Circuit Court for Washington County
Case No. 21-K-17-053423

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3218

September Term, 2018

ROBERT ALLEN POFFENBERGER

v.

STATE OF MARYLAND

Graeff,
Arthur,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: April 22, 2020

After a one-day jury trial in the Circuit Court for Washington County, appellant Robert Allen Poffenberger was convicted of theft of property valued at under $1,000; possession of a stolen, regulated firearm; possession of a regulated firearm after being convicted of a disqualifying crime; possession of a firearm after being convicted of a felony; possession of ammunition after being convicted of a disqualifying crime; use of a firearm in relation to a drug-trafficking crime; possession with intent to distribute marijuana; "manufacturing" marijuana; keeping or maintaining a common nuisance; possession of heroin; and possession with intent to use drug paraphernalia.

Poffenberger received an executed sentence of 30 years' imprisonment.[1] This timely appeal followed.

[1] The specific sentences imposed were as follows:

Count I (theft of property valued at under $1000)	Six months, concurrent with the sentence for Count 2
Count 2 (possession of a stolen, regulated firearm)	Five years, all but two suspended
Count 3 (possession of a regulated firearm after being convicted of a disqualifying crime)	15 years, all but eight suspended; first five years without the possibility of parole, consecutive to the sentence for Count 2
Count 4 (possession of a firearm after being convicted of a felony)	Merged with Count 3
Count 5 (possession of ammunition after being convicted of a disqualifying crime)	One year, consecutive to the sentence for Count 2
Count 6 (use of a firearm in relation to a drug-trafficking crime)	20 years, all but 15 suspended; the first five to be served without the possibility of parole; consecutive to the sentence for Count 3

(Continued…)

QUESTIONS PRESENTED

Poffenberger presents two questions, which we have rephrased for concision and clarity:

I. Was the evidence legally sufficient to sustain the verdicts?

II. Did the circuit court impose an illegal sentence for possession of a regulated firearm by a person with a disqualifying prior conviction?[2]

In response to the first question, we shall reverse Poffenberger's convictions for possession of drug paraphernalia, theft, possession of a stolen, regulated firearm, and use of a firearm in relation to a drug-trafficking crime, but shall otherwise affirm the judgments of conviction. In response to the second question, we shall vacate the sentence

(…continued)

Count 8 (manufacturing marijuana)	Five years, consecutive to the sentence for Count 6
Count 7 (possession with intent to distribute marijuana)	Five years, concurrent with the sentence for Count 8
Count 9 (keeping or maintaining a common nuisance):	Merged with Count 8
Count 10 (possession of heroin)	Six months, concurrent with the sentence for Count 2
Count 11 (possession with intent to use drug paraphernalia)	No sentence

[2] Poffenberger phrased his questions as follows:

1. Is the evidence sufficient to sustain appellant's convictions?

2. Is appellant's 15-year sentence for a conviction under Section 5-133(b) of the Public Safety Article illegal where the statutory maximum sentence for 5-133(b) [sic] is five years?

for possession of a regulated firearm by a person with a disqualifying prior conviction. In accordance with *Twigg v. State*, 447 Md. 1 (2016), we shall also vacate the sentences for the other convictions and remand for resentencing.

BACKGROUND

On January 14, 2017, Officer Kevin Rutkowski of the Hagerstown City Police Department arrested Sonny Lee Thomas for possession with intent to distribute heroin. Thomas informed the police that he was involved in a marijuana-growing operation at a house at 27 East Lee Street in Hagerstown. According to Thomas, Poffenberger lived at the house with his girlfriend and two children and oversaw the operation. Thomas advised the police that Poffenberger owned guns, and he told the police where the guns were hidden in the house.

Based upon that information, Officer Rutkowski surveilled 27 East Lee Street. He observed that the mailbox outside the property had two names listed on it: those of Poffenberger and his girlfriend. A green Mazda was parked in front of the house. A "ventilation tube" protruded from a third-floor window on the east side of the house. Based on his experience, Officer Rutkowski believed that the ventilation tube was part of a system for growing marijuana.

Officer Rutkowski obtained a search warrant for 27 East Lee Street. The warrant was executed on January 17, 2017, by Hagerstown city police officers and officers from the Washington County Sheriff's Office.

On the third floor of the house, the officers discovered 46 hydroponic marijuana plants in a ventilated tent under grow lamps. The officers recovered men's clothing from a bedroom on the second floor, as well as a letter that was addressed to Poffenberger at the Lee Street address. They also recovered a digital scale near an aquarium in front of a fireplace and magazines about marijuana on top of the fish tank and in a laundry room.

In a fireplace on the first floor of the house, immediately beyond the entryway, Sheriff's Agent Jay Mills discovered two guns: a .38 caliber Smith & Wesson handgun loaded with five rounds of ammunition and a semi-automatic, nine-millimeter rifle. Agent Mills testified that to get to the guns he "had to move some aquariums that were sitting in front of the . . . fireplace" and that he "crawled up in[side] [the fireplace] to look[.]" The agent could not see the guns. Instead, he reached up and "found a piece of particle board" that was painted black. He removed the particle board and found the guns above it.

While the police were executing the search warrant, Poffenberger drove up in the green Mazda that Officer Rutkowski had previously observed. He parked outside the house, got out and walked toward the house, and looked inside. He then continued walking down the street.

Washington County Sheriff's Agent Bryan Teets followed Poffenberger and placed him under arrest. During a search incident to the arrest, Agent Teets recovered a "knotted-plastic bag containing a tan-colored pow[d]er substance" from Poffenberger's pants pocket. The substance was later determined to be heroin.

Poffenberger gave the police permission to search his cell phone. Photographs of a marijuana-growing operation and chemical fertilizers were stored on his phone.

Thomas, the informant, testified that in the winter of 2017 he and Poffenberger agreed to run a marijuana-growing operation. Thomas invested "thousands" of dollars in the operation. Poffenberger had invested money in the operation as well. According to Thomas, Poffenberger lived at 27 East Lee Street and took care of the plants. Thomas and Poffenberger did not have a "specific" profit-sharing arrangement in place, and they had not actually sold any marijuana because the plants were not yet mature. Thomas knew that Poffenberger kept guns at the house: Thomas had observed the handgun in Poffenberger's possession at the house.

Hagerstown police Agent Frank Toston testified, by stipulation, as an expert in drug trafficking and the manufacture and distribution of drugs. He opined that $36,000 was a "very modest" estimate of the street value of the marijuana found at 27 East Lee Street. According to the agent, the overhead costs for an operation of that size included about $1,500 for supplies, plus significant expenses for electricity and water. Agent Toston also opined that, when people are involved in illegal businesses, such as the cultivation of marijuana, they "customarily" have "weapons on hand" to "protect their investment."

The parties stipulated that both guns were operable and that Poffenberger previously had been convicted of crimes that disqualified him from possessing a firearm

or ammunition. The parties also stipulated that the handgun had been stolen in 2013 and that it was valued at under $1,000.

At the close of the State's case, Poffenberger moved for judgment of acquittal on most of the counts. The court denied the motion. The defense rested without putting on any evidence.

We shall include additional facts as necessary to our resolution of the issues.

DISCUSSION

I. Sufficiency of the Evidence

Poffenberger contends that the evidence was legally insufficient to support any of his convictions, except the conviction for possession of heroin.

In assessing the sufficiency of the evidence supporting a criminal conviction, 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.'" *McClurkin v. State*, 222 Md. App. 461, 486 (2015) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "In applying that standard, we give 'due regard to the [fact-finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Id.* (alteration in original) (quoting *Harrison v. State*, 382 Md. 477, 488 (2004)). We do not "'distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Montgomery v. State*, 206 Md. App.

357, 385 (2012) (alteration in original) (quoting *Morris v. State*, 192 Md. App. 1, 31 (2010)). A court, on appellate review of evidentiary sufficiency, will not "retry the case" or "re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. 174, 185 (2010).

A. Possession of drug paraphernalia (Count 11)

Poffenberger contends that the evidence was insufficient to support a conviction for possession of drug paraphernalia with intent to use it, because the only paraphernalia that he possessed was the plastic bag that contained his heroin. He concedes, however, that his trial counsel failed to preserve a challenge to the sufficiency of the evidence to support the conviction.[3] He argues that we can still consider his contention, because, he says, he received ineffective assistance of counsel when his attorney failed to argue that a "plastic bag in which a drug is contained cannot form the basis for a separate paraphernalia conviction." He maintains that this ineffective assistance of counsel claim is one of the rare claims of that variety that is appropriate for resolution on direct appeal. *See, e.g.*, *Mosley v. State*, 378 Md. 548, 563-68 (2003).

The paraphernalia charge was premised upon the plastic bag containing heroin, which was found in Poffenberger's pocket during the search incident to arrest. Poffenberger was convicted of both the paraphernalia charge and the charge for simple

[3] In his motion for judgment of acquittal, defense counsel stated: "I guess the plastic bag reference is the little bit of heroin that – that is in evidence." He offered no further argument.

possession of heroin. The court imposed a six-month sentence for possession of heroin, but imposed no sentence for the paraphernalia conviction.[4]

Md. Code (2002, 2012 Repl. Vol., 2016 Supp.), § 5-619(c)(2) of the Criminal Law Article ("CL") makes it a crime to "use or possess with intent to use drug paraphernalia to: . . . store, contain, or conceal a controlled dangerous substance[.]" The term "drug paraphernalia" includes any "container used, intended for use, or designed for use in packaging small quantities of a controlled dangerous substance" and "a container or other object used, intended for use, or designed for use in storing or concealing a controlled dangerous substance." CL § 5-101(p)(2)(ix)-(x). It would appear to follow that the plastic bag that contained Poffenberger's heroin was drug paraphernalia.

Poffenberger contends that under *Dickerson v. State*, 324 Md. 163, 173-74 (1991), he would have been entitled to the grant of his motion for judgment of acquittal on the paraphernalia charge had defense counsel argued as much. *Dickerson* does not support Poffenberger's argument.

Dickerson was charged with possession with intent to distribute cocaine and possession of paraphernalia. The charges were based upon a single vial of crack cocaine

[4] The maximum penalty for a first conviction for possession of drug paraphernalia with intent to use it is a $500 fine. Md. Code (2002, 2012 Repl. Vol., 2016 Supp.), § 5-619(c)(3)(i) of the Criminal Law Article ("CL"). The court declined to impose a fine. Neither the State nor Poffenberger argued that that conviction merged with another offense.

that was found in a car in which he was a passenger. He was convicted and sentenced on both charges. *Id.* at 164-65.

On appeal, the Court of Appeals framed the issue before it as "whether dual convictions for possession of cocaine with intent to distribute and for use of drug paraphernalia lie when the latter conviction is based solely on the possession of the vial containing the cocaine on which the former conviction is based." *Id.* at 164. The Court recognized that the evidence was legally sufficient to support a conviction on the paraphernalia charge:

> Here, the only conceivable purpose of the vial was to contain, store, or conceal the cocaine which formed the basis for petitioner's conviction for possession with intent to distribute. Because it was used for that purpose in contravention of § 287A, the vial was drug paraphernalia. Of that, there can be no question.

Id. at 172-73.

Under the rule of lenity, however, the Court concluded that the General Assembly had not intended to permit "two convictions and, hence, double punishment" whenever a defendant was found in possession of a controlled dangerous substance that was stored in a container. *Id*. at 172.[5] For that reason, the Court reversed the conviction and sentence for the paraphernalia charge. *Id.* at 174-75.

[5] The rule of lenity is a principle of statutory construction. It mandates that two statutory offenses may not be punished separately if the General Assembly intended for them to be punished in one sentence. *Alexis v. State*, 437 Md. 457, 485 (2014).

Just as the evidence was sufficient to convict Dickerson of possession of paraphernalia for storing crack in a vial, so too was the evidence sufficient here to convict Poffenberger for storing heroin in a plastic bag. Poffenberger did not receive ineffective assistance of counsel when his attorney failed to move for a judgment of acquittal on a charge for which the evidence was legally sufficient to support a conviction.

It is true that under *Dickerson* Poffenberger's sentence for possession of paraphernalia would merge with the sentence for possession of heroin. In this case, however, the court imposed no sentence (or fine) for possession of paraphernalia. It is impossible to merge two sentences when the defendant received only one.

It is, however, also true that in *Dickerson* the Court did not merely merge the sentence for possession of paraphernalia into the sentence for possession of cocaine. Rather, the Court reversed the conviction for possession of paraphernalia. *Id.* at 174-75; *accord Butler v. State*, 377 Md. 470, 470 (2003) (summarily reversing a paraphernalia "conviction" in light of *Dickerson*). Accordingly, we reverse Poffenberger's conviction for possession of paraphernalia.

B. Use of a firearm in a drug-trafficking crime (Count 6)

In Count 6, the State charged Poffenberger with violating CL § 5-621(b)(2), which makes it a crime to "use, wear, carry, or transport a firearm" "[d]uring and in relation to a drug trafficking crime[.]" A "[d]rug trafficking crime" is a "felony or a conspiracy to commit a felony involving the possession, distribution, manufacture, or importation of a controlled dangerous substance[.]" CL § 5-621(a)(2). The term "[d]rug trafficking

crime" includes three of the crimes with which Poffenberger was charged: possession of marijuana with intent to distribute it, "manufacturing" marijuana, and keeping or maintaining a common nuisance.

In this case, the State does not contend that Poffenberger wore, carried, or transported a firearm "[d]uring and in relation to a drug trafficking crime[.]" Therefore, the only question is whether Poffenberger used a firearm "[d]uring and in relation to a drug trafficking crime" (or, more precisely, whether the evidence was sufficient to support his conviction for using a firearm "[d]uring and in relation to a drug trafficking crime").

In *Harris v. State*, 331 Md. 137 (1993), the Court of Appeals reversed a conviction for using, wearing, carrying, or transporting a semi-automatic assault weapon during and in relation to a drug-trafficking crime. During a search of a suspected stash house, the police found Harris on the first floor; $36,000 worth of cocaine in a hallway closet on the second floor; and three firearms, including an Uzi, in Harris's bedroom, also on the second floor. *Id.* at 143. Harris had been convicted under the predecessor to CL § 5-621, Md. Code (1957, 1992 Repl. Vol.), Article 27, § 281A, which made "it a crime for a person to use or to wear, carry or transport a firearm during, and in relation to, a drug trafficking crime." *Id.* at 144-45.

Because there was no contention that Harris had worn, carried, or transported a firearm, the *Harris* Court focused upon the meaning of the statutory term "use." For guidance, the Court looked to Maryland Code (1957, 1982 Repl. Vol., 1986 Supp.), Art.

27, § 36B(d), which proscribed the "use" of a handgun in the commission of a felony or a crime of violence. In interpreting § 36B(d), the Court had recently held that "use" entailed "'more than mere illegal possession of a handgun.'" *Id*. at 149 (quoting *Wynn v. State*, 313 Md. 533, 541 (1988)). Thus, for example, the Court had held that a defendant did not "use" a gun in the commission of a felony or a crime of violence merely because he had the gun in his possession when he committed the crime of housebreaking. *Id.* at 148 (citing *Wynn v. State*, 313 Md. at 544).

The Court also looked to the legislative history of § 281A, which was enacted in 1989 as part of the "Drug Kingpin Act." *Id*. at 150. The Court emphasized that, when the General Assembly enacted § 281A, it was "very much aware" of the meaning that the Court had ascribed to the term "use." *Id.* at 152. The Court also emphasized that, as originally drafted, § 281A(b) prohibited using *or possessing* a firearm during or in relation to a drug trafficking crime. *Id*. at 151. The General Assembly, however, ultimately deleted the term "possesses" from the final version of the legislation and added the terms "wears, carries, or transports." *Id*. at 152. "Had the punishment of one who possesses a firearm during and in relation to a drug trafficking crime been the Legislature's goal," the Court observed, "it would not have been necessary for it to delete that term." *Id.*[6]

[6] The Court recognized that, in interpreting a similar federal statute (18 U.S.C. § 924(c)), "[t]he majority of federal courts" had held that a firearm is "used" "if possession is an integral part of the predicate offense or if the firearm is within easy reach and

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The Court held that the term "use" should have the same meaning under § 36B(d), which proscribed the "use" of a handgun in the commission of a felony or a crime of violence, as it did under § 281A(b), which proscribed the "use" of a firearm during and in relation to a drug-trafficking offense. Thus, in interpreting § 281A(b), the Court incorporated the definition of "use" from the other statute: to "carry out a purpose or action by means of," to "make instrumental to an end or process," or to "apply to advantage." *Id.* at 157.[7] There being no evidence that Harris "used" the firearm in relation to the crime of possession with intent to distribute cocaine, the Court reversed his conviction.

In 1996, in response to the decision in *Harris*, the General Assembly amended § 281A(b) to expand the crime to cover persons who possessed a firearm in connection with a drug-trafficking crime. 1996 Md. Laws, chs. 561 & 562; *see also Johnson v.*

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available to protect the user during the ongoing drug trafficking offense." *Harris v. State*, 331 Md. at 154. The Court declined to follow the federal cases for two reasons. First, the federal cases were "not uniform." *Id.* at 157. Second, "the legislative history of § 281A(b) suggest[ed] that a different meaning of 'uses' was intended, since the Legislature chose to use the same language in section 281A(b) as it had used in section 36B, knowing the gloss [the Court] had put on the latter." *Id.*

[7] The Court said little about what would amount to the "use" of firearm, other than "active use or brandishment" (*Harris v. State*, 331 Md. at 147) or "brandishment or display." *Id.* at 154. This would presumably include firing the firearm, aiming it, cocking it, chambering a cartridge in it, or employing it, attempting to employ it, or threatening to employ it as a cudgel to beat someone. The Court added that its decision was not "contrary" to *Smith v. United States*, 508 U.S. 223 (1993), in which the Supreme Court held that trading a firearm for drugs would amount to "using" the firearm within the meaning of the similar federal statute.

State, 154 Md. App. 286, 306 (2003) (discussing the legislative history of § 281A). As amended, subsection (b) stated: "During and in relation to any drug trafficking crime, *a person who possesses a firearm under sufficient circumstances to constitute a nexus to the drug trafficking crime* or who uses, wears, carries, or transports a firearm is guilty of a separate felony." Md. Code (1957, 1996 Repl. Vol.), Art. 27, § 281A(b) (emphasis added).

In 2002, § 281A was recodified in its current form at CL § 5-621. In the recodification, the drafters divided subsection (b) into two subparts:

> (b) During and in relation to a drug trafficking crime, a person may not:
>
> (1) possess a firearm under sufficient circumstances to constitute a nexus to the drug trafficking crime; or
>
> (2) use, wear, carry, or transport a firearm.

The Revisor's note states that the new language was "derived without substantive change" from § 281A. Nonetheless, by dividing former § 281A(b) into two subparts, the 2002 amendment distinguishes the offense of using, wearing, carrying, or transporting a firearm during and in relation to drug-trafficking (in subsection (b)(2)) from the offense of possessing a firearm under sufficient circumstances to constitute a nexus to the drug-trafficking crime (in subsection (b)(1)).

In this case, the criminal information charged that on or about January 17, 2017, Poffenberger "unlawfully did while engaged in a drug trafficking crime *use, wear, carry, and transport a firearm*, to wit: Smith and Wesson .38 Caliber handgun[.]" It further

specified that Poffenberger was being charged pursuant to § 5-621(b)(2). The information did not charge Poffenberger with possessing a firearm under sufficient circumstances to constitute a nexus to a drug-trafficking crime, in violation of CL § 5-621(b)(1).

In these circumstances, where the State did not charge the defendant with possessing a firearm under sufficient circumstances to constitute a nexus to a drug-trafficking crime, and where the State did not contend that he "w[ore], carr[ied], or transport[ed]" a firearm, we can uphold the conviction only if the evidence was sufficient to prove, beyond a reasonable doubt, that he "used" a firearm in relation to a drug-trafficking crime. In answering that question, we are relegated to *Harris*'s definition of the term "use," which requires something beyond mere possession.

Here, the handgun was found behind a piece of particle board, inside a fireplace that was blocked by aquariums. Poffenberger may or may not have constructively possessed the handgun, but he did not "use" it during and in relation to a drug-trafficking crime any more than Harris "used" the Uzi that was found a floor away from him in the stash house where he was arrested. The evidence was legally insufficient to convict him of violating CL § 5-621(b)(2).[8]

[8] In advocating a contrary conclusion, the State focuses less on the statutory element of "use" than on the requirement that the defendant's conduct be "in relation to" a drug-trafficking crime. In the State's view, the jury could reasonably find that Poffenberger used the gun "in relation to" a drug-trafficking crime because he had hidden it near the entrance to the house, where it would be available to repel intruders who

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C. Theft of a firearm and possession of a stolen firearm (Counts 1 & 2)

Poffenberger was charged with theft (in the form of possession of stolen property) in violation of CL § 7-104(c) and with possession of a stolen, regulated firearm in violation of Md. Code (2003, 2011 Repl. Vol., 2016 Supp.), § 5-138 of the Public Safety Article ("PS").

CL § 7-104(c)(1)(i) prohibits a person from "possess[ing] stolen personal property knowing that it has been stolen, or believing that it probably has been stolen, if the person . . . intends to deprive the owner of the property." PS § 5-138 prohibits possession of "a stolen regulated firearm if the person knows or has reasonable cause to believe that the regulated firearm has been stolen." Thus, both statutes require proof of scienter – knowledge or a reasonable belief that the property was stolen.

Poffenberger stipulated that the handgun was stolen in 2013, four years before it was discovered inside the fireplace at 27 East Lee Street. In his motion for judgment of acquittal, however, defense counsel argued that there was no evidence that Poffenberger knew or would have had reasonable cause to believe the gun was stolen. Defense counsel agreed that in some circumstances a defendant might have notice that a gun had been stolen, but he asserted that the State had not proved any such circumstances in this case.

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wanted to steal his marijuana. The jury certainly could have found that Poffenberger possessed the gun "in relation to" a drug-trafficking crime. The jury, however, could not find that Poffenberger "used" the gun "in relation to" a drug-trafficking crime, in the active sense that Court of Appeals assigned to the term "use" in *Harris*. *See supra* n.7.

The State points to the evidence that Poffenberger possessed the stolen handgun, concealed it inside the fireplace, and was disqualified from owning a firearm. The State argues that this amounts to circumstantial evidence from which the jury could reasonably infer that Poffenberger knew or should have known that the handgun was stolen. Thus, in the State's view, if a convicted felon possessed a firearm that happened to have been stolen at any time in the past, and if he concealed it (as he probably would, because it is illegal for him to possess it), a jury could infer that he knew that it had been stolen, or believed that it probably had been stolen, or had reasonable cause to believe that it had been stolen.

In our judgment, this evidence of scienter is equivocal, at best. There is just too much of an inferential leap from the premises (surreptitious possession of a stolen gun by a person who is disqualified from possessing one) to the conclusion (knowledge or reasonable grounds to believe that the gun had been stolen). The evidence is not sufficient to prove, beyond a reasonable doubt, that Poffenberger knew or had reason to believe that the gun had been stolen.

Facts giving to a permissible inference of the required scienter under CL § 7-104(c) include "'the unexplained possession of recently stolen property, flight from the police or other evidence indicating an attempt to avoid capture and the condition of the property indicating a theft.'" *In re Landon G.*, 214 Md. App. 483, 501 (2013) (quoting *Commonwealth v. Carson*, 592 A.2d 1318, 1321 (Pa. Super. Ct. 1991)). In the instant case, four years had passed since the handgun had been stolen, there was no evidence of

flight, and photographs of the handgun do not show that it had been altered to disguise the prior ownership by obliterating the serial number. On these facts, the evidence was legally insufficient to give rise to a reasonable inference that Poffenberger knew or had reasonable cause to believe that the handgun had been stolen under CL § 7-104(c) or PS § 5-138. *Burns v. State*, 149 Md. App. 526, 549-51 (2003) (reversing a conviction for theft by possession of stolen property and commenting that the "passage of four months between the theft and [the defendant's] possession significantly attenuate[d] the conclusion the State [sought] to draw from the possession"); *United States v. White*, 824 F.3d 783, 787-89 (8th Cir. 2016) (interpreting the federal corollary to PS § 5-138 and holding that the evidence was legally insufficient to support a finding that the defendant "knew or had reasonable cause to believe the firearm was stolen" where the firearm had been stolen more than two years before it was discovered in the defendant's bedroom closet and there was no other evidence of "suspicious" circumstances linked to his possession of the gun), *reh'g en banc granted and vacated*, 824 F.3d 783, *rev'd in part on other grounds, reinstated in part*, 863 F.3d 784 (8th Cir. 2017).[9]

[9] The original appellate panel reversed White's conviction for possession of a stolen firearm, but affirmed his separate conviction for possession of an unregistered firearm. The panel's decision was vacated by the grant of rehearing en banc. The en banc court disagreed with the panel's decision not to reverse the conviction for possession of an unregistered firearm, but approved the panel's decision to reverse the conviction for possession of a stolen firearm. Hence, the en banc court "reinstated" the reversal of the conviction for possession of a stolen firearm. *United States v. White*, 863 F.3d 784, 785, 792 (8th Cir. 2017).

D. Remaining convictions (Counts 3-5 & 7-9)

Poffenberger contends that the evidence was legally insufficient to sustain his remaining convictions for possession of a firearm after being convicted of a disqualifying crime and a felony (Counts 3 and 4), possession of ammunition (Count 5), possession with intent to distribute marijuana (Count 7), "manufacturing" marijuana (Count 8),[10] and keeping or maintaining a common nuisance (Count 9). He argues that the "State failed to prove that the guns and marijuana belonged to [him]." Several of these contentions are unpreserved, and all lack merit.

"A criminal defendant who moves for judgment of acquittal is required by Md. Rule 4-324(a) to 'state with particularity all reasons why the motion should be granted[,]' and is not entitled to appellate review of reasons stated for the first time on appeal." *Starr v. State*, 405 Md. 293, 302 (2008). In moving for judgment of acquittal, defense counsel conceded that the evidence was legally sufficient to sustain a conviction under Counts 3, 5, and 7.[11] Poffenberger thereby forfeited or waived any sufficiency challenge as to these counts.

[10] In ordinary English, we would not say that someone "manufactured" marijuana; we would say that the person "grew" it or "cultivated" it. CL § 5-603, however, makes it a crime to "manufacture" a controlled dangerous substance, which includes marijuana. Consequently, the briefs talk about the crime of "manufacturing" marijuana.

[11] On Count 3, possession of a firearm after a disqualifying conviction, defense counsel stated, "I think that there probably is enough evidence with regard to that[.]" On Count 7, defense counsel stated that the evidence was "sufficient with regard to a possession with intent to distribute." Counsel initially omitted Count 5, possession of

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On the remaining counts, there was ample evidence linking Poffenberger to the drugs and the guns. Thomas testified that he and Poffenberger were partners in the marijuana-growing operation. He further testified that Poffenberger lived at 27 East Lee Street (where the marijuana was being grown), that there were guns in the house, and that he had seen Poffenberger in possession of the handgun at the house. Other evidence linking Poffenberger to 27 East Lee Street included the presence of his name on the mailbox, his arrival at the scene on the day the search warrant was executed, the letter addressed to him at 27 East Lee Street that was found inside the house, and the photographs on his cell phone depicting the marijuana-growing operation. This evidence was more than sufficient to support findings that Poffenberger possessed the marijuana and the guns found at the house.

II. Illegal Sentence

Poffenberger was convicted of possession of a regulated firearm after being convicted of a disqualifying crime in violation of PS § 5-133(b). The disqualifying crime was his 2007 conviction for "wanton endangerment with a firearm," in violation of West Virginia law. The circuit court sentenced Poffenberger to 15 years' imprisonment, with all but eight years suspended. The sentence is to run consecutively to the sentence imposed on Count 2.

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ammunition, from the motion for judgment of acquittal. He addressed Count 5 only after the court specifically inquired about it. In response to the court's inquiry, counsel said, "arguably they have . . . produced sufficient evidence to sustain that count."

The parties agree that this sentence exceeded the statutory maximum for the offense and, thus, is illegal. Although PS § 5-133(c) authorizes a penalty of up to 15 years when the disqualifying crime is a crime of violence or certain other enumerated crimes, the parties agree that Poffenberger's disqualifying crime did not fall within that subsection. Thus, the sentence for his violation of PS § 5-133(b) is governed by PS § 5-144(b), which authorizes a sentence of no more than five years' imprisonment. *See Jones v. State*, 420 Md. 437, 456 (2011). Accordingly, we must vacate Poffenberger's sentence on Count 3.

We have the discretion to vacate all of Poffenberger's other sentences as well, excluding those sentences imposed for the convictions reversed in this appeal. *Twigg v. State*, 447 Md. 1, 27-30 & n.14 (2016). We may exercise that discretion so as to provide the circuit court with the "maximum flexibility on remand to fashion a proper sentence that takes into account all of the relevant facts and circumstances," so long as it does not exceed the original aggregate sentence. *Id.* at 30 n.14. We elect to exercise that discretion to vacate the unreversed sentences in this case.

JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY FOR THEFT (COUNT 1), POSSESSION OF A STOLEN, REGULATED FIREARM (COUNT 2), USE OF A FIREARM IN RELATION TO A DRUG-TRAFFICKING CRIME (COUNT 6), AND POSSESSION WITH INTENT TO USE DRUG PARAPHERNALIA (COUNT 11) REVERSED. JUDGMENTS OF CONVICTION OTHERWISE AFFIRMED. SENTENCES IMPOSED ON ALL COUNTS

VACATED. CASE REMANDED FOR RESENTENCING CONSISTENT WITH THIS OPINION. COSTS TO BE SPLIT EVENLY BETWEEN APPELLANT AND WASHINGTON COUNTY.