a charge of transporting a handgun in a vehicle traveling on a public road or highway in violation of CR § 4-203(a)(1)(ii), had that offense been charged. In reviewing the sufficiency of the evidence, the essential inquiry 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.'" *Jefferson v. State*, 194 Md. App. 190, 213 (2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The trier of fact, and not the appellate court, has the responsibility to assess the credibility of witnesses, to resolve any conflicts in the evidence, and to draw reasonable inferences from the evidence. *State v. Smith*, 374 Md. 527, 534-35 (2003) (citations omitted); *Jefferson*, 194 Md. App. at 213-14 (citations omitted).

There is no dispute that the nine-millimeter handgun was being transported in a vehicle traveling on a public road or highway. Although Williams was one of seven occupants of that vehicle, two officers testified, with corroboration from the video and audio recording, that Williams told an officer that the handgun was his.[9] Williams nevertheless contends that his statement is insufficient to implicate him as the person who transported the handgun. According to Williams, "it is obvious . . . that his assertion of ownership was insincere, if not the product of inebriation."

As explained previously, even if Williams had been drinking before he made the statement, the evidence supported a finding that Williams made the statement voluntarily. *See Harper*, 162 Md. App. at 84-85. A rational factfinder could have credited Williams's statement and inferred from his statement that he had knowingly transported that handgun in the vehicle. *See Burns v. State*, 149 Md. App. 526, 545-48 (2003) (holding that sufficient evidence supported defendant's conviction for transporting a handgun in a vehicle, where defendant was a rear-seat passenger in a vehicle with three occupants and where other evidence created inference that defendant knew about and possessed the handgun found under front passenger seat). Contrary to Williams's assertion, the fact-finder was not required to conclude that Williams was lying to the police about the handgun because he was seeking to "take the charges" to help his friends. *See id.* at 547

[9] Speaking for a plurality of an en banc panel of this Court, Judge Adkins has observed that incriminating statements are one way to show that the passenger of a vehicle had a stronger connection to contraband found in a vehicle than did the vehicle's owner or driver. *Smith v. State*, 145 Md. App. 400, 421 (2002), *rev'd*, 374 Md. 527 (2003).

(concluding that jury was "entitled to disbelieve" defendant's alternative explanation for evidence linking defendant to handgun).

CONCLUSION

Williams's conviction and sentence for wearing, carrying, or knowingly transporting a handgun "in a vehicle traveling on a road or parking lot generally used by the public, highway, waterway, or airway of the State" were illegal. Both the conviction and sentence must be vacated. Although we express no opinion about whether Johnson can be retried for that offense, we conclude that the circuit court did not err in denying his motion to suppress a statement to the police and that the evidence would have been sufficient to convict him of transporting a handgun in a vehicle had the State charged him with that offense.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY REVERSED. COSTS TO BE PAID BY CHARLES COUNTY.