Circuit Court for Baltimore City
Case No. 1170117001

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No.2594

September Term, 2017

CHARLES MCEACHIN

v.

STATE OF MARYLAND

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

JJ.

Opinion by Salmon, J.

Filed: April 15, 2019

Charles McEachin, appellant, was convicted by a jury sitting in the Circuit Court for Baltimore City of three handgun offenses: carrying a handgun on his person, transporting a handgun in a vehicle, and possessing a firearm after conviction of a disqualifying crime.[1] The jury acquitted appellant of first-degree murder, second-degree murder, conspiracy to commit murder, and use of a handgun in the commission of a felony or a crime of violence. Appellant raises two questions on appeal, which we have rephrased and condensed for clarity:

I. Should we reverse appellant's conviction for possessing a firearm after conviction of a disqualifying crime because:

   A. the trial court erred when it instructed the jury that it could convict appellant of that crime as an accomplice when the State failed to produce evidence that the principal had a prior disqualifying crime?

   B. the trial court erred when it allowed the State to argue in closing argument that the jury could convict appellant of that crime as an accomplice when the State failed to produce evidence that the principal had a prior disqualifying crime?

   C. the evidence was insufficient to convict him of that crime under either the theory of accomplice liability or constructive possession?

II. Did the trial court err in not excluding certain telephone calls appellant made from jail because the State violated the discovery rules by failing to provide the defense with evidence of the calls in a timely manner?

[1] Appellant was sentenced by the court to three years of imprisonment for carrying a handgun and a consecutive 15 years for possessing a firearm after a disqualifying conviction. The court merged his remaining handgun conviction.

Because we are persuaded that there was insufficient evidence to support appellant's conviction of possession of a firearm by a disqualified person under either theory of liability, we shall vacate that conviction but shall affirm the judgment in all other respects.

BACKGROUND

Neither party disputes that Malcolm Jordan shot Tony Williams shortly before 1:00 p.m. on September 27, 2016, as Williams rode his bicycle across the parking lot of the Madera apartment complex in the 3500 block of Woodland Avenue in Baltimore City. Williams sustained multiple gunshot wounds and died from those wounds about a month later. The State's theory of prosecution was that appellant drove Jordan to and from the scene and that Jordan and appellant were accomplices to the shooting. Testifying for the State were several police officers and Linda Phillips, a witness to the shooting. Appellant's audiotaped statement to the police following his arrest, video surveillance footage from the apartment complex, and telephone calls appellant made from jail after his arrest were also introduced into evidence. The theory of defense was that appellant did not have prior knowledge that Jordan was going to shoot Williams. Appellant offered no testimonial evidence.

In the fall of 2016, Linda Phillips lived at the Madera complex with her two-year old son. Appellant, who worked as a "hack", meaning that he drove people to various places for money, watched Phillips's son several days a week. On the morning of the shooting, appellant took Phillips's son for a car ride. They returned to the complex around noon with another man, whom Phillips did not know but who was later identified as Jordan.

Phillips, appellant, Jordan, and a few other adults then congregated on the front steps of the apartment building at 3505 Woodland Avenue.

At some point, Williams rode by on a bicycle, and Jordan shot him several times. Phillips testified that she did not know that was going to happen. The police spoke to the victim immediately after the shooting, but he told them he did not know who shot him. Phillips went to the police station after the shooting and made a statement, although she did not tell the police her real name because she was scared. She described the shooting to the police and identified appellant as someone who was present around the time of the shooting. She also told the police that she could not identify the shooter.

Appellant was arrested nine days after the shooting. He was taken to a police station where he waived his *Miranda* rights[2] and gave an audiotaped statement that was admitted into evidence. In the statement, appellant told the police that on the morning of the shooting, he had Phillips's young son with him in his car when he saw someone he knew as "Tee" near Park Heights and Cold Spring Lane. He claimed in his statement that Tee was "not a person that I deal with or see on a regular basis and that he did not know Tee's last name. He admitted, however, that he had known Tee through the neighborhood for about a year.

On the morning that Williams was shot, Tee asked appellant where he was going. When appellant said that he was going to the Woodland Avenue area, Tee asked him for a ride, saying he was meeting someone "around the way."

[2] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

Once at the Madera apartment complex, the two socialized with others outside one of the apartment buildings. At some point, according to appellant's statement, Tee saw someone riding a bicycle nearby and asked appellant if he knew who it was. Appellant told Tee, "I don't know." Appellant then walked to his car to get a cigarette lighter. As he did so, Williams rode by on a bicycle. When appellant reached his car door, "all a sudden I hear a lot of shooting going on. I'm trying to get out of there." As appellant backed his car out of the parking spot, Tee opened the front passenger door, pointed a gun at appellant, and told him to drive. Appellant repeatedly told the police that he had no prior knowledge that the shooting was going to take place. He also denied that Tee told him to start the car just prior to the shooting. The police repeatedly asked appellant why he did not come forward earlier. Appellant explained that he was scared.

On October 22, Williams succumbed to his injuries and died. Six days later, a warrant was executed allowing the police to search appellant's car. The police, in executing the warrant, found appellant's cell phone. On November 8, the police re-interviewed Phillips. During the interview, she identified a photograph of Jordan as the shooter. Jordan was arrested on November 16, at which time the police recovered his cell phone.

Warrants were issued granting the police to search for both appellants and Jordan's cell phones. By examining the phone, the police could determine the timing of the incoming and outgoing calls/texts but were unable to learn the content of those texts because the phones were password protected. Examination of the phones revealed that between August 21 and September 27, 2016, the day of the shooting, appellant and Jordan

contacted each other 96 times. On the day of the shooting, the two contacted each other another 18 times, seven calls and seven texts were before the shooting and four calls were made after the shooting. Over the next four days, the two contacted each other seven more times. Following appellant's arrest on October 6, there was no contact between them.

Video from a fish-eye camera overlooking the front steps of 3505 Woodland Avenue was admitted into evidence and played for the jury. Although the audio on the video was amplified, what was said on the video is largely undecipherable. The video shows appellant pulling his car into a parking spot about six cars away from the front steps of 3505 Woodland Avenue. About two minutes later, Jordan exited the car, followed by appellant and Phillips's young son. Appellant and Jordan then join a few other adults on the front steps. Appellant next walked inside the building and returned with a beer, which he handed to Jordan. A minute later, Jordan passed a cigarette lighter to another man. About five minutes later, Jordan said to appellant, "Go" and appellant walked across the parking lot to his car.[3] About a minute later, Williams is shown riding through the parking area on a bicycle. When Williams passed the group, Jordan pulled a concealed handgun from his waistband and shot Williams multiple times. Jordan then ran back to the front

[3] In its brief, the State contends that on the videotape Jordan "is heard asking [appellant] if he knew who the man was." The State also writes that the shooting victim, Tony "Mooda" Williams, is then seen "riding his bicycle into the apartment complex." The State further writes that Jordan is heard asking appellant, "Is that Mooda?[,]" that appellant replied "Yup," and that Jordan responded, "Start the engine." Although the above statements were also made by the State prosecutor in closing argument, we have listened to the audiotape and did not hear any of the above statements. Moreover, the State admitted at oral argument that she had listened to the audiotape and also did not hear any of the above statements.

steps, picks up his beer, and then ran to appellant's car, which is backing out of a parking spot. The car stopped, Jordan enters, and the car quickly left the area.

Recordings of seven telephone calls appellant made from jail following his arrest were admitted into evidence. The contents of the calls were equivocal as to appellant's guilt. The jail conversations show that on the day of his arrest, appellant talked to his mother, who did not understand why he was in jail. Appellant explained: "They charging me – they're charging me because they don't – because they can't find the dude who actually did it. So, they charging me with it." He added: "Because the person who actually did it, they don't have him. I sat and tried to tell you that every day. I sat and tried to tell you that." The next day, he explained to an unidentified person that he is being charged with first-degree murder "because they can't find the guy. . . . I knew the guy, the guy drove up there with me so they figuring I know him." A few minutes later, appellant made another call that included his police officer cousin, who urges him to tell the police all that he knows. During the call, appellant told his cousin that he knew the shooter as "Boo" and he describes the exact street and house number from which he picked up Boo. When his cousin asked "Did you know any of this was going to go down?" appellant replied, "I didn't know it was going to. I didn't. Not at the time, no. I did not." Appellant also told his cousin that he knew Boo for about a year from around the neighborhood but did not know his real name, that he did not talk to him after the shooting and that he did not talk to the police after the shooting because he was scared. A couple of hours later he told an unidentified person that he "just remembered something. . . . Tell him [appellant's cousin] his [the shooter's] best friend got killed in his car last year on Saint Ambrose. That's how

you find out who he [the shooter] is." Appellant added that the car owned by the shooter in which the shooter's friend was killed was "a burgundy Mustang."

A few days later, appellant told his mother in a phone conversation to send him a phone card because he needed to call a friend who "might know the [shooter's] name because he – he know the dumb situation I'm in and he pissed about it; that that person put me in that situation." She replied: "you can't put people in your car" and he responded: "I know." He then asked his mother to call a certain person to help find out the shooter's name. A few days later, his mother advised him that the victim had died. There is a long pause. After some conversation, appellant tells his mother, "I'm real sorry for not listening." His mother responds, "Well, you did what you wanted to do. I – I can't control you."

The parties stipulated that appellant had previously been convicted of a crime that disqualified him from possessing a regulated firearm.

DISCUSSION

I.

Appellant argues on appeal that we must reverse his conviction for possessing a firearm by a disqualified person because that conviction was premised on the theory that he could be found guilty of that crime as an accomplice, but the State only produced evidence that he had a disqualifying crime and did not produce evidence that Jordan had a prior disqualifying crime. Appellant argues that reversal is warranted for three reasons: 1) the trial court instructed the jury on accomplice liability for possession of a firearm after a disqualifying crime but the instruction was not generated by the evidence because the State

presented no evidence that Jordan had a prior disqualifying crime; 2) the trial court erroneously allowed the State to argue that it could convict appellant of possession of a firearm after a disqualifying crime as an accomplice where the State produced no evidence that Jordan had a prior disqualifying crime; and 3) the evidence was insufficient to convict on that theory or on the theory that appellant, a disqualified person, constructively possessed the firearm.

The State points out that appellant never objected below on grounds that accomplice liability was an untenable theory. Therefore, the State contended appellant has waived all his above arguments grounded on that theory. The State conceded in its appellate brief (and during oral argument) that because the State failed to produce evidence that appellant's accomplice, Jordan, had a prior disqualifying crime, appellant could not properly be found guilty of possession of a firearm by a disqualified person based on an accomplice theory. Nonetheless, the State argues that there was sufficient evidence to sustain appellant's conviction for possession of a firearm by a disqualified person because appellant, a disqualified person, constructively possessed the firearm.

We agree with the State in part, but are persuaded that the State failed to produce evidence of constructive possession sufficient to sustain appellant's conviction for possession of a firearm by a disqualified person. Therefore, we shall vacate that conviction.

A. Possession of a firearm by a disqualified person under an accomplice liability theory where the State failed to produce evidence that the accomplice was a prior felon.

"Under Maryland law, one may commit an offense as either a principal in the first degree, or a principal in the second degree[.]" *Evans v. State*, 382 Md. 248, 263 n.11

(2004), *cert. denied*, 543 U.S. 1150 (2005). "A first degree principal is the actual perpetrator of the crime." *Owens v. State*, 161 Md. App. 91, 99 (2005) (citing Richard P. Gilbert & Charles E. Moylan, Jr., *Maryland Criminal Law: Practice and Procedure* § 21.0 (1983 & Supp.1985)). A second degree principal, also known as the aider and abettor or an accomplice, must be either actually or constructively present at the commission of a criminal offense and aid or encourage the principal in the first degree in the commission of the offense. *Owens*, 161 Md. App. at 99 (citations omitted). In sum, "'[a]n accomplice is a person who, as a result of his or her status as a party to an offense, is criminally responsible *for a crime committed by another*.'" *Diggs & Allen v. State*, 213 Md. App. 28, 85 (2013) (quoting *Sheppard v. State*, 312 Md. 118, 122 (1988), *overruled in part on other grounds*, *State v. Hawkins*, 326 Md. 270 (1992)) (emphasis added), *aff'd*, 440 Md. 643 (2014). *See also Owens*, 161 Md. App. at 102 ("The proof must establish that the offense was committed *by someone* and that the person charged as an aider and abettor, aided and abetted in its commission.") (quotation marks and citation omitted) (emphasis added).

Possession of a firearm by a disqualified person requires proof of three elements: 1) the gun involved was a regulated firearm, 2) the person possessed the firearm, and 3) the person was precluded from doing so because of a prior conviction. *See* Md. Code Ann., Public Safety ("Pub. Safety"), §5-133(c). Therefore, to prove that appellant was an accomplice to a violation of §5-133(c), the State was required to prove that: 1) the gun was a regulated firearm, 2) Jordan possessed the firearm, 3) Jordan was precluded from doing so because of a prior conviction, and 4) that appellant, with the intent to make the crime happen, knowingly aided or abetted Jordan's commission of that crime. Although

Maryland courts have not specifically considered the principles of accomplice liability in the context of a charge of possession of a firearm by a person with a disqualifying conviction, it is plain that the fourth element is a necessary one.[4]

At trial, the court instructed the jury that it could convict appellant of possession of a firearm by a disqualified person under two theories: accomplice liability and direct/ constructive possession. As to the first theory, the court instructed the jury:

> [T]he [d]efendant may be guilty of murder, use of a firearm in the commission of a felony or crime of violence, wear, carrying and transporting a handgun on or about person, wear, carrying and transporting a handgun in a vehicle, possession of a regulated firearm after being convicted of a disqualifying crime as an accomplice even though the [d]efendant did not personally commit the acts that constituted the crime.
>
> *In order to convict the* [*d*]*efendant of* murder, use of a firearm in the commission of a felony or crime of violence, wear, carrying or transporting

[4] Other jurisdictions have come to the same inescapable conclusion. *State v. Ramirez*, 334 P.3d 324, 335-38 (Kan. Ct. App. 2014); *People v. Chirchirillo*, 913 N.E.2d 635, 641 (Ill.App. Ct. 2009). In *Chirchirillo*, the Illinois appellate court stated:

> [The] defendant could not be held accountable for aiding [the principal] in that offense when it was never established that [the principal] was a convicted felon. Because the felony status of the person possessing the weapon is an element of unlawful possession of a weapon by a felon, the State, in order to establish that [the] defendant was accountable for unlawful possession of a weapon by a felon, had to prove that [the principal] possessed the weapon, that [the principal] was a convicted felon, and that defendant aided, abetted, or agreed or attempted to aid [the principal] in the planning or commission of that offense.

Chirchirillo, 913 N.E.3d at 644. *See also United States v. Ford*, 821 F.3d 63, 74 (1st Cir. 2016) (stating that the principal's "prior conviction" under the theory of accomplice liability is an element of the crime of possession of a firearm by a disqualified person); *United States v. Huet*, 665 F.3d 588, 596 (3rd Cir. 2012) (explaining that a valid conviction for aiding and abetting a felon-in-possession of a firearm crime must allege that the principal had been convicted of a previous disqualifying crime.).

> a handgun on or about a person, wear, carrying and transporting a handgun in a vehicle and possession of a regulated firearm after being convicted of a disqualifying crime as an accomplice, the State must prove that the murder, the use of a firearm in the commission of a felony or crime of violence, wear, carrying or transporting a handgun on or about a person, wear, carrying and transporting a handgun in a vehicle and *possession of a regulated firearm after being convicted of a disqualifying crime occurred, and that the* [*d*]*efendant with the intent to make the crime happen knowingly aided, counseled, commanded or encouraged the commission of the crime or communicated to a participant in the crime that he was ready, willing and able to lend support if needed.*

(Emphasis added). The trial court also instructed the jury on the crime of both direct and constructive possession of a firearm after a disqualifying conviction as follows:

> The [d]efendant is charged with possessing a regulated firearm after having been convicted of a crime that disqualifies him from possessing a regulated firearm. In order t[o] convict the [d]efendant, the State must prove that the [d]efendant knowingly possessed the regulated firearm and that the [d]efendant was previously convicted of a crime that disqualifies him from possessing a regulated firearm.
>
> The State and [d]efendant agree and stipulate that the [d]efendant was previously convicted of a crime that disqualifies him from possessing a regulated firearm. Possession means having control over the firearm whether actual or indirect. More than one person can be in possession of the same firearm at the same time.
>
> A person not in actual possession which knowingly has both the power and the intention to exercise control over a firearm has indirect possession of the firearm.
>
> In determining whether the [d]efendant has indirect possession of the firearm, you should consider all of the surrounding circumstances. These circumstances include the distance between the [d]efendant and the firearm and whether the [d]efendant had some ownership or possessory interest in the location where the firearm was found.

Neither party objected to the above instructions.[5]

As explained above, the trial court erroneously instructed the jury that it could convict appellant of possession of a firearm by a disqualified felon as an accomplice where the only evidence of a prior disqualifying conviction came from appellant, not Jordan. This theory was invalid under the circumstances of this case because the evidence did not support such an instruction. The State conceded this. Nonetheless, the State argues that because the jury could have convicted appellant of possession of a firearm by a disqualified person under the theory of constructive possession, we must affirm appellant's conviction.

B. It is unclear whether the jury convicted appellant on an invalid theory of accomplice liability or a valid theory of constructive possession.

Appellant argues that because there was insufficient evidence to support his possession of a firearm by a disqualified person under an accomplice theory of liability, we must reverse that conviction even if the conviction is supported by sufficient evidence on a constructive possession theory. Appellant argues that where a jury is instructed on an invalid and a valid theory and we do not know on which theory the jury relied, we must reverse the conviction. To support his argument, appellant cites *State v. Brady*, 393 Md. 502, 509-10 (2006) (rejecting the State's argument that because Brady's conviction was supportable without resort to the theory of transfer intent, which was erroneous, reversal is

[5] It appears that the jury was given written jury instructions during its deliberation. Although the written instructions are not part of the record, after reviewing the instructions with the parties but before instructing the jury, the trial court made the following statement: "So, the last thing is, I do send back the instructions that I'm going to give with the jury." Additionally, after the parties' closing arguments, the trial court told the jury: "[T]he instructions that I read to you, I do send back to you in print form in case you need to refer to them."

not warranted), and *Allen v. State*, 158 Md. App. 194, 246 (2004) (reversing conviction where we have "no way of knowing whether the jury" convicted under the invalid theory), *aff'd*, 387 Md. 389 (2005). These are jury instruction cases, not sufficiency of the evidence cases, but we find their reasoning applicable.

The State responds that we should reject appellant's argument and cites *United States v. Moye*, 454 F.3d 390 (4th Cir.) (en banc), *cert. denied*, 549 U.S. 983 (2006). Moye was charged with being a felon in possession of firearms, possessing stolen firearms, and being an aider and abettor to each of those offenses. *Moye*, 454 F.3d at 394. The trial court instructed the jury on accomplice liability generally and did not specify to which offense the instruction applied. *Id*. at 398-99. The jury found Moye guilty of both counts. *Id*. at 394. Moye appealed, arguing that the evidence was insufficient to support his conviction for felon in possession of a firearm under an aider and abettor theory. The Court of Appeals affirmed. The Court noted that there was no evidentiary basis to support the aiding and abetting instruction as to the charge of felon in possession, but there was circumstantial evidence to support his conviction under a constructive possession theory. *Id.* at 403. The State posits that here, just as in *Moye*, there was no evidentiary basis for the trial court's inclusion of possession of a firearm by a disqualified person among the offenses in its accomplice liability instruction, but there was sufficient circumstantial evidence from which the jury could conclude that appellant jointly and constructively possessed the firearm with Jordan.

We agree with appellant that *Moye* is inapplicable. In *Moye*, the trial court's aiding and abetting instruction was a "general instruction," meaning that the trial court "did not

specifically instruct the jury as to which count (or counts) the aiding and abetting instruction applied." *Id*. at 398. In contrast, the trial court below expressly instructed the jury that it could convict appellant of possession of a firearm by a disqualified person as an accomplice, which the State concedes was in error. Because we have no way of knowing whether the jury convicted appellant under the invalid or valid theory, we must reverse.

In cases where we reverse a conviction, and a defendant raises the sufficiency of the evidence on appeal, we must address that issue because a retrial may not occur if the evidence was insufficient to sustain the conviction in the first place. *Ware v. State*, 360 Md. 650, 708-09 (2000), *cert. denied*, 531 U.S. 1115 (2001) (citing *Mackall v. State*, 283 Md. 100, 113 (1978)).

C. Was the evidence sufficient to convict appellant of possession of a firearm by a disqualified person on the theory that appellant constructively possessed the firearm?

To answer this question, we must first decide whether the issue is preserved for our review. Md. Rule 4-324(a) provides, in pertinent part: "A defendant may move for judgment of acquittal . . . 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." The rule is mandatory. *Bates v. State*, 127 Md. App. 678, 691 (citing *State v. Lyles*, 308 Md. 129, 135 (1986)), *cert. denied*, 356 Md. 635 (1999). "A defendant may not argue in the trial court that the evidence was insufficient for one reason, then urge a different reason for the insufficiency on appeal[.]" *Id*.

The Court of Appeals has stated, in the context of determining whether a defendant had preserved for review a trial court's ruling to admit certain evidence, that while an appellant is entitled to present the appellate court with "a more detailed version of the [argument] advanced at trial[, we refuse] to require trial courts to imagine all reasonable offshoots of the argument actually presented to them before making a ruling on admissibility." *Sifrit v. State*, 383 Md. 116, 136 (2004). In *Starr v. State*, 405 Md. 293, 304 (2008), the Court of Appeals found the reasoning of *Sifrit* "fully applicable to appellate review of the denial of a motion for judgment of acquittal. [Therefore, w]hen ruling on a motion for judgment of acquittal, the trial court is not required to imagine all reasonable offshoots of the argument actually presented."

At the close of the State's case, defense counsel moved for judgment of acquittal. As to the handgun offenses, defense counsel argued that there was no evidence that appellant possessed the handgun. Specifically, defense counsel argued: "That basically [appellant] did not basically in his presence have a handgun. That was on Mr. Jordan. It was clear from the video. Clear from the evidence. I don't think he knowingly had a handgun on him, Your Honor." The State responded that the evidence was sufficient because the gun was a tool of their common design for conspiracy. Specifically, the State argued:

> And, obviously, the [c]ourt is aware that in terms of possession of a firearm that this is -- the evidence in this case is believed that this is, in fact, a common scheme or design. That the possessions of Mr. Jordan are legally the same as the possessions of [appellant], such that, if Mr. Jordan was the one carrying the firearm for the thing they plan to do, it doesn't matter that [appellant] didn't physically possess the gun. He's still legally deemed to be in possession because it's a tool, an instrument of a common design and

> enterprise and that, therefore, overcomes any of these other arguments regarding possession of either regulated firearm or handgun.

The trial court denied the motion for judgment of acquittal, stating generically that viewed in the light most favorable to the State, a rational fact finder could find the essential elements of the crimes charged beyond a reasonable doubt.

Certainly, the words "constructive possession" were never mentioned by defense counsel in his motion for judgment of acquittal. Defense counsel argued, however, that the possession charge should not go to the jury because appellant did not have actual possession of the handgun and that he did not knowingly have a handgun on him. Under these circumstances, we are persuaded that this argument sufficiently presented to the trial court the argument that appellant raises on appeal, that there was not sufficient evidence of constructive possession to sustain appellant's conviction for possession of a handgun by a disqualified felon.

The standard for appellate review of evidentiary sufficiency is "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Taylor v. State*, 346 Md. 452, 457 (1997) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence." *State v. Suddith*, 379 Md. 425, 447 (2004) (quotation marks and citation omitted). Thus, "the limited question before an appellate

court is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Allen v. State*, 158 Md. App. 194, 249 (2004) (quotation marks and citation omitted).

The above standard applies "regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Smith v. State*, 415 Md. 174, 185 (2010) (citation omitted). "Circumstantial evidence may support a conviction if the circumstances, taken together, do not require the trier of fact to resort to speculation or conjecture, but circumstantial evidence which merely arouses suspicion or leaves room for conjecture is obviously insufficient." *Id*. (quotation marks and citations omitted). Circumstantial evidence must "afford the basis for an inference of guilt beyond a reasonable doubt." *Id*. (quotation marks and citations omitted).

It is long settled that "[w]eighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder." *State v. Stanley*, 351 Md. 733, 750 (1998) (citing *Binnie v. State*, 321 Md. 572, 580 (1991)). A fact-finder is free to believe part of a witness's testimony, disbelieve other parts of a witness's testimony, or to completely discount a witness's testimony. *Jones v. State*, 343 Md. 448, 460 (1996) (citing *Muir v. State*, 64 Md. App. 648, 654 (1985), *aff'd*, 308 Md. 208 (1986)). Accordingly, contradictions in testimony go to the weight of the testimony and credibility of the evidence, rather than its sufficiency, and we do not weigh the evidence or judge the credibility of the witnesses, as that is the responsibility of the trier of fact. *See generally Stanley*, 351 Md. at 750.

As mentioned earlier, to convict appellant of possession of a firearm by a disqualified person, the State must prove three elements: 1) the gun involved was a regulated firearm, 2) appellant possessed the firearm, and 3) appellant was precluded from doing so because of a prior conviction. *See* Pub. Safety § 5-133(c). Possession, the second element, is at issue here.

Possession may either be actual or constructive, exclusive or joint in nature.[6] *Moye v. State*, 369 Md. 2, 13-14 (2002) (citations omitted). Possession requires showing that the person "exercised some dominion or control over the prohibited item." *Parker v. State*, 402 Md. 372, 407 (2007) (quotation marks, citations, and brackets omitted). Additionally, possession requires "knowledge" of the illicit item. *Moye*, 369 Md. at 14 ("Knowledge of the presence of an object is normally a prerequisite to exercising dominion and control.") (quotation marks and citation omitted).

Possession in Maryland "is determined by examining the facts and circumstances of each case." *Smith*, 415 Md. at 198. "It has long been established that the mere fact that the contraband is not found on the defendant's person does not necessarily preclude an inference by the trier of fact that the defendant had possession of the contraband." *Suddith*, 379 Md. at 432 (citations omitted). The "classic list" of relevant factors in determining whether an individual was in possession of an illicit item, include:

> '1) proximity between the defendant and the contraband, 2) the fact that the contraband was within the view or otherwise within the knowledge of the

[6] We note that possession cases are often addressed in the context of controlled dangerous substances, but the analysis used in those cases is applicable to cases involving other illegal items, including firearms. *Price v. State*, 111 Md. App. 487, 498-500 (1996) (discussing constructive possession cases).

> defendant, 3) ownership or some possessory right in the premises or the automobile in which the contraband is found, or 4) the presence of circumstances from which a reasonable inference could be drawn that the defendant was participating with others in the mutual use and enjoyment of the contraband.'

Cerrato–Molina v. State, 223 Md. App. 329, 335 (quoting *Folk v. State*, 11 Md. App. 508, 518 (1971)) (emphasis omitted), *cert. denied*, 445 Md. 5 (2015).

Taylor v. State, 346 Md. 452 (1997) is the classic Maryland constructive possession case and provides a framework for our analysis. In that case, police were called to a motel in Ocean City rented by Taylor and four friends because of a complaint about possible controlled dangerous substance violations. *Taylor*, 346 Md. at 454-55. Outside the motel door, the police officers smelled marijuana. *Id*. at 455. They knocked and were admitted by a person named "Myers." *Id*. Clouds of smoke were present in the room that smelled like marijuana. *Id*. Taylor was lying on the floor with his head turned away from the door. *Id*. When police told Myers they intended to search the room, Myers retrieved a baggie of marijuana from a carrying bag and told the officer the marijuana was his. *Id*. A subsequent search of the room by the police revealed more marijuana in a "multi-colored bag" and rolling papers inside a second bag that did not belong to Taylor. *Id*. at 455-56. No marijuana was visible, the ashtrays were clean, and no marijuana was recovered from Taylor's person. *Id*. at 456. The occupants denied they had been smoking marijuana, but admitted that some friends, who were not staying in the room, stopped by earlier and smoked marijuana in their presence. *Id*.

Taylor was charged and convicted of possession of marijuana. The Court of Appeals reversed the conviction, holding that a rational inference could not be drawn that Taylor was in possession of the marijuana seized. *Id.* at 463. The Court reasoned:

> Taylor's presence in a room in which marijuana had been smoked, and his awareness that marijuana had been smoked, cannot permit a rational trier of fact to infer that Taylor exercised a restraining or directing influence over marijuana that was concealed in personal carrying bags of another occupant of the room. Because [Taylor] was in joint rather than exclusive possession of the hotel room, his mere proximity to the contraband found concealed in a travel bag and his presence in a room containing marijuana smoke were insufficient to convict him.

Id. The Court noted that the trial court's "conjectures . . . might be entirely correct" but that "a conviction without proof cannot be sustained." *Id.* (quotation marks and citation omitted, ellipses added).

Appellant directs our attention to *Johnson v. State*, 142 Md. App. 172, *cert. denied*, 369 Md. 180 (2002), where we concluded that a jury could infer that a car's front seat passenger possessed marijuana resting on the car's gear shift, because it was equidistant from the driver and passenger and a passenger could easily place and remove an object on top of the gear shifter. *Johnson*, 142 Md. App. 199-200. In *Johnson*, we contrasted the facts before us to a situation where the marijuana is located on the clutch pedal, explaining that "absent unusual circumstances, the clutch pedal of the vehicle ordinarily is within the exclusive dominion of the driver." *Id.* (emphasis omitted). Appellant argues that the State "presented no evidence that the gun was anywhere but in Jordan's hands or pants[,]" which were exclusively in Jordan's control. We agree with appellant that there was insufficient

evidence produced to show that he knew of the presence of the firearm before the shooting or that he at any time exercised dominion or control over the firearm.

The State argues that there was sufficient evidence to support appellant's constructive possession of the firearm because the evidence showed that appellant and Jordan "planned and executed the murder together and that, during the execution of the murder and their escape from the scene, they jointly possessed the firearm that was used to shoot Williams." The State points to the regular telephone contact between appellant and Jordan in the weeks leading to the shooting, and appellant's lies to the police that he vaguely knew Jordan or where he lived. The State argues that the evidence showed that appellant transported Jordan to the scene in his car; that appellant identified the victim to Jordan,[7] and that appellant drove the getaway car. The State cites *Moye*, 454 F.3d 390 (4th Cir.), and *State v. Williams*, 397 Md. 172 (2007) in support of their argument. Those cases are distinguishable.

In *Moye*, the police responded to a sporting goods store burglar alarm about 5:30 a.m. and found Courtney Cooper behind the wheel of a car parked next to the side door of the store. *Moye*, 454 F.3d. at 393. Another person, Jackie Briggs, was trying to get in the car when Cooper noticed the police and sped away in the car forcing Briggs to run away on foot. *Id*. Both were pursued and eventually apprehended. Briggs was found in physical possession of two firearms, and 13 firearms were found in the car, all of which had been taken from the store's gun display area. *Id*. While police officers were pursuing Cooper

[7] There is no evidence of this. *See* footnote 3, *supra*.

and Briggs, another police officer noticed appellant trying to crawl out of the store's side door through a small cubby hole that framed the entire side door, blocked it from being used as an exit, and was three feet from the store's gun display cabinet. *Id.*

Moye was charged and convicted of possessing the stolen firearms, and being a felon in possession of a firearm. The Fourth Circuit affirmed his convictions on appeal, holding that the jury was free to conclude that based on the circumstantial evidence of how the robbery was carried out that Moye was in actual possession of the firearms as he passed them from the store to Briggs, who either handed some of the firearms to Cooper or placed some of them in the getaway car. *Moye*, 454 F.3d at 395. The court reviewed the circumstantial evidence presented, stating:

> The getaway car's location next to the side door, the forced entry, and the fact that the store had an alarm all suggest that Cooper, Briggs, and Moye knew this was a race against time.
>
> The next two pieces of circumstantial evidence are the size of the cubbyholes blocking the doorway and the fact that only one of the cubbyholes was uncluttered. [] From these facts, the jury was entitled to draw the reasonable inference that only one person, Moye, as opposed to all three individuals, entered the store to retrieve and then remove the firearms. Indeed, given the exceedingly small size of the entry space, it would have made little sense, in terms of efficiency, for Cooper, Briggs, and Moye to enter the store. Clearly, having one person in the store allowed for quick and easy access to everything in the store and allowed the items to be quickly passed through the uncluttered cubbyhole. The jury obviously was entitled to use its common sense and conclude that this tactic made eminently more sense than having two, or perhaps three, people enter the store through the small cubbyhole.
>
> The final pieces of circumstantial evidence are the time of the forced entry and Moye's flight. Given the hour of the forced entry (just before 5:30 a.m.), the jury was entitled to conclude that Moye was not present at the scene for an innocent purpose. . . .

> We recognize, in reaching our decision, that an argument can be made that Moye was merely present at the same location from which the firearms were stolen. Moreover, the government's failure to produce fingerprint evidence, though understandable, slightly weakens its case. However, it was for the jury, not this court, to decide which version of the events-the government's or Moye's-was more credible.

Id. at 395-96 (footnotes omitted).

Moye is distinguishable because the circumstantial evidence of possession of the firearms was quantitatively and qualitatively different than the evidence present in this case. First, unlike the facts of *Moye*, the crime here did not occur at 5:30 a.m., but around noon, and did not take place where one would not expect to find the appellant. Appellant worked as a hack and was taking care of Phillips's young son so there was an innocent explanation for why he drove Jordan to the crime scene. While a rational juror is free to discredit that evidence, unlike *Moye*, there is no evidence, other than mere suspicion, that appellant knew that the shooting would take place. Therefore, there is no evidence that he had constructive possession of the gun.

In *Williams*, 397 Md. 172, the State's theory of prosecution at a bench trial was that Williams aided and abetted a couple in the attempted robbery of a gas station attendant. *Id*. at 177. The State presented evidence that Williams drove his friends, the couple, to a bar near a gas station. *Id*. at 178-79. A neighbor saw movement inside the car that looked as if the occupants were covering their faces. *Id*. Williams waited in the car while the couple entered the gas station wearing masks and attempted to rob the cashier at gun point. *Id*. The couple were unsuccessful and were seen "hurrying" back to the car, and after getting in, Williams "took off a little bit faster." *Id*. at 179. Williams was apprehended

about two months after the attempted robbery and told the police that he had no idea that the couple had attempted to rob the gas station until sometime thereafter when they told him that the gun had gone off accidentally. *Id*. at 180-81. He admitted at trial, however, that the couple had shown him the gun prior to the attempted robbery. *Id*. at 183.

The trial court found Williams guilty, among other things, as an aider and abettor of attempted armed robbery, first-degree assault, and use of a handgun in the commission of a crime of violence. *Id*. at 177, 184. The court found Williams not guilty of wearing, carrying, or transporting a handgun, reasoning that one of the two people who went into the gas station "was the person that was carrying the weapon." *Id*. at 177, 184-85. Without any explanation or comment, the trial court found Williams not guilty of two counts of unlawful possession of a firearm. *Id*. at 185. We reversed Williams' convictions on appeal, and the Court of Appeals, affirmed our reversal. Agreeing with out reasoning, the Court found that the trial court's verdicts were inconsistent. The Court reasoned:

> Because Williams embraced the entire criminal enterprise, it was inconsistent for the trial judge to conclude that Williams used the handgun, but did not actually or constructively possess that gun. The trial judge failed to adequately explain how Williams was not in possession of the handgun while traveling to the Citgo station with Henderson and Gaines, but, nonetheless, embraced all of the other crimes committed in furtherance of the attempted armed robbery.

Id. at 199.

Williams is likewise distinguishable. In *Williams*, just prior to the robbery, the car's occupants were seen moving in a way that suggested that they were trying to cover their faces. Moreover, Williams testified that he saw the weapon shortly before the attempted robbery, and after the robbery, the couple who committed the robbery were seen "hurrying"

to the car which took off relatively quickly, all of which suggested that Williams knew of the robbery before it occurred. Here, however, there was no evidence that appellant knew Jordan had a gun prior to the shooting. While there is certainly *some suspicion* that appellant may have known of the shooting before it occurred because of the many telephone calls/texts between appellant and Jordan, the calls are nonetheless insufficient to show that appellant had knowledge of the gun or Jordan's plan to shoot Williams to sustain his conviction for possession of a firearm by a disqualified person. Additionally, the issue before the Court in *Williams* was whether the inconsistent verdict was valid. Therefore, the Court of Appeals reasoning for affirming our reversal, that Williams "must have possessed the handgun before he could have used it[,]" does not apply here. *Williams*, 397 Md. at 199.

For the reasons stated above, we are persuaded that there was insufficient evidence of constructive possession to sustain appellant's conviction for possession of a firearm by a disqualified person. Accordingly, we shall vacate that conviction.

II.

Lastly, appellant argues that all his convictions should be reversed because the trial court erred in allowing the State to admit recorded telephone calls he made, while in jail and awaiting trial, but provided 291 days past the discovery deadline. Appellant argues that the trial court erred in two ways: it did not determine whether the State had violated the discovery rules and it did not sanction the State by excluding the calls. The State responds that under the circumstances presented the trial court did not abuse its discretion in declining to impose the sanction of exclusion for the late disclosure.

Md. Rule 4-263 governs discovery in the circuit court and provides, among other things, that the State shall provide to the defense, without the necessity of a request, "[a]ll written and all oral statements of the defendant[.]" Md. Rule 4-263(d)(1). The statements shall be provided "within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the" circuit court following arrest. Md. Rule 4-263(h)(1). The major objectives of the discovery rules is to "assist the defendant in preparing his defense, and to protect him from surprise." *Hutchins v. State*, 339 Md. 466, 473 (1995) (quotation marks and citations omitted). The "[i]nherent benefits of discovery include providing adequate information to both parties to facilitate informed pleas, ensuring thorough and effective cross-examination, and expediting the trial process by diminishing the need for continuances to deal with unfamiliar information presented at trial." *Williams v. State*, 364 Md. 160, 172 (2001). "Each party is under a continuing obligation to produce discoverable material and information to the other side." Md. Rule 4-263(j).

The Rule provides sanctions for violations:

> If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court *may* order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances. The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court.

Md. Rule 4-263(n) (emphasis added). In fashioning a remedy for a discovery violation, a trial court should consider: "(1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances." *Thomas v. State*, 397 Md. 557, 570-71 (2007) (citations and footnote omitted). This list of considerations is neither exhaustive nor rigid, and the trial court may also consider "whether the disclosure violation was technical or substantial, [and] the timing of the ultimate disclosure[.]" *Taliaferro v. State*, 295 Md. 376, 390-91, *cert. denied*, 461 U.S. 948 (1983). A trial court should impose the "least severe sanction" that the circumstances warrant, and "drastic measures" like excluding evidence "is not a favored sanction[.]" *Thomas*, 397 Md. at 571-73 (citations omitted).

Whether a discovery rule has been violated is a question of law that we review *de novo*, but we review under an abuse of discretion standard what remedy, if any, the trial court imposed. *Cole v. State*, 378 Md. 42, 56 (2003) (citations omitted). "The exercise of that discretion includes evaluating whether a discovery violation has caused prejudice." *Id*. An abuse of discretion occurs when the trial court's decision is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *McLennan v. State*, 418 Md. 335, 353-54 (2011) (quotation marks and citations omitted).

Appellant was arraigned on or around February 24, 2017. This triggered a deadline of March 27, 2017, for the State to produce the jail calls. Between his arraignment and the discovery deadline, the State informed defense counsel of a jail call that occurred in

October 2016. Defense counsel was unable to open the call but told the State prosecutor "we could deal with that later."

On January 12, 2018, about ten months later and a month before appellant's trial, the State emailed defense counsel 11 jail calls, which included the earlier provided call and ten additional calls.[8] The next day, defense counsel emailed the State: "Thanks so much for sending us phone calls you've had since October late on Friday in January. I can't play them." He then asked the State prosecutor to send them to him "immediately in a different format." The State prosecutor emailed back that day and advised that, as he had reminded him earlier, defense counsel has always had the ability to access the jail calls because he was the defense attorney of record. The State prosecutor also advised defense counsel that he would receive certified discs of the calls on Friday (it is unclear whether the State prosecutor was referring to the previous day or the upcoming Friday), but he offered to meet defense counsel at the State's Attorney's Office that day (Saturday) or on Monday. On Monday, defense counsel emailed the State prosecutor to arrange a time to review the State's case file on Friday and mentioned that he was "still awaiting the disc you mentioned containing the jail calls." The State's attorney emailed back and asked if he had received a zip file of the certified jail calls that he had sent the day before. There is no indication that defense counsel responded back. On Friday, January 26, 2017, defense counsel reviewed the calls at the State's Attorney's Office.

[8] Seven of the calls were admitted into evidence at appellant's trial. Six of the calls were made in October 2016. One call was made in December 2016.

On January 29, 2018, two weeks prior to trial, defense counsel filed a written motion in limine to preclude the State from using the 11 calls. At a hearing on the morning of trial, defense counsel argued, "I think in an abundance of caution perhaps they should've been sent out a bit earlier to avoid this problem of the [d]efense being prejudiced, Your Honor, by not being able to play these jail calls in time to go over these calls with my client." Defense counsel added that although he knew about the substance of one of the jail calls much earlier and had told the State's attorney "we could deal with that later," he did not "expect to get 10 more jail calls 30 days before trial[.]" Defense counsel added that the late disclosure warranted sanctions. The motions judge interjected at one point and asked defense counsel whether his "argument today is not so much you couldn't open them, but that the discovery was late. So, therefore, I should – the sanction that I should be imposing is that they shouldn't be allowed to use those calls." Defense counsel responded that it was both.

The prosecutor responded and explained that at an unspecified time much earlier, he had told defense counsel that because there were "thousands of jail calls," he would send to him a disc of the calls when he narrowed down those he intended to use at trial. At that time, he had also informed defense counsel that, as the defendant's attorney of record, he had access to all of appellant's jail calls in the jail database. The State argued that excluding the jail calls as a sanction would be "completely inappropriate" because defense counsel had the calls 30 days before trial and has "in fact listened to them, and reviewed them well enough to go through in very nuanced detail what should and shouldn't be redacted."

The motions judge stated that she believed that defense counsel should have filed a motion to compel in March 2017, when the State had advised him about the one jail call from October 2016 that he could not open. The motions judge also stated that "it appears to me in your email, is that you're not all that upset about them being late, so much as you can't open it." The motions judge noted that the "problem is [] a discovery violation. You don't have it if you can't open it." As to any sanction, the judge stated:

> No judge is going to say that discovery should be excluded simply because you get it 30 days before trial. Or if you'd gotten it yesterday I might agree with you, you know. But you had it 30 days before trial. Obviously you've listened to it. I don't know whether you were able to take them to the jail to have your client listen to them.
>
> But I don't think the remedy, as I hear as how these things unfolded, is to impose any sanctions based on the [d]efense's lack of doing anything. Because you're coming in now and complaining about it. . . .
>
> I just – I just don't believe that the [d]efense has done enough for the [c]ourt to impose any sanctions at this time based on a discovery violation.

The judge then denied the motion.

Appellant first argues that the motions judge failed to rule that a discovery violation had occurred. We disagree. After reviewing the parties' and judge's remarks during the motions hearing, we are persuaded that the judge believed that a discovery violation had occurred, both in that the State had provided the jail calls late and defense counsel was unable to open the calls, but disagreed with appellant as to whether she should impose any sanctions for the violation.

Appellant next argues that the motions judge erred when she refused to exclude the calls. Appellant argues that he was prejudiced by the late disclosure because his attorney

was unable to review the calls with him and was unable to "do things like interview [appellant's] mother or the other people with whom he spoke on the calls." Appellant points to statements he made in the jail calls that the State emphasized during closing argument to suggest that he knowingly participated in the crimes surrounding Williams' death, specifically: 1) the call where he told his mother, "I tried to tell you, I tried to tell you so many times. I knew it was going to go down like this[.]"; 2) the call in which his mother told him that Williams had died, and the State argued, "[So] listen to that deafening silence as the [d]efendant, it really sinks in for the first time that in that moment what he's done."; and 3) and during the same call appellant told his mother that he was sorry for not listening to her. Appellant also points out that the State used the calls to undermine his credibility by contrasting his statement to the police that he did not know Jordan well and one of his jail calls where he said he knew that Jordan was shot at earlier in a burgundy Mustang.

Under the circumstances presented, we are persuaded that the trial court did not abuse its discretion in declining to grant the extreme sanction of exclusion. After reviewing the discussion and arguments made by the parties at the pre-trial motions hearing, the motions judge was fully aware of the reasons why the disclosure was late and the parties' arguments about whether prejudice had occurred. The court also considered the State's timing in notifying defense counsel of the recorded jail calls, 30 days before trial. Given the above, we find no abuse of discretion by the motions judge in declining to exclude the jail calls and to not impose the most "drastic" of measures. *Thomas*, 397 Md. at 570-72.

POSSESSION OF A HANDGUN BY A DISQUALIFIED PERSON CONVICTION VACATED. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.