Circuit Court for Cecil County
Case No. C-07-CR-17-000945

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2311

September Term, 2018

IKIEM RADON SMITH

v.

STATE OF MARYLAND

Nazarian,
Beachley,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: November 8, 2019

A jury in the Circuit Court for Cecil County convicted appellant, Ikiem Radon Smith ("Smith"), of possession with intent to distribute heroin and possession of drug paraphernalia. The trial court sentenced Smith to 10 years imprisonment on the possession with intent to distribute count, but imposed no sentence for the count charging possession of drug paraphernalia. The questions presented in this timely appeal as phrased by Smith, are:[1]

> 1. Is the evidence sufficient to support appellant's conviction for possession with intent to distribute heroin?
>
> 2. Did the court commit reversible error by allowing the prosecutor to reference appellant's failure to testify, shift the burden of proof to the defense, and vouch for the State's police-officer witnesses in closing and rebuttal closing argument?
>
> 3. Is the evidence sufficient to support appellant's conviction for possession of drug paraphernalia where the sole basis for the paraphernalia charge was the plastic bag in which the drugs were located?

For the reasons that follow, we affirm the judgments of the trial court.

BACKGROUND

Prior to February 16, 2017, the Maryland State Police had received court authorization to "track" Smith's cell phone in order to locate him in relation to an open arrest warrant. By tracking the phone, Corporal Michael Cox ("Cox") knew where Smith was traveling on February 16, 2017, and at approximately 10:00 p.m. that night, Cox and his partner, Sergeant Sean Harris ("Harris"), observed Smith's red Monte Carlo proceed southbound on I-95 and then on Route 272 in Cecil County.

[1] We have reordered the questions presented.

Cox and Harris pulled alongside the Monte Carlo and saw that Smith, whom they both knew by sight, was the sole occupant of the vehicle. The troopers initiated a traffic stop, and Smith pulled over. Cox ordered Smith to exit the vehicle, but he refused to do so and instead re-started the car. Cox leaned in the driver's side window and attempted to keep Smith from putting the car into drive, but he was unsuccessful. Fearful of being dragged by the car, Cox disengaged from the vehicle, and Smith sped off, proceeding southbound on Route 272.

Several police units initiated pursuit and observed Smith "loop around" to get back onto I-95. During the chase, which reached speeds of almost 100 miles per hour, Trooper Brian Porter ("Porter") saw Smith moving around inside the car, "digging into the center console and in the glove box." At one point, Smith had the driver's side window down with his elbow sticking out the window; his left hand went in and out the window, while his right hand was in the glove box, and he kept looking back at Porter. Cox was notified by Porter that he had seen Smith's arm out the window of the vehicle.

At 10:26 p.m., Smith was finally stopped in Delaware. A search of his person uncovered "a small piece of paper that had a certain amount of money for . . . Up, and . . . a certain amount of money for Down," which, in Cox's training and experience, constituted a "hand-written drug ledger." Cox explained that "Up is a common term used for cocaine or crack cocaine and Down is for heroin, because one brings you up and one brings you down."

Following a brief hospitalization, Smith was taken to a Delaware detention center where Cox obtained a sample of his DNA, pursuant to a search warrant. The police also

recovered a cell phone from Smith's car, when a second search warrant for the phone was executed.

Cox, Harris, and Trooper Boyce[2] returned to the area, where Porter had seen Smith with his arm out his car window, to search for contraband. On February 21, 2017, after a continuous four- to five-day search, police officers recovered a bag on the side of Route 272. The bag contained 57.3 grams of heroin, packaged in numerous rubber-banded blue bundles inside a clear plastic bag.

Tiffany Keener ("Keener"), the State's forensic scientist, processed the plastic bag for fingerprints and DNA evidence. Keener's testing revealed a partial DNA profile from at least two contributors, one of whom was the major contributor. Although unable to call the DNA of the major contributor a match to Smith because it contained a mixture of DNA and was a "low-level profile" obtained only from shed skin cells, Keener concluded that Smith "could not be excluded as a significant contributor from that DNA profile that was obtained." She explained that the probability of selecting an unrelated individual at random who had the same profile as the significant contributor was one in 12 quintillion for the U.S. Caucasian population, one in two quadrillion for the African American population, and one in 1.3 quintillion for the Hispanic population.[3] Smith is an African American.

Sergeant Chris Spinner ("Spinner"), the State's drug trafficking and interdiction expert, opined that the amount of heroin recovered—which had a street value of

[2] Trooper Boyce's first name is not provided in the transcripts.

[3] Keener testified that there are presently approximately seven billion people in the world.

approximately $1,000—and the manner in which it was packaged indicated an intent to distribute, not personal use. With regard to the paper recovered from Smith's person, Spinner explained it was a ledger or accounting:

> Where you see Up and Down, generally Up is not referred to as heroin. Down is a term referring to heroin frequently here in the County. And he has dollar amounts. A $1,000 Up, $1,120 Down, and in parenthesis he has '8 buns' written beside that, which is another common drug term, buns or bundles, here in Cecil.

As part of his investigation, Spinner also downloaded text messages from the phone recovered from Smith's car. In his testimony, Spinner highlighted three messages received or sent on the evening of February 16, 2017, shortly before Smith's car was stopped by the police. The first incoming message said "Need" with a downward pointing finger emoji; the second outgoing message said, "Okay"; the third message said, "Call you when I'm on the road." In Spinner's experience, that type of coded message was frequently used in drug trafficking.

At the close of the State's case, the court denied Smith's motion for judgment of acquittal as to the possession with intent to distribute count. Smith introduced no evidence and the court denied his renewed motion for judgment of acquittal and submitted the case to the jury.

ANALYSIS

I. Sufficiency of the Evidence—Possession with Intent to Distribute Heroin

Smith argues that the State's evidence was insufficient to establish that he was in control of the bag of heroin found on the side of a public road five days after his arrest. He stresses that control of the contraband is a necessary element of a possessory crime. In Smith's view, his presence in the area days before the drugs were found "provides only suspicion that he had knowledge and possession of the bags and does not approach proof beyond a reasonable doubt." And, he adds, the DNA evidence touted by the State in closing argument as "a damning piece of evidence," showed only that he could not be excluded from the DNA sample recovered from the bag and, according to Smith, had very little probative value with respect to the question of whether he had touched the bag.

The standard for our review of the sufficiency of the evidence is "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Hobby v. State*, 436 Md. 526, 538 (2014) (quoting *Derr v. State*, 434 Md. 88, 129 (2013)) (emphasis in original). In applying the test, "[w]e defer to the fact finder's 'opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence.'" *Neal v. State*, 191 Md. App. 297, 314 (2010) (quoting *Sparkman v. State*, 184 Md. App. 716, 740 (2009)). Moreover, our courts have held that when analyzing whether sufficient evidence has been introduced to present an issue for the fact-finder to decide, "'there is no difference between direct and circumstantial evidence.'" *Mangum v. State*, 342 Md. 392, 398 (1996) (quoting *Hebron v. State*, 331 Md. 219, 226 (1993)).

To sustain a conviction for a "possessory offense," the evidence must either directly show, or support an inference that, the defendant exercised some dominion or control over

the drug, and that the defendant knew of both the presence and the illicit nature of the drug. *Jefferson v. State*, 194 Md. App. 190, 214 (2010) (citations omitted). The contraband, however, "need not be found on a defendant's person in order to establish possession." *Handy v. State*, 175 Md. App. 538, 563 (2007). "Rather, a person may have actual or constructive possession of the [contraband], and the possession may be either exclusive or joint in nature." *Moye v. State*, 369 Md. 2, 14 (2002). Possession is not determined by any one factor or set of factors, but "by examining the facts and circumstances of each case." *Smith v. State*, 415 Md. 174, 198 (2010).

The evidence the State presented at trial was sufficient to establish that Smith had possession of the heroin found by the side of Route 272 five days after his arrest. When pulled over by Cox, Smith, the sole occupant of his vehicle, refused to exit the car, instead he fled from the scene. His flight permitted the jury to infer consciousness of guilt on his part.[4] *Cerrato-Molina v. State*, 223 Md. App. 329, 332, *cert. denied*, 445 Md. 5 (2015). The heroin was found in the area near where Trooper Porter had seen Smith reaching into the glove box of his car and putting his left arm out the driver's side window during the police chase. DNA testing of the plastic bag in which heroin was found could not exclude

[4] Of course, the jury was equally permitted to infer that the consciousness of guilt pertained not to Smith's possession of drugs in the vehicle but to the fact there was an open warrant for his arrest. S*ee State v. Smith*, 374 Md. 527, 557 (2003) (observing that, in reviewing the sufficiency of the evidence, the issue is "not whether the [fact finder] could have made other inferences from the evidence . . . but whether the inference [it] did make was supported by the evidence.").

(continued)

Smith as the major contributor, and the possibility that another person selected at random would have the same DNA profile as the major contributor was infinitesimal.[5]

In addition, there was evidence that Smith was involved in heroin distribution. On his person upon his arrest was a "ledger" of his accounts, referring to bundles of "Up" and "Down," which, according to the State's drug expert were cocaine and heroin, respectively, and the heroin found on Route 272 was packaged in bundles. There were several text messages on Smith's cell phone, sent within hours of his arrest, which Sergeant Spinner testified were coded messages relating to the sale of drugs. The jury could have inferred that Smith was transporting the drugs in his vehicle with the intent to distribute them and threw them out the window when he fled the traffic stop. The evidence was enough for the jury to draw the reasonable inference that Smith was in possession of the heroin with the intent to distribute it.

[5] Smith's reliance on *Whack v. State*, 433 Md. 728 (2013), is misplaced. In *Whack*, the Court of Appeals reversed because the prosecutor misrepresented the statistical significance of DNA evidence during rebuttal closing argument, by stating that Whack's DNA was conclusively found in the truck in which the victim was likely murdered, when the State's expert had testified only that Whack could not be excluded from the mix of DNA and that one out of every 172 African Americans could have contributed to the DNA. *Id*. at 746-47.

Given that evidence, the Court concluded that "the prosecutor went too far in stating emphatically that Petitioner's DNA was present in the truck" and "compounded that error by overstating the statistical significance of the DNA evidence by equating the odds of one in 172 with one in 212 trillion." *Id*. at 746. The prosecutor's statement, the Court said, "could have seriously misled the jury." *Id*. at 747. In this matter, however, Keener's testimony made clear that the possibility that anyone other than Smith was the significant contributor to the DNA recovered from the bag in which the heroin was stored was, to say the least, extremely unlikely.

II. Closing Argument and Rebuttal Closing Argument

Smith argues that the trial court erred by permitting the prosecutor, during closing argument and rebuttal closing argument, to make "several inappropriate and highly prejudicial arguments including commenting on [Smith's] failure to testify, vouching for police officers by listing the risks to their careers if they lied where the integrity of the police's investigation was at issue, and shifting the burden of proof to the defense to present evidence and prove that the State's evidence was untrue." Acknowledging that his trial counsel objected only twice during the State's closing arguments (and that the court sustained one objection), Smith nonetheless asserts that we should consider the cumulative prejudicial effect of all the comments and find reversible error.

In his relatively brief initial closing argument, the prosecutor summarized the "evidence from the witness stand," including Smith's flight from the traffic stop, his movement of his arm out the window of his vehicle during the high speed police chase, the recovery of the heroin in the area where Smith had been observed with his arm out the window, the packaging of the heroin in bundles, and Smith's possession of a drug ledger. The prosecutor also said during closing argument, referring to the DNA evidence:

> I would submit to you, ladies and gentlemen, that that is a damning piece of evidence that cannot just be thrown away, if you will, that it must be considered by you unless there is a reason for you not to consider it, and I submit to you the defense has presented no reason.

As discussed *infra*, Smith now says that the argument just quoted was improper. But at trial, Smith's counsel made no objection to anything the prosecutor said during his initial closing argument.

After defense counsel's closing argument, the prosecutor offered his rebuttal, which we set forth in full, emphasizing, and identifying by number, the statements Smith now contends were improper:

> Just a moment or two in rebuttal, ladies and gentlemen. [Defense counsel] hates when I ask you to use your common sense because that means he's in trouble.
>
> In any event, I will just touch on a few things he touched on because he doesn't want you to consider the evidence because [1] *he says all this evidence is flawed because the police have a motive to get this guy, and they are going to risk their careers, criminal charges themselves, they are going to make stuff up, they are going to fill in the gaps when they really don't exist, just to get Mr. Smith*. It's ludicrous. It's ludicrous. And he does that because he has no other evidence.
>
> [2] *I picked you because you said you would decide this case based on the evidence*. *The defense chose not to present the evidence*, but chose merely to argue about it and, as Judge Sexton told you, argument is not evidence. What came off the witness stand is the evidence, and that's the only thing you may consider.
>
> He tells you that how did they find this bag in the dark at this area the defendant was traveling? Well, I tell you, ladies and gentlemen, this was one of the finest examples of police work that I have seen. They went out there, they figured out where it would be, they found it, they sent it for DNA, and the DNA came back pretty dispositive. And [defense counsel] said, Oh, the DNA, it doesn't mean anything, all those numbers mean nothing, you couldn't even enter it in the National Data Base. But you could enter it in the state data base and the analyst told you that there were DNA parts missing of their full profile, so, therefore, it could not be entered into the National Data Base, but, again, the chances of picking a person at random is *over two quadrillion* or whatever figure she used. [Defense counsel] tells you, Oh, then that must not mean anything. I submit to you, ladies and gentlemen, [3] *that means more than reasonable doubt.*
>
> He tells you that, Oh, there's a discrepancy what the Delaware state police officer said the time was when he wrote his report and what Trooper Cox said the time was when he picked up the swabs. I don't find that to be too out of the ordinary. What Delaware does and when they time something when they finish it, it may be when they finish it, but what Trooper Cox does is when he collects it. I don't find those discrepancies to be abnormal at all.

And those are the little things because [4] *the defense has nothing else* so that he is hoping you are going to say, Oh my God, look at those discrepancies, none of this evidence means anything.

But, again, what is the evidence? The evidence is a high speed chase. The evidence is the assault and resisting arrest of Trooper Cox. The evidence is the drugs, 140 bags. [5] *There is nothing to controvert what Sergeant Spinner told you that that is possession with intent to distribute*. The difference in the weight? Obviously some of the drugs have to be used to be analyzed. That is of no consequence. Again, these little matters the [6] *defense proffered but don't offer testimony to—*

[DEFENSE COUNSEL]: Objection to that, Judge.

THE COURT: Overruled.

[PROSECUTOR]: --to get you to believe that the police did something wrong, that *it's really them making these things up*.

And going back to the *DNA, [7] if that DNA analysis was so bad, where is the defendant's expert? I know I have the burden, but if the DNA is that wrong, if they are wrong, don't you think they would have had somebody come in here and say that?*

[DEFENSE COUNSEL]: Objection to that, Judge.

THE COURT: Sustained. Jury disregard.

[PROSECUTOR]: Again, ladies and gentlemen, [defense counsel] hates when I do this because he's heard me do it over the years many a-times, you don't lose your common sense when you walk through that door. I think sometimes we get into the courtroom and we see the judge, the lawyers, the court reporter and the trappings of the courtroom, and we can't see the forest for the trees. If I told the man on the street this story, it would be like, Are you kidding me? But we get into the courtroom and, all of the sudden, it's a different standard. It's not. You still must use your common sense. The evidence in this case is overwhelming and I would ask you to find the defendant guilty.

Finally, I think my job is important, Trooper Cox I know thinks his job is important, but we can't do it without you, and I thank you for your service.

(Emphasis added).

First, we agree with the State that Smith did not preserve his claim of error regarding any statement made in the prosecutor's opening argument or in the statements made in rebuttal that we have identified as comments 1-5, because he failed to make timely objections during closing arguments.[6] Maryland Rule 8-131(a) provides that, except for issues of subject matter and personal jurisdiction, "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[.]" As such, "a defendant must object during closing argument to a prosecutor's improper statements to preserve the issue for appeal." *Shelton v. State*, 207 Md. App. 363, 385 (2012). Because Smith did not object to the prosecutor's statements during closing arguments, he cannot argue on appeal that such statements were improper when, as here, there has been no request for plain error review. *Id*. *See also Gross v. State*, 229 Md. App. 24, 36-37 (2016).

Regarding the propriety of comment number 6, which is preserved for our consideration, we review the trial court's decision to overrule Smith's objection for an

[6] As mentioned, counsel objected twice during the prosecutor's rebuttal closing argument, but the trial court sustained one of the objections and instructed the jury to disregard the comment. Therefore, in the absence of a defense request for further action, there is nothing for this Court to review with regard to comment number 7, where the objection to that statement was sustained. *See Hairston v. State*, 68 Md. App. 230, 236 (1986) ("Where an objection to opening or closing argument is *sustained*, we agree that there is nothing for this Court to review unless a request for specific relief, such as a motion for a mistrial, to strike, or for further cautionary instruction is made.") (Emphasis in original).

abuse of discretion. In *Wilhelm v. State*, 272 Md. 404, 412 (1974), the Court of Appeals addressed the scope of closing arguments:

> As to summation, it is, as a general rule, within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence; and such comment or argument is afforded a wide range. Counsel is free to use the testimony most favorable to his side of the argument to the jury, and the evidence may be examined, collated, sifted and treated in his own way. . . . Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom[.]

Our courts give counsel broad discretion in the scope of their closing arguments, and a remark, even if improper, does not "necessarily mandate[ ] reversal, and what exceeds the limits of permissible comment depends on the facts in each case." *Degren v. State*, 352 Md. 400, 430-31 (1999) (internal quotation marks, citations, and alteration omitted). The "determination of whether the prosecutor's comments were prejudicial or simply rhetorical flourish lies within the sound discretion of the trial court," *id.* at 431, and as the Court of Appeals has noted, "the trial judge is in the best position to gauge the propriety of argument in light of" the facts of the case. *Mitchell v. State*, 408 Md. 368, 380-81 (2009). Smith contends that rebuttal argument number 6 constituted the prosecutor's improper burden shifting argument.

In *Lawson v. State*, 389 Md. 570, 595-96 (2005) the Court discussed, and gave an example of a "burden shifting" argument:

> Petitioner argues that the State improperly attempted to place a burden upon him to present evidence that Nigha [the seven-year-old victim] had a motive to lie. The Court of Special Appeals determined that the prosecutor's statements clearly asserted that petitioner had failed to present evidence rebutting the State's case. *Lawson* [*v. State*], 160 Md. App. [602,] 628, 865 A.2d [617,] 633 [(2005)]. That court, however, found that the statements did

> not deny petitioner a fair trial, even if improper, because the jury instructions clearly stated that the burden was upon the State.
>
> We stated in *Eley* [*v. State*], 288 Md. [548,] 555 n.2, 419 A.2d [384,] 388 n.2 [(1980)], that the prosecution was not free to "comment upon the defendant's failure to produce evidence to refute the State's evidence" because it could amount to an impermissible shift of the burden of proof.
>
> * * *
>
> The primary evidence in this case was provided directly or indirectly by the victim's statements. Thus, her credibility was a major issue. The prosecutor's statements tended to shift the State's burden to prove all the elements of the crime beyond a reasonable doubt by requiring the defendant to prove that Nigha was lying. The State's statements were, therefore, inappropriate and under all of the circumstances of this case, as hereafter explained, the "jurors 'were likely to have been [improperly] influenced to the prejudice of the accused' . . . ." *Shoemaker* [*v. State*,] 228 Md. [462,] 473, 180 A.2d [682,] 688 [(1962)].

In his closing argument, defense counsel argued that: the police officers' "bias" against Smith led them to determine that the text messages on the phone recovered from Smith's car comprised "drug conversations"; the amount of drugs recovered could have been suggestive of personal use rather than distribution; Sergeant Spinner did not indicate, from his review of the text messages, "who was selling and who was buying because he doesn't know"; there was an unexplained discrepancy between the number of bundles and the weight of the drugs as noted by the police and the analyzing chemist, indicating a "lack of control of the evidence"; the State's chemist could not call Smith's DNA a match to the DNA recovered from the bag of heroin; additionally, as defense counsel argued, the 45 minute time difference between the time the Delaware police noted the giving of the DNA sample to the Maryland police and the time Corporal Cox wrote in his report that he took possession of the sample was another example of an oversight in the State's investigation.

As a result, defense counsel's claim that there was "reason to suspect the validity, the reliability of the evidence" was presented to the jury.

The prosecutor, then "touch[ing] on a few things [defense counsel] touched on," presented his rebuttal closing argument addressing the discrepancies in the evidence that were emphasized by his opponent. It was in this context that the prosecutor made the following statement (already quoted *supra* at page 10), which elicited the one objection defense counsel made that was overruled:

> The difference in the weight? Obviously some of the drugs have to be used to be analyzed. That is of no consequence. Again, these little matters the defense proffered but don't offer testimony to—
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> [DEFENSE COUNSEL]: Objection to that, Judge.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: --to get you to believe that the police did something wrong, that it's really them making these things up.

Citing *Smith v. State*, 367 Md. 348 (2001), Smith argues that the partial sentence, "Again, these little matters the defense proffered but don't offer testimony to—" was objectionable and impermissibly commented on Smith's failure to testify. In *Smith*, the Court of Appeals set forth the following test for determining whether a prosecutor's comments are improper: "[I]s the remark 'susceptible of the inference by the jury that they were to consider the silence of the traverser in the face of the accusation of the prosecuting witness as an indication of his guilt[?]'" *Id*. at 354 (quoting *Smith v. State*, 169 Md. 474, 476 (1936)). Smith claims the statement above is such an indication.

To support his contention that the prosecutor made improper burden shifting arguments, Smith listed rebuttal argument number 6 as one such argument. But in his brief, he never explains why that argument can be fairly characterized as "burden shifting." Instead, he supports his claim by attempting to demonstrate that statements that were not objected to constituted improper burden shifting arguments. This violates Md. Rule 8-504(a)(6), which requires a party to present "[a]rgument in support of the party's position on each issue." When that rule is violated, we need not consider the claim. *See Poole v. State of Maryland*, 207 Md. App. 614, 633 (2012); *Honeycutt v. Honeycutt*, 150 Md. App. 604, 618 (2003); *Beck v. Mangels*, 100 Md. App. 144, 149 (1994). Nevertheless, we shall address the issues as to rebuttal argument 6.

Reduced to its essence, rebuttal argument 6, was that defense counsel had alleged police misconduct but had failed to prove it. If defense accuses the State or its agents of bad behavior or negligence, the State surely has the right to discuss, in its jury presentation, whether the allegations have been proven. Such a discussion bears no relationship to an improper burden shifting argument, where the prosecutor's remark(s) "tend[ ] to shift the State's burden to prove all the elements of the crime beyond a reasonable doubt[.]" *Lawson*, 389 Md. at 596. For the above reasons, we hold that the trial judge did not abuse her discretion when she overruled Smith's objection to rebuttal argument 6.

III. Sufficiency of the Evidence—Possession of Drug Paraphernalia

Finally, Smith challenges the sufficiency of the evidence to sustain his conviction of possession of drug paraphernalia because the "sole basis for the paraphernalia charge was the plastic bag in which the [several bundles of] drugs were located," which he asserts

cannot form the basis of a separate paraphernalia conviction. Smith acknowledges the fact that he did not move for judgment of acquittal relating to the charge of possession of paraphernalia, thus failing to preserve the issue for appellate review. *See Starr v. State*, 405 Md. 293, 303 (2008) ("In a jury trial, the only way to raise and to preserve for appellate review the issue of the legal sufficiency of the evidence is to move for a judgment of acquittal on that ground." (quotation marks and citation omitted)). He nonetheless urges us to find that defense counsel's failure to address the issue in his motion for judgment of acquittal amounts to ineffective assistance of counsel and that such a claim is appropriate for our consideration on direct appeal.

In support of his ineffective assistance of counsel argument, Smith relies on *Dickerson v. State*, 324 Md. 163 (1991). In *Dickerson*, the defendant was found in possession of a vial of crack cocaine. *Id*. at 165. Based solely on the vial, which contained the cocaine, Dickerson was charged with possession of paraphernalia and possession of cocaine with the intent to distribute. A jury convicted him of both charges. *Id*. On appeal, the issue presented, as phrased by the *Dickerson* Court, was:

> whether dual convictions for possession of cocaine with intent to distribute and for use of drug paraphernalia lie when the latter conviction is based solely on the possession of the vial containing the cocaine on which the former conviction is based.

Id. at 164.

In discussing that issue, the *Dickerson* majority conceded that the State produced sufficient evidence to convict the defendant of the paraphernalia charge. *Id*. at 172-73. The majority then turned to the issue of legislative intent, *id.* at 170, saying:

> We are here concerned with multiple convictions, and punishment, imposed after a single trial and in respect of conduct, *i.e.*, the possession of a single vial containing cocaine, which, though different, is also closely related. Consequently, the issue that we must address is whether, when it enacted § 287A, the Legislature intended that two convictions result whenever a container is used to contain, store or conceal a controlled dangerous substance. *See Randall Book Corp. v. State*, 316 Md. 315, 323-24, 558 A.2d 715, 719-20 (1989).

The *Dickerson* majority opined that the Legislature did not intend that two convictions should result, and "hence, double punishment[.]" *Id*. at 172. The Court held, *id.* at 174, that:

> [W]hen there is no other drug paraphernalia, a defendant may only be convicted of possessing cocaine with the intent to distribute, even though the cocaine possessed is in a vial, which is thereby being used as drug paraphernalia.

As mentioned, Smith's sole basis for claiming ineffective assistance of counsel, is that his trial counsel failed to make a motion for judgment of acquittal as to the paraphernalia count at the end of the evidentiary phase of the trial. But *Dickerson* makes it clear that at that stage of the proceedings, the defendant was not entitled to the grant of such a motion. The same is true in this case.[7]

[7] There is no dispute that a plastic baggie used to carry drugs qualifies as "drug paraphernalia" under the statutory definition of that term. Md. Code, Criminal Law § 5-101(p)(2)(ix)-(x) (defining "drug paraphernalia" to include "a capsule, balloon, envelope, or other container used, intended for use, or designed for use in packaging small quantities of a controlled dangerous substance," and a "container or other object used, intended for (continued)

What *Dickerson* prohibits is dual convictions, under some circumstances. At the end of the evidentiary phase of the trial, Smith hadn't been convicted of anything and under the rule set forth in *Dickerson*, if a motion for judgment had been made as to the paraphernalia count it would have been error to grant it.

Defense counsel could have, but did not, file a post-trial motion based on *Dickerson*, asking that the paraphernalia conviction be vacated. But, there is no claim by Smith that such a motion should have been filed and, for that reason, as well as other reasons set forth below, we decline to decide whether the failure of counsel to make such a post-trial motion amounted to ineffective assistance of counsel.

Recently, in *Bailey v. State*, 464 Md. 685, 703 (2019), Judge Getty, speaking for the Court of Appeals, said:

> We have previously stated that we rarely consider ineffective assistance of counsel claims on direct appeal. However this rule is "not absolute and, where the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim, there is no need for a collateral fact-finding proceeding, and review on direct appeal may be appropriate and desirable." *In re Parris W.*, 363 Md. [717] at 726 [(2001)] (citations omitted).

In earlier cases, the Court of Appeals has made it clear that in almost all cases "[p]ost-conviction proceedings are preferred with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel . . . omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence

use, or designed for use in storing or concealing a controlled dangerous substance"); *see also Dickerson*, 324 Md. at 173. "[T]he vial was drug paraphernalia [under the statutory definition]. Of that, there can be no question.").

directly related to allegations of the counsel's ineffectiveness." *Mosley v. State*, 378 Md. 548, 560 (2003).

As in *Mosley*, the record before us on direct appeal does not "reveal[ ] counsel's ineffectiveness to be 'so blatant and egregious' that review on appeal is appropriate." *Id.* at 562-63 (footnotes and citation omitted). First, even had defense counsel filed a post-trial motion to strike the conviction for possession of paraphernalia, a grant of that motion would not have been ensured. The charging document in this case identified the paraphernalia as "a clear sandwich style baggie." In his testimony, Sergeant Spinner described the heroin as being stored in "numerous blue wax fold bags," which were themselves stored within the bag described in the charging document. The State argues:

> [T]he "clear sandwich baggies" identified in the charging documents as the basis for the paraphernalia charge, . . . appear to have been only one clear baggie, which was not itself used to store the heroin, but instead held other bags containing the heroin. . . . 324 Md. at 173.

At least arguably, a competent counsel may have believed that the clear "sandwich style baggie" identified by the charging documents as the basis for the paraphernalia charge was not the only container holding the drugs but a separate container used . . . in storing or concealing a controlled dangerous substance," as drug paraphernalia is defined in Md. Code, Criminal Law Article (2012 Repl. Vol.) § 5-101(p)(2)(x). Unlike the situation in *Dickerson*, where the drugs were solely contained in a vial, here the drugs were stored in numerous wax fold bags; those bags, in turn, were stored in larger bags, i.e., the alleged paraphernalia. Under such circumstances Smith's trial counsel may have been justified in believing that the trial judge would have distinguished *Dickerson* and denied a post-trial

motion to dismiss that count. On this record, we cannot find that Smith met the heavy burden of showing that his counsel's "representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

Also, the interests of judicial economy do not require us to decide whether a post-trial motion to strike the paraphernalia count would have succeeded because it is far from inevitable that a post-conviction petition will ever be filed if we decline to address the issue now. *See Bible v. State*, 411 Md. 138, 150-51 (2009). (In determining whether to address an issue that was not preserved, fairness and judicial economy are considered.). After all, the trial court imposed no sentence on the paraphernalia charge, and, as a practical matter, a conviction of that relatively minor charge will not likely adversely affect Smith in any way, given his lengthy record of prior convictions.[8]

Finally, to review the issue of whether Smith's counsel should have filed a post-trial motion, without the benefit of a post-conviction hearing and without Smith or the State even briefing the issue, would place this Court "in 'the perilous process of second-guessing' without the benefit of potentially essential information." *Mosley*, 378 Md. at 561 (quoting *Johnson v. State*, 292 Md. 405, 435 (1982)).

JUDGMENTS OF THE CIRCUIT COURT FOR CECIL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

[8] At the time of sentencing in this case, Smith was already serving an eight-year sentence for possession with intent to distribute cocaine. Prior to that last mentioned conviction, he had eleven other convictions and had served several lengthy prison sentences.