Circuit Court for Baltimore City
Case No. 116047018

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2438

September Term, 2016

ANTHONY FORD

v.

STATE OF MARYLAND

Reed,
Beachley,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: January 8, 2018

Anthony Ford, appellant, was convicted by a jury, in the Circuit Court for Baltimore City, of possession of cocaine, conspiracy to possess cocaine, conspiracy to possess cocaine with intent to distribute, possession of marijuana, conspiracy to possess marijuana, and conspiracy to possess marijuana with intent to distribute. The court sentenced Ford to a term of ten years' imprisonment, with all but four years suspended, for conspiracy to possess cocaine with intent to distribute and a concurrent two-year term of imprisonment for conspiracy to possess marijuana with intent to distribute, merging the remaining convictions. He then noted this appeal, raising the following issues:

> I. Whether the nearly eleven-month delay[1] in the trial of Ford, over timely and repeated objections, violated his rights under the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights?
>
> II. Whether the evidence at trial was insufficient to prove beyond a reasonable doubt that Ford was guilty of possession of cocaine, possession of marijuana, conspiracy to possess each of the same, and conspiracy to possess with intent to distribute each of the same, and whether Ford was deprived of his Sixth Amendment right to counsel when his trial counsel failed to move with particularity for a judgment of acquittal on the possession charges at the close of the State's case?
>
> III. Assuming there is sufficient evidence to support a conspiracy conviction, whether Ford's conviction and sentence on multiple conspiracy counts violates double jeopardy?

We hold that Ford's speedy trial rights were not violated; that the question of evidentiary insufficiency as to his possession convictions was not preserved but that, in

[1] As we shall subsequently explain, the actual delay in bringing Ford's case to trial was actually nine months and sixteen days.

any event, the evidence was sufficient as to both possession convictions; that the evidence adduced at trial was sufficient to sustain only a single conspiracy conviction; and that, given the court's error in merging the possession convictions into the conspiracy convictions, we shall vacate all of the sentences and remand for a new sentencing hearing.

BACKGROUND

On January 19, 2016, Baltimore City police officers executed a search and seizure warrant at a residence at 5102 Pembridge Avenue in Baltimore City. There were four occupants of that dwelling: Ford, Kristian Ford,[2] Dominic Hammond, and Michael Dennis.

After the police announced their presence and sought entry into the house, Hammond attempted to shut the door in their faces, but the police officers overpowered him and entered the dwelling. Hammond fled upstairs and into a bedroom but was apprehended, and ziplock baggies of cocaine were recovered from his mouth.

Officer Ryan T. Welsh, of the Baltimore City Police Department, who followed Hammond upstairs, observed Ford as he was "exiting the bathroom[.]" Officer Welsh entered the bathroom and, after ascertaining that "no one else" was inside, looked into the toilet and "could see" that "there was a bag of narcotics stuffed in the drain."

[2] One of the police officers testified that Kristian Ford was appellant's girlfriend. According to Ford's motion to dismiss on the ground of an alleged speedy trial violation, Kristian Ford was his wife.

Meanwhile, police officers ordered Ford to lie down on the floor. Then, Kristian Ford was seen leaving a bedroom, and she, too, was ordered to lie on the floor. Dennis was apprehended as he attempted to exit the rear door of the house. He was holding a bag of cocaine.

A subsequent search of Dennis's bedroom yielded a handgun, found in his boot, as well as marijuana. In the living room, police officers discovered two rifles, concealed beneath adjacent couches, and "various ammunition," concealed "inside the fireplace."

A nineteen-count indictment was subsequently returned, in the Circuit Court for Baltimore City, charging Ford with, among other things: possession of cocaine (count 9); conspiracy, with Kristian Ford and Dennis, to possess cocaine (count 13); conspiracy, with Kristian Ford and Dennis, to possess cocaine with intent to distribute (count 11); possession of marijuana (count 10); conspiracy, with Kristian Ford and Dennis, to possess marijuana (count 14); and conspiracy, with Kristian Ford and Dennis, to possess marijuana with intent to distribute (count 12).[3]

Following a jury trial, Ford was convicted of those six offenses, and the circuit court thereafter sentenced him to ten years' imprisonment, with all but four years suspended, to be followed by five years' probation, for conspiracy to possess cocaine with intent to distribute, and a concurrent term of two years' imprisonment for conspiracy

[3] The additional counts of the indictment are not relevant to this appeal because Ford was acquitted of the remaining charges. Kristian Ford and Dennis were similarly charged, in separate indictments, but, shortly before Ford was brought to trial, they reached plea agreements with the State. The record does not disclose the fate of Hammond.

to possess marijuana with intent to distribute. The circuit court merged the possession convictions into the conspiracy convictions, and it merged the conspiracy-to-possess convictions into the conspiracy-with-intent-to-distribute convictions. Ford thereafter noted this timely appeal.

DISCUSSION

I.

Ford asserts that his right to a speedy trial was violated because of the nine-month sixteen-day delay between his arrest and the commencement of trial. This assertion has no merit.

The Sixth Amendment, made applicable to the states by the Fourteenth Amendment, guarantees, among other things, a criminal defendant's right to a speedy trial. *Howard v. State*, 440 Md. 427, 447 & n.13 (2014). Article 21 of the Maryland Declaration of Rights contains a substantially similar guarantee. *Id.* at 447. In reviewing a trial court's denial of a motion to dismiss for a claimed speedy trial violation, we accept the court's factual findings unless clearly erroneous, *Glover v. State*, 368 Md. 211, 221 (2002), but we review "without deference" its "conclusion as to whether a defendant's constitutional right to a speedy trial was violated." *Howard*, 440 Md. at 446-47 (citing *Glover*, 368 Md. at 220).

In performing that review, we must apply the four-factor balancing test set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *See, e.g.*, *Howard*, 440 Md. at 447; *Glover*, 368 Md. at 221-22. Those factors are: the length of delay, the reason for the delay, the defendant's assertion of his or her right, and the prejudice to the defendant. *Barker*, 407

U.S. at 530. "None of these factors is, in itself, either necessary or sufficient to find a violation of the speedy trial right; instead, 'they are related factors and must be considered together with such other circumstances as may be relevant.'" *Nottingham v. State*, 227 Md. 592, 613 (2016) (quoting *Barker*, 407 U.S. at 533).

Length of the delay

Unless "there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. Thus, "the first factor, the length of the delay, is a 'double enquiry,' because a delay of sufficient length is first required to trigger a speedy trial analysis, and the length of the delay is then considered as one of the factors within that analysis." *State v. Kanneh*, 403 Md. 678, 688 (2008). With some exceptions not applicable here, "the length of the delay is measured from the date of arrest."[4] *Id.* (citing *Divver v. State*, 356 Md. 379, 388 (1999)).

Ford was arrested on January 19, 2016, and his trial commenced on November 4, 2016. Thus, the total length of the delay is nine months and sixteen days. Although neither the Court of Appeals nor the Supreme Court has declared that any fixed length of pretrial delay is required to trigger a constitutional analysis, the Supreme Court has said

[4] One notable exception to the general rule applies where there is a retrial following the declaration of a mistrial, in which case the length of the delay is typically measured from the date that the mistrial was declared. *Icgoren v. State*, 103 Md. App. 407, 420, *cert. denied*, 339 Md. 167 (1995). *But see Nottingham*, 227 Md. App. at 613-14 (observing that if the State, in good faith, dismisses the original charges and files new charges, "the speedy trial clock starts anew from the date of the filing of the new charging document").

that, "[d]epending on the nature of the charges," it is "generally" true that a pretrial delay is "presumptively prejudicial at least as it approaches one year." *Doggett v. United States*, 505 U.S. 647, 652 n. 1 (1992) (citation and quotation omitted). *See, e.g.*, *Icgoren v. State*, 103 Md. App. 407, 423 (concluding that a delay of eleven months and thirteen days was "barely" of constitutional dimension), *cert. denied*, 339 Md. 167 (1995). Indeed, in *Carter v. State*, 77 Md. App. 462 (1988), a "conceptually and factually uncomplicated" case involving misuse of a credit card, which was ultimately tried on an agreed statement of facts, "which took only a few minutes to read," we held that a delay of seven months and twenty-five days was sufficient to trigger a constitutional analysis. *Id.* at 466. The instant case is not as "uncomplicated" as *Carter*, but the delay here is approximately a month and a half greater. We assume, without deciding, that the nine-month, sixteen-day delay in the instant case is, as the *Icgoren* Court put it, "barely" of constitutional dimension, and we proceed to consider the remaining *Barker* factors.

Reasons for the delay

We turn to *Barker* for the framework we shall use in assessing responsibility for the various pretrial delays in this case:

> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. at 531 (footnote omitted).

We begin our analysis by setting forth the relevant timeline:

> January 19, 2016: Ford was arrested. Speedy trial clock begins.
>
> April 21, 2016: Defense filed an omnibus motion that included a demand for a speedy trial and for a severance.
>
> May 24, 2016: This was the initial scheduled joint trial date for Ford and co-defendants Dennis and Kristian Ford. The State moved for a continuance because one of its witnesses, a police officer, was on military leave. Over Ford's objection, the circuit court granted the State's motion and rescheduled trial for July 15, 2016.
>
> July 15, 2016: Co-defendant Dennis moved for a continuance because his recently retained counsel was not ready to try the case. The circuit court granted his motion, and, in response, the State moved for a continuance in Ford's case, because it preferred a joint trial. Over Ford's objection, the circuit court granted the State's motion. Upon finding good cause for the postponement in Ford's case, the circuit court rescheduled his trial for September 26, 2016, beyond the *Hicks* date, September 6, 2016.[5]
>
> September 26, 2016: The State moved for another continuance because one of its witnesses, a police officer, was on vacation. Upon finding good cause to postpone the case, the circuit court, over Ford's objection, granted the State's motion. Retrial scheduled for October 5, 2016.
>
> October 5, 2016: Ford's trial was postponed because no court rooms were available. Retrial scheduled for November 4, 2016.
>
> November 4, 2016: Ford's trial begins.

[5] Under Maryland Code (2002, 2012 Repl. Vol.), Criminal Procedure Article ("CP"), § 6-103, and Maryland Rule 4-271, a criminal case must generally be brought to trial no later than 180 days after the earlier of the appearance of counsel or the defendant's initial appearance before the circuit court pursuant to Rule 4-213, unless the administrative judge (or her designee) grants a postponement for good cause shown. *See generally State v. Hicks*, 285 Md. 310 (1979). In the instant case, the *Hicks* date was September 6, 2016, the 181st day after the appearance of counsel, because the 180th day was a holiday. In any event, Ford does not claim that there was a *Hicks* violation.

The first period of delay, from January 19, 2016 until May 24, 2016 (the originally scheduled trial date), carries no weight in the analysis, because that is the time it would have taken for trial preparation in the absence of any of the ensuing postponements. *See, e.g., Ratchford v. State*, 141 Md. App. 354, 361 (2001) (concluding that the initial six-month-eleven-day period of delay in a murder trial, from arrest to the first scheduled trial date, "was necessary for the orderly administration of justice and is not considered an unreasonable delay that calls for further accounting"), *cert. denied*, 368 Md. 241 (2002); *Howell v. State*, 87 Md. App. 57, 82 (observing that the "span of time from charging to the first scheduled trial date is necessary for the orderly administration of justice, and is accorded neutral status"), *cert. denied*, 324 Md. 324 (1991).

The second period of delay, from May 24, 2016 until July 15, 2016, is attributable to the State, but it carries only slight weight, because the reason for that period of delay was that a State's witness was on military leave and therefore unavailable to testify. *See Barker*, 407 U.S. at 531 (explaining that "a valid reason, such as a missing witness, should serve to justify appropriate delay").

The third period of delay, from July 15, 2016 until September 26, 2016, is attributable to the State but again carries little or no weight, because the reason for that period of delay was the necessity for a continuance for the benefit of a co-defendant, Dennis, whose counsel needed additional time to prepare. As for Ford's assertion that his case should have been severed and tried on the (re)scheduled date, July 15, 2016, we observe that the State had a significant interest in trying all three co-defendants in a

single trial, given the nature of the charges as well as the fact that all three co-defendants were arrested at the same time and place, apparently engaged in concerted illegal activity. *See Richardson v. Marsh*, 481 U.S. 200, 209-10 (1987) (setting forth reasons why joint trials, especially in conspiracy cases, "serve the interests of justice").[6] Moreover, the court itself had an interest in conducting a joint trial, to promote judicial economy and to avoid the possibility of inconsistent verdicts. *See* Md. Rule 4-253(a) (stating that "the court may order a joint trial for two or more defendants charged in separate charging documents if they are alleged to have participated in the same act or transaction or in the

[6] Indeed, the Supreme Court has observed the vital role played by joint trials in conspiracy cases:

> Many joint trials—for example, those involving large conspiracies to import and distribute illegal drugs—involve a dozen or more codefendants. Confessions by one or more of the defendants are commonplace—and indeed the probability of confession increases with the number of participants, since each has reduced assurance that he will be protected by his own silence. It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.

Richardson v. Marsh, 481 U.S. 200, 209-10 (1987).

same series of acts or transactions constituting an offense or offenses"); *State v. Hines*, 450 Md. 352, 368 (2016) (observing that Rule 4-253 "is based on a policy favoring judicial economy and its purpose is to save the time and expense of separate trials under the circumstances named in the Rule, if the trial court, in the exercise of its sound discretion deems a joint trial meet and proper") (citation and quotation omitted). *See also Ratchford*, 141 Md. App. at 361 (noting that "the orderly administration of justice" may justify a delay). We further note that these interests were not obviated by the happenstance that, at a subsequent date, Dennis and Kristian Ford entered plea agreements with the State, resulting in a trial of Ford only. We do not ascribe 20-20 foresight to the parties or to the court.

The fourth period of delay, from September 26, 2016 until October 5, 2016, though attributable to the State, carries only slight weight, because the reason for that period of delay was that a State's witness was on vacation and therefore unavailable to testify. *Barker*, 407 U.S. at 531 (explaining that "a valid reason, such as a missing witness, should serve to justify appropriate delay"). And finally, the fifth period of delay, from October 5, 2016 until November 4, 2016, is attributable to the State, but it, too, carries little weight, because the reason for that delay was the unavailability of a courtroom. *Id.* (characterizing "overcrowded courts" as a "more neutral reason" that "should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant").

In sum, the total period of delay in this case, nine months and sixteen days, is, at most, "barely" of constitutional significance. *Icgoren*, 103 Md. App. at 423. Of that total, the first 126 days, that is, more than forty percent of the total, is neutral, as it was necessary for the orderly administration of justice. The remaining periods of delay, totaling 164 days, that is, approximately five and one-half months, are attributable to the State, but none of them carry more than very slight weight.

Defendant's Assertion of the Right

Ford, as the circuit court noted, repeatedly asserted his right to a speedy trial, and the State does not contend otherwise. (We disregard its quibbles as to whether Ford invoked the magic words "speedy trial" or whether his assertions were "particularly forceful.") Thus, this factor weighs slightly in favor of Ford.[7]

Prejudice

Prejudice "should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." *Barker*, 407 U.S. at 532. Those protected interests are:

> (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.

[7] Indeed, had Ford not repeatedly asserted his right to a speedy trial, we would reject his claim outright. *See Wilson v. State*, 148 Md. App. 601, 637 (2002) (holding that a defendant was "foreclosed from any challenge of his conviction on the basis of the denial of the right to a speedy trial by virtue of his failure to assert the right").

Id. Of those three protected interests, the last, "the possibility that the defense will be impaired," is the "most serious," because "the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*

The only prejudice Ford asserts is grounded upon the first two interests, oppressive pretrial incarceration with its attendant anxiety and concern.[8] But, as we pointed out in *Wilson v. State*, 148 Md. App. 601 (2002), "any normal defendant" who is incarcerated while awaiting trial experiences some degree of "anxiety and concern." *Id.* at 639. As in *Wilson*, Ford does not contend that any of his "witnesses died or specifically had faded memories due to the delay," nor does he "point to any other hindrance occasioned by [his] inability to have [his] case[] tried more promptly." *Id.* Accordingly, in the instant case, given the total delay of only a little more than nine months and Ford's failure to demonstrate that his defense was in any way impaired by that delay, any purported prejudice suffered by Ford has little weight.

We note in passing that Ford additionally raises a novel prejudice argument, founded upon his purported ill health and the alleged inadequacy of the medical treatment he received while incarcerated and awaiting trial. To the extent that such a claim is cognizable, it does not form the basis for a speedy trial claim, but possibly for a civil

[8] In his motion to dismiss, Ford also contended that he suffered prejudice because, given the disposition of his wife's case, she was no longer available, he claimed, to testify as a witness on his behalf. He does not raise that claim in his appellate brief, and it is therefore abandoned. Md. Rule 8-504(a)(6) (providing that a brief shall contain "[a]rgument in support of the party's position on each issue"); *Diallo v. State*, 413 Md. 678, 692-93 (2010) (stating that "arguments not presented in a brief or not presented with particularity will not be considered on appeal") (quoting *Klauenberg v. State*, 355 Md. 528, 552 (1999)).

action alleging a violation of 42 U.S.C. § 1983 or an analogous state law action. *See, e.g.*, *DeShaney v. Winnebago Cty. Dept. of Soc. Servs.*, 489 U.S. 189, 199-200 (1989) (observing that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being"); *Estelle v. Gamble*, 429 U.S. 97, 105 (1976) (holding that "deliberate indifference to a prisoner's serious illness or injury states a cause of action under [§] 1983"); *State v. Johnson*, 108 Md. App. 54, 65 (1996) (noting that a negligence action may be maintained when the State breaches its "duty to provide reasonable health care to its prisoners").

Balancing of the Factors

Even assuming that the nine-month-sixteen-day delay between Ford's arrest and his trial were of constitutional dimension, we note that it is, at most, "barely" so. *Icgoren*, 103 Md. App. at 423. As the Court of Appeals has explained, "the delay that can be tolerated is dependent, at least to some degree, on the crime for which the defendant has been indicted." *Glover*, 368 Md. at 224 (citing *Barker*, 407 U.S. at 531). Thus, a twelve-month-sixteen-day delay was held to result in a constitutional violation in "a relatively run-of-the-mill District Court case," where the charges were driving under the influence of alcohol and running a red light, and the trial of the case "presented little, if any, complexity." *Divver*, 356 Md. at 390. In contrast, a twenty-month delay was permitted in a relatively complex murder case, despite "unacceptable reasons" for that delay. *Fields v. State*, 172 Md. App. 496, 550, *cert. denied*, 399 Md. 33, *cert. denied*, 399 Md. 593 (2007). *Accord Wilson*, 148 Md. App. at 640 (permitting an

eighteen-month delay in light of "the complexity and gravity of the case," despite appellate court's observation that it was "troubled at the State's handling of this case, as was [the trial judge]"). This case, involving charges of drug possession with intent to distribute as well as conspiracy, falls in between the two extremes of *Divver* on the one hand and *Fields* and *Wilson* on the other, but it also involves the shortest of the pretrial delays. We conclude that the nine-month-sixteen-day delay in this case is "not a weighty factor, one way or the other." *Ratchford*, 141 Md. App. at 360.

Ford did consistently assert his speedy trial right, and this factor weighs in his favor, though it has only slight weight. And, as we have previously pointed out, although all of the delays are attributable to the State, there was neither a "deliberate attempt to delay the trial in order to hamper the defense," *Barker*, 407 U.S. at 531, nor even grossly negligent conduct by the State, and none of the delays weighs heavily.

Finally, the prejudice that accrued to Ford does not weigh in his favor, given that the only prejudice claimed is the pretrial incarceration itself with its attendant anxiety and concern. *See Wilson*, 148 Md. App. at 639 ("accord[ing] great weight to the lack of any significant prejudice resulting from the delay"). In light of all of the relevant factors, we conclude that Ford was not denied his constitutional right to a speedy trial.

II.

Ford claims that the evidence was insufficient to sustain his convictions. Before addressing those claims, we shall first consider preservation as to each appellate claim of insufficiency. We then address the insufficiency claims in two separate categories: the

possessory offenses (which, as we shall explain, were not preserved), and the conspiracy offenses (which were preserved).

A.

Before beginning our analysis, we must first determine which insufficiency claims are properly before us. Appellate review of a claim of evidentiary insufficiency in a criminal case tried by a jury is predicated upon a trial court's denial of the defendant's motion for judgment of acquittal. *Starr v. State*, 405 Md. 293, 302 (2008) (citation omitted). Motions for judgment of acquittal are governed by Maryland Rule 4-324, which provides in pertinent part:

> **(a) Generally.** A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. **The defendant shall state with particularity all reasons why the motion should be granted.** No objection to the motion for judgment of acquittal shall be necessary. A defendant does not waive the right to make the motion by introducing evidence during the presentation of the State's case.

(Emphasis added.)

Although the rule does not prescribe a sanction for a defendant's failure to comport with the particularity requirement, *State v. Lyles*, 308 Md. 129, 137 (Eldridge, J., dissenting), the Court of Appeals has made it plain that an unparticularized motion results in a forfeiture of a claim of evidentiary insufficiency. *Id.* at 136 (observing that, where "no grounds for the motion" had been given below, "the issue of the sufficiency of the evidence [was not] preserved"). *Accord Starr*, 405 Md. at 302 (observing that a

defendant "is not entitled to appellate review of reasons stated for the first time on appeal").

At the close of the State's case, Ford moved for a judgment of acquittal, addressing in detail each count of the nineteen-count indictment in this case. As it pertained to the charges at issue in this appeal, the following exchange took place:

> [DEFENSE COUNSEL]: As to the seventh count, which is possession with intent to distribute cocaine, I would advise my client that at this point in the case, Her Honor has to consider the evidence not in the light most favorable to the defense, but in the light most favorable to the State and the officer testified that he saw you coming out of a bathroom and the he found cocaine in the – I think he testified in the toilet in the bathroom. So, considering the evidence in the light most favorable to the State, I'm going to submit as to argument on that, count seven.
>
> Also, I would submit as to count eight [possession with intent to distribute marijuana].
>
> As to argument as to count nine [possession of cocaine], just so you understand, I'm going to be arguing to the fact that you didn't possess that, but that's not – at this point in time, that's not the argument to be made. You understand that?
>
> MR. FORD: Yes, sir.
>
> [DEFENSE COUNSEL]: Okay. Now, as to the ninth count, it's possession of cocaine. I would submit as to argument on that because the evidence is considered in the light most favorable to the State.
>
> As to the tenth count, simple possession of marijuana, I'll submit as to argument because, as I said, it's in the light most favorable to the State.
>
> As to the [eleventh] count, I'm not going to submit. There hasn't been any evidence showing that there's any

meeting of the minds or conspiracy between Kristian Ford, Michael Dennis, and other persons whose names are unknown to the jurors with Mr. Ford to commit any crimes regarding controlled dangerous substances. There hasn't been any language. There hasn't been anything said. There hasn't been any actions. There hasn't been any actions observed where the people appeared to be, in other words, working together in some way which might indicate that there was a conspiracy: people were exchanging money, people were exchanging objects, people were giving directions. There has been nothing. There has been nothing like that, and as I said, Mr. Ford – there is no evidence to prove that Mr. Ford even lived in that residence.

* * *

THE COURT: I thought you said there's no evidence to show he lived there. So, he didn't possess.

[DEFENSE COUNSEL]: Well, it's a factor to consider. Dawkins v. State[9] talks about do you know, or don't you know; that knowledge is – it's an old case, about 20 years old – knowledge is an element.

* * *

[DEFENSE COUNSEL]: So I would ask that you dismiss number 12 and I would ask that you dismiss number 13, which is conspiracy to possess cocaine with the intent to distribute because there's no indication that Mr. Ford was involved in any conspiracy with Kristian Ford and Michael Dennis; that they did anything together which would indicate that they were conspiring to possess cocaine with the intent to distribute it.

I would also ask that you dismiss count 14, which is [conspiracy to] possession of marijuana, because there's no evidence that Mr. Ford conspired with Kristian Ford and

[9] *Dawkins v. State*, 313 Md. 638 (1988).

> conspired with Michael Dennis to possess marijuana; that they worked in any way to possess it together.

Ford's trial counsel, in moving for judgment of acquittal as to the drug possession charges, merely "submit[ted] as to argument" and asserted no particular grounds why the evidence that he possessed either cocaine or marijuana was insufficient. Clearly, under *Lyles* and *Starr*, this issue was not preserved for appellate review.[10] We shall, nonetheless, briefly address this claim. *Veney v. State*, 130 Md. App. 135, 142 (2000).

B.

In reviewing the sufficiency of the evidence to sustain a conviction, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Moreover, "the finder of fact has the 'ability to choose among differing inferences that might possibly be made from a factual situation[.]'" *Smith v. State*, 415 Md. 174, 183 (2010) ("*Smith II*") (quoting *State v. Smith*, 374 Md. 527, 534 (2003) ("*Smith I*")). "We do not second-guess the jury's determination where there are competing rational inferences available," but rather, we "give deference 'in that regard to the inferences that a fact-finder may draw.'" *Id.* (quoting *Smith I*, 374 Md. at 534).

[10] Indeed, as the State appears to suggest in its brief, Ford might even be deemed to have affirmatively waived any challenge to the sufficiency of the evidence as to possession, in light of his trial counsel's express statements. But we need not further address this point, because, in any event, Ford's claims are, at minimum, forfeited, and, moreover, lacking in merit.

At trial, evidence was adduced showing that, during the execution of a search warrant at a northwest Baltimore townhouse, Ford was seen exiting a bathroom (which, we may safely infer, was of a type typically used by a single person at a time). One of the police officers on the warrant task force, Officer Ryan Welsh, thereafter entered that bathroom and recovered a plastic bag, stuffed into the toilet, which, in turn, contained smaller bags of cocaine and a single, larger bag of marijuana. Officer Welsh also expressly stated that, between the time when he observed Ford exit the bathroom and his subsequent recovery of the plastic bag from the toilet, "no one else" entered the bathroom.

Ford, in claiming that there was insufficient evidence that he possessed the drugs found in that bathroom, immediately after he, its sole occupant, was observed exiting it, ignores a settled proposition: that we give deference to reasonable inferences that a jury may draw from the evidence. *Smith II*, 415 Md. at 183. Here, it is an entirely reasonable inference that Ford, under the circumstances just described, may be deemed to have sufficient knowledge to be in possession of the contraband recovered from the toilet. *Dawkins v. State*, 313 Md. 638, 651 (1988) (holding that knowledge is an element of CDS possession but that "such knowledge may be proven by circumstantial evidence and by inferences drawn therefrom"). This evidence was clearly sufficient to show that Ford possessed both the cocaine and the marijuana.[11]

[11] Ford also contends that his trial counsel was ineffective in submitting on the possession counts because the evidence was insufficient to sustain those convictions, and there was no conceivable trial tactic in failing to preserve the issue of evidentiary (continued)

C.

Ford also contends that the evidence was insufficient to sustain his convictions of conspiracy to possess cocaine, conspiracy to possess cocaine with intent to distribute, conspiracy to possess marijuana, and conspiracy to possess marijuana with intent to distribute. These claims were preserved for appellate review but lack any merit (except that, as we shall explain in the following section, only one of the conspiracy convictions may stand).

We have iterated the definition of criminal conspiracy in *Bordley v. State*, 205 Md. App. 692 (2012):

> Proof of a criminal conspiracy requires a showing of an unlawful agreement, which is a combination of two or more persons to accomplish some unlawful purpose. The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose or design. The conspiracy is complete when the unlawful agreement is reached, so that no overt act in furtherance of the agreement need be shown.

Id. at 723 (cleaned up). "[A] conspiracy may be shown by circumstantial evidence, from which a common design may be inferred[.]" *Id.* (quoting *Mitchell v. State*, 363 Md. 130, 145 (2001)).

Our decision in *Bordley* guides our reasoning in the instant case. In *Bordley*, we decided that there was legally sufficient evidence to sustain a conviction for conspiracy to

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(continued)
insufficiency. Because, as we have explained, the evidence that he possessed cocaine and marijuana was sufficient, we need not address this contention, but it would obviously fail because Ford cannot demonstrate prejudice. *Strickland v. Washington*, 466 U.S. 668, 674 (1984).

distribute heroin, cocaine, marijuana, and oxycodone found in a hotel room rented by Bordley. Bordley's mother, a night auditor at the hotel, observed a man "survey[] the property" and, in the video surveillance monitor, walk in the back door of the hotel and into the hotel room accompanied by another man. *Id.* at 699. After calling Bordley, she invalidated the key cards previously issued to her son and called the police. Bordley went with a friend to the hotel and then to the room in question, where they encountered the police. Inside the hotel room, the police found marijuana, cocaine, and heroin in plain view, along with a scale, razor blade, and packaging materials. The police also found a check book belonging to Bordley and, in the room safe, oxycodone and heroin. At trial, an expert in drug distribution testified that the quantity of the substances and the packaging materials indicated an intent to distribute. *Id.* at 702-03.

We upheld Bordley's conspiracy conviction because the circumstantial evidence adduced at trial supported the inference that Bordley and his friend engaged in a conspiracy to distribute the illegal drugs. Bordley "rented the room where a large quantity and variety of CDS with a significant value was being packaged for distribution [and] was seen in plain view." *Id.* at 722. Moreover, the circumstantial evidence supported "an inference that [Bordley] and [his friend], in response to Ms. Bordley's lock-out of [Bordley's room], made haste to the hotel and headed directly to [Bordley's room] in an effort to secure the CDS and paraphernalia." *Id.* at 723. Thus, "the trial court could reasonably find that [Bordley] and [his friend] agreed to act in concert to distribute the CDS they were attempting to secure." *Id.*

In the instant case, then-Officer Wayne J. Lynch,[12] of the Baltimore City Police Department, one of the officers who executed the search warrant, testified that the quantities of narcotics recovered from the house indicated distribution and that the firearms found in the house could have provided protection for that operation. From the facts adduced at trial, a fact finder could infer that Ford was attempting to dispose of the marijuana and cocaine found in the bathroom, as the other people in the house were. Hammond forcibly tried to keep the officers out of the house, ran up the stairs and into a bedroom, and was eventually caught with baggies of cocaine in his mouth. Dennis was caught running out of the back of the house holding a bag of cocaine. Viewing the evidence in the light most favorable to the State, one could further infer, given that Ford, Dennis, and Hammond all reacted in a similar manner to the execution of the search warrant, that they were part of the same enterprise and that there was a meeting of the minds to distribute the narcotics. We conclude that the evidence was sufficient to sustain Ford's convictions of conspiracy to possess cocaine, conspiracy to possess cocaine with intent to distribute, conspiracy to possess marijuana, and conspiracy to possess marijuana with intent to distribute, but with a caveat, which we shall address in the following section.

[12] Officer Lynch, having been promoted, testified at trial as Detective Lynch.

III.

A.

Finally, Ford challenges his convictions and sentences on multiple conspiracy counts, on the ground that those multiple convictions and sentences constitute a violation of the Double Jeopardy Clause. The State concedes on this issue and we agree. *See Jordan v. State*, 323 Md. 151, 159-62 (1991) (holding that the unit of prosecution for conspiracy "is the agreement or combination rather than each of its criminal objectives," regardless of "how many criminal acts the conspirators have agreed to commit," and ordering vacatur of both a second conspiracy conviction and sentence where the evidence established only a single agreement).

Following *Jordan*, we shall vacate the convictions for the crimes which carry the lesser penalties, in this case, conspiracy to possess marijuana, conspiracy to possess marijuana with intent to distribute, and conspiracy to possess cocaine. *Id.* at 162; CL § 1-202 (providing that the "punishment of a person who is convicted of conspiracy may not exceed the maximum punishment for the crime that the person conspired to commit"); CL § 5-601(c) (establishing penalties for possession of marijuana and other controlled dangerous substances); CL § 5-608 (establishing additional penalties for, among other things, distribution of cocaine, a Schedule II narcotic drug). Thus, upon our resolution of this appeal, Ford will stand convicted of only the single offense of conspiracy to possess cocaine with intent to distribute.

B.

Given our disposition of this appeal, we are left with a conundrum: What sentence may be imposed on Ford upon remand?

The circuit court, in entering judgment, committed two separate errors. Not only did it enter convictions for four conspiracies, where only a single conviction could be entered, it merged the two possession convictions into the conspiracy convictions. As for the latter error, it is clear that possession of a controlled dangerous substance and conspiracy to possess that substance (with or without intent to distribute it), are separate offenses and do not merge. *See*, *e.g.*, *Khalifa v. State*, 382 Md. 400, 436-37 (2004); *Grandison v. State*, 305 Md. 685, 759, *cert. denied*, 479 U.S. 873, *reh'g denied*, 479 U.S. 1001 (1986). Thus, the two possession convictions remain and are the subject of a resentencing upon remand. *Twigg v. State*, 447 Md. 1, 19-21 (2016) (holding that, where a trial court has committed a sentencing error, an appellate court has discretion to vacate all of the sentences imposed (including those that were lawful) and remand for a new sentencing hearing).

In resentencing, however, the circuit court must follow the strictures of Courts and Judicial Proceedings ("CJ"), § 12-702, which states in pertinent part:

> (b) If an appellate court remands a criminal case to a lower court in order that the lower court may pronounce the proper judgment or sentence, or conduct a new trial, and if there is a conviction following this new trial, the lower court may impose any sentence authorized by law to be imposed as punishment for the offense. However, it may not impose a sentence more severe than the sentence previously imposed for the offense unless:

> (1) The reasons for the increased sentence affirmatively appear;
>
> (2) The reasons are based upon additional objective information concerning identifiable conduct on the part of the defendant; and
>
> (3) The factual data upon which the increased sentence is based appears as part of the record.

Because the previous sentences imposed in this case were, in total, for a term of ten years, with all but four years suspended, the circuit court, in re-imposing sentence, may not exceed those limits, unless the exceptions set forth in CJ § 12-702(b)(1)-(3) were found to apply.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED. CASE REMANDED WITH INSTRUCTIONS TO ENTER CONVICTIONS FOR COUNTS 9 (POSSESSION OF COCAINE), 10 (POSSESSION OF MARIJUANA), AND 11 (CONSPIRACY TO POSSESS COCAINE WITH INTENT TO DISTRIBUTE) AND TO RESENTENCE IN ACCORDANCE WITH THIS OPINION. COSTS TO BE PAID FIFTY PERCENT BY APPELLANT AND FIFTY PERCENT BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.