Circuit Court for Allegany County
Case No.: C-0l-CR-l7-57

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3155

September Term, 2018

RICHARD ANDRE GREEN

v.

STATE OF MARYLAND

Graeff,
Reed,
Moylan, Charles E., Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 27, 2020

Following a bench trial, the Circuit Court for Alleghany County convicted appellant, Richard Andre Green, of possession of cocaine with intent to distribute, possession of cocaine, and possession of Oxycodone. The court sentenced appellant to eight years, all but four years suspended, for the conviction of possession of cocaine with the intent to distribute, and six months concurrent, for the conviction of possession of Oxycodone, to be followed by three years' supervised probation.[1]

On appeal, appellant presents the following questions for this Court's review, which we have slightly rephrased, as follows:

> 1. Did the circuit court err by admitting into evidence State's Exhibit 6, a package containing controlled dangerous substances, without an adequate chain of custody?
>
> 2. Did the circuit court abuse its discretion by accepting Trooper Lewis as an expert witness?
>
> 3. Was the evidence sufficient to sustain appellant's convictions?

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

BACKGROUND

Detective Eric Rice, the lead investigator and member of the Allegany County Narcotics Task Force, began an investigation concerning appellant in September 2017. This investigation culminated in the execution of a search and seizure warrant on October

[1] Appellant's conviction of possession of cocaine merged with his conviction for intent to distribute for sentencing purposes. The docket entries reflect that, after the briefs were filed in this case, the remainder of appellant's sentence was suspended, with two years' supervised probation. *See generally* Md. Rule 5-201 (concerning judicial notice of facts); *Lewis v. State*, 229 Md. App. 86, 90 n.1 (2016) (taking judicial notice of docket entries available on Maryland Judiciary website), *aff'd on other grounds*, 452 Md. 663 (2017).

10, 2017, at 144 Wood Street, Apartment 3B, in Frostburg, Maryland. Appellant shared the residence with his wife, Carla Bernal. Detective Rice had seen appellant at this location on "numerous occasions" when conducting surveillance and engaging in "undercover police officer buys from Mr. Green."

On October 10, 2017, the police arrived at the residence at 8:20 p.m. to execute the search warrant. They saw appellant and Ms. Bernal standing outside the apartment building in the parking lot area, near their vehicle. Maryland State troopers detained appellant and Ms. Bernal and held them outside of the apartment for the duration of the search.

During the search, the police found small Ziplock baggies of suspected crack cocaine inside the pocket of a purple coat hanging in the bedroom closet. Additional contraband was found in the bedroom, including: two baggies of crack cocaine on the nightstand near the bed; two more baggies of suspected crack cocaine in a cellphone case; and a box of sandwich baggies located in the bedroom closet, on a shelf directly above the purple coat.

During the search, Maryland State Police Sergeant Andy Farrell noticed that the overhead globe light in the hallway of the apartment was not working. Upon closer inspection, Sergeant Farrell observed plastic bags, containing an unidentified substance, concealed within the globe light**.** He unscrewed the globe cover off the light fixture and discovered three bags inside, one contained a powdered substance and the remaining two held a rock-like substance. The police then searched appellant and found eleven Oxycodone pills in his pants pocket.

At trial, the State admitted evidence of a phone conversation between appellant and Ms. Bernal, recorded the next day, October 11, 2017, while appellant was incarcerated at the Allegany County Detention Center. Detective Rice testified that, during the call, appellant "referenced a light in the hallway um, right inside the, the front door where we located the powder cocaine and the crack cocaine." Appellant asked: "[D]id they find it up in the, the light thing?"

The call, which was played in court, contained the following dialogue:

> [Appellant]: So that means, so that means that they didn't find the light thing until when?
>
> Bernal: …until when they were about to leave. Until like they noticed that the light wasn't goin' on. And then they just put the light right there. 'Cause they were about to leave and I was just like oh my God.
>
> [Appellant]: I know. But they didn't have no right to take it. . . . This is just a wake up call for me and you.

Charles Miller, a forensic scientist with the Maryland State Police, and an expert in "forensic chemistry and the identification of controlled dangerous substances," testified that he examined three of the 63 baggies in State's Exhibit 6 and found that all three tested positive for cocaine. He also weighed all 63 baggies and found that the baggies and their content weighed 20.62 grams. Mr. Miller also tested one of the eleven tablets found on appellant, which tested positive for Oxycodone.

The State sought to qualify Trooper Trenton Lewis, a member of the Narcotics Task Force with the Maryland State Police, as an expert in the "manufacturing, processing, packaging, repackaging, transport and sales of controlled dangerous substances." Trooper

Lewis testified that he had not previously been accepted as an expert witness, and he had been a member of the Narcotics Task for a little over a year.

After Trooper Lewis was accepted as an expert, he testified that, in Allegany County, crack cocaine is usually sold in a plastic bag and priced at $50 for a half gram or $100 for a full gram. A crack cocaine user's home usually would contain needles, spoons, pipes, or other items that the user can use to ingest the substance.

Additional details will be provided as necessary in the discussion that follows.

DISCUSSION

I.

Appellant first contends that the circuit court erred in admitting State's Exhibit 6, which included Maryland State Police ("MSP") Form 67 and a package containing controlled dangerous substances. The form listed Detective Rice as the first person who took possession of the evidence, and it listed the location where the evidence was found as 144 Wood Street. Appellant asserts that the drugs were admitted without an adequate chain of custody because: (1) the chain of custody log indicates that Detective Rice was the person who located the narcotics in the globe light fixture, but Sergeant Farrell testified that he found them; and, (2) the chain of custody log shows that the eleven Oxycodone pills were found at 144 Wood Street, but Detective Rice testified that they were found in Green's pants when he was outside of the residence.

The State contends that the circuit court "properly exercised its discretion in finding that there was an adequate chain of custody to admit State's Exhibit 6." It characterizes appellant's claims as "hypertechnical" and argues that they are without merit.

"A trial court's ruling on the admissibility of evidence is generally reviewed for abuse of discretion." *State v. Robertson*, 463 Md. 342, 351 (2019) (citing *Hopkins v. State*, 352 Md. 146, 158 (1998)). "A trial court abuses its discretion only when 'no reasonable person would take the view adopted by the [trial] court,' or when the court acts 'without reference to any guiding rules or principles.'" *Easter v. State*, 223 Md. App. 65, 75 (quoting *King v. State*, 407 Md. 682, 697 (2009)), *cert. denied*, 445 Md. 488 (2015).

In determining whether the State has shown the chain of custody of evidence, "the court evaluates whether the State satisfied its burden of establishing that the evidence presented at trial is in substantially the same condition as it was when initially recovered." *Wheeler v. State*, 459 Md. 555, 561 (2018). "The chain of custody need not be established beyond a reasonable doubt—the State need prove only that there is a 'reasonable probability that no tampering occurred.'" *Johnson*, 240 Md. App. 200, 211 (2019) (quoting *Cooper v. State*, 434 Md. 209, 227 (2013)), *aff'd on other grounds*, 467 Md. 362 (2020).

As this Court explained in *Easter*, 223 Md. App. at 75:

> Chain of custody evidence is necessary to demonstrate the "ultimate integrity of the physical evidence." *Best v. State*, 79 Md. App. 241, 256, 556 A.2d 701, *cert. denied*, 317 Md. 70, 562 A.2d 718 (1989). In most cases, an adequate chain of custody is established through the testimony of key witnesses who were responsible for the safekeeping of the evidence, i.e., those who can "'negate a possibility of "tampering" . . . and thus preclude a likelihood that the thing's condition was changed.'" *Jones v. State*, 172 Md. App. 444, 462, 915 A.2d 1010 (quoting *Wagner v. State*, 160 Md. App. 531, 552, 864 A.2d 1037 (2005)), *cert. denied*, 399 Md. 33, 922 A.2d 574 (2007). What is necessary to negate the likelihood of tampering or of change of condition will vary from case to case. *Best*, 79 Md. App. at 250, 556 A.2d 701. The existence of gaps or weaknesses in the chain of custody generally go to the weight of the evidence and do not require exclusion of the evidence as a matter of law. *See Jones*, 172 Md. App. at 463, 915 A.2d 1010 (upholding the admission of the evidence, but noting that the gaps in the

> State's chain of custody supported defense counsel's remarks in closing that the jury should discount its value).

Accord Boston v. State, 235 Md. App. 134, 161 (2017), *cert. denied*, 457 Md. 664 (2018).

Here, after the State's forensic scientist, Charles Miller IV, testified that the drugs he tested came back positive for cocaine, a Schedule II controlled dangerous substance, the State sought to admit them into evidence. Appellant objected. The following colloquy ensued:

> [DEFENSE COUNSEL]: Um . . . I'm concerned at this point, I mean looking at the chain of evidence log and listening to the evidence so far, I don't think there's sufficient foundation as to, first of all as to the 11 pills um . . . We have evidence that Detective Rice did not search or locate the pills on ah, Mr. Green but what we do have is we have a chain of custody log that says that he was the one who received it. Likewise, we have testimony from ah, Trooper, Sergeant Farrell who testified that he was the one who located the information, sorry located this alleged ah, substances up in the light fixture and again we have a chain a custody log that lists now, lists that it was ah, located by Detective Rice. Um, so I don't believe there's sufficient foundation at this point or evidence to show that ah, these items were received properly or by Detective Rice.

The State responded that Detective Rice was the lead investigator and was the one who collected the items, and it was "proper for him to be the, the seizing officer and the person who forwarded it to the Maryland State Police[.]" Defense counsel then added, with respect to the eleven pills found on appellant, that the chain of evidence log said they were located at the residence but, according to the testimony, they were found on his person, stating: "I believe that's inappropriate also."

The court overruled the objection and admitted the evidence, finding as follows:

> THE COURT: The Narcotics Task Force clearly through the testimony presented was operating as a team as they went through the residence and together as a team they seized the various items. Those items were ultimately

> turned over to Detective Rice who prepared the . . . list of articles and on the Form 67 it was contained as one grouping and under the circumstances . . . and it not being necessary that each individual officer participate in the chain of custody log . . . for the purposes of admitting it into evidence[.]

The evidence supports the court's conclusion that the officers acted as a team. Detective Rice testified that he, Sergeant Farrell, and others searched for drugs in the apartment. Although Sergeant Farrell testified that he was the officer who saw the non-working globe light in the hallway and discovered the three bags of suspected powder and crack cocaine inside it, Detective Rice testified that all of the evidence discovered on scene was given to him to collect.

As the "seizing officer," his name was listed on the chain of custody form. Detective Rice testified that the form provided a chain of custody with respect to the drugs seized from the residence, including the hallway, and these drugs were packed in a "K-pack" to be sent to the lab. With respect to the drugs concealed within the hallway globe light, Detective Rice testified that these drugs were seized, tested, "placed into our property" and included on Exhibit 6 chain of custody report. When Detective Rice opened the evidence in court, he confirmed that the narcotics were in substantially the same condition as when they were found. This evidence was sufficient to negate the possibility of tampering and support the court's determination to admit the evidence.

With respect to the narcotics found in appellant's pocket, the chain of custody form says they were found at 144 Wood Street. The testimony that appellant was outside the residence during the search indicates that the pills were found during the search of appellant in the parking lot just outside the apartment. It is clear from the chain of custody form and

from Detective Rice's testimony that the seizure of the evidence both inside and outside the apartment was all part of one larger action, and the police reflected this by including all of the narcotics on one form with the apartment address listed as the location. The trial court properly exercised its discretion in determining that there was no chain of custody bar to the admission of this evidence.

II.

Appellant next contends that the court abused its discretion in accepting Trooper Lewis as an expert in the manufacturing, processing, packaging, repackaging, transport, and sales of controlled dangerous substances. Appellant asserts that the trooper was not qualified to offer an expert opinion due to a lack of training and expertise in the subject area.

The State contends that the court properly exercised its discretion in accepting Trooper Lewis as an expert witness. It argues that there was "an adequate foundation for Trooper Lewis's qualification as an expert" based on his prior experiences as a police officer.

At trial, defense counsel objected to accepting Trooper Lewis as an expert witness, stating:

> [DEFENSE COUNSEL]: I don't believe there's a sufficient background and information that ah, he has studied to show that he could be an expert to determine this. Ah, one year as a narcotics task force officer is not much ah, you know. The majority of experts that are involved in usually they're there for 10 x plus years at that point in time not just one. So at this point I would object to him being listed as an expert.

The court overruled the objection, stating:

> THE COURT: The testimony that's been elicited on . . . Trooper Lewis's qualifications is that he's participated in approximately 59 search warrants. He has received training in the identification of controlled substances through the Top Gun Program. He also received training in the identification of controlled substances while he was in the Maryland State Police Academy. He testified that he's been involved in 200 controlled buys which involved heroin, crack cocaine and marijuana. He has actually purchased . . . controlled substances as an undercover officer approximately 10 time [sic] in the area of . . . using heroin, crack cocaine, marijuana. He had testified that he has participated in debriefings of people who have purchased . . . controlled substances as to the prices involved, the amounts of the substances, the manner in which they're packaged. Has also testified that . . . he's prepared approximately 11 search and seizure warrants himself concerning controlled substances. He has been working in the field of narcotics for approximately one year now. I simply note that Trooper Lewis every, every expert has to start with their first case and this is Trooper Lewis's first case as an expert. The testimony that he has provided convinces the Court that based upon his experience and training he is an expert in the area of manufacturing, processing, identifying, packaging of controlled substances. He will be accepted as such. His testimony here today goes to the weight of his testimony not so much the expertise.

The Court of Appeals has explained that "the admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will *seldom* constitute a ground for reversal." *Santiago v. State*, 458 Md. 140, 153–54 (2018) (quoting *Roy v. Dackman*, 445 Md. 23, 38–39 (2015)). "In exercising the wide discretion vested in the trial courts concerning the admissibility of expert testimony, a critical test is whether the expert's opinion will aid the trier of fact." *Santiago*, 458 Md. at 154 (quoting *Bryant v. State*, 393 Md. 196, 203–04 (2006)).

Maryland Rule 5-702 provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill experience, training, or education, (2) the

> appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

Appellant's contention addresses only the first factor, whether the witness is qualified as an expert. The Court of Appeals has explained that "an expert may be qualified to testify if he 'is reasonably familiar with the subject under investigation.'" *Levitas v. Christian*, 454 Md. 233, 245 (2017) (quoting *Roy*, 445 Md. at 41). An expert's familiarity can come from "professional training, observation, actual experience, or any combination of these factors." *Id*. (quoting *Radman v. Harold*, 279 Md. 167, 169 (1977)). A lack of experience or formal credentials does not disqualify an expert witness, "so long as the witness is sufficiently qualified that the witness's testimony would be helpful to the fact finder." *In re Adoption/Guardianship No. CCJ14746*, 360 Md. 634, 647 (2000).

Here, Trooper Lewis acknowledged that he had not previously testified as an expert in court. As the trial court noted, however, "every expert has to start with his [or her] first case." Trooper Lewis had been a member of the State Police for 14 years, and he had been on the Narcotics Task Force for a year and a half. He was trained in the "Top Gun" program, a "basic training" class that taught how drugs are packaged, how to participate in controlled buys, and general "drug training." He also received training in the Police Academy on the identification of different types of controlled dangerous substances.

As part of his experience, Trooper Lewis had participated in more than 200 controlled buys, where controlled dangerous substances were purchased by either a confidential informant or an undercover police officer. Trooper Lewis also participated in such buys himself, on approximately ten occasions, where he had purchased heroin, crack cocaine, marijuana, and methamphetamine. He also had debriefed individuals involved in

the illicit sale of narcotics, discussing with them the manner of packaging, as well as conversations about amounts and pricing. Trooper Lewis prepared approximately eleven search and seizure warrants involving crimes of distribution or possession with intent to distribute controlled dangerous substances, such as crack cocaine, heroin, methamphetamine, and marijuana.

Based on this evidence, Trooper Lewis had sufficient training and experience to qualify as an expert witness. The circuit court properly exercised its discretion in accepting Trooper Lewis as an expert witness.

III.

Appellant's last contention is that the evidence was insufficient to support his convictions. He asserts that the State failed to show that he possessed the contraband found within the apartment, noting that he was not inside the apartment when it was found, and arguing that nothing was found in the apartment that linked him to the apartment. With respect to the Oxycodone pills found on his person, he argues that they "should not have been introduced into evidence due to an inadequate chain of custody."[2]

The State contends that there was sufficient evidence to support appellant's convictions. It points to evidence that appellant lived in the apartment with his wife, sold drugs from the apartment, and knew about the cocaine stored in the light fixture.

In reviewing the sufficiency of the evidence in an action tried without a jury,

[2] With respect to the conviction for possession of Oxycodone, we have already held that the chain of custody was adequate for this conviction, and therefore, we need not address the sufficiency of evidence argument in this regard.

Maryland Rule 8-131(c) provides:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

In reviewing the sufficiency of the evidence, we ask "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." *Grimm v. State*, 447 Md. 482, 494–95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656–57 (2011)). In making that determination, we "defer to the fact finder's 'resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Riley v. State*, 227 Md. App. 249, 256 (quoting *State v. Suddith*, 379 Md. 425, 430 (2004)), *cert. denied*, 448 Md. 726 (2016). Stated another way, "when evaluating the sufficiency of the evidence in a non-jury trial, the judgment of the trial court will not be set aside on the evidence unless clearly erroneous." *State v. Manion*, 442 Md. 419, 431 (2015) (quoting *State v. Raines*, 326 Md. 582, 589 (1992)). But, "where the determination of the accused's guilt is formed entirely upon the basis of circumstantial evidence, such evidence must permit the trier of fact to infer guilt beyond a reasonable doubt, and must not rest solely upon inferences amounting to 'mere speculation or conjecture.'" *Manion*, 442 Md. at 432 (quoting *Smith v. State*, 415 Md. 174, 185 (2010)).

Possession may be constructive or actual, exclusive or joint. *See State v. Gutierrez*, 446 Md. 221, 234 (2016) (citing *Moye*, 369 Md. at 14). "[T]he 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." *Smith*, 415 Md. at 187 (quoting *Suddith*, 379 Md. at 432).

To be convicted of a possessory offense, one must "exercise actual or constructive dominion or control over a thing by one or more persons." *Gutierrez*, 446 Md. at 233 (quoting Md. Code (2012 Repl. Vol.), § 5-101 (v) of the Criminal Law Article). In order to exercise actual or constructive dominion or control, "the 'evidence must show directly or support a rational inference that the accused did in fact exercise some dominion or control over the prohibited . . . drug in the sense contemplated by the statute, *i.e.*, that the accused exercised some restraining or direct influence over it.'" *Id.* at 233 (quoting *Moye v. State*, 369 Md. 2, 13 (2002)). And, "[i]nherent in the element of exercising dominion and control is the requirement that the defendant knew that the substance was a CDS." *Smith*, 415 Md. at 187.

The following factors may be considered in determining possession:

> [1] the defendant's proximity to the drugs, [2] whether the drugs were in plain view of and/or accessible to the defendant, [3] whether there was indicia of mutual use and enjoyment of the drugs, and [4] whether the defendant has an ownership or possessory interest in the location where the police discovered the drugs. None of these factors are, in and of themselves, conclusive evidence of possession.

Gutierrez, 446 Md. at 234 (quoting *Smith*, 415 Md. at 174); *accord Folk v. State*, 11 Md. App. 508, 518 (1971).

Here, the cocaine was found in the bedroom and the hallway of the apartment appellant shared with his wife, Ms. Bernal. And during surveillance of the residence, the police had seen appellant there multiple times. Moreover, appellant's statements during

his conversation with his wife indicated that he knew about the drugs secreted in the hallway globe light. This evidence was sufficient for a reasonable fact finder to determine that appellant possessed the cocaine found in the apartment.

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