UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1580

September Term, 2016

TYRELL SAMUEL JONES

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Battaglia, Lynne A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: September 13, 2017

We have been called upon to determine whether the evidence was sufficient to support convictions for possession of various controlled dangerous substances[1] and drug paraphernalia[2] rendered after a bench trial by Judge J. Barry Hughes in the Circuit Court for Carroll County against the Appellant, Tyrell Samuel Jones, who raises three questions before us:

1. Did the circuit court err in finding sufficient evidence to support convictions for possession of CDS and CDS paraphernalia?
2. Did the circuit court err in imposing separate convictions for possession of CDS and possession of CDS paraphernalia where both convictions were based upon the same two baggies of cocaine?
3. Did the circuit court plainly err by failing to exercise its discretion in admitting highly prejudicial evidence of Appellant's prior conviction?

Initially, we note that the State has conceded error with respect to one aspect of question one and the entirety of question two. With respect to one issue encompassed in question one, Jones was convicted of two counts of possession of oxycodone (Counts 4 and 6), although there was no evidence adduced to support two convictions, only one, so that one conviction for possession of oxycodone (Count 6) must be vacated upon remand.

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[1] Section 5-601(a) of the Criminal Law Article, Maryland Code (2002, 2012 Repl.Vol., 2015 Supp.) states:

> (a) … Except as otherwise provided in this title, a person may not:
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> (1) possess or administer to another a controlled dangerous substance, unless obtained directly or by prescription or order from an authorized provider acting in the course of professional practice….

[2] Section 5-619(d) of the Criminal Law Article, Maryland Code (2002, 2012 Repl.Vol., 2015 Supp.) states:

> (d) … (1) Unless authorized under this title, a person may not … possess with intent to deliver or sell, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that the drug paraphernalia will be used to:
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> (i) plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled dangerous substance; or
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> (ii) inject, ingest, inhale, or otherwise introduce into the human body a controlled dangerous substance.

With respect to the second question, the State has conceded that Jones's conviction for possession of paraphernalia (Count 3) must merge with his conviction for possession of cocaine (Count 1), because a court may not impose separate convictions for possession of cocaine and possession of paraphernalia where the latter conviction is based solely on the container for cocaine. *See Dickerson v. State,* 324 Md. 163 (1991). As a result, upon remand, the paraphernalia conviction (Count 3) must be merged with that of the possession of cocaine conviction (Count 1).

We also need not tarry long, moreover, with respect to the third question that raises prejudice in the admission of Jones's prior conviction for distribution of cocaine in 2015. Jones failed to object when the State asked him about his prior conviction during his cross-examination. As a result, we review the alleged error for plain error.

It is within our discretion to review an unobjected to error at trial for plain error. The Court of Appeals has opined that the circumstances under which an appellate court should exercise its discretion to engage in plain error review are:

> "[A]n appellate court should take cognizance of unobjected to error" when the error is "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." Factors to consider in that determination include "the materiality of the error in the context in which it arose, giving due regard to whether the error was purely technical, the product of conscious design or trial tactics or the result of bald inattention."

Savoy v. State, 420 Md. 232, 243 (2011) (citations omitted).

Although it is by no means clear that error occurred when Jones's 2015 conviction for distribution of cocaine was admitted under Rule 5-609(a),[3] we shall, for the sake of argument, review the alleged error under the plain error standard of review. The purported error, however, was not plain nor material, in large part because Judge Hughes

[3] Rule 5-609(a) provides, in part, that, "[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if … the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party."

was the sole fact-finder, and he considered the conviction in weighing Jones's credibility, which is appropriate under Rule 5-609(a).

Now getting to the heart of this appeal, which involves sufficiency of the evidence, we are tasked to discern whether the evidence was sufficient to support Jones's remaining convictions, after the one conviction of possession of oxycodone is vacated (Count 6) and the conviction of possession of drug paraphernalia (Count 3) is merged with the conviction for possession of cocaine (Count 1); those convictions that remain are Jones's convictions for possession of cocaine (Count 1), possession of marijuana over ten grams (Count 2), possession of oxycodone (Count 4), and possession of hydrocodone (Count 5).

We have expounded about the standard of review for sufficiency of the evidence in criminal cases:

> The standard of review for the sufficiency of evidence is well settled. We must determine "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) (emphasis in original); *see Rivers v. State,* 393 Md. 569, 580 (2006); *Moye v. State,* 369 Md. 2, 12 (2002). Notably, appellate review of the sufficiency of evidence does not involve "a review of the record that would amount to a retrial of the case." *Winder v. State,* 362 Md. 275, 325 (2001); *see Brown v. State,* 182 Md. App. 138, 156 (2008). As a reviewing court, "[w]e do not re-weigh the evidence, but 'we do determine whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.'" *State v. Smith*, 374 Md. 527, 534 (2003) (quoting *White v. State,* 363 Md. 150, 162 (2001)).

Abbott v. State, 190 Md. App. 595, 615 (2010).

The facts of this case, in brief, are that Jones was found sleeping on a mattress in a bedroom in an apartment located in Carroll County on January 12, 2016, and adjacent to his feet was a "gift bag" or "shopping bag," inside of which there were a pair of underwear and baggies altered in a manner typical of drug distribution, as well as a variety of drugs contained in a nearby dresser and closet.

The facts adduced at trial, as included in Jones's brief, with which the State agreed are as follows:

> Appellant was charged with five counts of possession of CDS and with possession of CDS paraphernalia after a search and seizure warrant was executed on 85 Pennsylvania Avenue, Apartment 4, in the early morning hours of January 12, 2016. At trial, the State offered the testimony of four police officers who participated in executing the warrant: Detective Timothy Phaebus; Sergeant Timmy Dellospedale; Sergeant Jeffrey Schuster; and Detective William Jednorski, the lead investigator.
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> Detective Jednorski testified that the Westminster Police Department had received a complaint that the lessee of the apartment, a woman named Brandy Hanson, was "letting various individuals sell drugs out of her house." In response to that complaint, Detective Jednorski pulled trash from the dumpster behind Ms. Hanson's apartment on four different occasions. These "trash pulls" were done between approximately three and five a.m. on September 9, 2015; October 9, 2015; December 11, 2015; and December 22, 2015. None of the trash bags that Jednorski searched contained anything, such as documents or mail, that linked Appellant to the apartment.
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> Before pulling the trash, Jednorski and one or more other officers observed the apartment to "make sure nobody is around." Detective Jednorski testified that "there were several times that there were…people walking up the steps" to the apartment. He continued, "You could see people. And if you know the people, you can tell who they are. I saw Brandy Hanson who lives there." On one of the four occasions that officers surveilled the apartment, Detective Jednorski saw Appellant enter the door of the apartment. He could not recall the date on which the sighting of the Appellant occurred. After conducting the four trash pulls, Detective Jednorski prepared a search warrant, which was signed by a judge at 9:45 a.m. on December 30, 2015.
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> The search warrant was executed at 5:35 a.m. on January 12, 2016. Brandy Hanson and a man named Adam Schmidt were found in bed in the back bedroom of the apartment. There was "obvious CDS" in Ms. Hanson's bedroom, including a smoking device and a bag of syringes in open view on the night stand next to the bed. In a purse next to the bed was heroin and cocaine. The police asked Mr. Schmidt a few questions and then released him without arresting or charging him. Ms. Hanson was searched and CDS was found in her bra. She was arrested.
>
> Appellant was found sleeping in another bedroom located to the right of the hallway. No one else was in the bedroom. There was no CDS visible in the room. The bedroom contained a bed, which was unoccupied. Appellant was asleep on a mattress on the floor. The mattress was located approximately four or five feet from the bed, seven or eight feet from a bedroom closet, and five feet from a wooden dresser. The only thing on the mattress was a blanket and "maybe a pillow." Appellant was wearing nothing but size 40/42 Gildan boxer briefs. His

clothing was on the floor near the mattress. Detective Jednorski testified that there was other clothing in the room, but he did not know who it belonged to. Appellant had $108 in his wallet. Detective Jednorski searched Appellant and found no CDS on his person.

Inside the bedroom closet the police found a box on the floor. Inside that box was a white plastic bag, and inside of that white plastic bag was a plate with powdery reside on it and 28 clear plastic "sandwich baggies" with the corners cut off. The officers suspected the powdery residue on the plate was cocaine, but the powder was never analyzed. The plastic sandwich baggies were not visible without opening the white bag. The closet also contained clothing and other items that "another detective went through." None of the articles of clothing or personal items from the closet was admitted into evidence.

In the back of the closet, on a shelf "located at the top of the closet," behind some DVDs, inside a Crown Royal box, police found a plastic baggie with a fine white powder inside, which Detective Jednorski suspected to be baking soda. The powder was tested and no CDS was detected. On the same shelf were two green ziplock baggies with marijuana inside. Neither Sergeant Schuster nor Sergeant Dellospedale could recall whether the bedroom closet had a door, and whether that door had been opened or closed when they entered the room. However, Schuster testified that the top drawer to the dresser had been closed and that all the CDS he found was "concealed within a dresser and up in a closet." He did not find any syringes or smoking devices in the room.

Police also searched a wooden dresser located inside the bedroom against the wall. In the top drawer of the dresser was a plastic zip-lock bag containing two smaller, knotted plastic baggies, each with white powder inside. The white powder was tested and determined to be 0.73 grams of cocaine. Detective Jednorski testified that the two baggies containing cocaine were made by taking a sandwich bag, placing the cocaine in the corner, twisting and knotting the corner of the bag, and then cutting the corner off. The end result is an individual baggie of cocaine and a sandwich baggie with the corner cut off. The top dresser drawer also contained a ziplock bag containing three "little ziplock bags," which each contained trace amounts of a brown, powdery residue that Jednorski suspected was heroin. The residue in the bags was not analyzed. Finally, in the same drawer, police found 13 oxycodone pills and one hydrocodone pill.

On the floor of the bedroom, a couple feet from the mattress where Appellant had been sleeping, was a "gift bag" or "shopping bag." In the bag were two plastic sandwich baggies with the corners cut off and one pair of underwear. Detective Jednorski testified that the sandwich baggies with the corners cut off were "consistent with the individual packaging of cocaine found in the dresser drawer." The sandwich bags did not contain any residue and were not collected or tested. The underwear was "balled up" and the sandwich bags were located on top of the underwear inside the shopping bag. The underwear were Gildan size 40/42

and looked like they had been worn. They were the same size and brand as the underwear that Appellant was wearing. The underwear was not seized as evidence.

Detective Jednorski testified that when he informed Appellant that he was under arrest for possession of the cocaine found in the dresser, Appellant responded several times that "he knew that there was nothing in the dresser." Jednorski also testified that Appellant yelled at Brandy Hanson, "You going to take this, right, Brandy?" The State introduced into evidence a video that had been posted to Appellant's Facebook page on December 24, 2015, which showed Appellant sitting in a chair in the same bedroom where he was found asleep in the floor during the search of January 12, 2016.

On cross-exam, Detective Jednorski acknowledged that the drawers to the dresser had been closed and that there was no CDS in open view in the room. He testified that only 15-20 seconds had elapsed between officers knocking on the apartment door and entering the apartment, and that Appellant was asleep when officers found him, "so that he would not have been doing any hiding [of items]." Detective Jednorski testified that police found documents in the apartment with Brandy Hanson's name on them, but no documents in the apartment with Appellant's name on them.

Detective Jednorski could not recall if Adam Schmidt was wearing underwear when officers found him in bed with Brandy Hanson, testifying that he "did not go into that bedroom." He testified that Mr. Schmidt was released without being interrogated or charged -- despite officers finding various types of CDS and CDS paraphernalia all around him in plain view -- but denied that this was because Mr. Schmidt was white and Appellant was black. Jednorski acknowledged that they had not tested Appellant or his clothing to see if he had been handling CDS, and did not attempt to take fingerprints from the various bags that were seized. He testified that this was the usual practice.

After the State rested its case, Brandy Hanson testified for the defense. Ms. Hanson testified that she had lived in the apartment for three years, and that "lots of different people would come by and stay." She explained that she had mutual friends with Appellant, including her ex-boyfriend. She testified that Appellant did not live at her apartment and did not keep clothes, property, mail, or anything else at the apartment. However, Ms. Hanson acknowledged that he stopped by "here and there." She testified that on the night they were arrested, Appellant had gone to the bar with a friend and came by her apartment afterward to charge his phone and wait for a ride, then ended up falling asleep there. She testified that the room where Appellant fell asleep was used by other people, and that she had a couple staying in the bedroom at the time of Appellant's arrest. On cross-examination, Ms. Hanson acknowledged that she had been charged in connection with the search on her apartment and sentenced to probation before judgment, which had been revoked, and was currently serving a 60 day sentence. Finally, Ms. Hanson testified that she did not hear Appellant state "Brandy are you going to do this" when they were being arrested.

Appellant then testified on his own behalf. He testified that he stayed "on and off" with his brother at 201 Pennsylvania Avenue and made a living doing "side work, roofing and siding." He also testified that he was friends with Brandy Hanson through her boyfriend Brooklyn, and sometimes went by or stayed at Ms. Hanson's apartment. When he did, he saw other people there. Appellant testified that on the night of his arrest he had gone to a bar called Johansson's, which closes at 1 a.m. After the bar closed he walked up the street to Ms. Hanson's apartment and knocked on the door, which Ms. Hanson answered. Appellant told her that he needed to charge his phone and try to find a ride home, and that he might "pass out" because he did not know whether his ride was coming or not. Appellant testified that he was hoping his brother would come get him, but that his brother did not come.

Appellant testified that he fell asleep on the mattress on the floor, rather than the bed, "because it is not my bed." He testified that he had slept on that mattress twice before. Appellant testified that he had no knowledge of "the substances" in the dresser drawer or what was in the bedroom closet. Appellant testified that other than the pile of clothes he left on the floor next to the mattress, he had no other clothing or property at the apartment. He explained that he made the statement about there being no cocaine in the drawer because he was surprised and did not know there were drugs in the room. Appellant could not recall making a statement to Ms. Hanson such as "this is yours" or "you are going to take this."

On cross-examination, Appellant stated again that he had no knowledge of the drugs hidden in the bedroom. He acknowledged that he was found guilty of distribution of cocaine when he was 18. Appellant testified that he was on probation at the time of his arrest, was being drug tested, and that all of his drug tests had come back "clean." Appellant testified that he was a drug user when he was a juvenile, but was not a drug user at the time the search warrant was executed on the apartment.

(footnotes omitted) (citations omitted).

Judge Hughes, after trial, made the following findings of fact from the bench:

I do want to comment on the evidence that has been offered by the Defense in this case. The Defendant in this case indicated he only stopped over to Ms. Hanson's place to charge his phone and wait for a ride and there was a suggestion that he fell asleep waiting for the ride. Of course, the Court heard evidence that he was found in full sleep mode. He was undressed. So, it did not sound like this was a man who fell asleep waiting for someone to show up.

I also do find that the bag in which the underwear was found that had a sandwich bag that had been modified, as is customary with drug dealers, and that was in proximity to that pair of underwear, by the circumstantial evidence in this case did belong to the Defendant based upon its proximity to him and the identical nature of the brand and the size of underwear that were in that bag.

> And again, what is unexplained is the -- any reasonable hypotheses for why a bag so altered would innocently be found among the Defendant's belongings.
>
> I also had difficulty with the Defendant's ambiguous memory as it relates to what he said at the time when he was arrested. And was complaining that there was no CDS in the drawer. He did not recall calling to Ms. Hanson about taking the charge, although the Court would think that would be a rather memorable event of what took place that evening for the Defendant.
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> Also weighing against the Defendant's credibility is his prior felony conviction. And I found that his manner of testifying, particularly on cross-examination, to be unconvincing. I do not find that the Defendant made a credible witness.
>
> As far as Ms. Hanson is concerned the Court did not find her to be a credible witness for reasons that include her manner of testifying as well as her bias towards the Defendant and her utter lack of knowledge as to how any of these drugs could have been found to be in her house, in the second bedroom of the two bedroom house. That -- the Court finds that to be incredible testimony.

On appeal, Jones argues that, while he was physically near to the cocaine, oxycodone, and hydrocodone located in the dresser and marijuana in the closet in the bedroom, the other considerations relevant to determining evidentiary sufficiency, articulated in *Smith v. State,* 415 Md. 174 (2010) are absent—those being whether the drugs were in plain view or accessible to Jones, whether there were indicia of mutual use or enjoyment, and whether the defendant had an ownership or possessory interest in where the drugs were found.

Conversely, the State maintains that the evidence was sufficient to support Jones's drug convictions. The State argues not only did Jones have access to the drugs but that he had a possessory interest in the bedroom in which he was found and was engaging in mutual use and enjoyment of the drugs in the room through distribution.

Jones was convicted of possessing marijuana, cocaine, oxycodone, and hydrocodone, each of which, as a controlled dangerous substance,[4] is criminalized under

[4] Section 5-101 of the Criminal Law Article, Maryland Code (2002, 2012 Repl.Vol., 2015 Supp.) provided that:

> (g) … (1) "Controlled dangerous substance" means:
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> (i) a drug or substance listed in Schedule I through Schedule V….

Section 5-601(a) of the Criminal Law Article, Maryland Code (2002, 2012 Repl.Vol., 2015 Supp.).[5] Under Section 5-101(v) of the Criminal Law Article, Maryland Code (2002, 2012 Repl.Vol., 2015 Supp.), which is the definitional section for 5-601(a), possession is "to exercise actual or constructive dominion or control over a thing by one or more persons."

"[A] person may have actual or constructive possession of the CDS, and the possession may be either exclusive or joint in nature." *Moye v. State,* 369 Md. 2, 14 (2002). Actual possession is "direct physical possession or control of contraband drugs." *Nutt v. State,* 16 Md. App. 695, 706 (1973) (citing *Folk v. State,* 11 Md. App. 508 (1971)). In constructive possession, on the other hand, "dominion and control is inferred

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Section 5-402 of the Criminal Law Article, Maryland Code (2002, 2012 Repl.Vol., 2015 Supp.) listed marijuana among Schedule I drugs:

> (d)(1) A material, compound, mixture, or preparation that contains any of the following hallucinogenic or hallucinogenic-like substances is a substance listed in Schedule I:
>
> * * *
>
> (vii) marijuana….

Section 5-403 of the Criminal Law Article, Maryland Code (2002, 2012 Repl.Vol.) included hydrocodone, oxycodone, and cocaine among Schedule II substances:

> (b)(1) Unless the substance is listed in another schedule and except as provided in paragraph (2) of this subsection, opium and opiate, and a salt, compound, derivative, or preparation of opium or opiate is a substance listed in Schedule II, including:
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> * * *
>
> (x) hydrocodone;
>
> * * *
>
> (xiv) oxycodone….
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> * * *
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> (3) Substances listed in Schedule II also include:
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> * * *
>
> (iv) cocaine, its salts, optical and geometric isomers, and salts of isomers….

[5] Section 5-601(a) of the Criminal Law Article, Maryland Code (2002, 2012 Repl.Vol., 2015 Supp.) states:

> (a) … Except as otherwise provided in this title, a person may not:
>
> (1) possess or administer to another a controlled dangerous substance, unless obtained directly or by prescription or order from an authorized provider acting in the course of professional practice….

from the surrounding circumstances." 1 Byron L. Warnken, Maryland Criminal Procedure ch. 3, §3, at 63 (2013). In *Smith,* 415 Md. 174, the Court of Appeals identified four tenets that have been utilized to determine whether evidence is sufficient to support a determination of possession of CDS:

> [W]e have found several factors to be relevant in the determination of whether an individual was in possession of the CDS, including, [1] the defendant's proximity to the drugs, [2] whether the drugs were in plain view of and/or accessible to the defendant, [3] whether there was indicia of mutual use and enjoyment of the drugs, and [4] whether the defendant has an ownership or possessory interest in the location where the police discovered the drugs. None of these factors are, in and of themselves, conclusive evidence of possession.

Id. at 198 (citations omitted).

In *Gutierrez v. State,* 446 Md. 221 (2016), a constructive possession case, the police executed a search warrant on a small apartment, where they found cocaine in the front of a bathroom cabinet, in the hall closet, and under the kitchen sink, where a handgun was also found. They also found baggies testified to be commonly used for packaging drugs, in plain view, on the living room table. Also was found a "grinder"—a device used to powderize cocaine—along with various plastic baggies on the kitchen windowsill.

Gutierrez and Perez-Lazaro, both present during the search, told the police that they slept in the living room and bedroom. The police also found two passports belonging to Gutierrez and a receipt belonging to Gutierrez in a hallway closet, and Perez–Lazaro's paystub in the sole bedroom.

Gutierrez and Perez–Lazaro were convicted of possession of cocaine hydrochloride with an intent to distribute and possession of a firearm with a nexus to a drug trafficking crime. The Court of Appeals affirmed the convictions and held that the evidence was legally sufficient, because Gutierrez and Perez–Lazaro were in constructive possession of the drugs and the handgun. Each man "had a possessory interest in the apartment, such that they had the ability and intent to exercise dominion and control," because they slept in the apartment, and property belonging to them was found there. *Id.* at 236-37. Also indicative of each man's possessory interest, the cocaine and handgun

were found in "areas of common use" that would be "frequented by the apartment's inhabitants." *Id.* at 237. The "small size of the apartment" also rendered both men in close proximity to the cocaine and handgun. *Id.* They were also engaged in mutual use and enjoyment of the drugs because they were "participat[ing] in drug distribution." *Id.*

In the present case, the gateway to the application of the *Smith* tenets is the "gift bag" that was found within feet of Jones as he slept on the mattress in the bedroom. In the bag were found altered sandwich bags, which Officer Jednorski testified were consistent with the packaging of cocaine, as well as underwear of the same size and brand that Jones was wearing, near clothes of his. As Judge Hughes found,

> [T]he bag in which the underwear was found that had a sandwich bag that had been modified, as is customary with drug dealers, and that was in proximity to that pair of underwear, by the circumstantial evidence in this case did belong to the Defendant based upon its proximity to him and the identical nature of the brand and the size of underwear that were in that bag.

The "gift bag," thus, provides the nexus between Jones and the drugs found in the dresser and closet. Jones also was within feet of the dresser upon which Officer Jednorski testified was found a knotted piece of a plastic bag consistent with cocaine packaging:

> [STATE'S ATTORNEY]: What is that a photograph of?
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> [DETECTIVE JEDNORSKI]: It's the top of the brown wooden dresser. The first drawer was with the cocaine was found.
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> [STATE'S ATTORNEY]: Okay. And why was this photograph taken? What are we looking at?
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> [DETECTIVE JEDNORSKI]: There is a knotted piece of a plastic bag sitting right on top of the dresser. It didn't have any residue but that is usually a -- a knot was taken off one of the larger bags, with cocaine, to be broken up or it could have been taken off an individual baggie. But that is -- usually the way it is knotted.

Officer Jednorski also testified that within the dresser within feet of Jones was a plastic zip-lock bag containing two smaller, knotted plastic baggies of cocaine, a ziplock bag containing three "little ziplock bags," each of which contained suspected heroin, 13 oxycodone pills, and one hydrocodone pill. In the closet, there was a box containing a white plastic bag, inside of which was a plate with powdery reside suspected to be

cocaine and 28 sandwich bags altered similarly to those in the "gift bag." On a shelf in the back of the closet, which was within feet of Jones, police found a plastic baggie containing a fine white powder inside a box, suspected to be baking soda, a substance often used in the distribution of drugs. On the same shelf were two ziplock baggies with marijuana inside. Thus, with respect to the first *Smith* tenet, Jones was in close physical proximity to the drugs and paraphernalia.

Jones clearly also had access to the "gift bag," the dresser, and the closet. *Cf. Taylor v. State.* 346 Md. 452 (1997). Jones was found on a mattress that was within feet of the "gift bag," five feet from the dresser, and seven or eight feet the closet where the drugs and paraphernalia were found. Jones's denial that drugs were in the dresser underscores his access to the dresser contents.

As to the third *Smith* tenet, there are indicia of mutual use and enjoyment of the drugs on the part of Jones because the baggies reflect drug distribution. *See Gutierrez,* 446 Md. at 237. Jones was found near to a "gift bag" containing baggies used in the distribution of cocaine on top of underwear that matched the same brand and size of those he was wearing at the time. Jones was also found five feet from the wooden dresser, on top of which was the piece of plastic that Detective Jednorski testified was knotted in a way characteristic of cocaine distribution; the top dresser drawer contained cocaine. Jones was also found seven to eight feet from the closet in which there were a plate with suspected cocaine residue, 28 baggies altered similarly to those in the "gift bag," and baking soda, commonly used as a cutting agent.

As to the fourth *Smith* tenet, there was proof that Jones had a possessory interest in the location where the police discovered the drugs. The "gift bag" containing worn underwear similar to those which Jones was wearing was found near his feet while he slept. Jones also testified that he had slept on the mattress in the bedroom two times before. Jones's Facebook page, introduced into evidence, depicted him sitting on a chair in the same bedroom. Jones also alluded to knowing what was in the dresser when he was informed he was under arrest for the cocaine in the dresser drawer.

As a result, we hold that there was sufficient evidence to support Jones's convictions of possession of cocaine (Count 1), possession of marijuana over ten grams (Count 2), possession of oxycodone (Count 4), and possession of hydrocodone (Count 5). Jones, however, compares the quality of the evidence against him to cases in which we or the Court of Appeals found the evidence insufficient.

Jones principally relies on *Moye*, 369 Md. 2. In *Moye,* the police arrived at the home of Moye's sister, Yolanda Bullock, and her husband, Joseph Bullock, after receiving a call that a battery had occurred. When the police arrived, all of the occupants of the residence were present, including Moye, who may have been staying in the home. The Bullocks and another occupant of the home, who rented the basement of the house, came out of the residence. After police set up a barricade around the home, the police observed Moye moving about the first floor and the basement of the home. Several minutes later, Moye left the home from a back door leading out of the basement. The police arrested him and subsequently conducted a search of the home, including the basement where they found several open and partially opened drawers containing several small baggies of marijuana, cocaine, and drug paraphernalia. Moye was convicted of possession of marijuana and possession of drug paraphernalia.

The Court of Appeals reversed Moye's convictions and concluded that, "we are left with nothing but speculation as to Moye's knowledge or exercise of dominion or control over the drugs and paraphernalia found in the Bullocks's basement." *Id.* at 17. The Court reasoned that while Moye had been living in the house, the basement was leased to another person, and there also was no evidence Moye "frequented" the basement such that he would be aware of the drugs. *Id.* at 20. There also was no evidence that Moye was near the drugs during his time in the basement. *Id.* at 18. Furthermore, while there was evidence that "*someone* may have been using marijuana," there was no evidence as to *"who* may have been using it, and *when* such use may have taken place." *Id.* at 20.

Unlike the evidence in *Moye,* Jones had been found sleeping in a small room near his discarded clothes, where a "gift bag" with baggies testified to be paraphernalia for

distribution of cocaine along with underwear similar to his.[6] Jones testified that he had slept in that room twice before in which was also found cocaine, oxycodone, hydrocodone, and marijuana. Jones's Facebook page reflected that he had been in the bedroom before.

Jones also relies upon *State v. Leach,* 296 Md. 591 (1983). In that case, Stephen Leach was convicted of possession of PCP and of paraphernalia after the police recovered PCP from a closed container in the single bedroom of an apartment occupied by Michael Leach, Stephen's brother, as well as a magnifier and scale found in plain view on the kitchen table; "[t]here was testimony that these items could be used in cutting and packaging drugs." *Id.* at 594.

Prior to the search, Stephen and his brother had been the subject of police surveillance, during which Stephen was observed going in and out of his brother's house, on one occasion using a key. There was also evidence that Stephen had a key to the apartment, registered a vehicle there and gave the apartment address upon arrest. The trial judge, however, found that Stephen was not an occupant, and commented on the apartment having only one bed: "[I am] not going to assume that two gentlemen their age who are brothers were sleeping in the same bed. That's an inference I'm not drawing...." *Id.* at 595 (internal quotation marks omitted).

The Court of Appeals reversed the convictions, concluding that "the fact finding that Michael was the occupant of the Premises precludes inferring that Stephen had joint dominion and control with Michael over the entire apartment and over everything contained anywhere in it." *Id.* at 596. The Court reasoned that, "[e]ven though Stephen

[6] Jones also relies on *White v. State,* 363 Md. 150 (2001). In that case, the police pulled over a car, in which White was the front seat passenger and found cocaine in a sealed box in the trunk, also containing pots and pans. The car was registered to the driver. The Court of Appeals in reversing White's convictions for the cocaine, reasoned that White did not have a possessory interest in the car and that there was insufficient evidence that he had dominion and control over the content of the trunk, because of his "limited access" to it. *Id.* at 167. In the present case, Jones's possessory interest in the room was proven.

had ready access to the apartment, it cannot be reasonably inferred that he exercised restraining or directing influence over PCP in a closed container on the bedroom dresser or over paraphernalia in the bedroom closet." *Id.* The Court also found insufficient evidence for the conviction for possession of paraphernalia: "[i]f one assumes that the scales and magnifier found in plain view in the kitchen at the time of the search were always kept there, still those items are intrinsically innocuous. They become significant by association with drugs or cutting agents." *Id.*

In the instant case, Jones was found near a "gift bag" with underwear similar to those he was wearing, in which there were also found baggies testified to be paraphernalia for distribution of cocaine, and in the closet there were 28 similarly altered baggies, a plate with white residue suspected to be cocaine, and baking soda, commonly used as a cutting agent. Jones was sleeping in the bedroom where the drugs and paraphernalia were found. Jones's Facebook page also reflected he had been in the same bedroom before.

Jones also, however, refers us to *Garrison v. State,* 272 Md. 123 (1974). In *Garrison,* the police entered Shirley Garrison's house pursuant to a search warrant and found Garrison asleep in a bedroom, while her husband was attempting to discard bags of heroin in the toilet in a bathroom adjacent to a different bedroom in the home. No heroin or drug paraphernalia was found in the bedroom in which Shirley Garrison was located. Shirley Garrison was subsequently convicted of possession of heroin. The Court of Appeals reversed the conviction stating that, "[t]he seized heroin was not in the plain view of the appellant, nor was there a juxtaposition between her (in the front bedroom) and the contraband being jettisoned by her husband in the bathroom." *Id.* at 131. The Court concluded that, "there was no substantive evidence offered which showed directly or supported a rational inference that she had 'the exercise of (either) actual or constructive dominion or control'—solely or jointly with her husband—over the 173 glassine bags of heroin seized while being discarded by her spouse." *Id.* at 142.

However, in the present cases, there was sufficient evidence to show that Jones had constructive possession of the drugs.

Jones, finally, also urges *Davis v. State,* 9 Md. App. 48 (1970), in which an undercover officer bought marijuana from Robert Davis's wife outside of an apartment leased by both spouses. The officer did not see Robert during the transaction. We reversed Robert's conviction for possession, reasoning that it "would appear to rest entirely on the fact of his co-occupancy of the apartment and his relationship with [his wife]." *Id.* at 55.

In the instant case, evidence had been introduced that Jones had been sleeping in a room near his discarded clothes, where a "gift bag" with baggies testified to be paraphernalia for distribution of cocaine was found also containing underwear similar to his. Jones testified that he had slept in that room twice before in which was also found cocaine, oxycodone, hydrocodone, and marijuana. Jones's Facebook page reflected that he had been in the bedroom before.

We, therefore, affirm Jones's convictions for possession of cocaine (Count 1), possession of marijuana over ten grams (Count 2), possession of oxycodone (Count 4), and possession of hydrocodone (Count 5), but remand the case.

JUDGMENTS OF CONVICTION FOR POSSESSION OF COCAINE (COUNT 1), POSSESSION OF MARIJUANA IN THE AMOUNT OF TEN GRAMS OR MORE (COUNT 2), POSSESSION OF OXYCODONE (COUNT 4), AND POSSESSION OF HYDROCODONE (COUNT 5) AFFIRMED. JUDGMENT OF CONVICTION FOR POSSESSION OF OXYCODONE (COUNT 3) VACATED. SENTENCE FOR POSSESSION OF PARAPHERNALIA (COUNT 6) VACATED AND REMANDED TO THE CIRCUIT COURT WITH INSTRUCTIONS TO MERGE THE SENTENCE FOR COUNT 6 WITH THE SENTENCE IMPOSED FOR COUNT 1. COSTS TO BE SPLIT EQUALLY BETWEEN APPELLANT AND CARROLL COUNTY.