Circuit Court for Calvert County
Case No. 04-K-17-000189

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0047

September Term, 2018

CEPHAS TRAVIS HUTCHINS

v.

STATE OF MARYLAND

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

JJ.

Opinion by Wright, J.

Filed: May 10, 2019

A jury in the Circuit Court for Calvert County convicted Cephas Hutchins, appellant, of possession of cocaine and possession of cocaine with intent to distribute. The jury sentenced Hutchins to seven years' imprisonment with 115 days credit for time served. In his appeal, Hutchins presents the following questions for our review which we have reworded and condensed for clarity:[1]

> 1. Did the circuit court err in declining to grant a continuance raised by defense counsel in an un-transcribed chambers discussion?
>
> 2. Did the circuit court err in allowing defense counsel to argue the reasonable doubt standard in his opening and closing arguments?
>
> 3. Was the evidence insufficient to support Hutchins' conviction for possession of cocaine?

[1] Hutchins presented his questions to the Court as follows:

> 1. Did the lower court err and/or abuse its discretion when it denied Hutchins' request to call two defense witnesses and request for a continuance when it was revealed that defense counsel violated the discovery rules by failing to timely provide the State with the names and addresses of the two witnesses?
>
> 2. Did the trial counsel provide ineffective assistance by failing to timely provide the State with the names and addresses of the two witnesses prior to trial?
>
> 3. Did the trial court err and/or abuse its discretion by allowing defense counsel to illegally argue the law of the reasonable doubt standard?
>
> 4. Did the trial counsel provide ineffective assistance of counsel by illegally arguing the law of reasonable doubt standard?
>
> 5. Was there sufficient evidence of possession of CDS to prove the element of possession of CDS and possession with intent to distribute?

We answer all three questions in the negative and affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On April 14, 2017, at approximately 4:12 p.m., Trooper First Class William Costello ("Trooper Costello"), a Maryland State Police Officer assigned to the Prince Frederick Barrack and Road Patrol, was "conducting traffic enforcement, specifically looking for seatbelt and cell phone violations." Trooper Costello was located on Dares Beach Road, east of the traffic circle located at the intersection of Dares Beach Road and Armory Road, sitting in an elevated position, which gave him a good vantage point to see potential seatbelt and cell phone violators. Trooper Costello observed a black Chevy Tahoe traveling westbound on Dares Beach Road, later identified to be Hutchins' vehicle. Trooper Costello saw Hutchins driving without wearing his seatbelt.

Trooper Costello activated his emergency equipment and tried to stop Hutchins "right there on Dares Beach." Hutchins did not stop, and instead continued into the traffic circle located at Armory Road and Dares Beach. Hutchins entered the traffic circle, turned right, and appeared like he would continue driving straight, as "[h]e did not slow and turn a turn signal on." Instead, Hutchins continued driving and then turned left "at the last moment [he] could" into the parking lot where his barber shop was located.

When Hutchins abruptly turned left, Trooper Costello lost sight of him for a few seconds, but regained sight of the vehicle in the parking lot. Hutchins "didn't stop right there at the end of the parking lot." Instead, Hutchins "continued down through the

parking lot into the back[-]left portion of the parking lot." There were no other vehicles in the parking lot at that time.

After stopping behind Hutchins' vehicle, Trooper Costello "made contact" with Hutchins. Trooper Costello approached the vehicle's driver's side and found the window rolled down, which it had been since Hutchins turned into the barber shop parking lot. After letting Hutchins know why he was stopped, Hutchins said because "it was a short drive from where he was coming from to the barber shop," he forgot to put on his seatbelt. Trooper Costello testified that Hutchins had a "very nervous demeanor," that Hutchins' carotid artery in his neck was pulsing rapidly, and that Hutchins was breathing rapidly. Trooper Costello requested the assistance of other officers and requested that a K-9 unit be sent to his location.

Corporal Richard Wilson, a trained K-9 operator in the Patrol Division of the Calvert County Sheriff's Office, arrived on the scene with his K-9 partner Dexter ("K-9 Dexter") to perform a "CDS sniff" of Hutchins' vehicle. Corporal Wilson and K-9 Dexter "started at the rear bumper on the driver's side." When K-9 Dexter "got to the passenger side, he immediately turned and . . . started walking along the passenger side." K-9 Dexter then "started to show changes in behavior." At trial, Corporal Wilson testified that K-9 Dexter's changes in behavior occurred when he smelled "the odor of one of his narcotics that he is trained to identify."[2]

[2] K-9 Dexter was trained to recognize the odor of heroin, cocaine, and marijuana.

After K-9 Dexter got to the passenger side of Hutchins' vehicle, "[h]is breathing became heavy and rapid" and he "put his nose up in the air[,]" indicating that he was "trying to gauge where the odor is strongest so he knows which way to go." K-9 Dexter led Corporal Wilson to the front of Hutchins' vehicle. K-9 Dexter turned left, went along the front of the car, and continued to breathe heavily with his nose up in the air. This continued until K-9 Dexter had walked to the driver's door, where he then "stopped walking . . . jumped up on his back two legs and put his front paws up on the driver's door." Corporal Wilson testified that "indicated a positive alert to the vehicle for odor of some sort of CDS that he has been trained on." At that point, Corporal Wilson waited a few seconds to see if K-9 Dexter would "come off of" the scent; when he did not, Corporal Wilson had K-9 Dexter's "final response."

After K-9 Dexter identified a positive scent, Corporal Wilson notified Trooper Costello so that the two could conduct a search of Hutchins' person and vehicle. This search was intended to "find evidence of drugs being in the car so that [Corporal Wilson could] verify that [K-9] Dexter actually smelled the drugs that he is saying he smelled." Corporal Wilson and Trooper Costello did not find drugs in the vehicle.

After the search, Corporal Wilson found a "plastic baggie with [a] rock substance inside it with the notebook paper wrapped around it," which was located "behind both [Hutchins'] car and [Trooper Costello's] car," near the entrance of the parking lot.[3]

[3] On cross-examination, Corporal Wilson testified that he did not see Hutchins drop the baggie on the ground and that K-9 Dexter "didn't walk over that way" towards

Corporal Wilson showed Trooper Costello the location, which was "[t]he same location, that was the same moment that [Trooper Costello] had lost visual of the driver's side." When confronted with the drugs, Hutchins recognized the drug as crack cocaine, but denied that it belonged to him.[4]

After securing the drugs, Trooper Costello seized two cellphones and $532.00 in cash from Hutchins. Senior Trooper Dustin Brill ("Trooper Brill") analyzed the contents of the two cellphones. At trial, Trooper Brill was qualified and accepted as an expert in the Cellebrite Extraction System.[5] He testified that he knew the cellphone belonged to Hutchins based on e-mails associated with Hutchins' personal email address, but that he could not identify the sender and receiver of the text messages on the phone.

Sergeant Christopher Parsons ("Sgt. Parsons")[6] corroborated Trooper Brill's testimony. He testified as to the drugs and the contents of messages in Hutchins'

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the location of the drugs. He also testified that K-9 Dexter was not trained to find physical drugs, but was trained to find "[t]he odor of drugs." During recross examination, Corporal Wilson testified that "you have to have the actual tangible evidence [of drugs] to have the odor" that K-9 Dexter could alert to.

[4] Trooper Costello testified that the drugs were not inside of the Ziploc plastic baggie. Instead, he stated that Corporal Wilson showed him "[a] small piece of paper, and inside the paper was a rock like substance" that Trooper Costello suspected was crack cocaine.

[5] According to Trooper Brill's testimony, a Cellebrite Extraction System is a device that is used to download phones so that analysts can look at the phone's data. It also downloads "deleted" data.

[6] Sergeant Parsons was qualified and accepted as an expert "in the

cellphone, determining that both were indicative of distribution. When questioned about whether the package of drugs indicated distribution, Sgt. Parsons responded affirmatively:

> I mean the way it is packaged, it's five grams, just shy of five grams packaged together, you don't see that with users. Users are typically going to buy a 20 rock, you know, a 50 rock, maybe a 100 rock.

Sgt. Parsons also testified that the lack of drug paraphernalia in Hutchins' vehicle was significant because "a crack user is typically going to have paraphernalia on them so that they can ingest crack cocaine." He also found the money recovered to be indicative of distribution.

Sgt. Parsons next testified about the connection between Hutchins' cellphone text messages and drug distribution. First, he testified that the password to the cellphone, "blow," was street slang for cocaine. He also spoke of messages directed toward Hutchins wishing him – Merry Christmas and a happy birthday. He further testified about text messages that indicated drug activity, such as one stating: "I'll try one 2 c how it is, but I – so I'll try one, but I'm going to put it together myself." Trooper Brill opined that this message was indicative of "cooking" cocaine, the process by which cocaine becomes crack cocaine.

area of controlled dangerous substance investigations, detection, methods of distribution and trafficking, consumption, packaging, use, and value of controlled dangerous substances and paraphernalia, as well as to facts and circumstances of controlled distribution substance[s], [and] distribution of controlled substances[.]"

At the close of the State's case, and before the circuit court instructed the jury, Hutchins' counsel moved for Judgment of Acquittal on the grounds that the evidence was insufficient for a jury to find beyond a reasonable doubt that Hutchins was in possession of the cocaine. Defense counsel contended that K-9 Dexter could not indicate which of the three drugs he smelled by Hutchins' driver's side door, and that no witnesses saw Hutchins drop the cocaine. As to possession of cocaine with intent to distribute, defense counsel argued that although Sgt. Parsons testified about the contents of Hutchins' cell phone, Trooper Brill was unable to identify who sent and received those messages. Defense counsel also argued that the State failed to establish that on April 14, 2017, Hutchins was sending text messages related to drugs. The court denied the motion, which defense counsel renewed on the second day of trial.

The jury found Hutchins guilty of count one, possession with intent to distribute cocaine, and count two, possession of cocaine.[7] Approximately a week later, Hutchins filed a Motion for New Trial and Request for Hearing, wherein he alleged that the evidence was insufficient to convict him and raised, for the first time, the claim that his trial attorney rendered ineffective assistance of counsel.[8] A hearing on the motion was

[7] Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL") § 5-601(a)(1) prohibits the possession of controlled dangerous substances (which, under CL § 5-403(b)(3)(iv), includes cocaine). CL § 5-602 prohibits the possession of CDS with the intent to distribute. Under CL § 5-101(v), "possess" means "to exercise actual or constructive dominion or control over a thing by one or more persons."

[8] Mr. Warren, Hutchins' trial attorney, entered a motion to withdraw on December 5, 2017. Mr. Harvey, Hutchins' new counsel, entered his appearance thereafter.

held on January 26, 2018. At a sentencing hearing on March 5, 2018, the circuit court sentenced Hutchins to seven years to be served, with a credit for 115 days. Hutchins noted his timely appeal to this Court on March 16, 2018.

DISCUSSION

I.

A. Continuance or Postponement

Pursuant to Md. Rule 4-263(e)(1), defense counsel is required to furnish the names, addresses, and written statements for each defense witness, other than the defendant, to the State. On November 14, 2017, during a discussion with the parties about a plea offer, the circuit court judge stated the following:

> THE COURT: The other things you need to know are the following, before we – when we started this morning's discussion Mr. Warren gave me his *voir dire*. On the *voir dire* were two witnesses that he may or may not want to call in your case. He had an obligation to give those names to the State's Attorney's Office 30 days before today. He did not. Those witnesses will not be allowed to be called. And they are, for the record, Len Elter, E-L-T-E-R, Senior, and Valerie Hampton. So I don't know if that makes a difference in your calculus as to whether or not to accept or reject the State's offer.

Hutchins concedes that trial counsel violated Md. Rule 4-263(e)(1), but argues that the circuit court should have either (1) granted Hutchins' request for a continuance, or (2) postponed the trial. Hutchins further alleges that the circuit court violated his right to call witnesses under the Sixth Amendment of the United States Constitution. Hutchins also

claims that his attorney's failure to call these two witnesses constituted ineffective assistance of counsel.

The State responds that this issue is unpreserved because Hutchins raised it for the first time in a motion for a new trial. The State avers that the transcript does not reflect any "request to call" the two witnesses, and that Hutchins errs in relying on "an untranscribed conference in chambers" as evidence that defense counsel requested a continuance or postponement. The State argues that this Court should decline to review Hutchins' ineffective assistance of counsel claim on direct appeal.

This issue as to the "request to call" the two witnesses is barely preserved for our review. The notice to the State that Hutchins wanted to call the two witnesses belatedly came not in a formal request, but in the form of a request for *voir dire*. *See* Md. Rule 8-

131(a).[9] The record indicates that the circuit court considered whether it should permit Hutchins' two witnesses to testify and decided to deny counsel's request.[10]

Pursuant to Md. Rule 4-263(e)(1), the defense is required to provide the State's Attorney with the names and addresses of all defense witnesses it intends to call 30 days before trial. *See* Md. Rule 4-263(h)(2) (requiring that defense disclosures be made "no later than 30 days before the first scheduled trial date"). Where a party fails to disclose information under Md. Rule 4-263, the court may exercise its discretion in issuing sanctions. *See* Md. Rule 4-263(n).[11]

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[9] Md. Rule 8-131(a) provides:

> The issues of jurisdiction of the trial court over the subject matter and, unless waived under [Md.] Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue *unless it plainly appears by the record to have been raised in or decided by the trial court*, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

(Emphasis added).

[10] In arguing that a request to call the two witnesses was made, Hutchins relies on an un-transcribed conference in chambers. The transcript of the trial reflects no discussion for a continuance or a postponement. The transcript also does not reflect any request to call those witnesses by Hutchins.

[11] Md. Rule 4-263(n), which governs sanctions, states:

> 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,

The Rule is intended to enable the State to investigate information disclosed by the defense. *See Simms v. State*, 194 Md. App. 285, 314 (2010), *cert. granted*, 417 Md. 384, *aff.*, 420 Md. 705. Although Hutchins argues that the circuit court erred in failing to grant him a postponement or a continuance, the court is under no obligation to grant a postponement, as it has the discretion to fashion what it deems to be an appropriate remedy for a violation of Md. Rule 4-263. *See Howard v. State*, 440 Md. 427, 444 (2014). Given this wide latitude, we review a circuit court's decision to deny a postponement or continuance for an abuse of discretion. *See Howard*, 440 Md. 440 n.9; *Prince v. State*, 216 Md. App. 178, 203, *cert denied*, 438 Md. 741 (2014). To show an abuse of discretion, the party requesting the continuance must show:

> (1) [T]hat he had a reasonable expectation of securing the evidence of the absent witness or witnesses within some reasonable time; (2) that the evidence was competent and material, and he believed that the case could not be fairly tried without it; *and* (3) that he had made diligent and proper efforts to secure the evidence.

Id. at 204 (quoting *Smith v. State*, 103 Md. App. 310, 323 (1995)).

Courts should also consider the following factors when exercising the discretion to issue sanctions:

> 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.

> (1) [T]he 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, 572-73 (2007).

The circuit court did not err in not permitting the two witnesses to testify or in failing to sanction the defense counsel. The circuit court's decision to exclude these witnesses was reasonable because Hutchins failed to disclose the witnesses' names to the State in the 30 days before trial. The circuit court properly exercised its discretion pursuant to Md. Rule 4-263. While preventing these witnesses from testifying on behalf of the defense may have been harsh, Md. Rule 4-263 plainly requires the defendant to disclose the names and addresses of their witnesses, and not wait until the trial date. If they do, it is at their peril.

B. Ineffective Assistance of Counsel

Hutchins argues that trial counsel's violation of Md. Rule 4-263(e)(1) amounted to ineffective assistance of counsel. For the reasons below, we decline to address this claim.

Generally, post-conviction proceedings are the appropriate time to address ineffective assistance of counsel claims since "the trial record rarely reveals why counsel acted or omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to the allegations of the counsel's ineffectiveness." *Mosley v. State*, 378 Md. 548, 560 (2003) (footnote omitted). If the trial record does not *clearly* "illuminate why counsel's actions were ineffective[,]"

appellate courts are placed in the "perilous process of second-guessing without the benefit of potentially essential information." *Id.* at 561 (quotations and citations omitted).

This rule is not absolute, and we will review "exceptional cases where the trial record reveals counsel's ineffectiveness to be . . . 'blatant and egregious.'" *Mosley*, 378 Md. at 562-63 (quotation omitted). One such case is *In re Parris W.*, 363 Md. 717 (2001), where defense counsel subpoenaed two "alibi" witnesses for the wrong court date, despite having received notice of a change in the trial date. *Id.* at 721. The Court of Appeals found that the case fell within the exception to the general rule and explained that "[t]he trial record is developed sufficiently to permit review and evaluation of the merits of the claim, and *none of the critical facts surrounding counsel's conduct [are] in dispute*." *Id.* at 727 (emphasis added) (footnote omitted). The Court held that counsel's performance was deficient and prejudicial to the appellant. *Id.* at 730.

In *Mosley*, 378 Md. at 553, a defendant appealed convictions for assault, robbery, wearing or carrying a dangerous weapon, and robbery with a dangerous or deadly weapon. He contended that his counsel was ineffective because, in his motion for judgment of acquittal, counsel failed to raise the evidence that the "dangerous weapon" was an air gun. *Id.* at 554. When the record came to this Court, it contained no mention of the air gun. *Id.* This Court determined that the evidence was sufficient to sustain his conviction, and declined to address his ineffective assistance claim. *Id.* The Court of Appeals vacated that judgment, and held that it declined to address Mosley's ineffective

assistance claim because critical facts were in dispute. *Id.* at 569. Namely, the evidence related to whether the weapon Mosley used was really an air gun. *Id.* at 571.

Only if "the facts found in the trial record are sufficiently developed to clearly reveal ineffective assistance of counsel and that counsel's performance adversely prejudiced the defendant," will we consider an ineffective assistance claim on direct review. *Mosley*, 378 Md. at 567. This is not such a case. While Hutchins heavily relies on *Parris W.* to bolster his claim, that comparison is fatally flawed. In *Parris W.*, the error of counsel was clearly evident; here, such error is not so apparent. In this case, defense counsel never acknowledged this alleged error on the record, but raised it for the first time in a motion for new trial.[12] We have no record before us on which to test the hypothesis that "there is nothing that could justify [defense counsel's] failure to timely provide the State with the names and addresses of the two desired defense witnesses," as the reason for counsel's failure to do so remains in dispute. Further, we were informed at argument that these two witnesses were not alibi witnesses. Therefore, their testimony may have been cumulative of testimony that was before the court. This fact may well have factored into trial counsel's decision not to pursue the matter prior to trial. Therefore, we decline to consider this issue on direct appeal.

II.

Reasonable Doubt Argument

[12] A defendant may raise an ineffective assistance of counsel claim in a motion for new trial. *See Ruth v. State*, 133 Md. App. 358, 367-70 (2000).

In his opening statement, defense counsel stated:

But more importantly, because this is a criminal case, and the State has the burden throughout this case, the State has a burden exclusively to prove the case beyond a reasonable doubt. My client, Mr. Hutchins, doesn't have a burden whatsoever. All he has to do is show up for court. He doesn't have to put on a case. He just has to be here.

So we are asking you that you bear that in mind throughout the course of this trial that there is always a State burden to eliminate every reasonable doubt from your mind. That's the State's burden. They have to eliminate every reasonable doubt from your mind.

And so we are confident that the State cannot prove beyond a reasonable doubt, eliminate all reasonable doubt from your mind, that Mr. Hutchins was in possession of any kind of cocaine, or drug, or narcotic whatsoever on April 14th, 2017. They simply cannot and will not prove that beyond a reasonable doubt.

During closing arguments, defense counsel stated:

So, in closing, let me just remind you as you go back to deliberate, ladies and gentlemen, bear in mind that, as Honorable Judge Clagett indicated to you, that presumption of innocence has remained with my client throughout this proceeding, that this highest of burdens in our judicial system, proof beyond a reasonable doubt, that is eliminate each and every element of the State's case beyond a reasonable doubt, [. . .] must eliminate reasonable doubt from your mind, just eliminate.

In effect when you bring these cases, and they are solid, and they are compelling, and com -- persuasive, to use a few other sports analogies, it's analogous to scoring a touchdown. You carried that ball over the goal line. Nobody knows, this is -- it's a -- it's compelling, it's persuasive. I have scored a touchdown. It's compelling. It's so overwhelming and compelling you will walk out of the courthouse and say, look, you know, I know that guy was guilty, the evidence was so strong and so overwhelming that I know he was guilty, but the State hasn't come close to that. It's analogous to a slam dunk, a home run. You have run the whole course. The State hasn't come close to that.

Hutchins argues that the circuit court erred in allowing defense counsel to argue the law of reasonable doubt. Hutchins also contends that defense counsel violated his right to effective assistance of counsel by making this reasonable doubt argument, but concedes that we may decline to address the issue.[13] The State responds that Hutchins' argument is unpreserved because defense counsel "did not object to his own opening statement" or his closing statement. The State also avers that we should decline to address Hutchins' ineffective assistance of counsel claim on direct review.

"[U]nless there exists a dispute as to the proper interpretation of the law of the crime for which there is a s*ound basis*, the court's instructions are binding on the jury and counsel as well." *Newman v. State*, 65 Md. App. 85, 101 (1985) (quotations and citations omitted) (citations in original). "Arguing law includes stating, quoting, discussing, or commenting upon a legal proposition, principle, rule, or state." *Id.* at 102 (quoting *Bonner v. State*, 43 Md. App. 518, 524 (1979)). The Court of Appeals has articulated the binding "bedrock characteristics" of the law that are not subject to dispute by counsel:

> (1) The accused is presumed innocent until proved guilty by the State by evidence beyond a reasonable doubt.
>
> (2) The State has the burden to produce evidence of each element of the crime establishing the defendant's guilt.
>
> (3) The defendant does not have to testify and the jury may infer no guilt because of his silence.

[13] We fully accept Hutchins' invitation and will decline to address this ineffective assistance of counsel claim.

(4) The evidence to impeach the defendant bears only on his credibility and may not be used to prove the substance of the offense.

(5) The evidence is limited to the testimony (and reasonable inferences therefrom) and the exhibits admitted into evidence.

(6) Evidence does not include the remarks of the trial judge nor the arguments of counsel.

Montgomery, 292 Md. at 91.

A jury has only the limited authority to decide "the law of the crime," "the definition of the crime," and the "legal effect of the evidence before [it]." *Stevenson*, 289 Md. at 167, 178 (citations omitted). Counsel may *only* argue law "where a dispute . . . exists as to the law of the crime." *White*, 66 Md. App. at 118.

"[D]uring closing argument, counsel must confine his or her oral advocacy to the issues in the case, but is afforded . . . wide latitude to engage in rhetorical flourishes and to invite the jury to draw inferences." *Ingram v. State*, 427 Md. 717, 727 (2012) (citations omitted). Here, counsel's inartful sports analogies, at best or at worse – we cannot tell which – were nothing more than "rhetorical flourishes." As to the concepts of reasonable doubt, defense counsel did not "argue that the reasonable doubt standard was something other than what the court described in its instruction." *Anderson v. State*, 227 Md. App. 584, 591 (2016). We discern no error.

III.

As to the sufficiency of evidence to support Hutchins' conviction for possession of cocaine, at the close of the State's case, defense counsel moved for Judgment of Acquittal

on both counts. As to possession, trial counsel argued that no officer or witness saw Hutchins "physically handle, discard, or place any object on the ground whatsoever."

The State responded that overwhelming evidence indicated possession: K-9 Dexter's CDS alert; Corporal Wilson's recovery of over four grams of cocaine at the "exact location" Trooper Costello lost sight of Hutchins' vehicle; Hutchins' ability to identify the cocaine; and the contents of Hutchins' cellphone, which included the password "blow," as well as text messages that Sgt. Parsons testified were replete with language that referenced drugs. The circuit court denied Hutchins' motion, finding that the evidence indicated both possession and possession with the intent to distribute. Defense counsel renewed his Motion for Judgment of Acquittal on the second day of trial, incorporating his former arguments, which the court denied.

Hutchins avers that the evidence was insufficient to convict him of possession of cocaine. The State responds that a jury could reasonably infer that Hutchins was in constructive possession of the cocaine based on the evidence adduced at trial.

"The test of 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." *Donati v. State*, 215 Md. App. 686, 718 (2014) (quotations and citation omitted). Circumstantial evidence is enough to sustain a conviction. *Neal v. State*, 191 Md. App. 297, 314 (2010). We defer to all of the reasonable inferences that the jury could have drawn, as they are

best positioned to "assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]" *Id.* (quotations and citations omitted).

To sustain a conviction for a "possessory offense," the evidence must either directly show, or support an inference that, the defendant exercised some dominion or control over the drug, and that the defendant knew of both the presence and the illicit nature of the drug. *Jefferson v. State*, 194 Md. App. 190, 214 (2010) (citations omitted); *Handy v. State*, 175 Md. App. 538, 563 (2007) (citations omitted). We examine several factors to determine whether an individual was in possession of CDS: 1) the proximity between the defendant and the contraband; 2) whether the contraband was within the view or knowledge of the defendant; 3) whether the defendant had ownership of or some possessory right in where the contraband was found; and 4) whether a reasonable inference can be drawn that the defendant was participating in the mutual use and enjoyment of the contraband. *Cerrato-Molina v. State*, 223 Md. App. 329, 335 (2015) (citing *Folk v. State*, 11 Md. App. 508, 518 (1971)). This list is not exhaustive, and we look to the unique "facts and circumstances of each case." *Smith v. State*, 415 Md. 174, 198 (2010).

The evidence here was sufficient to support the jury's finding that Hutchins was in possession of the cocaine. The crack cocaine was found "behind both [Hutchins'] car and [Trooper Costello's] car, but . . . in the parking lot up near the entrance to it," precisely in the area that Trooper Costello testified he first lost sight of Hutchins' vehicle. In his brief and at oral argument, Hutchins makes much of the fact that the drug was

located on the ground. The drugs "need not be found on [Hutchins'] person to establish possession." *Handy*, 175 Md. App. at 563; *see also Smith*, 415 Md. at 187 (holding that "the mere fact that the contraband is not found on the defendant's person does not necessarily preclude an inference . . . that the defendant had possession of the contraband.") (citation omitted).

At the scene of his arrest, Hutchins recognized the drugs to be crack cocaine but denied that it belonged to him. Hutchins had a possessory interest in the vehicle, and the drugs were located nearby. This evidence leads to the rational inference that Hutchins exercised some dominion and control of the drugs. In addition, there was evidence that Hutchins had participated in drug distribution, which included the use of the password "blow" to unlock his phone. On his cellphone, there were several text messages that Sgt. Parsons testified were related to drug distribution. Also, K-9 Dexter alerted to the presence of either cocaine, marijuana, or heroin in the vehicle during the CDS sniff. Therefore, the jury could infer that Hutchins had recently transported drugs or drug paraphernalia in the vehicle. In totality, this evidence, along with Hutchins' vehicle being the lone vehicle in the parking lot, and Hutchins' behavior when stopped by Trooper Costello, was enough for a jury to draw the reasonable inference that Hutchins was in possession of the crack cocaine.

Despite Hutchins' arguments to the contrary, whether the jury could have drawn an alternative inference that Hutchins was not in constructive possession of the crack cocaine is not relevant to our analysis. *See, e.g., State v. Smith*, 374 Md. 527, 557 (2003)

(observing that, in reviewing the sufficiency of the evidence, the issue is "not whether the [fact finder] could have made other inferences from the evidence . . . but whether the inference [it] did make was supported by the evidence."). In conclusion, the evidence was sufficient to convict Hutchins of possession of crack cocaine.

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