Circuit Court for Prince George's County
Case No. CT-17-0473A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2324

September Term, 2017

TEON DE'MARKUS HATTON

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: October 4, 2019

*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.

On March 11, 2017, at about 1:30 a.m., appellant Teon De’Markus Hatton[1] was driving in his Honda Accord with a female passenger, Amahnie Fikes, when Officer Timothy Shomper signaled Hatton to pull over. Officer Shomper was driving in his patrol car and noticed that the tag light on the Honda Accord was not working. Hatton continued to drive for about a tenth of a mile under Officer Shomper’s spotlight. During this time, Officer Shomper saw Hatton lean forward, reach behind his back, and hand Fikes “an unknown object.” Fikes then leaned forward as if placing something on the passenger-side floorboard. When the car finally stopped, Officer Shomper saw Hatton jump into the rear passenger seat and Fikes climb into the driver’s seat. Shortly thereafter, when Officer Shomper and his partner approached the car, Hatton was sitting in the back seat, his feet resting on the center console, eating a bag of chips. The officers removed Hatton and Fikes from the car; they handcuffed Hatton and patted him down for weapons. Finding none, Officer Shomper checked the passenger compartment of the vehicle. Inside a purse on the floor of the car, Officer Shomper found a loaded silver revolver.

Prior to his trial in the Circuit Court for Prince George’s County, Hatton moved to suppress the firearm and ammunition. The suppression court denied his motion and the case proceeded to trial. The jury found Hatton guilty of possession of a firearm, illegal possession of ammunition and driving without a license. He noted his timely appeal to this Court and presents four questions for our review:

(1) “Did the trial court err in denying [Hatton]’s motion to suppress?”

[1] The appellant’s name appears in the record as “Teon De’Markus Hatton” and as “Teon Demarcus Hatton.” We have chosen to use the former spelling for consistency.

(2) "Did the trial court err in permitting inadmissible lay testimony?"

(3) "Did the trial court err in allowing the prosecutor to make improper and prejudicial comments at closing argument?"

(4) "Is the guilty verdict for driving unlicensed a nullity?"

At the hearing on the motion to supress, Officer Shomper articulated his reasonable suspicion to conduct a protective search for weapons, but he failed to articulate why it was necessary to open the purse in the passenger compartment or why a less-intrusive search would not have sufficed. The facts the State adduced at the suppression hearing also did not support a finding of probable cause to search the car. Therefore, we hold that the circuit court erred in denying Hatton's motion to suppress because the State failed to demonstrate why Officer Shomper's search of the purse was constitutionally permissible. We reverse Hatton's firearm and ammunition convictions but affirm his conviction for driving without a license. The remaining issues Hatton raises concerning lay trial testimony and closing argument are not sufficiently likely to arise on remand, so we do not resolve them here.

BACKGROUND

On April 4, 2017, Hatton was indicted by a grand jury on seven counts: (1) possession of a firearm after a conviction for conspiracy to commit a felony; (2) possession of a firearm after having been convicted of the disqualifying crime of misdemeanor assault; (3) possession of a firearm after having been convicted of the disqualifying crime conspiracy to distribute marijuana; (4) the illegal possession of ammunition; (5) wearing, carrying, and transporting a handgun; (6) wearing, carrying, and transporting a handgun in a vehicle on a public road; and (7) driving while unlicensed.

Motions

On September 14, 2017, Hatton moved to suppress the evidence uncovered during the road-side search. He argued that "the suspected handgun and ammo were seized pursuant to an unlawful search, seizure, and/or arrest[,]" in violation of his State and Federal constitutional rights.

Suppression Hearing

Prior to trial, on October 3, the court considered Hatton's motion to suppress. Officers Shomper and Loveless testified for the State. Hatton called no witnesses and did not testify. Officer Shomper's testimony described his observations on the night of Hatton's arrest, March 11, 2017:

> I observed a silver Honda Accord. The tag light was completely out. I activated my emergency lights and sirens to effect a traffic stop. The vehicle proceeded approximately a 10th of a mile before coming to a stop. During that 10th of a mile, it was dark outside so I shined my spotlight into the vehicle to illuminate the vehicle to see what was going on inside. I observed a male in the driver's seat, a female in the passenger seat.
>
> As the vehicle was proceeding that 10th of a mile, I observed the driver, which was the defendant.
>
> * * *
>
> . . . I observed the defendant in the driver's seat lean forward in his seat, reach behind his back with his right hand and take a dark in color object and pass it over to the female passenger.
>
> * * *
>
> I couldn't make out [the object]. All I could make out is that it was a dark in color object.
>
> * * *
>
> We were still traveling at this point. I then observed the female accept the unidentified object. I observed her lean forward in the seat as if she was putting something on the passenger side floorboards. Then the car came to a stop in a dark parking lot.
>
> Immediately as soon as the car stopped, I observed the defendant get out—like put the seatbelt above his head and jump into the back seat of the vehicle.

* * *

> The female passenger, [the] front seat passenger[,] jumped across he center console into the driver's seat.
>
> * * *
>
> At that point I immediately got out of my cruiser and approached the vehicle on the passenger side. At that point, I observed the defendant lying in the back seat. His feet were still up on the center console and he was eating a bag of chips.

Officer Shomper then described what he did next and why:

> At that point, because of the furtive movements I knew through my training and experience, furtive movements people are often trying to conceal weapons. Out of fear of safety, I removed the defendant from the back seat of the car and patted him down for weapons. Again through my training and experience, I observed the defendant making several movements as if he was going to flee the scene, so I placed him in handcuffs.
>
> * * *
>
> To explain the movements further, our common practice is to put their hands above their head and lace their fingers. I could feel him trying to pry his hands apart and looking around for avenues of escape. **So I placed him in handcuffs. Then Officer Loveless removed the now driver, which was a female, from the vehicle and escorted her back to our police cars.**
>
> **I immediately went to the area that I believed there was a weapon, which was the passenger side floorboard, and saw a purse on the floorboard. And in the purse I found the silver and black handgun revolver.**

(Emphasis added). Officer Shomper clarified that they did not handcuff the female passenger "until after the gun was found." Having found the gun, officers arrested both Hatton and the passenger, and transported them to the station for questioning.

On cross-examination, Officer Shomper described the female's furtive movements more fully:

> I said that I could see her lean forward as if she was putting the object on the floorboard.
>
> * * *
>
> As I said, I could see the female lean forward in the passenger seat and her head disappeared from the headrest. I could not see her body at all

> and I couldn't tell where [s]he was putting it, but I believe it was in the inside passenger compartment, but I couldn't see.
>
> * * *
>
> Usually people don't do that with the police behind them with lights and sirens on.
>
> . . . [M]ost of the time, criminal movements like this, they're trying to hide a weapon. It could have been drugs, but most of the time it's a weapon.

He clarified that "[t]he furtive movements alone" gave him the impression that Hatton had a gun. And he elaborated that, "through training and experience [he] know[s] if someone is known to carry weapons, they're known to carry more than one weapon."

On redirect, the State asked Officer Shomper to identify five photographs to confirm that they depicted "the way the car was found when [he] located the handgun[.]" The fifth photo showed, on the floor of the passenger's side of the car, a brown purse made of soft leather or similar material that was zipped shut. Two other photos showed a close-up of the purse, unzipped, revealing part of a silver revolver beneath a stick of deodorant. And two more photos show the revolver more clearly, out of the purse.

Officer Loveless testified next. He described the stop from his perspective, including that he took the female passenger out of the car while Officer Shomper handcuffed and patted down Hatton. He eventually handcuffed the female passenger after Officer Shomper found the gun in the front passenger seat. Officer Loveless explained that the traffic stop was not routine "[b]ecause the driver jumped into the back seat and the front passenger jumped into the driver's seat."

Following its presentation of evidence, the State argued that "just to clarify, the officer was performing a *Terry*[2] frisk of the automobile. . . . [T]he furtive movements were what led to the reasonable articulable suspicion that there was a gun in the car," and thus the "gun should not be suppressed." Counsel for Hatton retorted that "[t]here is no such thing as the *Terry* search of an automobile," and that "[f]urtive movements . . . are not sufficient for a frisk." He argued further that the officers lacked probable cause because "the Fourth Amendment requires [] that the officers have a specific crime in mind" before searching an automobile, and here, the officers merely "saw some furtive movements," which were not indicative of any particular crime.

The court denied Hatton's motion to suppress. The court found that there was "probable cause for the stop[,] . . . the taillight or the tag light was out on the car." In regard to the search, the court stated:

> Once the car came to a stop, [Officer Shomper] indicated that [Hatton] then lifted up his seatbelt to squeeze out and into the back seat with his feet still on the console when the officer approached the car. And also that the passenger then assumed the driver's seat.
>
> He also indicated before the passenger assumed the driver's seat, once handed the object, she bent down so he could no longer see her head, and reached somewhere under near her seat. And therefore, when [Officer Shomper] came to the car and saw those things, the [c]ourt does find that it was enough probable cause to search the vehicle. That those movements, indeed, did point him to say that these furtive gestures may result in the gun, as stated in his statement of probable cause. He did not say just drugs. He said a gun. He believed it could have been a gun and he, therefore, searched

[2] As discussed in more detail below, the Supreme Court of the United States in *Terry v. Ohio* ruled that police officers have "narrowly drawn authority" to conduct "a reasonable search for weapons" for the officers' safety when they have "reason to believe that [they are] dealing with an armed and dangerous individual[.]" 392 U.S. 1, 27 (1968).

> the only area that he saw those furtive movements being made and located a gun in that same area.

The case proceeded to trial. The jury found Hatton guilty of possession of a firearm, illegal possession of ammunition, and driving without a license. It acquitted him of illegal possession of a regulated firearm; wearing, carrying, and transporting a handgun on his person; and wearing, carrying, and transporting a handgun in a vehicle. On January 12, 2018, the court sentenced Hatton to five years' incarceration, all but 18 months suspended, for possession of a firearm; a concurrent term of 1 year for the illegal possession of ammunition; and a concurrent term of 90 days' incarceration for driving while unlicensed. He noted his timely appeal to this Court the following week, on January 16, 2018.

As Hatton's primary contention on appeal deals with the motion to suppress, we will limit our recitation of facts to those adduced at the suppression hearing. We will include any facts necessary to the remaining issues in those sections of our discussion.

DISCUSSION

I.

Motion to Suppress

Our review of the denial of a motion to suppress "under the Fourth Amendment is based solely upon the record of the suppression hearing." *Ferris v. State*, 355 Md. 356, 368 (1999). We examine factual findings and credibility determinations for clear error. *Bean v. State*, 240 Md. App. 342, 354 (2019) (citation omitted). In doing so, we consider the evidence, and all reasonable inferences drawn therefrom, in a light most favorable to the prevailing party. *Id.* (citation omitted). Conclusions of law, including the ultimate

determination of whether the defendant's constitutional rights were violated, we review without deference to the circuit court. *Id*.

The Fourth Amendment to the U.S. Constitution, made applicable to the States through the Fourteenth Amendment, guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. CONST. amend. IV; *see State v. Nieves*, 383 Md. 573, 583 (2004) (citing *Mapp v. Ohio*, 367 U.S. 643 (1961) (noting incorporation of the Fourth Amendment)). State-conducted searches and seizures, without a warrant, "are presumptively unreasonable and, thus, violative of the Fourth Amendment." *Thornton v. State*, ___ Md. ___, ___, No. 51, September Term, 2018, slip op. at 14 (filed August 6, 2019) (citations omitted). The State bears the burden of proving that a warrantless search or seizure is reasonable. *Id.* Evidence obtained in violation of the Fourth Amendment, "will ordinarily be inadmissible in a state criminal prosecution pursuant to the exclusionary rule." *Id.* at 13.

A warrantless search may be reasonable if police have probable cause to believe that the search will uncover evidence of a crime. In regard to the subset of warrantless searches that may proceed based upon reasonable suspicion, it is the nature of the activity—in other words, *what* the officer suspects—that matters insofar as what is sufficient to support a protective search or frisk as opposed to an investigative stop. The mélange of legal theories presented and relied on by the parties and the court in this case jumble these legal distinctions. At the suppression hearing, Hatton argued that the handgun and ammunition "were seized pursuant to an unlawful search, seizure, and/or arrest." The State, tasked with proving the reasonableness of the warrantless search, argued that the

officer was "performing a *Terry* frisk of the automobile." The suppression court then ruled that there was "enough probable cause to search the vehicle." On appeal, Hatton claims there was enough reasonable suspicion to conduct a *Terry* frisk of his person, but not the car. The State relies on the same set of facts to supply the reasonable suspicion necessary for a protective search of the vehicle, as well as the probable cause necessary to conduct and a more expanded search of the vehicle under the *Carroll* doctrine.[3] We endeavor to address the parties' arguments by analyzing the quanta of suspicion and evidence required in ascending amounts.

A. Reasonable Suspicion

One exception to the warrant requirement is a "stop and frisk," as the Supreme Court recognized in *Terry v. Ohio*, 392 U.S. 1 (1968). "The *Terry* stop and the *Terry* frisk . . . serve quite distinct purposes." *Ames v. State*, 231 Md. App. 662, 671 (2017). Although both must be based on reasonable articulable suspicion, the *Terry* stop is an investigative tool used to detect crime, while the *Terry* frisk "'is concerned only with officer safety'" and "is not intended to be an investigative tool at all." *Id.* (quoting *Graham v. State*, 146 Md. App. 327, 358-59 (2002)). A lawful stop must precede a lawful frisk. *Gibbs v. State*, 18 Md. App. 230, 238-39 (1973). It does not follow, however, that a frisk is lawful merely because a lawful stop precedes it. *Id.*

[3] This doctrine is named for *Carroll v. United States*, in which the Supreme Court upheld the legality of a warrantless search of a vehicle suspected of containing bootlegged liquor. 267 U.S. 132 (1925).

An officer may frisk an individual or conduct a protective search only if, at the search's inception, "the officer has reasonable articulable suspicion that the person with whom the officer is dealing is armed and dangerous." *Thornton*, slip op. at 15-16. The officer need not be certain but merely "have 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.'" *Id.* at 16 (citation and brackets omitted). "To articulate reasonable suspicion, an 'officer must explain how the observed conduct, when viewed in the context of all the other circumstances known to the officer, was indicative of criminal activity.'" *Thornton*, slip op. at 21 (citation omitted).

When reviewing whether that reasonable suspicion existed at the time of the search, a court conducts a fact-specific inquiry into the totality of the circumstances to determine whether "a reasonably prudent law enforcement officer would have felt that he or she was in danger, based on reasonable inferences from particularized facts in light of the officer's experience." *Id.* at 16. (brackets and ellipsis omitted). In conducting this inquiry, the court "should give due weight to an officer's 'specific reasonable inferences which he or she is entitled to draw from the facts in light of his or her experience[,]'" but "give no weight to an officer's 'inchoate and unparticularized suspicion or hunch.'" *Id.* at 16-17 (quoting *Terry*, 392 at 27).

Hatton does not challenge the legality of the initial traffic stop in this case. Instead, he argues, broadly, that there was no reasonable suspicion to conduct a *Terry* frisk of the car. According to Hatton, any reasonable suspicion that Officer Shomper may have had "dissipated before Officer Shomper searched the car." To illustrate this point, Hatton

points to Officer Shomper's testimony at the suppression hearing, in which "[h]is only reference to officer safety was in explaining why he patted down [Hatton's] *person*[,]" and "not [] that he feared for officer safety when he went to search the car and, ultimately, the purse inside the car." Further, Hatton continues, even assuming there was reasonable suspicion to justify a *Terry* frisk in the vehicle, Officer Shomper exceeded the permissible scope of the search because Officer Shomper "fail[ed] to engage in a pat-down of the purse."[4] Hatton concludes the State failed to meet its burden of justifying the scope of the protective search because "Officer Shomper offered no explanation for why a pat-down of the purse would not have sufficed; nor was the purse itself produced for the court's inspection."

The State responds that the protective search of the vehicle was constitutional because Officer Shomper had reasonable articulable suspicion to believe there was a

[4] For the first time on appeal, the State argues that Hatton lacks standing to challenge the legality of the search of Fikes's purse. Hatton replies that the State's standing argument is unpreserved given its failure to raise it below. By failing to raise the challenge before the suppression court, Hatton was deprived of his ability to present evidence regarding his expectation of privacy in the property.

We will not consider the State's standing argument because it does not "plainly appear by the record to have been raised or decided by the trial court[.]" Md. Rule 8-131(a). Because a warrantless search is "presumptively unconstitutional, [] the State bears the burden of production and persuasion" at the suppression hearing. *Boston v. State*, 235 Md. App. 134, 151 (2017). The State's failure to raise its standing argument before the suppression court deprived Hatton of his ability to present evidence regarding his expectation of privacy in the purse and deprived the suppression court of its opportunity to address the issue in the first instance. *See McCain v. State*, 194 Md. App. 252, 278-79 (2010) ("As appellant correctly notes … the State did not contend at the suppression hearing that appellant lacked a legitimate expectation of privacy in Ms. McCain's purse."). For this Court to consider "the standing issue for the first time on appeal would be unfair to [Hatton]," and accordingly we will not address it. *Id.* at 279.

weapon in the vehicle. The facts that constituted reasonable suspicion, according to the State, were that Hatton was slow to stop the vehicle, reached behind his back and passed a dark-colored object to Fikes, "who then leaned forward and disappeared from view," as well as the fact that Hatton and Fikes then changes seats.[5]

1. Articulable Suspicion: Armed and Dangerous

A threshold requirement of a frisk or protective search is that the frisking officer must articulate, expressly, the specific reasons he or she had for believing the frisk or protective search was necessary. *Ames*, 231 Md. App. at 674. "It is not enough that objective circumstances be present that might have permitted some other officer in some other case to conclude that the suspect was armed and dangerous." *Id.*

In *Goodwin v. State*, this Court reviewed the totality of the circumstances and concluded that the officers' reasonable articulable suspicion that Goodwin was armed and dangerous supported a 'frisk' of his vehicle. 235 Md. App. 263, 281-86 (2017), *cert. denied*, 457 Md. 671 (2018). Police, while surveilling an apartment complex known for drug sales and gang-related activity, observed a man by the name of Walker walk back and forth between the apartment building and Goodwin's car several times. *Id.* at 268. Walker

[5] Additionally, the State argues that, at the time of the search, "there existed a risk that Fikes could gain immediate control of a weapon and pose a danger to the officers." We reject the State's reliance on speculation. Our assessment of what facts constituted reasonable suspicion is limited to those facts the were presented into evidence at the suppression hearing. *See McDowell v. State*, 407 Md. 327, 341 (2009). Neither Officer Shomper nor Officer Loveless testified that they were concerned that Fikes might have gained access to the weapon. In fact, while the officers handcuffed Hatton for officer safety, they took Fikes away from the vehicle and did not similarly handcuff her until after Officer Shomper found the gun in her purse.

then got into the passenger seat of Goodwin's car, and the two men drove off. *Id.* The officers recognized Walker and knew he had an outstanding warrant, so they decided to pull over the car to arrest Walker. *Id.* Goodwin was slow to stop the car, giving officers the impression that he was buying time. *Id.* As he pulled over, "officers noticed him bend down near the floorboard toward the inside of the vehicle, completely disappearing from the officers' view for several seconds before coming back into view." *Id.* at 269. One officer testified that this behavior was typical of someone trying to either conceal or retrieve something. *Id.* Concerned that Goodwin "was retrieving a weapon," based on his movements, officers asked Goodwin to exit the vehicle while they "conducted a frisk of the 'lunge-and-grab area'" of the vehicle where Goodwin had been seated. *Id.* The search included "the driver's seat; the driver's door pocket; under the driver's seat; to the side of the driver's seat, on both sides; the cup holder/center area; and then under the floor mat[.]" *Id.* at 270. At the subsequent suppression hearing, one officer clarified that he lifted the floor mat to look for a gun or weapon that may not cause a visible bulge. *Id.* The officer found a syringe under the floor mat, which he believed was used for heroin, so he arrested Goodwin and searched the vehicle and Goodwin's person, revealing more drug-related matter. *Id.* The circuit court denied Goodwin's motion to suppress, finding that "taken together, given the context of the observations made at [the apartment complex], the actions of [Goodwin] and the procedure of the stop, I think [the search] was appropriately done[.]" *Id.* at 273.

We affirmed on appeal. After confirming that the initial traffic stop was lawful and that there was no prolonged detention of Goodwin, we held that reasonable articulable

suspicion supported the officers' protective search. *Id.* at 281-83. The totality of the circumstances that "supported the officers' suspicion that [Goodwin] was armed and dangerous[,]" included: the officers' observations of a suspected drug transaction in an area known for drug-related crime; Goodwin slowly rolling to a stop as if to buy time; and Goodwin "ben[ding] toward the floor area of the car, disappearing from the officers' view, which caused the officers to be concerned that [he] was reaching for or concealing a weapon." *Id.* at 282. We reasoned that the Court of Appeals' decision in *Chase v. State* supported our decision. *Id.* (citing 449 Md. 283 (2016)).

The police officers in *Chase* observed one man exit his car and get into another man's Jeep in a motel parking lot in a high-crime area. 449 Md. at 290-91. Believing the men were engaged in a drug transaction, two officers approached the Jeep, at which point they observed the men move furtively—"like they were moving things around." *Id.* at 292. Specifically, Chase reached under the driver's seat, then both men put their hands in their pockets. *Id.* This led the officers to remove the men from the vehicle and handcuff them to check for weapons. *Id.* Outside the vehicle, Chase and the passenger told conflicting stories and the passenger became "irate." *Id.* A pat-down of the men revealed no weapons, so the officers searched the car as well, uncovering evidence. *Id.* Before the Court of Appeals, Chase challenged the officers' decisions to remove him from the vehicle and to handcuff him as they conducted their protective search. *Id.* at 286. The Court concluded that the men's "actions, mannerisms and 'furtive movements'" created reasonable articulable suspicion for the officers to believe "that weapons may have been present." *Id.* at 312. Because the officers "continued to fear that weapons were in the Jeep[,]" the Court

concluded that it was also "reasonable to detain Chase in handcuffs during the two minutes necessary to search the car[.]" *Id.*

In contrast to *Goodwin* and *Chase*, the Court of Appeals in *Thornton* recently determined that an officer lacked reasonable suspicion necessary to frisk the driver of a parked car. *Thornton*, slip op. at 1-2 & n.2. Police questioned Thornton for 30-40 seconds while he was still sitting in the car. *Id.* at 3. The officers described Thornton's demeanor as "laid back," but he moved furtively—he "appeared to be manipulating something," touched his waistband several times, and "kept [] doing [] a check" like he was doing "a weapons check . . . like he had something he was trying to hide." *Id.* at 3-5. As the officers questioned Thornton, he sat with his shoulder raised and elbows together; he kept adjusting something in his waistband, "manipulating something." *Id.* at 5. Given their training and experience, the officers believed that Thornton's movements "were characteristic of an armed person," so they ordered him out of the vehicle for a pat-down. *Id.* at 6, 21. An officer touched Thornton's waistband and then waist, at which point Thornton "tried to run away, [] slipped, and fell." *Id.* at 6-7. The officers cuffed Thornton and rolled him over, revealing a handgun that was lying beneath him. *Id.* at 7.

Thornton moved to suppress the handgun, but the circuit court denied his motion. *Id.* at 1-2, 7. The court noted, however, that there was no indication that Thornton was aggressive, disobedient, or falsely identified himself, and no indication that something bad happened more generally. *Id.* at 20-21. Thornton appealed his subsequent conviction to this Court. *Id.* at 10. We assumed the illegality of the frisk but held that the weapon was admissible under the attenuation doctrine. *Id.* at 10-11.

The Court of Appeals reversed. *Id.* at 38. With regard to reasonable suspicion, the Court observed that "[t]he officers did not testify to having observed [Thornton] reach under his seat or make any of the quick movements" typical of armed individuals, and reasoned that the way Thornton "move[d] his right shoulder [wa]s not, by itself, dispositive[.]" *Id.* at 22. Moreover, the Court continued, "the officers failed to articulate an objective basis or provide a justification for suspecting that [Thornton] was manipulating or adjusting a *weapon* in his waist area rather than some innocent object." *Id.* at 23. The Court reasoned that, although Thornton "made allegedly 'furtive movements' as officers approached his vehicle," the officers' testimony was too unparticularized to explain why Thornton's conduct indicated the presence of a weapon and was not merely the type of conduct engaged in by "a very large category of presumably innocent travelers." *Id.* at 23-24. As such, the Court could not say that the officers based their frisk "on anything more than an inchoate and unparticularized hunch[.]" *Id.* at 24. The Court held, therefore, that the frisk was "not supported by the requisite quantum of suspicion to overcome the State's burden of proving that the warrantless search was reasonable." *Id.* Because the Court also held that the attenuation did not apply, the Court reversed the denial of Thornton's motion to suppress. *Id.* at 38.

Comparing the facts presented in the foregoing cases—*Chase*, *Goodwin* and *Thorton*—to those before us, as articulated by Officers Shomper and Loveless at the suppression hearing, we conclude that this case is more similar to *Goodwin* and *Chase.* Specifically, like Goodwin who slowed his car to a stop as if to buy some time, Hatton, too, was slow to stop. Before Hatton pulled over, Officer Shomper observed him "lean

forward in his seat, reach behind his back with his right hand and take a dark in color object and pass it over to the female passenger." Then, similar to the officers in *Goodwin* and *Chase*, Officer Shomper observed the female passenger "lean forward in the passenger seat and her head disappear[] from the headrest." From this movement, Officer Shomper discerned that the passenger was likely secreting the dark-in-color object that Hatton had handed her, and that, based on her movements, "[i]t could have been drugs, but most of the time it's a weapon." It was these furtive movements that put Officer Shomper in "fear of safety" and led him to remove Hatton from the car to "pat[] him down for weapons." Officer Shomper then "immediately went to the area [where] I believed there was a weapon," because people who travel armed typically carry more than one weapon.

In contrast to the officers in *Thornton*, who based their suspicion that Thornton was armed and dangerous on just the position of his shoulder and his adjustment of his waistband, Officer Shomper saw Hatton pass a dark-in-color object to the passenger and the passenger then hide that object. Additionally, as Officer Loveless explained, this was not a routine traffic stop. Hatton climbed into the backseat and the passenger climbed into the driver seat, arousing further suspicion. Once removed from the car, Hatton tried to pry apart his hands and seemed like he might flee. Viewing all these circumstances together, we are satisfied that Officer Shomper articulated a reasonable suspicion that Hatton was armed and dangerous.

2. Scope of the Limited, Protective Search

Moving on to examine the permissible scope of Officer Shomper's protective search, we reiterate that "the State has the burden of demonstrating that the officer did,

indeed, use the least intrusive means likely to be effective in determining whether the suspect is armed and dangerous." *McDowell v. State*, 407 Md. 327, 341 (2009). The scope of the search "is whatever is necessary to serve the purpose of that particular search—but not one little bit more." *Ames*, 231 Md. App. at 679. Reasonable articulable suspicion, alone, does not permit a general exploratory search for whatever evidence of criminal activity an officer might find. *See Terry*, 392 U.S. at 30. "[T]he objective is to discover weapons readily available to a suspect . . . not to ferret out carefully concealed items that could not be accessed without some difficulty." *State v. Smith*, 345 Md. 460, 465 (1997). Accordingly, we require that police officers "distinguish between the need to protect themselves and the desire to uncover incriminating evidence." *Id.* Even if a police procedure is "not particularly intrusive," it "is not an acceptable functional equivalent of a true frisk or pat-down if it could reveal more than the presence of a weapon." *Epps v. State*, 193 Md. App. 687, 717 (2010). "[I]f the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *In re David S.*, 367 Md. 523, 544 (2002) (quoting *Minn. v. Dickerson*, 508 U.S. 366, 373 (1993)).

A protective search under *Terry* can extend to the "passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden," if an officer has reasonable articulable suspicion that "the suspect is dangerous and the suspect may gain immediate control of weapons." *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). One area in which a weapon may be placed or hidden may be a container, such as a bag or purse. *See McDowell*, 407 Md. at 341; *but see Goodwin*, 235 Md. App. at 286 ("*McDowell*

does not control here because a floor mat is not a container.”). When an officer has reasonable articulable suspicion that a weapon is secreted in a container within a car, the officer must still use the “least intrusive means” to determine whether a weapon is present. *McDowell*, 407 Md. at 341. The officer need not, however, engage in futile measures. *Id.* This means that the officer need not resort to a pat-down of a container “[i]f, by reason of a container’s construction or other circumstance, a pat-down of it is impractical or is not likely to reveal the desired information[.]” *McDowell*, 407 Md. at 341. But if “there is no articulated reason why a pat-down might not suffice, there is no need to open the container as a self-protective measure, and doing so in that circumstance would exceed what is permitted under *Terry*.” *Id.* To sustain its burden of proving the reasonableness of an officer opening a container, the State may either “hav[e] the officer explain why it was necessary to conduct that search” or “demonstrat[e] from the container itself that a pat-down would not have revealed the presence or absence of a weapon.” *Id.* The Court of Appeals has described the State’s burden as “not [] difficult” but “a necessary one” under “the requirement laid out in *Terry*.” *Id.*

The Court of Appeals in *McDowell* addressed the limited scope of a *Terry* frisk of a bag contained in a car. 407 Md. 327 (2009). McDowell was a passenger in a car he owned when police stopped the car for driving erratically. *Id.* at 331. Both McDowell and the driver, Hines, appeared nervous; McDowell stared straight ahead and refused to look at the State Trooper who initiated the stop. *Id.* When the Trooper ran the driver’s license and the vehicle registration, “he observed McDowell bending down and twisting his body several times.” *Id.* The Trooper called for backup out of fear that McDowell was reaching

for a weapon. *Id.* Rather than waiting for backup to arrive, the Trooper approached the vehicle and "saw McDowell reaching underneath his seat and then behind the seat into a gym bag." *Id.* The Trooper asked McDowell what he was reaching for; McDowell replied that he was reaching for cigarettes but admitted that there were none in the bag. *Id.* "His suspicion heightened," the Trooper ordered McDowell out of the car and ordered him to open the bag, the act of which revealed "some prescription bottles, clothing, syringes, and a plastic bag containing a white powdery substance." *Id.* at 331-32.

Prior to trial for drug-related offenses, McDowell moved to suppress the evidence found in the gym bag. *Id.* At a hearing on the motion to suppress, the Trooper described the bag as being about 30 inches by 18 inches, large enough to hold a weapon. *Id.* at 331. The bag itself, however, was not placed into evidence or described further. *Id.* The trial court denied McDowell's motion to suppress and this Court affirmed. *Id.* at 332.

The Court of Appeals reversed. First, the Court held that the Trooper articulated sufficient reasonable facts to "justify an examination of the [gym] bag to confirm or allay [the Trooper's] suspicion" that the bag contained a weapon. *Id.* at 338. The Court then considered the method the Trooper used to examine the bag (*i.e.*, "whether he was authorized to open the bag, or demand that McDowell do so, so that he could view its contents, without articulating why a pat-down of the bag would not have sufficed to achieve his purpose.") *Id.* The Court observed that the Trooper "offered no explanation for why a pat-down would not have sufficed; nor was the bag itself produced for the court's inspection." *Id.* at 341. Because it was the State's burden to establish the ineffectiveness or impracticality of the Trooper patting down the gym bag, the Court refused to speculate

as to why the Trooper opened the bag (or ordered McDowell to) rather than conducting a pat-down. *Id.* at 341-42. The Court held, therefore, that the trial court should have granted McDowell's motion to suppress. *Id.* at 342.

Similarly, in *Ames*, this Court held that an officer exceeded the scope of a *Terry* frisk by removing an opaque coin purse from a suspect's pocket and opening it to search inside. 231 Md. App. 679-84. When conducting an "open-hand pat-down of [Ames's] outer garments[,]" an officer "detect[ed] a soft 'large bulge' in [Ames's] left front pants pockets." *Id.* at 667. Ames admitted to having needles within the bulge, so the officer reached in Ames's pocket and removed an opaque coin purse. *Id.* Inside the bag, the officer "found a rock-like substance that resembled crack cocaine." *Id.* Discussing the excessive scope of the search, we opined that, lacking any indication that the coin purse contained weapons, the officer "should simply have proceeded with the pat-down until he was satisfied that [Ames] had no weapons. Whatever else [Ames] may have had on his person was constitutionally beside the point." *Id.* at 681. We identified the "critical moment" in which the officer's search exceeded its constitutional bounds as when, after being warned of needles, the officer reached into Ames's pocket and removed the coin purse. *Id.* at 682. The officer had expressed no fear of being stuck by a needle, we observed, but instead stated his assumption that the presence of needles likely meant the presence of heroin. *Id.* The unconstitutional intrusion continued when the officer searched within the coin purse rather than merely squeezing it to "confirm[] that there was no weapon inside it." *Id.* at 682-83. *But see Goodwin*, 235 Md. App. at 284-86 (holding that

the protective search was reasonable in scope because officers searched only the lunge-and-grab area in which they saw Goodwin bend over as if concealing something).

Returning to the present case, we conclude that the State did not carry its burden to demonstrate that the officers used "the least intrusive means likely to be effective in determining whether the suspect is armed and dangerous" when they searched Ms. Fikes's purse. *McDowell*, 407 Md. at 341. Officer Shomper's testimony concerning the scope of the search was limited to the following cursory explanation: "I immediately went to the area [where] I believed there was a weapon, which was the passenger side floorboard, and saw a purse on the floorboard. *And in the purse I found the silver and black handgun revolver*." The first description by Officer Shomper is constitutionally sound—he limited his search of the vehicle to the specific area where he believed there was a weapon. Once Office Shomper found a purse, however, he told the suppression court merely that he found a revolver inside the purse. He did not say how he came to determine that the purse contained the revolver. Was the purse unzipped and the revolver clearly visible? As best we can tell from the State's exhibits, the purse was zipped when Officer Shomper found it. And the purse also seems to be made of soft material. Did Officer Shomper pat-down the purse and feel the revolver inside, or did he worry that patting the purse may be dangerous or futile? If either explanation existed, Officer Shomper did not provide it. It is beyond the scope of our review to speculate as to Officer Shomper's reasons; it was the State's burden to justify the scope of the Fourth Amendment intrusion. *See McDowell*, 407 Md. at 341. With "no articulated reason why a pat-down might not suffice," Officer Shomper's search of the purse "exceed[ed] what is permitted under *Terry*." *Id.*

Accordingly, we hold that the search of the purse, unsupported by reasonable *articulable* suspicion, was constitutionally unreasonable. This does not end our inquiry, however, because the manner and scope of Officer Shomper's search of the vehicle and purse contained inside would not have been so limited in scope if probable cause existed at the time of the search.

B. Probable Cause

Hatton argues that "the search of the car and, from there, the search of the purse inside the car, was unreasonable[]" because the information known to Officer Shomper at the time of the search "fell short of probable cause." To demonstrate how little proof Officer Shomper had, Hatton points to the type of evidence that the State *did not* adduce at the suppression hearing. He says: there was no evidence that Hatton was in a high-crime area; no evidence of nervousness by either Hatton or Fikes; no testimony that either Hatton or Fikes gave vague or evasive answers regarding their furtive movements; no evidence that Officer Shomper knew Hatton or Fikes to have relevant prior convictions; and no evidence of contraband found on Hatton or Fikes to support a search of the vehicle.

The State responds that, "[v]iewed collectively, Hatton's hesitation in stopping the Accord, his reaching behind him, his passing a dark-colored object to Fikes, who then leaned forward and disappeared from view, and Hatton's shift to the backseat established a fair probability that Fikes and Hatton were hiding a weapon in the Accord." Further, the State emphasizes that our analysis should focus on those facts that *did* exist, not those that *did not*—concluding that the existence of probable cause in this case is not undermined by additional factors that, had they existed, would have further supported probable cause.

The "automobile exception," also known as the "*Carroll* doctrine," is another exception to the warrant requirement, under which "a law enforcement officer may conduct a warrantless search of a vehicle based on probable cause." *Robinson v. State*, 451 Md. 94, 109 (2017). For a search to be legal, officers need "enough information to support a fair probability that evidence of such a crime would be found there[.]" *State v. Johnson*, 458 Md. 519, 543 (2018). A "fair probability" is based on "the factual and practical considerations of everyday life on which reasonable and prudent [people], not legal technicians, act." *Robinson*, 451 Md. at 110 (quoting *U.S. v. Cortez*, 449 U.S. 411, 418 (1981)).

In the context of the *Carroll* doctrine, probable cause exists when "an objectively reasonable police officer" believes that "contraband or evidence of a crime is present" in the car. *Johnson*, 458 Md. at 533. Consequently, an officer with probable cause to conduct a search may search the parts of the "vehicle and its contents that may conceal the object of the search." *Id.* at 540 (quoting *U.S. v. Ross*, 456 U.S. 798, 825 (1982)). Such a search is not limited to containers belonging to the driver. A passenger's belongings may also be lawfully searched. *Id.* at 538 (citing *Wyoming v. Houghton*, 526 U.S. 295, 307 (1999)). Police officers, "armed with probable cause to search a vehicle, may inspect passengers' belongings found in the car that are capable of concealing the object of the search[.]" *Id.* (internal citation omitted). This is because passengers and drivers are presumed to "be engaged in a common enterprise . . . and have the same interest in concealing the fruits or the evidence of their wrongdoing." *Id.* (quoting *Wyoming*, 526 U.S. at 304-05)).

The Court of Appeals recently applied the *Carroll* doctrine in *Johnson*, 458 Md. 519. While patrolling a high-crime area, Officer Sheehan observed a car with a defective brake light. *Id.* at 524. He turned on his lights and siren and shined his spotlight on the car. *Id.* Officer Sheehan saw Johnson and her front-seat passenger, Haqq, engage in "furtive movements" while Johnson "continued to drive for twenty-five seconds" before stopping in a commercial parking lot. *Id.* While Johnson slowly pulled over, Officer Sheehan could see Johnson reach toward the center console, and Haqq "lift his rear end up off the seat and then bring it back down, as if he was either trying to reach underneath where he was sitting, or the seat or the floorboard." *Id.* at 525. Based on his training and experience, Officer Sheehan concluded that Johnson and Haqq might be trying to hide weapons or drugs. *Id.*

When he approached the car, Officer Sheehan observed that Johnson seemed nervous "beyond the 'normal baseline' level of nervousness" he was accustomed to seeing in routine traffic stops: she was shaking and trembling, with her "carotid pulse . . . beating quickly." *Id.* Haqq, in contrast, sat "like a statute," sitting "extremely still," "staring straight ahead." *Id.* at 525-27. He also held his shirt over his crotch in an odd way and ignored Johnson's request to retrieve her vehicle registration from the glove compartment. *Id.* at 525. The occupants of Johnson's car offered short and elusive answers, and Johnson "began each answer with 'uh or um,' as if she was 'trying to think up an answer.'" *Id.* at 527. When Officer Sheehan returned to his patrol car to check whether the occupants had outstanding warrants, he learned that Haqq and the backseat passenger, Helms, had prior

convictions for possession of a controlled substance with intent to distribute, and Haqq had prior convictions for assaulting law enforcement officers. *Id.* at 527-28.

Backup then arrived with a K9 unit, which caused Johnson to "put her head down" and grow quiet. *Id.* at 528. Johnson's reaction, along with her prior furtive movements with Haqq, led Officer Sheehan to remark that "he was 'pretty sure' the dog would 'hit' on the car." *Id.* The officers ordered the occupants to exit the car, at which point Haqq, without prompting, spread his legs and raised his hands, and consented to a search. *Id.* at 528. The search revealed a bag of marijuana on Haqq; his breath also had the smell of PCP. *Id.* After arresting Haqq, officers proceeded to search the vehicle, including the glove compartment and the trunk. *Id.* In the trunk, they found a backpack containing over 100 grams of marijuana and a digital scale. *Id.*

The suppression court denied Johnson's motion to suppress the evidence found in the trunk, and this Court reversed on appeal, holding that the search should have been limited to the passenger area of Johnson's vehicle, because "the officers lacked probable cause to believe that drugs were in the trunk based *solely* on the drugs found in the waistband and on the breath of the front passenger." *Id.* at 529-31. The Court of Appeals granted certiorari and reversed.

According to the Court, the facts and circumstances known to the officers at the time of the search, when "viewed in their entirety and through the lens of the officers' training and experience," supported a finding of probable cause. *Id.* The Court emphasized that "[w]ithin moments of activating his emergency equipment, Officer Sheehan observed both [Johnson] and [Haqq] engage in simultaneous 'furtive movements[.]'" *Id.* at 541.

Johnson "leaned over and reached toward the passenger seat as if she was 'manipulating something in the center console area' while [Haqq] raised and lowered himself in the seat[.] . . . Given his training and experience, Officer Sheehan's first thought was that Johnson" and Haqq were concealing drugs or weapons. *Id.* In addition to their coinciding furtive movements, both Johnson and Haqq displayed "exaggerated levels of nervousness," and their furtive movements continued when Officer Sheehan returned to his patrol vehicle. *Id.* at 541-42. Then there was Johnson's "evasive or vague" answers to the officers' questions, the prior drug convictions of Haqq and Helms, and Johnson's reaction when the K9 unit arrived on the scene. *Id.* at 542. At this point, Officer Sheehan was already "pretty sure" the K9 search would uncover drugs in the vehicle. *Id.* Then, the consent search of Haqq revealed 13 grams of marijuana and the odor of PCP on his breath. *Id.* at 542-43. Based on the totality of these circumstances, the Court concluded, the officers had probable cause to believe there were drugs in the trunk of Johnson's car. *Id.*

Although not a *Carroll*-doctrine case, the Court's decision in *Reid v. State* provides a nice juxtaposition to the probable cause determination in *Johnson.* As in this case, the outcome in *Reid* depended on whether officers had probable cause or merely reasonable suspicion. 428 Md. 289 (2012). The police in *Reid* had effected a *de facto* arrest, the Court of Appeals held, by shooting Reid with a taser, the metal prongs of which lodged in Reid's back. *Id.* at 305. The conclusion that Reid was arrested led the Court to consider whether probable cause existed at the time of his arrest. *Id.* at 306. The facts supporting probable cause were as follows: Reid matched the description given by an informant who called about drugs and/or guns in a black Honda in a particular location; when officer's

approached Reid, he turned his body away and attempted to open the car door; Reid "checked the area where the guns would be"; something heavy in Reid's pocket caused it to sway; and Reid ran from the police. *Id.* (brackets omitted). Looking to its prior decision in *Bost v. State*, 406 Md. 341, 359-60 (2008), the Court reasoned that "presence in a high crime area, unprovoked flight, and furtive movements consistent with possessing a gun were, in the aggregate, sufficient to establish reasonable, articulable suspicion, [but] short of probable cause." *Id.* at 307. Because "the only additional fact [in *Reid*] was the existence of the informant's tip, which the trial judge described as not 'particularly significant,'" the Court held that the facts presented fell short of establishing probable cause. *Id.* at 307-09.

Applying the foregoing principles to the facts before us, we conclude that the totality of the circumstances, while sufficient to establish reasonable articulable suspicion, fell short of the threshold of probable cause. *See id.* at 307. As was the case in *Reid* and *Johnson*, Hatton and Fikes made furtive movements that raised suspicion that weapons may be present. And like the furtive movements in *Johnson*, the movements of Hatton and Fikes coincided as if they were acting in concert. But furtive movements alone do not amount to probable cause. *Cf. Thornton*, slip op. at 17 ("furtive movements, coupled with *additional* circumstances, can provide law enforcement with *reasonable suspicion*[.]" (emphasis added). A significant factual difference between this case and *Johnson* is the absence of drugs or any prior arrest history known to the police. The circumstances in *Johnson* included the marijuana found in Haqq's pocket and the odor of PCP on his breath, his prior convictions for drug-related offenses, and the way Johnson acted when the K9

unit arrived. *See* 458 Md. at 542-43. Police in this case had not discovered any contraband or prior convictions before their search. Nor did the officers in this case describe the extreme levels of nervousness that existed in *Johnson*.

There was little more evidence of criminal activity in this case other than the suspects' furtive movements. That Officer Shomper testified that he suspected that Hatton was looking for an avenue by which to flee the scene does not change our conclusion. The suspect in *Reid* actually *did* flee, and the Court of Appeals held that his furtive movements plus flight did not equal probable cause. *See* 428 Md. at 307-09. We simply cannot say that the facts the State adduced at the suppression hearing were sufficient to establish the probable cause required to search Hatton's car and Fikes's purse.

II.

Motion to Correct

Hatton argued in his principal brief that, when polled, the jury declared him guilty of driving unlicensed but, when hearkened, it declared him "not guilty," and that the hearkening controlled. His argument was based on a mistake in the transcript, whereby the transcriber accidentally typed "not guilty" instead of "guilty" when the jury was hearkened as to the charge of driving without a license.

The State filed an *unopposed* motion to correct the record on September 20, 2018. Attached was a letter attesting that he had inadvertently typed the incorrect verdict. We granted the State's motion on October 5, 2018. Hatton filed his reply brief on October 17, 2018, and made no attempt to resurrect the null argument. Thus, although we reverse the firearm and ammunition convictions, we affirm Hatton's conviction for driving without a

license. *See Young v. State*, 234 Md. App. 720, 741 (2017) (reversing and remanding for new trial the charges affected by the error and affirming the charges unaffected by the error).

III.

Remaining Issues on Appeal

Hatton also challenges the propriety of the prosecutor's closing argument and the trial court's decision to permit Officer Shomper to opine, based on his training and experience, as to what he thought the "dark in color object" might be, his reasons for stopping the car and patting down Hatton, and his belief that Hatton was a flight risk.[6] Because these issues are not sufficiently likely to arise again on remand, we need not resolve them.

[6] Were we to reach Hatton's issue regarding Officer Shomper's testimony, we would conclude that the circuit erred in permitting Officer Shomper to base his "lay" opinion directly on his specialized training and experience. Unlike the officer in *In re Ondrel M.* who, without the aid of "specialized knowledge or experience," detected the presence of marijuana based on his own familiarity with the drug's odor, 173 Md. App. 223, 227 (2007), Officer Shomper was unable to discern the presence of a gun here based on his own lay perception. His testimony at the suppression hearing made as much clear. Officer Shomper testified that, based on his firsthand observation, he could not tell what the object was that Hatton handed to Fikes. It was only after the State elicited that Officer Shomper had specialized training in "the movements that people make when they are armed" that Officer Shomper opined that the "dark-in-color" object was a gun. Indeed, the State's line of questioning, and Officer Shomper's elaborations in response thereto, established a clear link between Officer Shomper's "professional experience" and training and his opinion. As in *Ragland v. State*, "the connection between [Officer Shomper's] training and experience on one hand, and [his] opinions on the other," rendered Officer Shomper's opinion testimony the type that "should have been admitted only upon a finding that the requirements of [] Rule 5-702 were satisfied." *See* 385 Md. 706, 725-26 (2005).

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AS TO APPELLANT'S CONVICTION FOR COUNT 6 (DRIVING UNLICENSED) AFFIRMED; JUDGMENTS AS TO COUNT 1 (POSSESSION OF A FIREARM) & COUNT 3 (ILLEGAL POSSESSION OF AMMUNITION) REVERSED; CASE REMANDED TO THE CIRCUIT COURT FOR ANY FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLANT TO PAY 33% OF COSTS AND APPELLEE TO PAY 67% OF COSTS.