Circuit Court for Wicomico County
Case No. C-22-CR-19-000411

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2242

September Term, 2019

KEONE DAVIS

v.

STATE OF MARYLAND

Graeff,
Friedman,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: November 4, 2021

*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.

A jury in the Circuit Court for Wicomico County convicted Keone Davis, appellant, of possession with intent to distribute cocaine, manufacturing cocaine, possession of equipment for manufacturing cocaine, keeping a common nuisance, possession of cocaine, possession of buprenorphine naloxone (Suboxone), and possession of drug paraphernalia. The court sentenced appellant to 20 years' imprisonment: ten years for the conviction of possession with intent to distribute cocaine (count 1); ten years, consecutive, for the conviction of manufacturing cocaine (count 2); five years, concurrent, for the conviction of keeping a common nuisance (count 4); and one year, concurrent, for the conviction of possession of buprenorphine (count 6). Appellant's convictions for the remaining sentences were merged.[1]

On appeal, appellant presents the following questions for this Court's review, which we have rephrased slightly, as follows:

> 1. Did the trial court err by allowing improper rebuttal evidence and by denying appellant's motion for a mistrial?
>
> 2. Was the evidence sufficient to sustain the convictions for manufacturing cocaine, possessing equipment to manufacture cocaine, keeping a common nuisance, and possessing buprenorphine?
>
> 3. Should the sentences for appellant's convictions of possessing cocaine with intent to distribute, manufacturing cocaine, and keeping a common nuisance have merged?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

[1] Specifically, the court merged appellant's sentences for possession of cocaine (count 5) and possession of drug paraphernalia (count 7) into the conviction of possession with intent to distribute cocaine (count 1), and merged his sentence for possession of equipment to manufacture cocaine (count 3) into his conviction for manufacturing cocaine (count 2).

FACTUAL AND PROCEDURAL BACKGROUND

In 2019, Corporal Heather Shellenberger and other members of the Fruitland Police Department in Wicomico County initiated an investigation regarding suspected drug activity by appellant. On May 8, 2019, at 6:00 a.m., the police executed a search warrant at 109 East Crockett Avenue, a residence leased by appellant's girlfriend, Brianna Griffin. Corporal Shellenberger described the residence as a one-story apartment with "one bedroom, one bath, a laundry room, a living room, and a kitchen[/]dining room area."

The police found appellant, Ms. Griffin, and Ms. Griffin's one-year-old niece in the bedroom of the residence and removed them to a couch in another room. It appeared that appellant was living there because his identification card and numerous articles of men's clothing (including shirts, pants, and shoes) in appellant's size were found in the home.

The police found in the bedroom and its attached bathroom the following items: $390 in cash in the pocket of a pair of jeans; $96 in cash in a white box; three cell phones; and a knotted clear plastic bag. In the living room, underneath the rug, the officers located an unopened strip of Suboxone with buprenorphine, a schedule III controlled dangerous substance ("CDS"), as its active ingredient.

In and under the liner of the kitchen trash can, the officers found several plastic sandwich bags with the corners removed. They also found the following items in the kitchen: a clear bag containing suspected cocaine; small white rock-like substances suspected to be cocaine on the counters under the microwave and in the kitchen drawers; a glass measuring cup with white residue; two forks with white residue; a half-full bottle of Smooth LAX, which can be used as a cutting agent for cocaine; three boxes of sandwich

bags; a glass plate in the microwave with "a bunch of white residue on it"; two digital scales in working order with white residue; and a lid to a third digital scale. They did not find any pipes, needles, or other paraphernalia indicative of personal use of CDS.[2] Corporal Shellenberger testified that field testing of the white rock-like substances located in the kitchen drawer and under the microwave was positive for cocaine.

Corporal Shellenberger placed both appellant and Ms. Griffin under arrest. As Corporal Shellenberger was escorting appellant to her patrol vehicle, he advised that he wanted to talk about the incident.

At the police station, Corporal Shellenberger, along with two other officers, advised appellant of his *Miranda* rights and conducted an interview.[3] Appellant began by apologizing for "what he did," and he stated that he "needed to start obeying the law." He admitted to dealing drugs and stated that his cocaine supplier, "Shitty" Holbrook, came to the house to cook the cocaine into crack, which appellant purchased daily for $1,200, making a $200 profit for each purchase.[4] He sold all the cocaine that was made into crack cocaine the day before the search warrant was executed, and he had planned to purchase more that day.

[2] Subsequent chemical testing confirmed the presence of .217 gram of cocaine, a schedule II CDS, with an approximate street value of $10 to $15. The chemist with the Maryland State Police never tested the two scales, two forks, and the measuring cup for CDS. It was common not to test every item once a similar suspected substance has tested positive for CDS.

[3] *See Miranda v. Arizona*, 384 Md. 436 (1966).

[4] At a different point, appellant said that Mr. Holbrook had cooked cocaine at the residence only one time.

Appellant requested his cell phone to prove to the officers that he was not the person who cooked the crack, and he showed them text messages primarily related to drug dealing. The phone rang several times during the interview, and appellant said "it was somebody looking to get high." Corporal Shellenberger later extracted the contents of the cell phone. Corporal Schellenberger also spoke with Ms. Griffin, who advised that she had seen appellant "cook[] crack cocaine" in the house on previous occasions.

Trial began on October 23, 2019. The circuit court permitted the State to amend the indictment date range including dates from April 24, 2019, to May 8, 2019. The State's first witness was Corporal Shellenberger, who testified to the events described *supra*.

The court then accepted Michael Daugherty, Wicomico County State's Attorney's Office Special Investigator, as an expert in narcotics valuation, identification, investigation, and the common practices of CDS users and dealers. He testified that he had reviewed the State's evidence, and based on his training and experience, the case was indicative of the manufacture and distribution of cocaine by a "mid-level dealer." The basis for this opinion was appellant's interview with police, the presence of multiple cell phones in the searched residence, the content of appellant's text messages, and the items recovered during the execution of the search warrant, such as the scales, other manufacturing equipment, and the large amounts of money in small denominations. Mr. Daugherty stated that cocaine sellers often cook or dry the drugs in their houses using a microwave, and they then package the cocaine in plastic sandwich bags with the corners removed.

The defense called Brianna Griffin, who testified that, on May 8, 2019, she had been living at the East Crockett Avenue address for approximately one month.[5] Although appellant did not live with her or have a key to her house, he had some clothing at her home because he was there "once or twice a week." That morning, appellant had come to the home at approximately 5:00 a.m., and they had gone back to sleep with her niece when the police arrived an hour later to execute the search warrant. When the police arrived, she immediately took full responsibility for the contraband, telling the officers that "everything was [hers]," and appellant was unaware of any contraband in the house. Ms. Griffin signed a notarized letter, which was introduced as Defense Exhibit 1, stating: "To whom this may concern, I, Brianna Griffin am writing this statement to make it known that [appellant] was unaware of anything being held[/]found on Wednesday, May 8, 2019 at 109 E. Crockett Avenue, Fruitland, Maryland 21826. I am truly sorry for any inconveniences." Ms. Griffin denied telling Corporal Shellenberger that she previously had seen appellant cook drugs in the house, and she continued to assert sole ownership of the items seized during the search.

Appellant testified that he had dealt drugs in the past and had a previous conviction for possession with intent to distribute. He stated that, although he visited Ms. Griffin's house "a lot of times" to see her, he did not live there, and he did not know the drugs were in the house when the police arrived on May 8, 2019. He denied ever having cooked crack cocaine, or knowing how to do so, although he admitted that he had seen it done before.

[5] Ms. Griffin pled guilty and was sentenced for her part in the drug-related crimes prior to appellant's trial.

He denied using any of the items recovered by the police to manufacture illegal drugs. He stated that he did not "allow" his supplier to come into Ms. Griffin's house the previous day to manufacture cocaine, but he was present.

In the State's rebuttal, Corporal Shellenberger testified that Ms. Griffin told her, at the police station on May 8, 2019, that she had seen appellant cook crack cocaine at her house on previous occasions. The State also attempted to establish that appellant had told Ms. Griffin to take responsibility for the seized items through recorded jailhouse calls between appellant and his mother and other unidentified speakers. As discussed in further detail *infra*, the State also recalled Mr. Daugherty to testify regarding numerous text messages that had been extracted from appellant's phone, which, in Mr. Daugherty's expert opinion, related to drug sales between April 23, 2019 and May 8, 2019.

At the conclusion of trial, the jury found appellant guilty on all counts. This appeal followed.[6]

DISCUSSION

I.

Rebuttal Evidence

Appellant's first contention involves the admission of text messages between appellant and another person. Appellant contends that the circuit court erred in allowing this evidence because it was not proper rebuttal evidence, and the court subsequently erred

[6] Appellant filed a notice of appeal as a self-represented litigant. The Office of the Public Defender subsequently entered an appearance on his behalf in this Court. Appellant also filed a *pro se* petition for writ of *certiorari* to the Court of Appeals, which was denied on February 28, 2020. *See Davis v. State*, 467 Md. 266 (2020).

in denying his motion for mistrial. The State contends that the court properly admitted the evidence and properly denied the motion for mistrial.

A.

Background

During the State's case-in-chief, it sought to introduce State's Exhibit 11, a 263-page document containing text messages obtained from appellant's cell phone. The messages, which were dated from March 4 to May 6, 2019, were between appellant and various unidentified individuals, including contacts labeled "Trey," "Benno," and "Justin."[7]

The State initially moved to admit the text messages during Corporal Shellenberger's testimony. Defense counsel objected on the ground that "the whole phone dump" was irrelevant and should be limited to the charges related to possession of cocaine. When the prosecutor proffered that Mr. Daugherty would later explain the relevance of all the messages, the court reserved ruling on the admission of the evidence until "the expert testifie[d]."

During Mr. Daugherty's direct examination, the prosecutor asked about the significance that multiple cell phones were recovered during the execution of the warrant. Mr. Daugherty responded that it was significant because drug dealers often have a "clean" phone to communicate with family members and friends and a "dirty" phone to communicate solely with drug buyers or suppliers. Mr. Daugherty then testified that the

[7] Although the exhibit ultimately was introduced into evidence, the State's questions focused only on certain messages with "Trey" starting on April 23, 2019.

text messages extracted from appellant's phone were indicative of "drug distribution and possession with intent" to distribute.

When the prosecutor again attempted to admit State's Exhibit 11 into evidence, defense counsel requested a bench conference, during which he stated: "[W]e are providing the jury just simply too much prejudicial information going back into text messages for various alleged drug transactions when what we are actually specifically here for today is possession of .2 grams of cocaine allegedly with the intent to distribute." The prosecutor advised that the State's theory was that the .2 grams of cocaine recovered on May 8, 2019, was merely one piece of relevant direct evidence indicative of possession with intent to distribute and manufacturing.

Defense counsel stated that the evidence was unduly prejudicial because the text messages, spanning several weeks, impermissibly expanded the State's theory to assert that appellant was "just a general drug dealer." The court sustained appellant's objection, stating that the messages were prejudicial for the reasons asserted by defense counsel. The prosecutor argued that the State expected the defense to call Ms. Griffin to testify that the drugs were hers and appellant did not know they were there, and therefore, the messages, which referred to prior acts of drug distribution, had special relevance relating to appellant's identity, knowledge, and intent. The court stated that the text messages "might become admissible at that point if that happens."

As anticipated, during the presentation of appellant's case, Ms. Griffin testified that all the contraband found in the house belonged to her. Appellant testified that he had no

knowledge of the drugs or the manufacturing equipment found in Ms. Griffin's house. He further testified that he did not know how to "cook crack cocaine."

At the close of appellant's case, the prosecutor sought to recall Mr. Daugherty as a rebuttal witness to review the text messages, i.e., State's Exhibit 11.[8] Defense counsel renewed his objection on the ground that the text messages were not "in rebuttal to anything [appellant] did or did not say," noting that the defense had been "very careful not to open the door to this." The prosecutor responded that the exhibit was in rebuttal of "Ms. Griffin's testimony" and that it went to "identity and knowledge and also his, because he said he didn't have any knowledge of it being in his presence." The court agreed that the rebuttal evidence was proper and overruled the objection.

Mr. Daugherty then read a handful of the text messages for the jury, which he explained had been extracted from the cell phone seized from appellant on the day of his arrest. The prosecutor asked Mr. Daugherty to clarify some of the terminology, and Mr. Daugherty explained that there were references to cocaine and fentanyl, and all of the messages contained references to different drugs, different quantities, and prices.

Defense counsel objected and moved for a mistrial. The following exchange occurred:

> [DEFENSE COUNSEL]: The witness's last statement was exactly what I was concerned about where he says all of these contain references of different drugs of different prices.

[8] The State also introduced a recording of appellant's jailhouse phone calls in rebuttal to Ms. Griffin's assertion that appellant had never directed her to take responsibility for the drugs. Appellant does not challenge this aspect of the State's rebuttal evidence on appeal.

> We're not here for different drugs or different prices. We're here for possession of cocaine with intent to distribute. So for that reason, I think it's extremely prejudicial.
>
> We are going outside the scope of anything that's been charged. This witness just did exactly what we were designed to prevent here with the jury hearing evidence of different drugs of different prices.
>
> So I would be moving for a mistrial on those grounds.
>
> THE COURT: Do you want to be heard?
>
> [PROSECUTOR]: Yeah. I think it's safely in the prior bad acts analysis. But I mean, even if it weren't which I am arguing it is, I think the proper remedy is not a mistrial, but just to --
>
> THE COURT: Instruct them not to listen -- to ignore it.
>
> [PROSECUTOR]: -- give a curative instruction.
>
> I think it's --
>
> THE COURT: I'm overruling the objection.
>
> I don't think you put adequate grounds for a mistrial.
>
> [DEFENSE COUNSEL]: Thank you, Your Honor.
>
> THE COURT: So your request for a mistrial is denied.

At the close of the State's rebuttal case, appellant renewed his motion for a mistrial based on Mr. Daugherty's testimony, which in appellant's view "expand[ed] the scope of this case well beyond anything that we started the day with, where we are claiming that we have a case with possession of cocaine, and now we have a case with different drugs and different prices." The trial court stated that Mr. Daugherty's characterization of the text messages as referring to "various different drugs, various different quantities and prices" was "a single response to a single question" that did not warrant a mistrial.

During instructions to the jury, the trial court provided a limiting instruction with respect to the text messages:

> You have heard evidence that the defendant committed other crimes and bad acts, which is not a charge in this case. You may consider this evidence only on the question of common scheme or plan, intent, and knowledge. However, you may not consider this evidence for any other purpose.
>
> Specifically, you may not consider it as evidence that the defendant is of bad character or has a tendency to commit crime.

B.

Parties' Contentions

On appeal, appellant contends that the trial court abused its discretion by admitting the text messages on rebuttal, along with Mr. Daugherty's testimony, and denying his motion for a mistrial. He asserts that this evidence should not have been admitted as rebuttal evidence because it did not explain, reply to, or contradict a new matter raised in the defense's case-in-chief. Moreover, even if the State was permitted to rebut his denial that he was involved with the cocaine in Ms. Griffin's home, he argues that the messages did not accomplish that goal because they involved meetings that did not relate to Ms. Griffin's apartment, any of the items seized, or the manufacture of cocaine. He asserts that the text messages were simply "cumulative" and "corroborative" of other evidence that appellant "was in the business of selling cocaine."[9]

[9] He also contends in his reply brief that the evidence was inadmissible under Maryland Rule 5-404, which provides that "evidence of a person's character or character trait is not admissible to prove that the person acted in accordance with the character or trait on a particular occasion." Because he did not raise below this rule violation claim, and the contention on appeal was raised for the first time in the reply brief, we will not

The State contends that the rebuttal evidence was properly admitted. It asserts that the text message evidence was in response to a "new matter" introduced by the defense, specifically to appellant's testimony that he had no knowledge of the CDS in the house and Ms. Griffin's testimony that the CDS was hers. The State argues that the texts did not explicitly refer to Ms. Griffin's home, but they showed that appellant was involved in drug dealing during the time period in question, which contradicted Ms. Griffin's testimony that the items in the residence were hers and appellant had no knowledge of the drugs.

In any event, the State argues that, even if the evidence regarding the text messages was improperly admitted, any error was harmless because this evidence was "unimportant in relation to everything else the jury considered." It notes that, although the text messages indicated that appellant was involved with drugs, appellant testified that he was a drug dealer who bought and sold cocaine on a daily basis. Although appellant now argues that the contents of the text messages were beyond the scope of the crimes with which he was charged, the State notes that the defense did not request any redactions, and the court properly gave the jury a limiting instruction on the use of this evidence.

address it. *See Harris v. State*, 251 Md. App. 612, 660 (2021) ("Although this Court has discretion to review unpreserved errors, the Court of Appeals has explained that 'appellate courts should rarely exercise' their discretion under Md. Rule 8-131(a)."); *Jones v. State*, 379 Md. 704, 713 (2004) ("[A]n appellate court ordinarily will not consider an issue raised for the first time in a reply brief.").

C.

Analysis

Rebuttal evidence is defined as any competent, relevant, and material evidence that "explains, or is a direct reply to, or a contradiction of, any new matter that has been brought into the case by the defense." *State v. Hepple*, 279 Md. 265, 270 (1977) (quoting *Mayson v. State*, 238 Md. 283, 289 (1965)). It is within the sound discretion of a trial court to determine what constitutes rebuttal evidence. *State v. Booze*, 334 Md. 64, 68 (1994). The court's determination will be reversed only if it is "manifestly wrong and substantially injurious." *Mayson*, 238 Md. at 289.

Here, after defense counsel objected to the introduction of the text messages in the State's case-in-chief, the prosecutor advised that it was being introduced in anticipation of defense testifying that appellant had no knowledge of the drugs and they belonged to Ms. Griffin. The court sustained the objection but advised that the evidence might be admissible if the defense witnesses testified as predicted by the prosecutor. The defense witnesses then testified consistent with the prediction. The text messages responded to the "new matter," i.e. a witness who attempted to take sole responsibility for the contraband in the apartment. They indicated that appellant was involved in drug dealing during the time period of the offenses at issue here, which related to whether the drugs were Ms. Griffin's drugs and whether appellant had knowledge of them.[10]

[10] On appeal, appellant argues that portions of the texts were unduly prejudicial, citing to references to his "po," i.e. probation officer, and to "fake pee." Appellant, however, did not raise this specific objection below. In fact, when asked if there were

Moreover, even if the evidence was not proper rebuttal evidence and it was error to admit it, any error was harmless beyond a reasonable doubt. *See Dionas v. State*, 436 Md. 97, 108 (2013) (An error is harmless when a reviewing court is "satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.") (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). Appellant specifically states that the evidence was "mainly cumulative to and corroborative of" other evidence introduced at trial. Although the text messages referred to appellant dealing drugs, appellant admitted to the police that he sold cocaine, and he testified at trial that he dealt drugs. Appellant acknowledged that his supplier had cooked cocaine into crack cocaine at his girlfriend's home while he was present, and he admitted that he previously had been convicted for CDS distribution. Under these circumstances, any error in admitting text messages indicating that appellant was involved in dealing drugs was harmless error that does not require reversal of appellant's convictions. *Yates v. State*, 429 Md. 112, 120 (2012) (No reversible error if "the essential contents of that objectionable testimony have already been established and presented to the jury without objection through the prior testimony of other witnesses." (quoting *Grandison v. State*, 341 Md. 175, 218–19 (1995) (emphasis omitted))). This is

specific messages he wanted to be redacted, counsel stated, "[a]ll of them," noting that they were not proper rebuttal evidence. Because the trial court may have redacted these particular texts if they had been brought to its attention, any argument that those particular texts were unduly prejudicial is not preserved for this Court's review, and we will not consider that contention. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court.").

particularly so because the court gave the jury a limiting instruction advising that it could consider the text messages only for the limited purpose of considering "common scheme or plan, intent, and knowledge," but not as evidence that appellant was "of bad character or [had] a tendency to commit crime."

For the same reason, the trial court did not abuse its discretion in denying appellant's motion for mistrial. *See Klauenberg v. State*, 355 Md. 528, 555 (1999) (We will not reverse a trial court's decision to deny a motion for a mistrial unless the defendant clearly was prejudiced by the trial court's abuse of discretion.); *Cooley v. State*, 385 Md. 165, 173 (2005) ("The determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" (quoting *Kosh v. State*, 382 Md. 218, 226 (2004))).

II.

Sufficiency of the Evidence

Appellant next contends that the evidence was insufficient to support his convictions for manufacturing cocaine, possessing manufacturing equipment, keeping a common nuisance, and possessing buprenorphine. The State contends that appellant's contentions are not preserved for appellate review and without merit.

A.

Background

At the close of the State's case-in-chief, appellant moved generally for judgment of acquittal, asking to "be heard as to several specific counts." With respect to the charge of common nuisance, counsel stated:

> I don't think there has been any sufficient evidence to establish that [appellant] has been keeping or maintaining a common nuisance. These are -- these type of cases, I think, the origin of these cases dealt with things like brothels or houses of ill fame where you have literally a crowd malingering [sic] around and coming and going and often times disturbing the neighbors and the law-abiding citizens and the businesses, taking up parking spaces, tracking in dirt, in literal and figurative dirt, I suppose.
>
> In any event, I don't think that there is any specific support or really even implied support that the common nuisance exist[s] in this case. At minimum, I think you would need testimony to suggest that people, people were coming and going to the nuisance, to the detriment, to the complaint of another third person, someone in the community.
>
> So for those reasons, I would ask that, Your Honor, enter judgment of acquittal on count 4, maintaining a common nuisance.

The court then asked if there were "other specific ones [appellant] want[ed] to argue about," and the following occurred:

> [DEFENSE COUNSEL]: The Suboxone which would be count 6, I think it's very strained to get to possession of -- it really didn't factor into the case other than that a Suboxone strip was found in the --
>
> [PROSECUTOR]: Living room.
>
> [DEFENSE COUNSEL]: -- living room of an apartment that was rented by someone other than [appellant].
>
> And then I suppose as to count 1, if I could, in count 1 is that he possesses cocaine in a sufficient quantity to indicate an intention to distribute same.

> And arguably, that's admittedly an insufficient quantity. I think -- I understand the testimony may not be interpreted the same by the State as by I, but I think that the State's own witness said in the weight, in and of itself, is not in a sufficient quantity to indicate an intention to distribute same.
>
> So for that reason, I would ask that judgment of acquittal be specifically granted as to count 1.

The court denied the motion, finding that, "on all of the counts, there [was] [a] sufficient quantity of evidence for the trier of fact to find that the elements of each crime ha[d] been proven." Specifically, the court stated that there was sufficient evidence to show that appellant had constructive possession over the buprenorphine strip (count 6). With respect to the charge of possession with the intent to distribute (count 1), the court stated that, when viewed in the light most favorable to the State, there was "sufficient quantity" for the jury to convict. Finally, with respect to common nuisance (count 4), it found that there was sufficient evidence for the jury to determine that appellant "kept a place in which [CDS] or drug paraphernalia intended for use by others was repeatedly or continuously stored or concealed, particularly [when] viewed in a light most favorable to the State."

After the State's rebuttal case, appellant renewed his motion for judgment of acquittal, "generally, especially as it relate[d] to the common nuisance." The court again denied the motion on the basis that the evidence was sufficient as to all counts.

B.

Preservation

We address first the State's contention that appellant's challenge to the sufficiency of the evidence is not preserved for the Court's review. Pursuant to Maryland Rule 4-

324(a), a criminal defendant who moves for judgment of acquittal must "'state with particularity all reasons why the motion should be granted[,]' and is not entitled to appellate review of reasons stated for the first time on appeal." *Starr v. State*, 405 Md. 293, 302 (2008) (quoting Md. Rule 4-324(a)). "The language of the rule is mandatory, and review of a claim of insufficiency is available only for the reasons given by [the defendant] in his motion for judgment of acquittal." *Whiting v. State*, 160 Md. App. 285, 308 (2004), *aff'd*, 389 Md. 334 (2005) (citations omitted). A "trial court is not required to imagine all reasonable offshoots of the argument actually presented." *Starr*, 405 Md. at 304. *Accord Arthur v. State*, 420 Md. 512, 523–25 (2011).

Here, at the conclusion of the State's case-in-chief, appellant moved for judgment of acquittal "generally." It then addressed the charges of keeping a common nuisance, possession of buprenorphine, and possession with intent to distribute cocaine. Counsel made no argument below, as he does on appeal, that the evidence was insufficient to support a conviction of manufacturing cocaine or possession of equipment for manufacturing cocaine. At the close of all the evidence, appellant simply renewed his earlier motion for judgment of acquittal, without any additional argument, and the motion was denied.

Because counsel failed to make any argument regarding the sufficiency of the evidence to support the convictions for manufacturing cocaine and possessing equipment to manufacture cocaine, appellant has failed to preserve these issues for review, and we will not address them.

Although counsel did make a motion for judgment of acquittal regarding the charges of keeping a common nuisance and possession of buprenorphine, the arguments that he made below were different than those raised on appeal with respect to the nuisance charge. Accordingly, appellant's claim of insufficiency with respect to the nuisance conviction also is not preserved for appeal.[11]

The only sufficiency claim that is preserved for review is the claim that the evidence was insufficient to show that appellant was in possession of buprenorphine (Suboxone). At trial, defense counsel argued that acquittal on this count was warranted because the evidence of possession was "very strained," in that the strip was found under the rug in the living room "of an apartment that was rented by someone other than" appellant. On appeal, appellant similarly argues that there was insufficient evidence to show constructive possession. Accordingly, we will address this claim on the merits.

[11] We decline appellant's suggestion that we review his unpreserved insufficiency claims based on ineffective assistance of counsel or the plain error doctrine. Post-conviction proceedings, as opposed to review on appeal, generally is the better way to address ineffective assistance of counsel claims because the appellate court risks getting "entangled in 'the perilous process of second-guessing' without the benefit of potentially essential information." *Mosley v. State*, 378 Md. 548, 561 (2003) (quoting *Johnson v. State*, 292 Md. 405, 435 (1982)). Any claim of ineffective assistance of counsel in this case should be addressed in a post-conviction proceeding. With respect to appellant's request to engage in plain error review, the discretion to engage in review of unpreserved issues "is a discretion that appellate courts should rarely exercise." *Chaney v. State*, 397 Md. 460, 468 (2007). *Accord Morris v. State*, 153 Md. App. 480, 507 (2007) (discretion to engage in plain error review is a "rare, rare phenomenon."). We decline to exercise our discretion to engage in plain error review in this case.

C.

Possession of Buprenorphine

This Court recently has explained the standard of review in assessing a claim of insufficient evidence, as follows:

> In assessing the sufficiency of the evidence supporting a criminal conviction, we ask "'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.'" *McClurkin v. State*, 222 Md. App. 461, 486 (2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "In applying that standard, we give 'due regard to the [fact-finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Id.* (quoting *Harrison v. State*, 382 Md. 477, 488 (2004)). On appellate review of evidentiary sufficiency, a court will not "retry the case" or "re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. 174, 185 (2010). The relevant question 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." *Fraidin v. State*, 85 Md. App. at 241 (emphasis in original); *accord Smith v. State*, 232 Md. App. 583, 594 (2017).

Stanley v. State, 248 Md. App. 539, 564–65 (2020):

Corporal Shellenberger testified that, "[i]n the living room, underneath of the rug, there was an unopened Buprenorphine strip Suboxone which has the active ingredient, Buprenorphine, which is a schedule 3 controlled dangerous substance." In assessing whether appellant was in possession of this controlled dangerous substance, four factors are relevant to our analysis:

> (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.

State v. Gutierrez, 446 Md. 221, 234 (2016) (quoting *Smith v. State*, 415 Md. 174, 198 (2010)). "[T]he mere fact that the contraband is not found on the defendant's person does not necessarily preclude an inference by the trier of fact that the defendant had possession of the contraband." *Id.* (quoting *Smith*, 415 Md. at 187).

Here, although appellant did not have an ownership or possessory interest in the residence, he was a frequent visitor at his girlfriend's home. The buprenorphine strip was found in an area of common use (i.e., the living room) in Ms. Griffin's one-story apartment. *See Gutierrez*, 446 Md. at 237 (Evidence was sufficient to show constructive possession when the contraband was found in the kitchen, an area of the small apartment that typically is "frequented by the apartment's inhabitants.").

With respect to "mutual use and enjoyment," there was ample evidence, including appellant's own admissions, that he was aware of, and involved with, drug distribution and drug manufacturing in the apartment. *See Cook v. State*, 84 Md. App. 122, 135 (1990), *cert. denied*, 321 Md. 502 (1991) (Mutual use and enjoyment can be inferred when evidence indicates that "the house was being used as a base for a drug operation in which the appellants played a role," and "[t]herefore, despite the lack of proof that appellants had a proprietary or possessory interest in the house, the evidence was sufficient to permit the jury to conclude that appellants exercised joint and constructive possession" of the CDS in question.). Accordingly, when viewed in the light most favorable to the State, the evidence was sufficient for a rational trier of fact to find that appellant constructively possessed the buprenorphine strip.

III.

Merger

Appellant's final argument involves his sentences. The court sentenced appellant to ten years' imprisonment on the conviction for possession with intent to distribute cocaine, ten years, consecutive, on the conviction for manufacturing of cocaine, and five years concurrent on the conviction for keeping a common nuisance. Appellant contends that the court erred in imposing separate sentences for these convictions, asserting that the convictions should have merged for sentencing purposes.

The State disagrees. It contends that the court lawfully imposed separate sentences for these convictions.

Although appellant did not argue below that his sentences should merge, pursuant to Md. Rule 4-345(a), a court "may correct an illegal sentence at any time." We consider *de novo* whether the trial court's determination regarding sentencing was legally correct. *Clark v. State*, 246 Md. App. 123, 131 (2020), *aff'd*, 373 Md. 607 (2021).

"The merger of convictions for purposes of sentencing derives from the protection against double jeopardy afforded by the Fifth Amendment of the federal Constitution and by Maryland common law." *Brooks v. State*, 439 Md. 698, 737 (2014). "Merger protects a convicted defendant from multiple punishments for the same offense." *Id.* A trial court's failure to merge convictions for sentencing purposes when required to do so comprises reversible error. *Clark*, 246 Md. App. at 130.

Generally, we first analyze whether offenses merge under the required evidence test. *State v. Smith*, 223 Md. App. 16, 34 (2015); *Claggett v. State*, 108 Md. App. 32, 45 (1996).

Under that test, one offense "merges into another 'when both offenses are based on the same act or acts' and 'one [offense] is a lesser included offense of the other.'" *Clark v. State*, 218 Md. App. 230, 254 (2014) (quoting *State v. Lancaster*, 332 Md. 385, 391 (1993)). The required evidence test focuses on the distinct elements of each offense; if all of the elements of one offense are included in the second, then the former merges into the latter. *Claggett*, 108 Md. App. at 46. Here, appellant concedes that his convictions for possession with intent to distribute cocaine and manufacturing cocaine do not merge under the required evidence test, *see Spiering v. State*, 58 Md. App. 1, 13 (1984), and that possession with intent to distribute cocaine and keeping a common nuisance do not merge under the required evidence test, *see Salzman v. State*, 49 Md. App. 25, 51–52 (1981).

Convictions that do not merge under the required evidence test, however, may merge under another ground, i.e., the rule of lenity or principles of fundamental fairness. *See Carroll v. State*, 428 Md. App. 679, 693–94 (2012) (setting forth three grounds for merging convictions). Appellant contends that merger is required under the rule of lenity because the convictions were "predicated on the same conduct or transaction and were closely intertwined." The State contends that the rule of lenity is inapplicable because the crimes did not arise out of a single act, but rather, a series of events within the charging period.

The rule of lenity applies only where a defendant is convicted of at least one statutory offense. *Latray v. State*, 221 Md. App. 544, 555 (2015). It "give[s] the defendant the benefit of the doubt" when it is not clear whether the General Assembly intended that two crimes arising out of a single act be punished separately. *Walker v. State*, 53 Md. App.

171, 201 (1982). *Accord Kyler v. State*, 218 Md. App. 196, 228 (2014). Accordingly, we undertake a two-step analysis to determine whether to merge two offenses under this rule: "(1) first, we ask whether the two offenses arise out of the same criminal conduct; and (2) second, we ask whether the Legislature has expressed an intention to impose multiple punishments." *Wiredu v. State*, 222 Md. App. 212, 220 (2015). If merger is appropriate, the lesser statutory offense must merge into the offense carrying the greater penalty, and the defendant may only be sentenced for the greater offense. *Kyler*, 218 Md. App. at 229.

With respect to the first step in the analysis, we explained in *Morris v. State*, 192 Md. App. 1, 39 (2010), as follows:

> The "same act or transaction" inquiry often turns on whether the defendant's conduct was "one single continuous course of conduct," without a "break in conduct" or "time between the acts." *Purnell v. State*, 375 Md. 678, 698 (2003). The burden of proving distinct acts or transactions for purposes of separate units of prosecution falls on the State. *Snowden v. State*, 321 Md. 612, 618 (1991). Accordingly, when the indictment or jury's verdict reflects ambiguity as to whether the jury based its convictions on distinct acts, the ambiguity must be resolved in favor the defendant. *Williams v. State*, 187 Md. App. 470, 477, *cert. denied*, 411 Md. 602 (2009); *Jones v. State*, 175 Md. App. 58, 88 (2007), *aff'd*, 403 Md. 267 (2008); *Gerald v. State*, 137 Md. App. 295, 312, *cert. denied*, 364 Md. 462 (2001).

In *Morris*, 192 Md. App. at 42, the State argued that merger was not appropriate because the "jury could have inferred from evidence introduced at trial that appellant's assault of [a victim] was an act distinct from his attempt to rob her at gunpoint." We disagreed, noting that "neither the charging document nor the jury instructions made clear that the charges of assault were based upon separate and distinct acts from those upon which the robbery charges were based." *Id.* at 44. There was no instruction given to the jury explaining "how the assault and robbery charges related to one another, how they

differed, and what the jury needed to find to convict under both charges." *Id.* at 43. Because there was ambiguity in the record, we merged the convictions. *Id.* at 44.

Similarly, here, neither the charging document nor the jury instructions made clear that the charges were based on separate and distinct acts. Accordingly, because there is ambiguity regarding whether the jury based its convictions on distinct acts, we must resolve the ambiguity in appellant's favor.

The second part of the inquiry, then, is "whether the Legislature has expressed an intention to impose multiple punishments." *Wiredu*, 222 Md. App. at 220. As this Court has explained:

> When two statutory crimes arise out of the same act, [i]t is purely a question of reading legislative intent. If the Legislature intended two crimes arising out of a single act to be punished separately, we defer to that legislated choice. If the Legislature intended but a single punishment, we defer to that Legislative choice. If we are uncertain as to what the Legislature intended, we turn to the so-called "Rule of Lenity," by which we give the defendant the benefit of the doubt.

Id. (quoting *Walker v. State*, 53 Md. App. 171, 201 (1982)).

The offenses at issue here are as follows: possession with intent to distribute cocaine, Md. Code Ann., Crim. Law ("CR") § 5-602 (West) (2020 Repl. Vol.); manufacturing cocaine, CR § 5-602; and keeping a common nuisance, CR § 5-605. The penalty applicable to those offenses is found in CR § 5-608(a), which provides that "a person who violates a provision of §§ 5-602 through 5-606 of this subtitle with respect to a Schedule I or Schedule II narcotic drug is guilty of a felony and on conviction is subject to imprisonment not exceeding 20 years." The legislature did not indicate whether it intended offenses included in this statute to be punished separately or with a single

punishment, so "we give [appellant] the benefit of the doubt." *Wiredu*, 222 Md. App at 220. Appellant's convictions for manufacturing cocaine and keeping a common nuisance should be merged for sentencing purposes into his convictions for possession with intent to distribute cocaine.

TEN-YEAR SENTENCE FOR MANUFACTURING COCAINE AND FIVE-YEAR SENTENCE FOR KEEPING A COMMON NUISANCE VACATED. JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY OTHERWISE AFFIRMED. COSTS TO BE SPLIT (50% EACH) BETWEEN APPELLANT AND WICOMICO COUNTY.