Circuit Court for Baltimore City
Case Nos. 119042016 and 119042015

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2246, September Term, 2019

DAVON JONES
v.

STATE OF MARYLAND

No. 2450, September Term, 2019

ANTONIO JOHNSON

v.

STATE OF MARYLAND

Graeff,
Nazarian,
Wells,

JJ.

Opinion by Graeff, J.

Filed: May 21, 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.

Appellants, Antonio Johnson and Davon Jones, were jointly tried in the Circuit Court for Baltimore City for CDS and weapons related offenses. After a bench trial, Johnson was convicted on nine counts: three counts of possession with the intent to distribute (a) 28 grams or more of fentanyl, (b) a mixture of heroin and fentanyl, (c) cocaine; two counts of conspiracy to distribute (a) fentanyl, (b) a mixture of heroin and fentanyl; and four counts of possession of a regulated firearm. Jones was convicted on seven counts: three counts of possession with intent to distribute (a) fentanyl, (b) a mixture of heroin and fentanyl, (c) cocaine; three counts of conspiracy to distribute (a) fentanyl, (b) a mixture of fentanyl and heroin, (c) cocaine; and one count of possession of a regulated firearm by a disqualified person.

The court sentenced Johnson to 40 years' incarceration, all but 20 years suspended, with no possibility of parole within the first 15 years, followed by 5 years of probation. It sentenced Jones to 40 years' incarceration, all but 20 years suspended, with no possibility of parole within the first 5 years, and 5 years of supervised probation.

In this consolidated appeal, appellants present multiple questions for this Court's review, which we have rephrased and renumbered slightly as follows:

1. Did the circuit court err in accepting appellants' jury trial waiver in the absence of a demonstration of a knowing and voluntary waiver?

2. Was the evidence legally insufficient to sustain the multiple convictions for conspiracy and must the sentences for lesser included offenses be vacated under the doctrine of merger?

3. Did the circuit court abuse its discretion in admitting police expert opinion testimony?

4. With respect to Johnson, must the conviction for possession with intent to distribute 28 grams or more of fentanyl be reversed because the absence of representative sampling by forensic scientists renders their testimony concerning the weight of recovered substances lacking a sufficient factual basis?

5. With respect to Jones, did the circuit court err in denying his motion to suppress his statement?

6. Did the circuit court err by imposing illegal sentences?

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

FACTUAL AND PROCEDURAL BACKGROUND

In August 2018, the Baltimore City Police Department began investigating narcotics sales in the 2400 block of Woodbrook Avenue and surrounding streets. Detective Ryan Hill and Detective Ryan McLaughlin led the investigation, which was named "Black Magic," the same name as narcotics sold on the 2400 block of Woodbrook.

The investigation concluded on January 15, 2019, which the investigating officers named "take-down day." On that day, both Johnson and Jones were arrested. They subsequently were indicted on multiple CDS and firearms offenses.

On November 20, 2019, the first day of trial, the court held a hearing on Jones' motion to suppress the statement that he made to Detective Hill and Detective McLaughlin the day of his arrest. Counsel stated that his motion to suppress was based solely on the "involuntariness of the statement." Counsel argued that Jones invoked his right to counsel and clearly stated that he wanted a lawyer, but the detectives "mislead

him about that process," telling him that, if he wanted a lawyer, he would not get one immediately.

The State argued that the law required a "clear and unambiguous, unequivocal statement of the invocation of a right to an attorney," and Jones' statement that he would have an attorney in the future was "not a clear and unequivocal invocation of the right to counsel." Moreover, the State noted that the detectives followed up and asked Jones if he wanted an attorney present while being questioned, to which Jones replied: "No, I ain't got one now, but I'm definitely going to get one."

The court found that Jones did not unambiguously and unequivocally invoke his right to counsel, and "[i]t was explained to him over and over and over again that he didn't have to answer the questions, he could stop at any time he wants. The police told him that they couldn't give him any type of legal advice. He said he understood." The court denied Jones' motion to suppress his statement.

The State then made a motion to amend the indictments. The State sought to lower the amount of the CDS in the indictment from 62.6 grams to 20 grams or more. The court granted the State's motion. As discussed in more detail *infra*, the court then accepted appellants' waiver of the right to a jury trial, and it proceeded with a bench trial.

The State called 29 witnesses. The witnesses included the detectives who worked on the Black Magic investigation, officers who assisted with the execution of search and seizure warrants, and multiple chemists who tested the items seized throughout the investigation for the presence of CDS.

Detective Hill testified that, in August 2018, following the arrest of an unknown individual selling prescription medication in the 2400 block of Woodbrook, he began to investigate the identities of individuals known as "Tony" and "Cheese," as well as a blue Saab. Detective Hill identified "Tony" as Johnson, "Cheese" as Jones, and the blue Saab as a vehicle registered to Jones. The blue Saab frequently parked in the 1400 block of Gilmore, i.e., near Jones' residence at 1610 Booker Court.

Detective McLaughlin testified that, on August 21, 2018, while conducting covert surveillance of the 2400 block of Woodbrook, he observed an individual identified as Shawn Courtney conduct suspected hand-to-hand CDS transactions. Mr. Courtney then placed a bag of suspected CDS in the windowsill of a nearby residence. At Detective McLaughlin's request, Detective Jamal Brunson and Detective Brandon Sanchez went to that residence and recovered a plastic bag with gelatin capsules from a windowsill of a house.[1] One of the recovered gelatin capsules was tested by a chemist, and it contained fentanyl. The chemist explained that, if there was a package with identical items, they would test only one of the items. If, by contrast, there were 20 vials with silver tops, but one was a blue top, they would conduct a separate test of that vial.

On September 6, 2018, Detective Hill and Detective McLaughlin were conducting covert surveillance on a residence that Detective Hill initially believed to be a

[1] In his capacity as an expert, Detective Patrick Carpenter testified that a typical single dose of heroin, fentanyl, or fentanyl mixture, comes in the form of a gelatin capsule, also known as a "gel cap."

stash house for an organization associated with "Knockout."[2] The following day, while covertly surveilling 2429 and 2431 Woodbrook Avenue, Detective McLaughlin observed Mr. Courtney exit Jones' vehicle with a backpack. Mr. Courtney gave the backpack to a woman, who then took the backpack into 2431 Woodbrook. Detective McLaughlin also observed pink gelatin capsules in Mr. Courtney's hands.

The next day, Detective Hill applied for a search and seizure warrant for 2431 Woodbrook Avenue, which he executed later that day. Detective Sanchez assisted, and he recovered "[s]everal empty gel caps, a lot of CDS paraphernalia, [and] a handgun." The handgun and CDS packaging material were found inside a backpack, the same backpack that Detective McLaughlin observed earlier in Mr. Courtney's possession.

On September 18, 2018, Detective Patrick Carpenter, an expert in street-level CDS investigation and identification, observed Mr. Courtney leave a group of people in the 2400 block of Woodbrook, go across the street, and give suspected CDS to another individual in exchange for money. Detective Carpenter approached Mr. Courtney and observed him toss suspected CDS in the gutter. Detective Carpenter apprehended Mr. Courtney and recovered $275 cash from his person. Another detective recovered the suspected CDS that Mr. Courtney had dropped, which included bags of pink gelatin

[2] Detective McLaughlin testified that both Black Magic and Knockout were sold in the 2400 block of Woodbrook; they were two different products sold by two different organizations.

capsules and white-topped vials. Two gelatin capsules were tested and found to contain fentanyl, and the white-topped vials contained cocaine.[3]

On September 20, 2018, while surveilling the 2400 block of Woodbrook, Detective McLaughlin observed what he believed to be hand-to-hand drug transactions occurring in an alley. After one of the suspected purchasers left in his vehicle, Detective McLaughlin asked Detective Brunson and Detective Sanchez to conduct a stop of the vehicle, which they did. Detective Sanchez recovered a "pack of 50 pills," i.e., 50 pink gelatin capsules, as well as other "CDS paraphernalia," including a bag of five clear gelatin capsules containing a white powder. One gelatin capsule from the bag of 50 was tested and found to contain fentanyl, and one gelatin capsule from the bag of five also contained fentanyl.[4] The detectives did not know from whom the driver of the vehicle purchased the recovered capsules.

[3] The chemist who conducted the analysis testified that the total weight of the bag containing 38 pink gelatin capsules was 14.95 grams. The chemist also tested a "lump of pink mutilated gel caps with white powder," and the total weight of the lump was 11.61 grams. The weight of the white-topped vials was 2.8 grams. Because each population was homogenous, i.e., they "look alike," the chemist only tested one item from each population, e.g., one gelatin capsule from the bag of 38, one gelatin capsule from the "lump," and one white-topped vial. The chemist did not weigh the substances inside the 38 gelatin capsules separately from the gelatin capsules themselves, and therefore, he did not know how much the powder inside the gelatin capsules weighed.

[4] The chemist who analyzed the gelatin capsules testified that, because all 50 gelatin capsules were "homogenous," i.e., they looked the same, he only analyzed one of the gelatin caps for the presence of controlled dangerous substances. The same was true for the bag of five clear gelatin capsules.

On September 25, 2018, while monitoring CCTV cameras focused on the 1400 block of Gilmore and the 2400 block of Woodbrook,[5] Detective Hill observed Jones and Sebastian Bardney engaging in what he believed to be CDS activity. Based on his observations, Detective Hill testified that he concluded that Jones brought a large amount of narcotics to Mr. Bardney, who he knew to be a "hitter," i.e., a street-level dealer.

That same day, after Mr. Bardney was arrested, Detective McLaughlin monitored a jail call that Mr. Bardney made to Jones. Mr. Bardney called Jones to request bail money. Mr. Bardney informed Jones that he would be released in the morning.

On September 28, 2018, Detective McLaughlin observed Jack Coker enter 1610 Booker Court. Detective McLaughlin testified that this observation helped the investigation because it led him to believe that Mr. Coker was visiting Jones.

On October 4, 2018, Detective McLaughlin observed Jones with Mr. Bardney. Mr. Bardney yelled, "it's clear," and Jones then walked into a nearby alley in the 2400 block of Woodbrook. After several minutes, Jones left the alley and told Mr. Bardney to "[c]ome on," i.e., to follow him.

On October 5, 2018, Detective McLaughlin observed Jones walk into an alley, leave after several minutes, and proceed to the 2400 block of Woodbrook. Detective McLaughlin then heard "the word 'Magic' being yelled or advertised in the area."

[5] Closed-circuit television or "CCTV" is "a system that sends television signals to a limited number of screens, and is often used in stores and public places to prevent crime." Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/cctv, available at https://perma.cc/JCE3-XE4M (last visited May 14, 2021).

On October 12, 2018, several months into the investigation, the police conducted a "controlled purchase through a confidential informant." Detective Keenan Murphy met with the informant, searched him and his vehicle, and then sent the informant to conduct a purchase. Detective Murphy followed from a distance in his vehicle, and Detective Hill monitored the purchase through city CCTV cameras. Detective Brunson and Detective Norman Jones conducted surveillance of the controlled purchase, and they observed Jones throw a pack to Mr. Bardney. Mr. Bardney pushed the informant into the alley upon the passing of a patrol car. The informant then left the alley and gave Detective Murphy 50 red and clear gelatin capsules with white powder. A chemist tested one of these gelatin capsules and determined that it contained fentanyl.

On November 13, 2018, while conducting a patrol through the 2400 block of Woodbrook, Detective Hill observed appellants standing with Mr. Bardney. He also observed Mr. Coker, the "lookout," while monitoring CCTV footage. He observed Mr. Coker splitting a clear and red gelatin capsule, which he suspected contained CDS. The color of the gelatin capsule was significant to the Black Magic investigation because, when the investigation first started, "they were using full pink gelatin capsules." They then "went to a clear and red gelatin capsule," a white and red gelatin capsule, and "at the very end, they were using clear gelatin – like, full clear gelatin capsules. So there was four different gel caps they used throughout our investigation."

On November 14, 2018, Detective Hill again observed, in the 2400 block of Woodbrook, Jones with Mr. Bardney. Mr. Bardney went behind a building and a large

group of people followed. Based on the hand movements of those who emerged from behind the building, Detective Hill believed that Mr. Bardney was conducting CDS transactions. Over counsel's objection, Detective Hill testified that there appeared to have been a lookout, and that the swapping of cash in exchange for something stored in a small pouch was indicative of a "hand-to-hand drug transaction."

On November 16, 2018, Detective Hill observed Johnson, Mr. Coker, and Mr. Bardney through CCTV cameras. Mr. Bardney had cash, which he placed in the pocket of another individual whom Detective Hill believed to be "Jarrell." Detective Hill explained, in his capacity as an expert, that "once they get done selling the pack, then they try not to keep the money on them."

On November 28, 2018, Detective McLaughlin observed Mr. Bardney conducting a suspected CDS transaction and called other officers to make an arrest. Detective Jones chased Mr. Bardney on foot, apprehended him, and recovered from his person a plastic bag containing white and red gelatin capsules, white-topped vials, and cash. The red and white gelatin capsules contained fentanyl, and the white-topped vials contained cocaine.[6]

On December 4, 2018, Detective McLaughlin observed Johnson's black Infiniti on the 2400 block of Woodbrook and observed Johnson and Dana Stewart engaging in suspected CDS transactions. The next day, Detective Hill and Detective McLaughlin observed suspected hand-to-hand CDS transactions from a vehicle in the 2400 block of

[6] The chemist who tested the gelatin capsules and glass vials for CDS testified that, when there are numerous items that were relatively the same, he would "select one to do the analysis."

Woodbrook. A search of the vehicle revealed 75 red and clear gelatin capsules, packaged in three bags, each containing 25 gelatin capsules. After analysis of several capsules, it was determined that they did not contain CDS.

On December 6, 2018, Detective Hill observed Jones emerge from 1610 Booker Court, Jones' minivan leave the block, and Johnson's black Infiniti parked adjacent to 1610 Booker Court.[7] Jones subsequently returned and opened the hood of Johnson's vehicle, reached into the top of the engine compartment, removed a plastic bag, and entered 1610 Booker Court. Approximately four minutes later, the time required to drive from 1610 Booker Court to the 2400 block of Woodbrook, Detective Hill observed Johnson's vehicle arrive at the 2400 block of Woodbrook. This was the first suspected "drop" that the detectives had observed involving Johnson.

On December 14, 2018, Detective McLaughlin observed another suspected drop between Jones and Johnson. Johnson got out of the driver's seat, removed a black plastic bag from the engine compartment of his black Infiniti, and handed it to Jones. Jones then took the black plastic bag into his house.

On December 18, 2018, Detective Hill located Johnson's vehicle near 1610 Booker Court and relayed its location to "Foxtrot," a helicopter unit, to begin aerial surveillance. Johnson emerged from his vehicle and had a conversation with the driver of a Honda sedan, a vehicle Detective Hill believed to be owned by Ebony Truett, Johnson's girlfriend. After the conversation, Johnson entered 1610 Booker Court, where Jones

[7] Detective Hill explained that Jones' blue Saab was towed, after which he drove a Honda Odyssey minivan.

could be seen in the doorway. After Johnson left, along with the Honda that was with him, Foxtrot began its aerial surveillance.

Officer Andre Smith, a tactical flight officer assigned to the helicopter unit, conducted the aerial camera surveillance. As shown in the surveillance footage admitted at trial, once the black Infiniti and Honda sedan reached a storage facility off Rolling Road, they went to a storage unit, which Officer Smith calculated to be the nineteenth unit from the end of the row. Johnson got out of his black Infiniti, approached the driver's side window of the other vehicle, retrieved a set of keys, and opened a storage unit. When the vehicles left the storage facility, the black Infiniti continued on Rolling Road, and the other vehicle travelled in a different direction. Officer Smith continued tracking the black Infiniti until it reached an apartment complex located on Riverstone Drive. The black Infiniti parked next to what appeared to be the other vehicle present at the storage facility, and when the driver of the black Infiniti emerged, he appeared to talk to the driver of the other vehicle, a female.

On December 19, 2018, Detective Hill went to the storage facility that Foxtrot located during aerial surveillance and identified unit G-114, registered to Ebony Truett, as the unit Johnson opened the prior night. He requested a K-9 scan of the unit, and the K-9, who was trained to detect the odor of marijuana, cocaine, and heroin, "rendered a positive alert."

Detective Hill subsequently learned that Ebony Truett and Johnson resided in apartment 403 at 4652 Riverstone Drive. The apartment was in the name of Ebony Truett's mother.

Because both the storage facility and the apartment were in Baltimore County, Detective Hill could not execute a search and seizure warrant. He contacted the Baltimore County Police Department's drug unit, and they planned to execute all search and seizure warrants on January 15, 2019.

Also, on December 19, 2018, while Detective Hill was conducting further investigation into the storage facility and the apartment, Detective McLaughlin observed another suspected drop. Johnson parked his black Infiniti near 1610 Booker Court, Jones retrieved something from the engine compartment, and he closed the hood of the vehicle. Detective McLaughlin subsequently observed Jones with a black plastic bag, which he believed came from the engine compartment of the black Infiniti because Jones did not have the bag when he exited the residence.

On January 3, 2019, Detective McLaughlin observed another suspected drop. Jones approached the black Infiniti, which was again parked near 1610 Booker Court, opened the hood, and removed a plastic bag from the engine compartment.

On January 7, 2019, Johnson sold his black Infiniti and purchased a newer white Infiniti. Detective McLaughlin first saw the white Infiniti parked at the apartment complex on Riverstone, and he determined that it was registered to Johnson.

On January 15, 2019, "take-down day," officers from Baltimore City and Baltimore County "served all the search warrants and arrest warrants for all the suspects that [they] accrued during the investigation." Multiple vehicles and multiple places, including unit G-114 at the storage facility, appellant's apartment, 1610 Booker Court, and 2446 Woodbrook Avenue, were searched.

With respect to vehicles, the detectives did not locate anything in the engine compartment of Johnson's Infiniti, but they recovered a cardboard box containing mannite (a cutting agent), as well as a plastic bag containing cash elsewhere in the vehicle. Detective Murphy testified that the quantity of mannite recovered from Johnson's vehicle was an "extremely significant amount," as the typical weight of a gelatin capsule, including the CDS and cutting agent, was, on average, approximately .7 grams, and the weight of the recovered mannite was 800 grams. Nothing of importance was recovered from Jones' minivan.

With respect to 2446 Woodbrook Avenue, a suspected stash house for the Black Magic organization, detectives recovered "at least two clear bags containing gel caps . . . and . . . at least one bag containing white top vials." The gelatin capsules did not contain any CDS, but the white-topped vials contained cocaine.

In the apartment where Johnson resided, detectives recovered the following items: a blue duffle bag with sifters, scales, and plastic bags; ID cards belonging to Johnson; two sets of two bags of white powder; a bar of mannite; rolls of U.S. currency totaling $9,500; and a black bag with unused packaging materials. The chemist who analyzed the

items seized from the apartment testified that she analyzed four gelatin capsules out of a population of 35 and found that those capsules contained fentanyl and acetyl fentanyl.[8] The chemist also tested two sets of two plastic bags containing white powder, the first of which did not contain any CDS, but the second set, which weighed 70 grams, contained fentanyl and acetyl fentanyl. The single bag that was tested and found to contain fentanyl and acetyl fentanyl weighed 41.08 grams by itself.

With respect to unit G-114 at the storage facility, the detectives discovered a Taurus gun box, which contained only a magazine for a handgun. Inside a nearby shoe box, however, detectives located a Smith & Wesson 9mm handgun. Thereafter, they also located three additional handguns, a "Ruger .357 revolver, a .40 caliber handgun, and a Colt .45 caliber handgun." All four handguns recovered from the storage unit were found to be operable. The only fingerprints recovered from any of the firearms were not suitable for analysis.

In 1610 Booker Court, Jones' residence, a detective located "a black shopping style bag containing numerous vials with suspected cocaine and [clear] gel caps with suspected heroin." The chemist analyzed five clear gelatin capsules: one gelatin capsule from a bag of 30 and four other gelatin capsules, each from a bag of 50. Sergeant Joseph

[8] She explained that the sampling plan she followed required one unit to be tested for every ten present, and because there were 35 gelatin capsules present, she tested four. On cross-examination, counsel asked the chemist if she knew if any CDS was present in the 31 untested gelatin capsules. She responded that, because she did not use a "statistical sampling plan," she could only confirm the presence of CDS in the four gelatin capsules that she tested.

Wiczulis testified that the quantity of the suspected CDS contained in the black bag he recovered from 1610 Booker Court, which he estimated to be "at least 400 pieces," indicated that "it's packaged for distribution" and would not be for personal use.

The chemist who tested these items testified that no CDS was present in the gelatin capsules, although there was a possible presence of Etizolam (benzodiazepine, i.e., a depressant). Additionally, the chemist tested 23 of the hundreds of white-topped vials, and all contained cocaine. The police also recovered two bags of white powder, the gross weight of which was 13.59 grams. The one bag tested contained fentanyl and an additional, unknown substance.[9] A search of a jacket revealed a handgun. Jones was not present at 1610 Booker Court at the time of the execution of the search and seizure warrant.

Appellants were arrested on take-down day. Detectives Hill and McLaughlin interviewed appellants separately, and they each gave a statement.

When the detectives questioned Johnson regarding the items they seized from the apartment and the storage facility, they told Johnson that, if he wanted "Ebony to take all of [his] B.S., that's fine, that's not going to get [him] out of anything," but it "wouldn't be good for [Ebony]." Johnson said that Ebony Truett was not involved, and he took responsibility for the items seized from the apartment, saying "if there was money in there, if there was drugs in there, that's mine; everything in there, that's mine." Johnson

[9] Because both bags had "the same physical characteristics of outside packaging as well as the inside," the chemist analyzed only one of the bags. The chemist agreed with counsel that he did not use a representative sampling methodology.

said that he did not have fentanyl or cocaine, did not know what fentanyl was, and took responsibility only for heroin.[10] Johnson also admitted that the Ruger .357 revolver recovered from the storage unit was his, but he denied knowledge of any other weapons. When asked about Black Magic, Johnson stated: "That's really not my thing."

With respect to the items recovered from 1610 Booker Court, Jones told the detectives that "whatever's in there is mine." He also stated that he was "not really" involved with Black Magic.

After the State rested, appellants elected not to testify, called no witnesses of their own, and rested their case. As indicated, *supra*, the court found appellants guilty of multiple drug and firearm counts.

This appeal followed.

DISCUSSION

I.

Appellants both contend that the circuit court erred in accepting their waiver of the right to a jury trial without ensuring that the waiver was made "knowingly." The State agrees, and so do we.

The right to a jury trial is guaranteed by the Sixth Amendment of the United States Constitution and the Maryland Declaration of Rights. *See* U.S. Const. amend. VI, XIV § 1; Md. Decl. of Rts. Art. 5, 21, 24. A defendant can waive this right, however, and elect to be tried by the court. *Boulden v. State*, 414 Md. 284, 293–94 (2010). A

[10] A data dump of Johnson's phone, admitted as State's Exhibit 54-A, revealed numerous internet searches for fentanyl and how to acquire fentanyl.

constitutionally valid waiver of the right to a jury trial must be knowing and voluntary; it must be "an intentional relinquishment or abandonment of a known right or privilege." *Id.* at 295 (quoting *Powell v. State*, 394 Md. 632, 639 (2006)). There is no "fixed incantation" required, but the court must "satisfy itself that . . . the defendant has some knowledge of the jury trial right before being allowed to waive it." *State v. Hall*, 321 Md. 178, 182–83 (1990) (quoting and citing *Martinez v. State*, 309 Md. 124, 134 (1987)). If the record "does not disclose a knowledgeable and voluntary waiver of a jury trial, a new trial is required." *Smith v. State*, 375 Md. 365, 381 (2003).

Here, prior to the start of trial, the court asked counsel to advise appellants of their right to a jury trial. The following colloquy then occurred:

> [COUNSEL FOR JONES]: Mr. Jones, Mr. Johnson, both listen. Both of you have an absolute right to a have a [c]ourt trial or a jury trial. Understand -- it's my understanding that both of you are electing to have a [c]ourt trial, is that true, Mr. Jones?
>
> [JONES]: Yes.
>
> [COUNSEL FOR JONES]: Mr. Johnson?
>
> (Brief pause.)
>
> [COUNSEL FOR JONES]: Mr. Johnson, it's my understanding that you're electing to have a [c]ourt trial in lieu of a jury trial; is that correct?
>
> [JOHNSON]: Yes.
>
> [COUNSEL FOR JONES]: Gentlemen, both let me ask you a few questions. Are you currently under the influence of any drugs, alcohol or medication here today, Mr. Jones?
>
> [JONES]: No sir.

[COUNSEL FOR JONES]: Mr. Johnson?

[JOHNSON]: No, sir.

[COUNSEL FOR JONES]: Are you currently under the care of a psychologist or psychiatrist, Mr. Jones?

[JONES]: Yes.

[COUNSEL FOR JONES]: And what are you under the care for?

[JONES]: Depression.

[COUNSEL FOR JONES]: Depression? And do you take medication for that?

[JONES]: Yes.

[COUNSEL FOR JONES]: And have you taken your medication today?

[JONES]: No.

[COUNSEL FOR JONES]: No? And when do you normally take your medication?

[JONES]: Every morning.

[COUNSEL FOR JONES]: Every morning? But you didn't get it today?

[JONES]: No.

[COUNSEL FOR JONES]: Because of the fact that you didn't get your medication today, is it impairing your ability to think clearly?

[JONES]: I still can think.

[COUNSEL FOR JONES]: And are you under -- are you not thinking clearly here today?

[JONES]: I'm thinking clearly.

[COUNSEL FOR JONES]: Okay. Do you understand what I'm saying?

[JONES]: Yes.

[COUNSEL FOR JONES]: Okay. And the medication when you normally take it, does it help you maintain your balance, mood and think clearly?

[JONES]: Yes.

[COUNSEL FOR JONES]: Okay. So let me ask this, in the last five years, and I'm just going to continue with Mr. Jones for now, in the last five years have you been under the care of a psychiatrist or -- I mean, have you been in a mental hospital or mental institution?

[JONES]: No.

[COUNSEL FOR JONES]: No? And how long have you suffered from depression?

[JONES]: Ever since like 2016.

[COUNSEL FOR JONES]: 2016?

[JONES]: Yeah.

[COUNSEL FOR JONES]: So you've been under the care of a psychologist or psychiatrist since then?

[JONES]: Yes.

[COUNSEL FOR JONES]: And you received your medication?

[JONES]: Yes.

[COUNSEL FOR JONES]: Okay. And has anyone forced, threatened or coerced you to go forward with a [c]ourt trial and waive your right to a jury trial?

[JONES]: No sir.

[COUNSEL FOR JONES]: So understanding that you're giving up, this election to have a [c]ourt trial in lieu of a jury trial, do you have any questions for me or for the [c]ourt about how you're proceeding?

[JONES]: No sir.

[COUNSEL FOR JONES]: And are you making this decision based upon your own free will, meaning this is Mr. Jones' decision, this is no one else's decision?

[JONES]: Yes sir.

[COUNSEL FOR JONES]: Your Honor, I would submit that he's entered his waiver. I'll let [counsel for Johnson] --

THE COURT: Thank you, I find that he has freely, knowingly, voluntarily and intelligently waived his right to a jury trial.

[COUNSEL FOR JOHNSON]: Mr. Johnson, are you under the influence of any drugs, alcohol or medication?

[JOHNSON]: No, sir.

[COUNSEL FOR JOHNSON]: Are you thinking clearly here today?

[JOHNSON]: Yes, sir.

[COUNSEL FOR JOHNSON]: Do you understand that you are giving up your right to pick 12 individuals from the motor and voter rolls from Baltimore City?

[JOHNSON]: Yes, sir.

[COUNSEL FOR JOHNSON]: And it's my understanding that you wish to proceed by way of a bench trial in front of His Honor; is that correct?

[JOHNSON]: Yes.

[COUNSEL FOR JOHNSON]: And no one has threatened you to do that?

[JOHNSON]: No, sir.

[COUNSEL FOR JOHNSON]: That's your choice?

[JOHNSON]: Yes.

[COUNSEL FOR JOHNSON]: Your Honor --

THE COURT: I find that Mr. Johnson's freely, voluntarily, intelligently, and knowingly waived his right to a jury trial as well.

"Considering the totality of the circumstances," we conclude, as the Court of Appeals did in *Tibbs v. State*, 323 Md. 28, 31 (1991), that "the record is woefully deficient to establish" that Johnson or Jones knowingly waived their right to a jury trial. Jones received no information regarding the nature of a jury trial, and the only question to Johnson was whether he understood that he had a right "to pick 12 individuals from the motor and voter rolls from Baltimore City."

Because the waiver colloquy did not show "some knowledge" of the right that they were relinquishing, the record does not reflect a knowing waiver of the right to a jury trial. Accordingly, we agree with the State that reversal of appellants' convictions is required.

II.

Because we are reversing for a new trial, we need not address Jones' contention that his waiver of his right to testify was not voluntary, nor claims by either appellant regarding the propriety of the sentences imposed "or with respect to the admission of certain evidence." *Turner v. State*, 192 Md. App. 45, 79–80 (2010). We must, however, address the claims regarding sufficiency of the evidence because, when a defendant's conviction is reversed on the ground that the evidence was insufficient to support the

conviction, "the Double Jeopardy Clause bars retrial on the same charge." *Id.* at 80 (quoting *Lockhart v. Nelson*, 488 U.S. 33, 39 (1988)).

Appellants contend that the evidence was insufficient to support more than one conspiracy conviction. Jones challenges his convictions for the three conspiracies to distribute fentanyl, fentanyl mixture, and cocaine. Johnson challenges his convictions for the two conspiracies to distribute fentanyl and fentanyl mixture. They argue that the evidence did not support the existence of multiple, separate agreements, and therefore, they could each be convicted of, at most, one count of conspiracy.

"A criminal conspiracy is 'the combination of two or more persons, who by some concerted action seek to accomplish some unlawful purpose, or some lawful purpose by unlawful means.'" *Savage v. State*, 212 Md. App. 1, 12 (2013) (quoting *Mason v. State*, 302 Md. 434, 444 (1985)). "The 'unit of prosecution' for conspiracy is 'the agreement or combination, rather than each of its criminal objectives.'" *Id.* at 13 (footnote omitted) (quoting *Tracy v. State*, 319 Md. 452, 459 (1990)). "[T]he conviction of 'a defendant for more than one conspiracy turns on whether there exists more than one unlawful agreement,'" and "multiple agreements can be part of a single conspiracy." *Id.* It is the State's burden to "prove the agreement or agreements underlying a conspiracy prosecution." *Id.* at 14.

As this Court explained in *Savage*, 212 Md. App. at 16–17:

> [D]etermining the number of conspiracies and distinguishing one agreement from another is a "challenge" with which "[c]ourts have long wrestled." Anne Bowen Poulin, *Double Jeopardy Protection from*

> *Successive Prosecution: a Proposed Approach*, 92 Geo. L.J. 1183, 1274 n.507 (2004). . . .
>
> To address the single as opposed to multiple conspiracies question, it is "necessary to analyze the nature of the agreement" or agreements, *Mason v. State*, 302 Md. 434, 445, 488 A.2d 955 (1985), and to ask, when there are agreements among several parties, "whether there was 'one overall agreement' to perform various functions to achieve the objectives of the conspiracy," or separate conspiracies. *United States v. Arbelaez*, 719 F.2d 1453, 1457 (9th Cir. 1983) (quoting *United States v. Zemek*, 634 F.2d 1159, 1167 (9th Cir. 1980)). In making that determination, some courts consider the "totality of the circumstances" in their analysis. *United States v. Fenton*, 367 F.3d 14, 19 (1st Cir. 2004); *United States v. Smith*, 450 F.3d 856, 860 (8th Cir. 2006). Justice Blackmun has observed that courts "have looked to a number of discrete factors. Some of these include the relevant (1) time, (2) participants, (3) . . . offenses charged, (4) overt acts charged, and (5) places where the alleged acts took place." *United States v. Broce*, 488 U.S. 563, 585 n.2, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989) (Blackm[]un, J., dissenting) (citations omitted).
>
> In the multiple conspiracy context, the agreements are "distinct," *Manuel v. State*, 85 Md. App. 1, 12, 581 A.2d 1287 (1990), and "independent" from each other, *Timney v. State*, 80 Md. App. 356, 368, 563 A.2d 1121 (1989), in that each agreement has "its own end, and each constitutes an end in itself." *United States v. Sababu*, 891 F.2d 1308, 1322 (7th Cir. 1989) (citing *Blumenthal v. United States*, 332 U.S. 539, 558–59, 68 S.Ct. 248, 92 L.Ed. 154 (1947)). If the prosecution fails to present "proof sufficient to establish a second conspiracy," it follows that "there [is] merely one continuous conspiratorial relationship," *Vandegrift v. State*, 82 Md. App. 617, 646, 573 A.2d 56 (1990), or one "ongoing criminal enterprise," *Rudder v. State*, 181 Md. App. 426, 448–49, 956 A.2d 791 (2008), that is "evidenced by" the multiple acts or agreements "done in furtherance of it." *Greenwald v. State*, 221 Md. 245, 250, 157 A.2d 119 (1960); *see Bergeron v. State*, 85 Wis.2d 595, 608, 271 N.W.2d 386 (1978) ("It is not unusual for a conspiracy to require successive steps before its unlawful objective is accomplished.").

Although appellants frame their contentions as a sufficiency of the evidence claim, it actually raises a claim of double jeopardy. All of the cases they cite involved a double jeopardy challenge, which is the usual challenge when there is a claim that an appellant

improperly received multiple convictions and sentences for one conspiracy. *See Savage*, 212 Md. App. at 15 ("When a defendant 'contends that only one conspiracy exists, while the [prosecution] insists there are at least two,' he 'challenges [his] conviction[s] on the ground of double jeopardy.'") (quoting *U.S. v. Abbamonte*, 759 F.2d 1065, 1068 (2d Cir. 1985)). "The theory underlying the double jeopardy challenge is that, "[t]o convict [him] severally for being part of two conspiracies when in reality he is only involved in one overall conspiracy would be convicting him of the same crime twice." *Id.* (quoting *United States v. Palermo*, 410 F.2d 468, 470 (7th Cir. 1969)). On remand, the State should look at the evidence in light of the caselaw to determine whether multiple counts of conspiracy should be presented to the jury.

Jones additionally argues that the evidence was insufficient to support his convictions for possession with intent to distribute fentanyl and possession with intent to distribute a fentanyl mixture. He asserts that the court found as a fact at the motion for judgment of acquittal that he was "not guilty for charges related to items found in Johnson's house," and the evidence found in his residence was insufficient to support convictions for those items, i.e., the fentanyl and fentanyl mixture.

The State contends that the evidence was sufficient to support Jones' convictions for possession with intent to distribute fentanyl and possession with intent to distribute a fentanyl mixture. It asserts that, although the court said that Jones could not have "dominion or control over what was in Johnson's apartment," there was other evidence supporting Jones' convictions. The State notes that baggies recovered from Jones'

residence tested positive for fentanyl, and Jones had sifters, scales, empty gelatin capsules, "thousand of dollars in cash, and plastic bags of the same sort that were found in Johnson's home, where large volumes of fentanyl were recovered." Moreover, Jones had retrieved objects from Johnson's black Infiniti, and fentanyl was found in Jones' residence.

"The sufficiency of the evidence is viewed in the light most favorable to the prosecution." *State v. Morrison*, 470 Md. 86, 105 (2020). Accordingly, "we examine the record solely to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Wilson*, 471 Md. 136, 159 (2020) (quoting *Fuentes v. State*, 454 Md. 296, 307 (2017)). Moreover, this Court "does not 're-weigh' the credibility of witnesses or attempt to resolve any conflicts in the evidence," *Morrison*, 470 Md. at 106 (quoting *Fuentes*, 454 Md. at 307–08), but rather, we "assess '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[.]'" *Id.* at 105 (quoting *White v. State*, 363 Md. 150, 162 (2001)). "Although circumstantial evidence alone is sufficient to support a conviction, 'the inferences . . . must rest on more than mere speculation or conjecture.'" *Id.* at 106 (quoting *Smith v. State*, 415 Md. 174, 185 (2010)).

Here, we agree with the State that the evidence was sufficient to support Jones' convictions for possession with intent to distribute fentanyl and possession with intent to distribute a fentanyl mixture. There was ample circumstantial evidence in this case that

would have allowed a trier of fact to find that Jones worked with Johnson in a large-scale drug operation, which included fentanyl. Jones removed bags from the engine compartment of Johnson's car on multiple occasions, and bags recovered from Jones' residence contained fentanyl. The evidence was sufficient to support Jones' convictions of possession with intent to distribute fentanyl and possession with intent to distribute a fentanyl mixture.[11]

III.

Motion to Suppress

Jones contends that the circuit court erred in failing to suppress his statement. He asserts that his statement should have been suppressed because he clearly requested a lawyer, but the detective continued to speak with him, and they misled him about his right to counsel, which rendered his subsequent statement involuntary. Because this claim was raised below, at least partially, and it is likely to be an issue on retrial, we shall address the preserved contention for the guidance of the court and counsel on remand.

"Typically, when reviewing a suppression ruling made during trial, the Court is limited to the evidence and arguments made at the hearing on the motion to suppress and not the trial record." *Funes v. State*, 469 Md. 438, 461–62 (2020). This Court will accept

[11] Johnson also contends that his conviction for possession with intent to distribute 28 grams or more of fentanyl must be reversed because the chemist's expert opinion testimony lacked a factual basis. The State construes this as a sufficiency of the evidence claim that must be addressed even though the convictions are being reversed. We disagree. Johnson's claim on appeal in this regard is based solely on the ground that the expert testimony lacked a sufficient basis, a claim not raised below. Johnson is free to make that claim on remand and develop a proper record for review.

"the suppression court's factual findings and credibility determinations, unless clearly erroneous, viewing the evidence in the light most favorable to the prevailing party." *Id.* at 462. We review the suppression court's legal conclusions *de novo*. *Id.*

Here, a recording of the colloquy between Jones and the detectives was played for the court and transcribed. In pertinent part, the exchange between Jones and the detectives was transcribed as follows:

> [DETECTIVE MCLAUGHLIN]: . . . Anything you say or write may be used against you in the court of law. If you understand that right, initial.
>
> You have the right to talk with an attorney before any questioning or during any questioning. If you understand that right, please initial on that line.
>
> Okay. If you agree to answer questions, you may stop at any time to request an attorney and no further questions will be asked of you. If you understand that right, initial there.
>
> Do you understand that? I tried to explain it for you if you need it (inaudible at 11:48:53 a.m.).
>
> [JONES]: Um, I ain't really got to[o] much to say anyway.
>
> [DETECTIVE MCLAUGHLIN]: Okay. All right. Well, let's just -- let's just finish [the form] off and if that's so, we'll deal with that. So the fifth is if you want an attorney and cannot afford to hire one, an attorney will be appointed to represent you. If you understand that right, initial there please.
>
> * * *
>
> . . . . At any point during your questioning, you can stop answering questions at this point, you have to have -- you have the right to have your lawyer present, and that's just saying you understand all of these rights.
>
> [JONES]: I understand this, but I'm a getting -- I gonna have a lawyer.

[DETECTIVE HILL]: You want to have your lawyer present when you are questioned?

[JONES]: No, I ain't got one now, but I'm definitely going to get one.

[DETECTIVE HILL]: No, you can get one at any point you want to. I'm saying, if you want --

[JONES]: (inaudible at 11:58:20 a.m.) as of right now.

[DETECTIVE HILL]: I know, I'm saying.

[DETECTIVE MCLAUGHLIN]: No, but that's something that we do later, it's not happening today, it's not like the movies where like we're going to leave you in here and go get some lawyer. And go get a lawyer and he's going to walk in and talk to you. No.

[DETECTIVE HILL]: So you pretty much the way this works is you can either agree to talk with us about everything that's going on or you can just sign that and then just request your lawyer and we won't ask any more questions. That's up to you.

[JONES]: What's you think going to be quicker?

[DETECTIVE MCLAUGHLIN]: We can't legally advise you of anything. This is your choice. Basically it comes to the fact of, you're not going to be able to ask us questions that we then can give you answers and we can't ask you questions that you can do the same for us.

* * *

But basically, if you say, I want a lawyer and like you don't want to talk to us about any of this. Not what happened today, not anything that's going on in this overall bubble, then that's it, we're done. Right here right now. We go talk to the rest of the individuals that are out there and then that's it. But this is – it's one hundred percent your choice. And any–

[DETECTIVE HILL]: And if you want to talk to us about what's going on.

[JONES]: I want -- I want to know what's going on.

> [DETECTIVE HILL]: At any point you can tell us you want your lawyer present and we can stop asking you questions. It's really up to you how you proceed.
>
> *   *   *
>
> [DETECTIVE HILL]: You don't have to talk to us, it's up to you.
>
> [DETECTIVE MCLAUGHLIN]: And that goes for like if my next question is like hey, what's your social? No, I'm done. Like for any -- anything at all. All right. But like understand that. Like do not feel obligated to answer our questions just because you signed that piece of paper. All right? This is strictly just an understanding of your rights, this is not saying I don't want.

At the suppression hearing, the prosecutor sought to clarify the scope of Jones' motion regarding his statement, and the following occurred:

> [PROSECUTOR]: Can we clarify, just for the purposes of the universe of this motion, I think [Counsel for Jones] is attacking the language used by his client in terms of what he will claim is an invocation of a right to counsel, we're not making any arguments as to any type of length of detention or any other –
>
> [COUNSEL FOR JONES]: Correct, it's just a request of counsel, Your Honor, involuntariness of the statement.

Defense then argued that Jones requested a lawyer, but the police misled him about the process.

The circuit court then denied the motion to suppress, stating as follows:

> Thank you, counsel. The defendant is of proper age, was not under the influence of any drugs, alcohol or medication, could read and write, it's not the first time he's been through this process. He stated that in the future he was planning on hiring an attorney. He was told numerous times that he didn't have to talk to the police, he didn't have to. It was explained to him over and over and over again that he didn't have to answer the questions, he could stop at any time he wants. The police told him that they couldn't give him any type of legal advice. He said he understood.

> For these reasons, I find that the statement were freely and voluntarily given and there was not a clear an unequivocal evoke of his right to counsel in this case.

As the parties acknowledge, *Miranda* requires that, prior to custodial interrogation, a suspect be given warnings regarding his or her right to counsel and to remain silent. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). "If the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him." *Gupta v. State*, 452 Md. 103, 130 (quoting *Davis v. United States*, 512 U.S. 452, 458 (1994)), *cert. denied*, 138 S.Ct. 201 (2017). To establish an effective *Miranda* waiver, the State can show that a *Miranda* warning was both given and understood. *Id.* "[I]f a suspect requests counsel at any time during the interview," however, "he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." *Id.* (emphasis omitted) (quoting *Davis*, 512 U.S. at 458). "The suspect's invocation of the right to have counsel present must be unambiguous," which "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *Id.* (quoting *Davis*, 512 U.S. at 459). As the Supreme Court has stated, a suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis*, 512 U.S. at 459. If the defendant's invocation of his right to counsel is not unequivocal, then officers are not required to cease questioning. *Id.*

Here, the trial court found, and we agree, that Jones did not unequivocally indicate that he wanted counsel present. His first statement, that he "ain't really got to[o] much to say," cannot reasonably be interpreted to be an unequivocal invocation of his Fifth Amendment right to counsel. His second statement, that "I understand this, but I'm getting -- I gonna have a lawyer," indicated an intent to seek representation sometime in the future. The detectives nevertheless sought to clarify this statement, asking if Jones wanted his lawyer present when being questioned, and Jones responded: "No, I ain't got one now, but I'm definitely going to get one." The police then reiterated that he could elect to have an attorney present, and they would stop asking questions. Jones' contention that his statement was taken in violation of *Miranda* is without merit.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.