Circuit Court for Harford County
Case No. 12-K-14-000629

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1013

September Term, 2016

EDWARD JASON FREED

v.

STATE OF MARYLAND

Arthur,
Leahy,
Reed,

JJ.

Opinion by Arthur, J.

Filed: August 1, 2017

A Harford County jury convicted appellant Edward Jason Freed of conspiracy to distribute oxycodone, distribution of oxycodone, and keeping a common nuisance. Because Freed had a previous conviction for manufacturing or distributing a controlled dangerous substance, the court employed Md. Code (2002, 2012 Repl. Vol.), § 5-905 of the Criminal Law Article to double the 20-year sentence for each of his three convictions. The court ordered that each of the three 40-year sentences would run consecutively, for a total of 120 years of incarceration, but it suspended all but 35 years.

In Freed's timely appeal, he complains of the court's refusal to give a jury instruction, an alleged restriction on closing argument, the sufficiency of the evidence supporting his conviction for keeping a common nuisance, and the legality of his enhanced sentences. Concluding that the court erred only in sentencing, we remand for resentencing, but otherwise affirm his convictions.

FACTUAL AND PROCEDURAL HISTORY

A. The Police Investigation

In January 2014, federal and local law enforcement agencies began a joint investigation into an oxycodone distribution network. A primary target of the investigation was Antoine Times, a leader of the illicit organization. The investigation involved extensive use of police surveillance and wiretapping, because the task force sought to "charge everybody involved in th[e] organization" in order "to dismantle [it]."

Over the course of six weeks in early 2014, the task force intercepted numerous phone calls and text-messages from Times's cell phone. Freed was one of the people

who was found to be in contact with Times.

The first intercepted call between Times and Freed occurred on the afternoon of February 8, 2014. In that call, Freed told Times, "I'm tryin' to make a couple little moves." Towards the end of the call, Times said, "I can fix you up, like, tomorrow like I come through or whatever and we link up and chop it up."

Detective Brandon Underhill, who worked on the investigation, testified that in his expert opinion, when Freed said that he was "trying to make a couple little moves," he was referring to making drug deals to earn money. The detective also testified that when Times said that he and Freed would "link up and chop it up," he meant that he was going to meet Freed to give him some oxycodone.

On February 21, 2014, between 12:56 p.m. and 2:15 p.m., Freed and Times exchanged the following text-messages, which we have reproduced without edits:

[FREED]: Homie I got a lil bitch in da wood with 6 my g, wat u can do for me homie?

[TIMES]: Your timing is the worse, I'm a lil fucked up right now, that's crazy I was about to hit your phone to see wassup over there, . . . I only got 3 wit me. . . .

[FREED]: She got 6 hundred my g

[FREED]: But i do got one bitch who want 3 that's gonna come so i will get em 4 her if u wanna come thru, im home alone

[TIMES]: I'm close ima hit you when bounce from my man spot,. When this fuckin rain chill out

[FREED]: Aight g

[FREED]: Hit me b4 u leave cuz now the bitch talkn bout hold up when

im tryin to find out if I get em is she sure so i dnt buy em 4 nothin, so just hit me b4 u step out my g

[FREED]: R u gonna b able to do the 6 deal?

[TIMES]: In a lil bit not right now

[FREED]: Aight then ill put her on hold til tonght

[TIMES]: Ok

Detective Underhill testified that when Freed referred to "a lil bitch in da wood with 6" or "6 hundred," he meant that he had a female customer in Edgewood who wanted to buy $600 worth of oxycodone. When Freed said that he had "one bitch who want 3," he meant that he had another female customer who wanted to buy $300 worth of oxycodone. When Times told Freed, "ima hit you when [I] bounce from my man spot," he meant that he would call Freed when he left wherever he was and got close to Freed's house.

At 2:32 p.m. on February 21, 2014, 17 minutes after the last text message, Times called Freed:

[FREED]: What's good homie?

[TIMES]: Yo, yo, you at the crib?

[FREED]: Yeah, yeah, yeah, I'm at the, uh, I'm at the spot. I said, um the one bitch that wanted the 3? This bitch ain't never hittin' me back and shit, but that one girl that, uh, that wanted the 6 and shit, she's steady hittin' me, so I mean . . .

[TIMES]: I'm a stop and holler at you.

[FREED]: [Talking over each other] . . . she, she wants it.

[TIMES]: Come outside in one minute. I'm comin' down your block right now, so just come outside.

[FREED]: Is you comin' out? You said you out my block?

[TIMES]: Yeah, I'm comin' down your block so come outside.

[FREED]: All right.

About 90 seconds after that call ended, Times called Freed to confirm his location:

[TIMES]: Yo, what's the name of your street?

[FREED]: I was just about to ask you, it sure is cold here, it's, ah, Spring Lake Way.

[TIMES]: Yeah, yeah, yeah, yeah. I'm on, um, I'm on it right now. I'm on, um . . .

[FREED]: North Way shit?

[TIMES]: Nah, I'm on . . .

[FREED]: North Way . . .

[TIMES]: Turning on your street right now.

[FREED]: All right.

[TIMES]: You should see me in a few seconds.

[FREED]: All right.

[TIMES]: I'm in a Jeep.

[FREED]: Okay, okay.[1]

[1] In its brief, the State asserts that based on the context of the prior calls, the transcript appears to designate the speakers incorrectly. We agree and have made the correction in our summary of the conversation.

At 1:23 p.m. the following day, February 22, 2014, Freed called Times about another interested buyer:

[FREED]: Hey, I got somebody that wants – still my sister's, uh, mother again – but they got somebody over there. One of 'em wants 20 and the other wants 60 or more.

[TIMES]: What, we gotta go over there to them?

[FREED]: I mean, they in Grace.

[TIMES]: Oh, they in Grace? I don't fuck in Grace. I told you that. . . .

[FREED]: Oh yeah, yeah. True, true, true.

[TIMES]: Yeah, they gave me bullshit [talking over each other]

[FREED]: Um, I could probably, uh, get her to come up here.

[TIMES]: I mean, not to sound like – I only deal with you, right? So you like work it out to where I deal with you. Like, I'm not fuckin' with them. Like, the motherfuckers be lying' and say they want this then when you get to them they say this – that shit's just like a headache. You know what I mean?

[FREED]: Right, right, right.

[TIMES]: I deal with like 3 people son. So, like, once you say yo look, I got everything in my hand. It's a go. Then we can do it like that.

[FREED]: All right.

[TIMES]: 'Cause I wanna shoot the load anyway so I'd rather you, you know what I'm sayin' – so you see me before I get on [in audible] you know what I mean?

* * *

[TIMES]: I mean like, yo so, I'm gonna do it for you so you can eat.

I'm a do it for a dub you know what I'm sayin'?

[FREED]: Right.

[TIMES]: You know, you can cut' em for whatever you wanna cut 'em.

* * *

[FREED]: Yeah, um, all right, yeah I'm just gonna go ahead – I'll probably hit 'em, man, yo, shit. I took – damn, I know they gonna wanna hear on the 22.

According to Detective Underhill, when Freed said that he had someone who wanted "20" and someone else who wanted "60," he was telling Times that he had two customers who wanted to buy 20 and 60 oxycodone pills, respectively. In Detective Underhill's opinion, Freed's statements demonstrated that he was "middling deals" – i.e., functioning as a middleman – for Times. When Times said, "I deal with like 3 people," he was confirming his role as a wholesale distributor and encouraging Freed to function as the middleman.

The detective also testified that when Times said, "I'm gonna do it for you so you can eat" and "I'm a do it for a dub," he was telling Freed that he would give him a good deal. According to the detective, a "dub" means $20, so Times was telling Freed that he would sell him the oxycodone for $20 a pill. When Freed said, "I know they gonna wanna hear on the 22," he was debating with himself about whether to take the deal, because he knew that his customers would want to pay $22 a pill.

At 2:09 p.m. on February 22, 2014, about 30 minutes after the prior call ended, Freed placed another call to Times:

[TIMES]: Yo.

[FREED]: Hey . . .

[TIMES]: What's going on?

[FREED]: I was thinking like, now, um because it's like a couple family members on her end or whatever right, so what I'm gonna do – I'm just gonna have 'em come to my spot and then when everything, when all the birds here land or whatever, that side strip, that Webster joint – like I'll just walk out where so they can't even see the car or nothing.

[TIMES]: All right. Cool.

* * * * * * * *

[FREED]: So, all right. Well yeah homey, that's what I'll do. I'll just hit you when, ah, all the birds arrive.

[TIMES]: All right, cool.

[FREED]: All right, um, I'm off.

Detective Underhill testified that Freed's reference to "birds" was a mistranscription and that Freed actually referred to "bread," by which he meant "money." The detective interpreted Freed's statements to mean that he would purchase oxycodone from Times when the money arrived.

Detective Underhill drove out to Freed's house on Springlake Way in Havre de Grace on February 22, 2014, after he had intercepted the communications that indicated that Times would be going there. The detective (who was presumably driving an unmarked car) saw that Times had backed his car into Freed's driveway, but had parked close to the road. Times, whom the detective had observed on other occasions, was

sitting in the driver's seat. Another man was sitting in the passenger seat. By referring to a Motor Vehicle Administration photograph, the detective confirmed that the other man was Freed. The detective was unable to take photographs because there was little traffic (it was a Sunday afternoon), and Freed had parked his car so that it would face out onto the street. On cross-examination, the detective testified that the activity he observed was consistent with what he knew to be a drug transaction.

On cross-examination, defense counsel asked Detective Underhill whether he had seen other cars in the driveway that day. The detective responded that he saw "multiple other cars there that were parked up close to the house." On redirect, the detective expressed the view that the parked cars may have belonged to Freed's customers.

Two days later, on February 24, 2014, at 8:14 p.m., the investigators intercepted another call from Times to Freed:

[FREED]: Whew, yeah big bro!

[TIMES]: Yo, um, fuck man, you wanted the fifty right?

[FREED]: Yeah, yeah, yeah, yeah.

[TIMES]: Fucking, um, yo, like I don't if I can get it filled so some of em might just have to be the big ones.

[FREED]: What do ya mean the big ones? Thirties?

[TIMES]: There's, um, 224's. I mean they're all 30's but . . .

[FREED]: Oh, yeah, yeah, yeah. No it don't matter if they're 224's or whatever.

[TIMES]: All right. Nah, some people be like, they be funny about that you know what I'm saying. They hafta . . . .

[FREED]: So you're on your way?

[TIMES]: Yeah.

[FREED]: All right. That's what it is G.

Detective Underhill interpreted Times's statement "you wanted the fifty?" to mean that he was confirming that Freed wanted 50 pills. He explained the references to "30's" and "224's" by testifying that all oxycodone pills have a dosage of 30 milligrams, but that one manufacturer makes a larger pill that is inscribed with the number "224." Times was telling Freed that some of the pills would be the larger "224" pills, and Freed was responding that it didn't matter.

At 8:47 p.m. on February 24, 2014, less than half an hour after Times told Freed that he was on his way, another call occurred:

TIMES]: I'm about to turn down your block [overtalking], I'm trying to ah . . .

[FREED]: You're about to turn down my block now?

[TIMES]: I'm outside.

[FREED]: All right, here I come homey. All right.

Two days later, on February 26, 2014, the investigators intercepted another call from Freed to Times:

[TIMES]: Ya all right?

[FREED]: Well what it is my G?

[TIMES]: What's up?

[FREED]: Shit, I got, ah, I got, um, another high number lined up. Probably about maybe about 50 or 60 of 'em.

[TIMES]: I ain't got shit right now son.

Detective Underhill opined that when Freed said that he had "lined up" "another high number" of "[p]robably 50 or 60," he meant that he had customers who wanted to purchase 50 or 60 oxycodone pills. The detective testified that 50 pills would be worth $1000 and that 60 would be worth $1200.

On March 5, 2014, the investigators intercepted a text message from Freed to Times, in which Times wrote: "Got that stack I owe u big brother." Detective Underhill testified that the term "stack" meant money – typically $1000.

On March 9, 2014, Times and his girlfriend were arrested in a hotel room in North East, Maryland. A body-cavity search of Times's girlfriend uncovered 1000 oxycodone pills that she was trying to conceal.

B. The Search of Freed's Residence and the Interview

At about 10:40 a.m. on March 9, 2014, the day when Times was arrested, Detective Underhill, along with a team of officers, executed a no-knock search warrant on Freed's residence in Havre de Grace. Freed and a woman were inside.

The search lasted 45 minutes. It uncovered $196 in a safe, a small bag of heroin, "personal use" drug paraphernalia (i.e., spoons and syringes), and eight cellular phones. The telephone number of one of the phones indicated that it had been used to communicate with Times during the investigation. Freed acknowledged that the phone belonged to him.

Approximately 15 minutes after the officers broke into the house, Freed was advised of his *Miranda* rights. Although Freed did not initial or sign a form containing the *Miranda* warnings, Detective Underhill testified that Freed orally agreed to speak with him.[2]

After the search was completed, Detective Underhill and another police officer moved Freed into a bedroom so that the female occupant could not "overhear [their] conversation." Freed was handcuffed, and the officers were armed, but there is no indication that their weapons were unholstered. Detective Underhill testified that Freed agreed to speak to the officers and that no one made any threats or promises to obtain any statements from him.

The interview lasted approximately five to eight minutes. According to the detective, Freed told him that he "middled deals." Freed said that he "lined up his customers ahead of time, obtain[ed] all the money from his customers, and then . . . reach[ed] out to his source of supply so that he [could] obtain what he need[ed] to distribute them." Although the interview was not recorded, Detective Underhill's handwritten notes, which read "middle man for pills," were admitted, without objection.

C. Sentencing

After the jury returned a verdict of guilty on all counts, the State requested an enhanced penalty because of Freed's previous conviction for heroin distribution and his

[2] According to the detective, Freed documented his receipt of the warnings and his assent by circling "yes" in response to the question: "Do you understand your rights as explained?"

criminal history. Relying on § 5-905 of the Criminal Law Article, the court imposed three enhanced sentences for each of Freed's three convictions: a sentence of 40 years' imprisonment, with all but 25 years suspended, for conspiracy to distribute oxycodone; a consecutive sentence of 40 years' imprisonment, with all but 10 years suspended, for the distribution of oxycodone; and a consecutive sentence of 40 years' imprisonment, all of which was suspended, for keeping a common nuisance.

Freed filed this timely appeal.

QUESTIONS PRESENTED

Freed presents four issues on appeal, which we quote:

1. Did the trial court err when it refused to instruct the jury that it must find that Mr. Freed's incriminating statement was voluntary before considering it?

2. Did the trial court err when it precluded defense counsel from arguing that Mr. Freed did not make a statement to police?

3. Was there insufficient evidence to convict Mr. Freed of keeping a common nuisance?

4. Did the trial court err when it doubled Mr. Freed's sentences under § 5-905 on more than one count?

For the reasons that follow, we answer the first three questions in the negative. However, we hold that the court erred in imposing three enhanced sentences under § 5-905 of the Criminal Law Article. Consequently, we remand for resentencing on all convictions.

DISCUSSION

I. Jury Instruction on Voluntariness

During a bench conference concerning jury instructions, Freed's defense counsel requested that the court give MPJI-CR 3:18, the pattern jury instruction that addresses the voluntariness of a defendant's statement to the police. The focus of the requested instruction was Freed's statement that he "middles" for Times.[3]

[3] In full, MPJI-CR 3:18 reads:

> You have heard evidence that the defendant made a statement to the police about the crime charged. [You must first determine whether the defendant made a statement. If you find that the Defendant made a statement, then you must decide whether the State has proven] [The State must prove] beyond a reasonable doubt that the statement was voluntarily made. A voluntary statement is one that under all circumstances was given freely.
>
> [[To be voluntary, a statement must not have been compelled or obtained as a result of any force, promise, threat, inducement or offer of reward. If you decide that the police used [force] [a threat] [promise or inducement] [offer of reward] in obtaining defendant's statement, then you must find that the statement was involuntary and disregard it, unless the State has proven beyond a reasonable doubt that the [force] [threat] [promise or inducement] [offer of reward] did not, in any way, cause the defendant to make the statement. If you do not exclude the statement for one of these reasons, you then must decide whether it was voluntary under the circumstances.]]
>
> In deciding whether the statement was voluntary, consider all of the circumstances surrounding the statement, including:
>
> (1) the conversations, if any, between the police and the defendant;
>
> (2) [whether the defendant was advised of [his] [her] rights;]
>
> (3) the length of time that the defendant was questioned;

Defense counsel argued there was some evidence to support the instruction because Freed made the statement shortly after 12 officers had used a battering ram to break down his door under the authority of a no-knock warrant. Although Freed received *Miranda* warnings at the beginning of the raid, counsel argued that Freed made the alleged statement about 30 to 45 minutes later, while he was handcuffed, in a secluded room, and was being interrogated by two armed officers. Counsel also argued that Freed did not sign the sheet containing the *Miranda* warnings and that the detectives did not record their interview with him. Counsel pointed out that the State had the burden of proving the voluntariness of the statement beyond a reasonable doubt and that MPJI-CR 3:18 lists a number of factors for a jury to use in evaluating whether the State met its

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> (4) who was present;
>
> (5) the mental and physical condition of the defendant;
>
> (6) whether the defendant was subjected to force or threat of force by the police;
>
> (7) the age, background, experience, education, character and intelligence of the defendant;
>
> [(8) whether the defendant was taken before a district court commissioner without unnecessary delay following arrest and, if not, whether that affected the voluntariness of the statement;]
>
> (9) any other circumstances surrounding the taking of the statement.
>
> If you find beyond a reasonable doubt that the statement was voluntary, give it such weight as you believe it deserves. If you do not find beyond a reasonable doubt that the statement was voluntary, you must disregard it.

burden.

The State argued that there was "clearly nothing" to indicate that Freed's statement was involuntary because "the officer . . . did not have a weapon drawn, . . . did not make any threats to the defendant, [and] did not make any promises."

The court denied Freed's request for MPJI-CR 3:18. It reasoned, incorrectly, that "the instruction should be given only if there is an issue as to whether a defendant actually made a statement[.]" As the Notes on Use to the instruction explain, the initial bracketed language in *the first paragraph* of the multi-paragraph instruction "should only be given if there is an issue as to whether the defendant actually made a statement." Nevertheless, "[t]he instructions in the second paragraph should be given if there is an issue, generated by the evidence, about whether force, or a promise, threat, or offer of reward compelled or produced a statement."

Freed contends that the circuit court erred in denying his request for a jury instruction, because he says: (1) the court erroneously held that the instruction was "only relevant when there is an issue as to whether a defendant actually made a statement"; and (2) there was "some evidence" that Freed's statement was involuntary.

Although the State concedes that the court premised its decision on an erroneous rationale, it contends that Freed waived his right to challenge the refusal to give the instruction, because he did not take exception to it after the court instructed the jury at trial. Furthermore, even if Freed did not waive the issue, the State maintains that the instruction was not generated by the evidence and that the failure to give the instruction

was harmless beyond a reasonable doubt.

We agree that Freed's counsel did not preserve the objection. We do not reach the State's other contentions.

Under Rule 4-325(e), "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." "A principal purpose of Rule 4-325(e) 'is to give the trial court an opportunity to correct an inadequate instruction' before the jury begins deliberations." *Alston v. State*, 414 Md. 92, 112 (2010) (quoting *Bowman v. State*, 337 Md. 65, 69 (1994)).

After the court had instructed the jury in this case, it prompted both parties to note any objections on the record, yet defense counsel declined to do so:

[COURT]: Counsel, do you all wish to approach for any reason?

[STATE]: No.

[DEFENSE COUNSEL]: No.

Freed concedes that, "he did not object again after the jury had been instructed" and that his failure to object "may fail to preserve the issue for appeal." *See* Md. Rule 4-325(e). He nevertheless contends that we should consider the voluntariness issue because he "substantially complied with the preservation requirement" as discussed in *Gore v. State*, 309 Md. 203 (1987). He argues that his counsel did object after the court initially expressed its refusal to give the instruction and that, thereafter, he "continued to argue"

that the instruction should be given. We reject his contention that he substantially complied with Rule 4-325(e).

To show substantial compliance with Rule 4-325(e), a party must meet the following requirements:

> [T]here must be an objection to the instruction; the objection must appear on the record; the objection must be accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the record[;] and the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless.

Gore v. State, 309 Md. at 209; *accord Sims v. State*, 319 Md. 540, 549 (1990) (stating that, "under certain well-defined circumstances, when the objection is clearly made before instructions are given, and restating the objection after the instructions would obviously be a futile or useless act, we will excuse the absence of literal compliance with the requirements of the Rule").

The Court of Appeals has made it clear that instances of substantial compliance "represent the rare exceptions." *Sims v. State*, 319 Md. at 549. In an opinion by Judge McAuliffe, a former trial judge, the Court explained:

> Many issues and possible instructions are discussed in the usual conference that takes place between counsel and the trial judge before instructions are given. Often, after discussion, defense counsel will be persuaded that the instruction under consideration is not warranted, and will abandon the request. Unless the attorney preserves the point by proper objection after the charge, or has somehow made it crystal clear that there is an ongoing objection to the failure of the court to give the requested instruction, the objection may be lost.

Id.

In this case counsel did not substantially comply with Rule 4-325(e). To the

contrary, he acquiesced in the instructions as given when he declined the trial judge's express invitation "to approach for any reason" after she had finished instructing the jury. *See Choate v. State*, 214 Md. App. 118, 129-30 (2013) (finding no substantial compliance where defense counsel agreed with the instruction and told the court that he was satisfied with the instructions); *Braboy v. State*, 130 Md. App. 220, 226-27 (2000) (finding no substantial compliance where defense counsel told the court that the defense has no exceptions).

This is certainly not a case like *Gore*, in which the Court of Appeals found substantial compliance when defense counsel did not reiterate an objection after the court, on its own motion, devised and delivered an erroneous instruction in response to counsel's comments in closing argument and told counsel, "'You can object all you want, but I'm going to do it.'" *Gore v. State*, 309 Md. at 206. Nor is this a case like *Horton v. State*, 226 Md. App. 382, 412-14 (2016), in which this Court found substantial compliance where counsel did not object after the trial judge had said that she would consider the instruction overnight and advise the parties of her decision the following morning and, on the following morning, announced that she would not give the instruction. Here, the court invited an exception after it had instructed the jury, but counsel did not make one.

"There are good reasons for requiring an objection at the conclusion of the instructions even though the party had previously made a request." *Johnson v. State*, 310 Md. 681, 686 (1987). "If the omission is brought to the trial court's attention by an

objection, the court is given an opportunity to amend or correct its charge." *Id.* "Moreover, a party initially requesting a particular instruction may be entirely satisfied with the instructions as actually given." *Id.*

In this case, "[o]nce the request was denied and the instructions given, there was no further discussion." *Braboy v. State*, 130 Md. App. at 227. Accordingly, "we conclude that the issue was not preserved for appeal." *Id.*

II. Closing Argument

At the same time that the circuit court refused to give a voluntariness instruction, it prohibited Freed's defense counsel from arguing that Freed did not make a statement to the detectives and that Detective Underhill was "wrong or lying" in saying that he did. Freed contends that the circuit court abused its discretion in prohibiting him from making that argument. In our view, the error, if any, is immaterial, because Freed's counsel made the argument notwithstanding the court's ruling.

In his closing argument, Freed's defense counsel told the jury:

> Now, of course [Detective] Underhill claims my client made the statement that he was "middling" for him. I think that's very interesting. There was one of the exhibits, you can look at it, the Miranda Waiver. He didn't even sign it, and he received that Miranda Waiver a half hour – 45 minutes earlier in the midst of a house raid. And we are told that it's not recorded. We have to just believe. It's not written down anywhere. My client didn't write down a statement that he made this statement he middled for Times.
>
> But they have always had the theory because they've been monitoring my guy on the wire that he's middling for Times. So, of course, surprise! They say he said he middles for Times.

In substance, Freed's counsel succeeded in making the argument that the court had

prohibited him from making. He expressed skepticism about the detective's testimony ("I think that's very interesting"). He noted some of the irregularities associated with the statement – the unsigned waiver ("[h]e didn't even sign it"), the apparent lack of a recording ("we are told that it's not recorded"), and the absence of a signed statement ("[i]t's not written down anywhere"). He insinuated that the detective's account was uncorroborated ("[w]e have to just believe") and, hence, unworthy of credence. He concluded with another insinuation that the detective fabricated Freed's alleged statement ("of course, surprise!") in order to confirm a preexisting theory of guilt ("[b]ut they have always had the theory . . . that he's middling for Times").

In short, counsel managed to say just about everything that the court had prohibited him from saying. In these circumstances, the court's ineffectual prohibition cannot form a basis for reversal. *See Ingram v. State*, 427 Md. 717, 733-35 (2012) (holding that any error in precluding counsel from making proposed closing argument was harmless where trial court "afforded extensive latitude" for defense counsel to make substantively similar argument).

III. Common Nuisance

Section 5-605(b) of the Criminal Law Article states that "[a] person may not keep a common nuisance." The statute defines a "common nuisance" as "a dwelling, building, vehicle, vessel, aircraft, or other place":

> (1) resorted to by individuals for the purpose of administering illegally controlled dangerous substances; or
>
> (2) where controlled dangerous substances or controlled paraphernalia are

manufactured, distributed, dispensed, stored, or concealed illegally.

Id. § 5-605(a).

Freed challenges the sufficiency of evidence supporting his conviction for keeping a common nuisance.

We recently set forth the applicable standard for reviewing challenges to the sufficiency of the evidence:

> In reviewing the sufficiency of the evidence, an appellate court determines "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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Derr v. State*, 434 Md. 88, 129 (2013); *Painter v. State*, 157 Md. App. 1, 11 (2004) ("[t]he 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'") (citations omitted) (emphasis in original).
>
> The appellate court thus must defer to the factfinder's "opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]" *Pinkney v. State*, 151 Md. App. 311, 329 (2003); *see also State v. Mayers*, 417 Md. 449, 466 (2010) ("[w]e defer to any possible reasonable inference the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence") (citations omitted). Circumstantial evidence, moreover, is entirely sufficient to support a conviction, provided that the circumstances support rational inferences from which the trier of fact could be convinced beyond a reasonable doubt of the guilt of the accused. *See, e.g.*, *State v. Manion*, 442 Md. 419, 431-32 (2015); *Painter* [*v. State*], 157 Md. App. at 11.

Benton v. State, 224 Md. App. 612, 629-30 (2015).

Under § 5-605(b) of the Criminal Law Article, "an essential element of the offense . . . is its recurring nature." *McMillian v. State*, 325 Md. 272, 294 (1992). The Court

explained:

> "[T]here is no particular extent of time prescribed during which the improper practices must continue or recur; each case must be adjudged according to its own circumstances. It is usually deemed sufficient if, when the character of the culpable acts and the circumstances under which they were committed are taken into account, it appears that they were repeated often enough to warrant an inference that the house was kept for the indulgence of such practices."

Id. at 295 (quoting *Ward v. State*, 9 Md. App. 583, 593 (1970)).

In *McMillian* the Court of Appeals applied this standard in the course of holding that the evidence was sufficient to convict a club owner of keeping a common nuisance. Even though the evidence in that case "was restricted to what the police saw and heard during approximately four hours of a single day" (*id.* at 296), it showed "the consummation of a number of drug transactions involving a number of different, transient buyers" at the social club that McMillian owned. *Id.* When the police searched the club, they found "59 glassine bags of cocaine, weighing in excess of 72 grams." *Id.* When the police asked McMillian why he was involved in drug-dealing at the club, "he responded that he had to 'make a living somehow.'" *Id.* "From this evidence," the Court concluded, "the jury could reasonably have inferred that McMillian was maintaining a building that was being used on a recurring basis to distribute, dispense, store or conceal drugs." *Id.*

The offense does require "more than the private use of a dwelling by the owner or occupant for the personal use of illegal drugs." *Davis v. State*, 100 Md. App. 369, 389 (1994) (citing *Tucker v. State*, 19 Md. App. 39, 44 (1973)). "Evidence found on a single

occasion, however, may be sufficient to demonstrate a crime of a continuing nature." *Id.* at 387. For example, in *Hunt v. State*, 20 Md. App. 164, 167-69 (1974), this Court held that the evidence was sufficient to support a conviction for maintaining an apartment as a common nuisance where a search disclosed a cellophane bag containing heroin; several measuring spoons; 250 glassine bags of heroin, in 10 bundles, each consisting of 25 bags; empty glassine bags; and records of the purchase and sale of quantities of drugs. *Id.* at 165. In reaching its decision, our predecessors reasoned that the evidence showed a "continuing narcotics operation" that the defendant conducted in the apartment. *Id.* at 169.

Freed contends that he could not be guilty of keeping a common nuisance because there was insufficient evidence to establish that his house "was used for drug-related activity for other people, on a recurring basis." We disagree.

In a text message at about 1:00 p.m. on February 21, 2014, Freed told Times about a female customer who wanted to stop by to buy $300 worth of oxycodone ("i do got one bitch who want 3 that's gonna come"). Freed said that he was at his house if Times wanted to deliver the drugs ("if u wanna come thru, im home alone").

A few minutes after the last exchange on this subject, Times called Freed and asked whether he was "at the crib." Freed replied that, "Yeah, yeah, yeah, I'm at the, uh, I'm at the spot." Freed told Times that the woman who wanted $300 worth of oxycodone had not called him back ("[t]his bitch ain't never hittin' me back"), but that he had another customer who wanted $600 worth of the product ("that one girl that, uh, that

wanted the 6 and shit, she's steady hittin' me"). Times said that he would stop by ("I'm a stop and holler at you").

Ninety seconds later, Times called and asked for the name of Freed's street. Once he had confirmed the name, Times told Freed that he was turning onto the street, that Freed would see him in a few seconds, and that he was in a Jeep. Freed said, "Okay."

On the following day, February 22, 2014, Freed called Times to tell him that he had two more customers – one who wanted 20 pills, and another who wanted at least 60 ("One of 'em wants 20 and the other wants 60 or more"). Times seems to have understood Freed to be saying that he and Freed would have to go another location in Havre de Grace to make the sale ("Oh, they in Grace? I don't fuck in Grace"). Times made it clear that he did not intend to deal with Freed's customers and that he dealt only with Freed as his middleman:

> I only deal with you, right? So you like work it out to where I deal with you. Like, I'm not fuckin' with them.

Freed responded that he could probably get one customer to come to his house ("I could probably, uh, get her to come up here"). About 30 minutes later, Freed called Times to tell him that the customer (or customers) was (or were) coming to his house ("I'm just gonna have 'em come to my spot"). He said that he would call Times when he had the money ("I'll just hit you when, all, all the birds arrive").

After intercepting that conversation, Detective Underhill went to Freed's house. On the afternoon of February 22, 2014, the detective saw Times and Freed sitting in Times's car, which had been backed into Freed's driveway to allow the occupants to see

what was happening on the street. The detective opined that their conduct was "consistent with a drug transaction." He added that he saw other cars parked near the house, which suggested that Freed's customers had been waiting for him at the house.

Two days later, on February 24, 2014, Times called Freed to confirm that he wanted 50 pills ("you wanted the fifty right?"). Freed asked whether Times was on his way, and Times said that he was. Less than half an hour later, Times called to say that he was turning onto Freed's block ("I'm gonna turn down your block right now") and that Freed went out to meet him ("All right, here I come homey").

This evidence, when viewed in the light most favorable to the State, shows far more than Freed's private use of his dwelling for his personal use of illegal drugs. Freed concedes that Times went to Freed's house or indicated that he planned to go there on three occasions – on February 21, 22, and 24, 2014. On each occasion, Freed had informed Times that he had a customer and had discussed the volume of pills that were to be purchased. On one occasion, the detective saw Times and Freed engaging in conduct that was consistent with a drug transaction in Freed's driveway and saw cars that may have belonged to Freed's customers near his house. On another occasion, Freed told Times that he was going to have the customers come to his "spot," which, the jury could find, meant his house. Finally, after his arrest, Freed himself told the detective that he "middles" for Times.

On these facts, the jury could reasonably infer that, on a recurring basis over a period of at least several days, Freed was working from his house as a middleman for

Times, where he received orders from customers, placed orders with Times, took deliveries from Times, and dispensed the product to his customers. Hence, the evidence was sufficient to support a conviction for keeping a common nuisance. *See McMillian v. State*, 325 Md. at 296 (evidence was sufficient even though based on only four hours of observation on a single day); *see also Ward v. State*, 9 Md. App. at 593-94 (evidence was sufficient to convict defendant of common-law offense of keeping a disorderly house where conviction was based on, at most, nine days of observation).

Freed asserts that the State did not rule out the possibility that he might have made his calls from a location other than his house and that the State did not have direct (as opposed to circumstantial) evidence that Times actually delivered any oxycodone on any of the three occasions when he admittedly went to Freed's house. He also asserts that there was no evidence of a public nuisance, because no one had complained of his activities, the house did not resemble a busy drug market ("[t]here were not multiple people hanging around the home and conducting drug transactions"), and the police found no oxycodone in or around the house. In our view, his arguments go to the weight, not the sufficiency, of the evidence against him. In particular, the failure to find oxycodone may only have meant that he had liquidated all of his inventory. His arguments do not establish that the evidence was insufficient to support a conviction for

keeping a common nuisance.[4]

IV. Enhanced Sentencing

Relying on *Price v. State*, 405 Md. 10 (2008), Freed contends that the circuit court erred in using § 5-905 of the Criminal Law Article to double his sentence on more than one count arising from the same transaction. The State concedes error.

Section 5-905 of the Criminal Law Article provides, in pertinent part:

> (a) A person convicted of a subsequent crime under this title is subject to:
>
> (1) a term of imprisonment twice that otherwise authorized;
>
> (2) twice the fine otherwise authorized; or
>
> (3) both.
>
> * * *
>
> (d) A sentence on *a single count under this section* may be imposed in conjunction with other sentences under this title.

(Emphasis added.)

In *Price v. State*, 405 Md. at 29, the Court of Appeals vacated the defendant's enhanced sentences, holding that "only one of them may be doubled under [§ 5-905]." In reaching its decision, the Court observed that "the language of subsection (a) does not

[4] Freed argues that the conversation on February 24, 2014, "does not suggest" that he was purchasing pills to resell to "other people." In that conversation, Freed discussed buying 50 pills. Times warned him that some of the pills were "the big ones," and Freed said that that didn't matter. Freed's comment does not dispel the inference that the size of the pills "didn't matter" to his customers. Nor does it dispel the reasonable inference that he was buying 50 pills for resale, not for his own personal use.

address multiple crimes charged together and based on the same incident." *Id.* at 30. The Court also observed that, "[l]ike the statutory language, the legislative history of § 5-905(d) reads in terms of one 'offense' or a single 'count' being enhanced 'under' § 5-905 of the Criminal Law Article." *Id.* at 33. Consequently, the Court agreed that, as applied to a case involving convictions on multiple counts that arose from a single transaction, § 5-905(d) "is ambiguous." *Id.* at 33. Faced with this ambiguity, the Court invoked the rule of lenity, which "favor[s] a milder penalty over a harsher one'" if "'there is doubt as to the penalty[.]'" *Id.* (quoting *Gardner v. State*, 344 Md. 642, 651 (1997)). Accordingly, the Court concluded that the circuit court could employ § 5-905(d) to enhance only one of the defendant's several sentences.

Price governs our disposition of Freed's statutory sentencing challenge. Because Freed was convicted of multiple counts that arose from a single transaction, we hold that the circuit court erred in enhancing the sentences for all three of his convictions. We vacate the sentences for all three convictions and remand for resentencing.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED IN PART AND VACATED IN PART; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. THREE-FOURTHS OF COSTS TO BE PAID BY APPELLANT. ONE-FOURTH OF COSTS TO BE PAID BY HARFORD COUNTY.