Circuit Court for Saint Mary's County
Case No. C-18-CR-19-000296

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 74

September Term, 2022

ANTHONY LEON BROOKS

v.

STATE OF MARYLAND

Wells, C.J.,
Graeff,
Berger,

JJ.

Opinion by Wells, C.J.

Filed: February 28, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

By indictment in the Circuit Court for Saint Mary's County, the State charged appellant, Anthony Leon Brooks ("Mr. Brooks"), with 15 counts, including: firearms possession by a prohibited person (i.e., one with certain prior disqualifying convictions); possession of a firearm with nexus to drug trafficking; and multiple counts of possession of, possession with intent to distribute, and distribution of a controlled dangerous substance ("CDS"). After a trial from November 9-10, 2021, a jury convicted Mr. Brooks on all counts. On February 24, 2022, the trial court sentenced Mr. Brooks to 45 years of incarceration. This appeal followed. On appeal, Mr. Brooks presents the following questions,[1] which we have slightly rephrased:

1. Was the evidence presented at trial legally sufficient to sustain Mr. Brooks' convictions for CDS distribution and firearms possession?

[1] Mr. Brooks' questions presented, verbatim, read:

1. Did the trial court err in denying Mr. Brooks' motion for a judgment of acquittal as to the distribution charges, where the State failed to put forth sufficient evidence for the jury to find beyond a reasonable doubt that a controlled dangerous substance was exchanged to another person, and/or as to the firearms charges, where the State failed to put forth sufficient evidence for the jury to find beyond a reasonable doubt that Mr. Brooks possessed any firearms?

2. Did the trial court err in imposing an illegal sentence enhancement under the mistaken belief that a mandatory minimum sentence was required?

3. Did the trial court err in permitting the State to elicit evidence about, and to comment in both its opening statement and closing argument on, Mr. Brooks' exercise of his Fifth Amendment right to remain silent so as to invite the jury to infer guilt from Mr. Brooks' silence?

2. Did the trial court err in imposing a mandatory minimum sentence enhancement as to Count 11?

3. Should this Court review for plain error whether the trial court erred when it did not, sua sponte, preclude the State from eliciting evidence, and making arguments based on, Mr. Brooks' refusal to give officers the pass code for his phone?

For the reasons we discuss below, we affirm the circuit court's judgment, except that we remand for resentencing on Count 11.

FACTUAL AND PROCEDURAL BACKGROUND

A. Trial Evidence

On April 2, 2019, the Vice Narcotics Unit of the Saint Mary's County Sheriff's Office executed a search warrant, in connection with a narcotics distribution investigation, at 46864 Rogers Drive in Leonardtown, Maryland. The search warrant allowed officers to, among other things, search the residence, search any persons in the residence, seize any evidence and paraphernalia found related to their narcotics investigation, and search and seize any cell phones or similar devices.

Generally, when executing a search warrant, the Emergency Services Team ("EST")[2] enters the location first, secures everyone where they are found, and conducts a quick search for any weapons within those individuals' reach. Once the location is safe and secured, then the officers conducting the search will enter, photographing each person and

[2] Emergency Service Teams consist of law enforcement officers. This team, in particular, was made up of members of the Saint Mary's County Sheriff's Office

documenting his or her location. Although it is not entirely clear from the testimony at trial, it appears the EST followed these general practices on April 2, 2019.[3]

After the EST secured the residence, the officers entered. Upon entering, Detective Potter found Mr. Brooks, his 11-year-old daughter, and Mr. Boothe in the living room; Detective Whipkey discovered Mr. Bond in the kitchen; and Detective Meyer found Mr. Brooks' girlfriend, Ms. Johnson, to whom the residence was leased, upstairs in a bedroom. Mr. Brooks' mother was also found upstairs. Each adult was advised of his or her *Miranda*[4] rights. Upon entry, Detective Potter was responsible for taking photographs of everyone where they were found, as well as any evidence discovered during the search.

Detective Meyer searched Mr. Brooks. Inside Mr. Brooks' sweatshirt pocket, the officer discovered a clear plastic bag containing seven capsules of a white powdery substance.[5] In the right rear pocket of Mr. Brooks' pants, the officer found a "large wad of cash" totaling $990, separated into three stacks. In his front right pocket, there was an

[3] The State did call one member of the EST to testify. Although neither the State nor defense counsel asked this individual directly if the EST followed its general practices on April 2, 2019 when its members entered the residence, he did testify that his role, in addition to assisting with the search of the downstairs bathroom, was "the initial entry and securing the location." Further, several officers also testified that they entered the residence after it was deemed secure and safe by the EST. Defense counsel did not call any witnesses at trial.

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

[5] Scientific testing showed that the seven capsules taken from Mr. Brooks contained 3.313 grams of heroin and fentanyl.

additional $40. Officers found another capsule containing a white powdery substance on the floor of the living room.[6]

On a coffee table in the living room, officers discovered a zippered camera bag that contained three semiautomatic pistols—a Glock 19 nine mm, a Smith and Wesson nine mm, and a .40 caliber Beretta—along with five magazines, three of which had ammunition, and 36 rounds of various calibers of ammunition.[7]

In the kitchen, Detective Whipkey encountered Mr. Bond, who he believed was having a seizure. After calling for medical assistance, the officer searched Mr. Bond and found an aluminum foil fold on him.[8] After emergency services tended to Mr. Bond, officers began to search the kitchen area. In and above the cabinets, officers found capsules with a white powdery substance in them, as well as empty capsules and a homemade smoking device used to ingest crack cocaine. Additionally, in the kitchen trash can, Detective Whipkey discovered "torn plastic baggies" which, he explained, are commonly used by "those involved in drug distribution" to more easily distribute drugs to customers.

In a downstairs bathroom, Detective Russell discovered syringes, syringe caps, spoons with residue, and capsules, some of which were empty and some of which contained residue.

[6] Scientific testing showed that this capsule contained heroin and fentanyl.

[7] No DNA or fingerprint identification could be made from the firearms or ammunition.

[8] Scientific testing determined that this fold contained heroin and fentanyl.

Upstairs, Detective Meyer found Ms. Johnson in a bedroom. Underneath a pillow on the bed, a member of the EST discovered a .25 caliber semiautomatic pistol with six live rounds of ammunition.[9]

Officers also found several phones in the residence, including a black Motorola cell phone. Detective Potter testified that Mr. Brooks told the officers that the Motorola phone was his, but "refused to give us the pass code for that phone."[10] Detective Potter also collected Mr. Boothe's phone, testifying that Mr. Boothe gave officers the pass code for it.

From Mr. Boothe's phone, the police extracted his communications with Mr. Brooks' phone, including text messages between the two from September 12, 2018 to April 2, 2019. In these texts, Mr. Boothe referenced his "bill", paying Mr. Brooks, and on numerous occasions, Mr. Boothe asked Mr. Brooks to provide him with "caps," "boy," and other unspecified items:

- "Hey u got 2 of them on u" (March 20, 2019)
- "Man I need 7 of them what's up who's got them" (March 18, 2019)
- "Hey can I give Lee ur number he wants a couple" (March 17, 2019)
- "What's up yo what's u with 3 of them things" (March 7, 2019)
- "What's up can u bring me 2 of them to my house" (March 6, 2019)

[9] Mr. Brooks was not charged in relation to the gun found in the bedroom.

[10] When the police extracted information from the Motorola phone, they were only able to obtain the phone number associated with the phone, which they used to identify the carrier and subscriber to the phone—Mr. Brooks.

- "What's up Talk to me can u do that for me please and I will pay u that plus some on my bill" (February 26, 2019)
- "What's up can u spot me a 5 till I get off my work tomorrow I have ten of it now and I pay on my bill also when I get off please" (February 25, 2019)
- "What's up yo I could use some caps just need something" (February 24, 2019)
- "What's up yo u got any boy" (February 24, 2019)
- When Mr. Brooks asked, "You got what you owe me," Mr. Boothe responded, "Part of it and u got boy too" (February 22, 2019)
- "What's up yo can u come down my way for a couple of them things and some of that boy" (February 22, 2019)
- "Call me brah need 2 me then things about to go push snow" (January 12, 2019)
- "Can I come get 3 caps for these boys" (January 11, 2019)
- One evening, Mr. Brooks informed Mr. Booth, "I got boy to." (January 10, 2019)
- "Can I come by around 730 in the morning and get one of them I got the 20 for it the box I get them from Fucked me and ain't give me shit out of them and Im half way sick now" (January 9, 2019)
- "Hey what's up yo u going to be home in about 45 mins to an hour so I can come talk at u and get a couple of them things" (December 31, 2018)

- "Hey I know the caps were full but Cory said ur a Fucking liar and all the caps were half full but I'm done with him period yo he robbed his grandmother yesterday and robbed another boy earlier for the money he just had every thing out his mouth is a lie" (December 30, 2018)
- "Where the caps full when u gave them to Cory" (December 30, 2018)
- "Be there in a min and I only need the 2 caps" (December 20, 2018)
- "When u get back need 4 of them" (December 19, 2018)
- "Just around about how long or what time need like 4 of them" (December 19, 2018)
- "I got the money for the 2 and I'll let you get that video camera for 3 of the I looked it up its still going for almost 200 on eBay and shit and its not stolen" (December 11, 2018)
- "Hey can I please come get two more before I have to take this ride to Prince Frederick please I'm still sick and I will do whatever pay double when I get back with the noon'" (October 16, 2018)
- "Can I come grab 3 of them" (September 22, 2018)
- "Can u lookout on them 3 till I get paid later please" (September 20, 2018)
- "Yo could u please spot me 3 of them things till my lunch break tomorrow my dad wasn't around for me to get paid when I got off I will give u the 60 bucks please u know I spend lots with u" (September 19, 2018)

Mr. Boothe also complained about the quality of the "dope" or "caps" he received. On September 12, 2018, Mr. Boothe texted Mr. Brooks, "[t]hat hundred was small as shit yo I shot the whole thing and barely got a buzz yo and I spend lots of money u need to do better if I going to fucks with u[.]" In early January of 2019, the following exchange occurred:

> [Mr. Boothe]: What's up buddy I ain't never complained but my buddy did both his and didn't even make him well and I shot my and never felt anything at all it barely taste like dope man what's up with that shit yo
>
> [Mr. Boothe]: So what's up with that shit yo
>
> [Mr. Boothe]: So what's up man whats up with them Fucked up caps
>
> [Mr. Brooks]: Fuck is you talking about you know I don't play no games

Shortly after he was arrested, Mr. Brooks made several calls from jail that were recorded. On April 3, 2019, in his first jail call, Mr. Brooks said to an unidentified speaker, "I think Patrick [Mr. Boothe] set me up, man." Later in the call, when Mr. Brooks stated that "[t]hey charged me with three [inaudible]," the unidentified speaker responded, "[o]nly three?" to which Mr. Brooks replied, "[y]eah." On his second call, shortly thereafter, Ms. Johnson, Mr. Brooks' girlfriend, told him that he is being charged "with four guns," to which Mr. Brooks responded, "I got three counts." Less than an hour later, on the third call that day, an unidentified speaker relayed to Mr. Brooks that "[h]e told me to tell you you know what you supposed to do, take the dope[,]" to which Mr. Brooks answered, "[y]eah." It appears then, that someone else joined the call, at which point Mr. Brooks and the two individuals started discussing the "drums."

> [Mr. Brooks]: I said talking about the drum.

[Unidentified Speaker]: I can't hear you, Bro.

[Unidentified Speaker]: He said they talking with the drum.

[Mr. Brooks]: He said they did?

[Unidentified Speaker]: Yeah.

[Mr. Brooks]: Man. (Inaudible.)

[Unidentified Speaker]: It carries 15 a drum.

[Unidentified Speaker]: Say what?

[Unidentified Speaker]: It carries 15 a drum.

[Unidentified Speaker]: (Inaudible.)

[Mr. Brooks]: (Inaudible.) You got to tell them that.

[Unidentified Speaker]: You heard him?

[Unidentified Speaker]: No, can you repeat that?

[Unidentified Speaker]: Only going to take them drums, man?[11]

Finally, on April 5, when Ms. Johnson told him that the "paper" stated that "they got a plastic bag containing seven plastic capsules," Mr. Brooks responded, "I didn't have seven. They did that [inaudible] I only had was four – only had five [inaudible]."

[11] In closing argument, the State argued to the jury that when Mr. Brooks stated on the April 3rd calls that he had been charged with three of something, he meant the three guns. Further, the State submitted to the jury that Mr. Brooks was using the term "drum" instead of the word "gun" when discussing these charges because he knew his calls were being recorded. Finally, the State argued that by telling someone else to take those possession of firearm charges, Mr. Brooks demonstrated that he knew about the location of the firearms.

B. Jury Verdict and Sentencing Hearing

The jury found Mr. Brooks guilty on all 15 counts, including Counts One, Two, and Three for possession of regulated firearms, Count Eight for possession of a firearm with nexus to drug trafficking, and Counts Ten and 11 for distribution of a CDS.

At the sentencing hearing, on February 24, 2022, the State argued that, under Criminal Law Article ("CR") § 5-608, Mr. Brooks was subject to a sentence enhancement. Specifically, the State argued that this was Mr. Brooks' fourth narcotics related conviction, and therefore, under CR § 5-608(d), the State believed that Mr. Brooks was subject to a mandatory minimum sentence of 40 years. Mr. Brooks did not contest the first two convictions, but disputed the "third" conviction,[12] arguing that it should not count against him under CR § 5-608 because he had not yet been sentenced for that conviction.

At the court's request, the State read aloud the current text of CR § 5-608, including, most relevant here, subsection (c), pointing out that a third time offender under the statute "is subject to imprisonment *not exceeding 25 years* or a fine." (emphasis added). Nevertheless, the State interpreted "not exceeding" to mean "not less than," and argued that a third time offender under the provision is subject to a mandatory minimum sentence, "not less than 25 [years]." In turn, the court also operated under this interpretation: "The bad news is this gives you a third conviction, and if you are convicted again, you are now facing a mandatory sentence." After a long discussion about whether Mr. Brooks had two

[12] In 2022, in a separate case, Mr. Brooks was convicted for conspiracy to distribute a CDS, but at the time of this Sentencing Hearing, he had not been sentenced yet for that 2022 conviction.

or three prior qualifying convictions, the trial court ultimately determined that he was a third time offender. Applying CR § 5-608(c), the court sentenced him as follows:

> Now, the mandatory minimum for the third time offender in the statute would be counts 10, 11 or 15. So for count 11 I'm going to sentence you to 25 years, which is the required, 25 years to the Department of Corrections, and I will make that consecutive to counts one, two, and three.

Additionally, the trial court sentenced Mr. Brooks to five years on each of Counts One, Two, and Three for possession of regulated firearms, consecutive to each other; five years on Count Eight for possession of a firearm with a nexus to drug trafficking, consecutive to all other sentences; and ten years on Count Ten for distribution of heroin, ten years on Count 12 for possession with intent to distribute, and ten years on Count 15 for possession with intent to distribute fentanyl within 1000 feet of a school, concurrent to each other and concurrent to all other sentences. The court merged the remaining counts and did not impose sentences for them. In total, Mr. Brooks was sentenced to 45 years of incarceration.

We will provide any additional facts as necessary.

DISCUSSION

I. The Trial Evidence Was Legally Sufficient to Sustain Mr. Brooks' Convictions.

A. Parties' Contentions

Mr. Brooks argues that the evidence was insufficient to sustain his convictions for the distribution of CDS and possession of firearms. As to the distribution charges, Mr. Brooks asserts that the State's evidence fails to provide sufficient evidence for a jury to conclude beyond a reasonable doubt that Mr. Brooks sold, exchanged, or transferred a CDS

to anyone on April 2, 2019. With respect to the firearms possession charges, Mr. Brooks argues that the State offered no evidence that Mr. Brooks knowingly exercised dominion or control over the handguns found in the camera bag.

In response, the State argues that the totality of the evidence provided a reasonable basis for the jury to infer that Mr. Brooks distributed a CDS to Mr. Boothe. Further, the State counters that it proffered a reasonable basis for the jury to infer that Mr. Brooks constructively possessed the three firearms found in close proximity to him at the time of the search.

B. Standard of Review

"The standard for appellate review of evidentiary sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Smith*, 374 Md. 527, 533-34 (2003) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis on "any" in *Jackson*)). "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." *Smith*, 374 Md. at 534 (cleaned up) (internal quotation marks omitted). Rather than re-weighing the evidence, we "determine whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Id.* (quoting *White v. State*, 363 Md. 150, 162 (2001)). "A valid conviction may be based solely on circumstantial evidence." *Id.*

C. Analysis

Evidence Sufficient to Convict Mr. Brooks of Distribution of CDS

CR § 5-602 prohibits a person from distributing or dispensing a controlled dangerous substance.[13] In the context of CDS, "distribute" means "to deliver." *Id.* § 5-101(m). And, "deliver" means "to make an actual, constructive, or attempted transfer or exchange from one person to another whether or not remuneration is paid or an agency relationship exists." *Id.* § 5-101(i). The State's evidence in this case, in its totality, presented a reasonable basis for the jury to infer that Mr. Brooks distributed a CDS to Mr. Boothe.

The text messages between the two could support an inference that Mr. Brooks routinely sold Mr. Boothe drugs. Mr. Brooks argues that the texts, often using terms like "caps" and "them," are too ambiguous to show that Mr. Boothe was buying capsules of CDS from Mr. Brooks in the months preceding April 2, 2019. However, on January 3, 2019, Mr. Boothe texted Mr. Brooks complaining that Mr. Brooks had provided him with something that "barely taste[s] like dope." Less than an hour later, Mr. Boothe followed up asking, "whats up with them Fucked up caps[?]" Read in the context of their

[13] CR § 5-602 reads:

> Except as otherwise provided in this title, a person may not:
>
> (1) distribute or dispense a controlled dangerous substance; or
>
> (2) possess a controlled dangerous substance in sufficient quantity reasonably to indicate under all circumstances an intent to distribute or dispense a controlled dangerous substance.

communications, in which Mr. Boothe repeatedly asked for "caps," one could reasonably infer that in this instance, and throughout their texts, when Mr. Boothe used the term "caps" or "them," he was referring to "dope."

Mr. Brooks argues that even if the evidence shows that Mr. Brooks distributed drugs to Mr. Boothe generally, that is not sufficient to conclude there was a distribution on the date at issue. *See Vandegrift v. State*, 82 Md. App. 617 (1990), and *Kohler v. State*, 203 Md. App. 110 (2012). In *Vandegrift*, this Court held that the evidence was insufficient to sustain a conviction for distributing marijuana where police observed the exchange of a brown paper bag for currency, but did not interpret the intercepted telephone communication to indicate marijuana would be exchanged. 82 Md. App at 642. We explained that one's testimony that "appellant was generally engaged in the distribution of marijuana is not, without more, enough to conclude that the contents of the paper bag was marijuana." *Id.* at 642-43. In *Kohler*, we held that a defendant may not be convicted of distribution of a CDS "based solely on his role as a buyer and receiver" of CDS because "distribution" requires delivery to another person. 203 Md. App. at 126-128.

However, these cases are distinguishable from the case at bar. First, the State was not arguing that Mr. Brooks should be convicted as a buyer of CDS, but rather as a seller. Second, the State presented more evidence to the jury than the fact that Mr. Brooks generally engaged in the distribution of CDS. On April 2, 2019, when the warrant was executed, Mr. Boothe texted Mr. Brooks, "What's up call me back." When the police entered the residence, Mr. Brooks and Mr. Boothe were both in the living room. Mr. Brooks had a plastic bag with seven capsules containing CDS in his sweatshirt pocket, $40 in his

front pant pocket, and $990 in his back pant pocket. There was also a capsule containing heroin and fentanyl found on the living room floor, in between Mr. Brooks and Mr. Boothe. In the kitchen and trash can, officers found torn baggies that are commonly used to distribute drugs. Presented with these circumstances and the text messages, a rational jury could infer that: (1) Mr. Boothe was at the residence to buy "caps" from Mr. Brooks; (2) Mr. Boothe gave Mr. Brooks $40 and that is why that money was separate from the three other stacks of cash in his back pant pocket; and (3) when police arrived, Mr. Boothe dropped the drug-filled capsule Mr. Brooks sold him on the floor. Based on the totality of the evidence presented to the jury, we determine that the evidence was sufficient to sustain Mr. Brooks' convictions for distribution of CDS.

Evidence Sufficient to Convict Mr. Brooks of Possession of Firearms

Pursuant to § 5-133(c) of the Public Safety ("PS") Article, a person previously convicted of certain crimes, including the distribution of a CDS, cannot "possess a regulated firearm." Additionally, CR § 5-621(b)(1) makes it unlawful to "possess a firearm" in connection with a drug trafficking crime. "'Possess' means to exercise actual or constructive dominion or control over a thing by one or more persons." CR § 5-101(v). *See also White v. State*, 250 Md. App. 604, 650 (2021) (quoting *Handy v. State*, 175 Md. App. 538, 564 (2007)). Contraband does not have to be found on a defendant's person to establish possession. *White*, 250 Md. App. at 651 (citing *State v. Suddith*, 379 Md. 425, 432 (2004)). "To prove possession of contraband, whether actual or constructive, joint or individual, the State must prove, beyond a reasonable doubt that the accused knew of both the presence and the general character or illicit nature of the substance." *Handy*, 175 Md.

App. at 564 (quoting *Dawkins v. State*, 313 Md. 638, 651 (1988)) (internal quotation marks omitted).

When determining whether a defendant had constructive possession over contraband, we consider the following four factors:

> 1) proximity between the defendant and the contraband, 2) the fact that the contraband was within the view or otherwise within the knowledge of the defendant, 3) ownership or some possessory right in the premise or the automobile in which the contraband is found, or 4) the presence of circumstances from which a reasonable inference could be drawn that the defendant was participating with others in the mutual use and enjoyment of the contraband.

Moseley v. State, 245 Md. App. 491, 505 (2020) (emphasis omitted) (quoting *Folk v. State*, 11 Md. App. 508, 518 (1971)).

For Mr. Brooks' argument that the State presented insufficient evidence to reasonably infer that he knowingly exercised dominion or control over the handguns found in the camera bag, he relies primarily on *Moye v. State*, 369 Md. 2 (2002), and *Parker v. State*, 402 Md. 372 (2007). In *Moye*, police approached a home after receiving a call regarding a man cutting people with a knife. 369 Md. at 5-6. The home was leased by a husband and wife, who rented out the basement to a man named Benson. *Id.* at 5. The wife's brother, Moye, also may have been staying with the couple at the time, although it was unclear from the record. *Id.* at 5, 5 n.2. When the police arrived, the couple and Benson exited the home. *Id.* at 6. From outside the home, officers observed Moye through the windows moving around the first floor, and then the basement. *Id.* After several minutes, Moye exited the home through a basement door and was arrested. *Id.* When the police entered, they searched the basement and discovered marijuana and cocaine in three opened

or partially opened drawers and the ceiling. *Id.* at 6-7. Moye was later convicted for possession of drugs and drug paraphernalia. *Id.* at 10-11.

In finding the evidence insufficient to sustain Moye's convictions for drug possession, the Supreme Court[14] relied on several similar cases, including *Taylor v. State*, 346 Md. 452 (1997). In *Taylor*, when police entered and searched a motel room occupied by Taylor and four other people, the petitioner was found lying on the floor, either asleep or pretending to be asleep. *Id.* at 455. Another occupant took a bag of marijuana out of his own carrying bag, informed the officers that it was his, and then directed the officers to another of his bags which also contained marijuana. *Id.* At trial, Taylor was convicted for possession of marijuana and paraphernalia. *Id.* at 456. The Supreme Court, however, reversed Taylor's conviction for possession, ruling:

> under the facts of this case, any finding that he was in possession of the marijuana could be based on no more than speculation or conjecture. The State conceded at trial that no marijuana or paraphernalia was found on [Taylor] or in his personal belongings, nor did the officers observe [Taylor] or any of the other occupants of the hotel room smoking marijuana. Viewing the evidence in the light most favorable to the State, [the officer's] testimony established only that Taylor was present in a room where marijuana had been smoked recently, that he was aware that it had been smoked, and that Taylor was in proximity to contraband that was concealed in a container belonging to another.

[14] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See, also*, Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland…."). The Judges of the Court are now called "Justices."

> The record is clear that [Taylor] was not in exclusive possession of the premises, and that the contraband was secreted in a hidden place not otherwise shown to be within [Taylor's] control. Accordingly, a rational inference cannot be drawn that he possessed the controlled dangerous substance.

Moye, 369 Md. at 15-16 (quoting *Taylor*, 346 Md. at 459).

Applying *Taylor*, the Court explained why one could only speculate as to Moye's knowledge or exercise of dominion or control over the drugs and paraphernalia found in the basement. *Id.* at 17. First, Moye did not have any ownership or possessory right in the premises where the drugs and paraphernalia were found. *Id.* at 17-18. Although Moye's sister leased the home, Benson was the sole lessee of the basement, and there was no evidence to suggest that Moye frequented the basement. *Id.* Second, the evidence failed to establish Moye's proximity to the drugs while he was observed in the basement. *Id.* at 18. Third, the evidence failed to show that the drugs were in "plain view" of Moye for the brief time he was in the basement, or why he would have been aware of their presence in the partially open drawers. *Id.* at 18-20. Finally, there was no evidence showing that Moye, Benson, or the couple were observed using drugs on the night in question. *Id.* at 20. Thus, the Court concluded that the circumstantial evidence presented failed to establish Moye's constructive possession of the drugs found in the basement. *Id.* at 24.

Similarly, in *Parker v. State*, the Supreme Court held that the evidence was insufficient to support the defendant's conviction for possession of a regulated firearm. 402 Md. at 407. In *Parker*, officers entered a two-story—plus a basement—residence where the defendant was located and recovered drugs throughout the house, as well as a handgun on the second floor. *Id.* at 376-77. Guided by its decision in *Moye*, the Court noted that

nothing in the record established Parker's ownership or possessory interest in the home. *Id.* at 408. ("In fact, the evidence did not show whether Parker was residing in the home at the time or simply was visiting [the person] who lived there.") Further, the Court determined that the State failed to establish that Parker had any proximity to the handgun considering the gun was found on the second floor and "[n]othing in the record indicates where the police observed Parker in the home, whether he had access to the second floor, or how long he had been in the house." *Id.* at 409. Finally, the Court stated:

> the record does not indicate where in the second floor hall the handgun was located or whether the gun was in plain view. . . . The record in the present case does not contain evidence supporting a reasonable inference that Parker had ever seen the gun, had the opportunity to see the gun, or was aware of it. With no established interest or residence in the house, it cannot reasonably be inferred that Parker was cognizant of all of the house's contents.

Id. (internal citations omitted). On this evidence, the Court found it insufficient to support an inference that Parker knowingly exercised dominion or control over the handgun. *Id.* at 411.

The State, however, relies on *State v. Suddith*, *supra*, in which the Supreme Court held that the evidence was sufficient for the jury to infer that the passenger of a vehicle had constructive possession of drugs and paraphernalia found throughout the vehicle. 379 Md. at 446-47. In *Suddith*, Suddith was one of three passengers in a stolen Ford Explorer during a high-speed police chase. *Id.* at 427-28. Eventually, the driver lost control of the vehicle and it flipped three times before coming to a stop. *Id.* at 428. When the officers searched the vehicle, they found several bags of drugs and drug paraphernalia "strewn about in the interior passenger compartment of the stolen [vehicle]." *Id.* All four occupants denied

having knowledge of the drugs, nor were any drugs found on Suddith's person. *Id.* Still, a jury found Suddith guilty of possession of the drugs and paraphernalia. *Id.* at 429.

On appeal, the Supreme Court distinguished *Suddith* from *Moye*, pointing out that unlike Moye, Suddith was not in a large house with several rooms; he was inside the passenger compartment of a vehicle, "in a relatively close space" where contraband was found scattered throughout the passenger compartment of the vehicle after it crashed. *Id.* at 436. ("The jurors could have made the inference due to the quantity of the contraband and the nature of the vehicle, that the contraband was contained in the open area of the vehicle prior to the crash.") Additionally, the Court noted that unlike in *Moye*, where it was unclear whether the drugs in the drawers of the basement were in "plain view", in *Suddith*, the Court found "the jury, using its own experience and common sense, could reasonably infer that it was inconceivable, given the quantity of contraband found inside the vehicle, that all of the contraband was concealed from [Suddith's] view before the vehicle flipped over three times." *Id.*

The Court also distinguished *Suddith* from *Taylor v. State*, *supra*, and *White v. State*, 363 Md. 150 (2001) (holding that the evidence was insufficient to establish that the passenger of a vehicle exercised dominion or control over cocaine found inside a sealed box of pots and pans located in the vehicle's trunk where the passenger had limited access to and no possessory interest in the vehicle). *Suddith*, 379 Md. 437-41. In *Suddith*, the Court acknowledged that Suddith, like White, had no possessory interest in the vehicle, nor were any drugs found on his person. *Id.* at 438. However, unlike in *White*, where the drugs were sealed in a container in the trunk, "*not accessible* from the interior compartment[,]"

in *Suddith*, the drugs were found "strewn throughout the inside compartment" of the vehicle. *Id.* (emphasis in original).

Similar to *White*, in *Taylor*, although Taylor was found in the room where the drugs were located, he "did not have *access* to the closed bags containing the drugs[,]" which were attributed to another person. *Id.* at 440 (emphasis added). *See also Taylor*, 346 Md. at 459 ("The record is clear . . . that the contraband was *secreted in a hidden place* not otherwise shown to be within [Taylor's] control.") (Emphasis added). By contrast, in *Suddith*, when the officers searched the vehicle—of which all the occupants denied ownership—drugs were scattered throughout the inside compartment. *Id.* Thus, the Court determined "an inference [ ] could be made that all of the [vehicle's] occupants had *equal access* to the contraband." *Id.* at 440-41 (emphasis added).

Applying the Court's analysis in these cases to the case at bar, we start with Mr. Brooks' proximity to the handguns. Upon entering the residence, the officers found Mr. Brooks in the living room, along with his 11-year-old daughter, and Mr. Boothe. In the same room, on the coffee table, officers found a camera bag containing three handguns and ammunition. Mr. Brooks asserts that "the State offered no evidence or testimony about where the camera bag or Mr. Brooks were located when EST officers first entered the residence**."** However, the State did call as a witness a member of the EST, who testified that he participated in the initial entry and securing of the location. On cross-examination, defense counsel did not ask this witness about the location of the camera bag when EST members entered the residence, or any of the EST's actions that day. Instead, defense counsel questioned Detective Meyer about EST's conduct, to which the officer eventually

responded, "[h]e was seated inches away from the bag on the couch when the Emergency Services Team entered the residence." Unlike in *Parker*, where there was no indication of where the defendant was in relation to the handgun on the second floor, 402 Md. at 409, here, there was evidence supporting that Mr. Brooks was in the same room, within reach of the handguns. Thus, a fact-finder could reasonably infer from this evidence that Mr. Brooks was in close proximity to the firearms in the camera bag.

Next, we consider whether the firearms were within the plain view or otherwise within the knowledge of Mr. Brooks. Although the camera bag was in plain view of Mr. Brooks, the State's exhibits indicate that the bag was closed and thus the firearms appeared to be concealed at the time of the search. Based on this, Mr. Brooks asserts that "the record does not support a reasonable inference that [he] had ever seen, or was aware of, the contents of the bag." However, awareness or "knowledge may be proven by inferences from the totality of the evidence, circumstantial or direct, presented to the trier of fact." *Moseley*, 245 Md. App. at 504 (quoting *Suddith*, 379 Md. at 432). Unlike in *Taylor*, where the marijuana was "secreted in a hidden place not otherwise shown to be within [Taylor's] control [i.e., someone else's bag]"; or *White*, where the drugs were "not accessible" to the passenger as they were sealed in a container in the trunk of the vehicle; here, the camera bag—sitting prominently on the living room coffee table—containing the three handguns, would have been clearly visible to any house guest, let alone Mr. Brooks who was discovered within arms-reach of the bag when officers arrived. Unlike in *Moye*, the contraband was not secreted away in a partially open drawer in the basement of a tenant, who the defendant had no apparent relationship with; but, rather the contraband was in a

camera bag on the living room coffee table of his girlfriend's home, in the same room as Mr. Brooks' minor child. Further, over the span of several jail calls on April 3, the jury heard Mr. Brooks discussing the three gun charges with an unidentified speaker and his girlfriend, followed shortly thereafter by a conversation in which it appears Mr. Brooks and two other individuals are talking about who will take the charges for possession of the "drums."[15] Under the totality of these circumstances and given Mr. Brooks' clear access to the handguns in the camera bag, "the jury, using its own experience and common sense, could reasonably infer that it was inconceivable," *Suddith*, 379 Md. at 436, that Mr. Brooks was not aware of the firearms in the camera bag. As such, under the theory of constructive possession, we determine that the evidence was sufficient to sustain Mr. Brooks' convictions for possession of firearms.

II. The Trial Court Erred in Imposing a Mandatory Minimum Sentence Enhancement as to Count 11.

A. Parties' Contentions

[15] A "drum" magazine is a type of high-capacity magazine that stores rounds for firearms, cylindrical in shape, similar to a drum. ROBERT E. WALKER, CARTRIDGES AND FIREARM IDENTIFICATION 229-30 (CRC Press, 2021) To be sure, Mr. Brooks correctly points out that the only time the State presented to the jury that "drums" meant "firearms" was in its closing argument, "which, as the jury was advised, is 'not evidence.'" However, "[t]he prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence *or inferences reasonably drawn therefrom*." *Winston v. State*, 235 Md. App. 540, 572-73 (2018) (quoting *Degren v. State*, 352 Md. 400, 429-30 (1999)) (emphasis added) (internal quotation marks omitted). In light of what was discussed by Mr. Brooks and others in these jail calls, which were played for the jury at trial, it was reasonable for the prosecutor to submit to the jury that "drums," in this context, meant "guns," and comment thereon.

Mr. Brooks argues that the trial court erred in imposing an illegal sentence as to Count 11—distribution of a CDS, fentanyl—and therefore, it must be vacated. Specifically, Mr. Brooks asserts that if a trial court sentences a defendant based on the mistaken belief that a mandatory minimum sentence is required, that sentence is "contrary to law" and should be vacated, regardless of whether the defendant objected at the sentencing hearing. *Clark v. State*, 218 Md. App. 230, 256-58 (2014); Md. Rule 4-345(a). Further, Mr. Brooks points out that while the trial court concluded that Mr. Brooks was eligible for the third time offender sentencing enhancement under CR § 5-608(c), it incorrectly believed that this statute imposed a 25-year mandatory minimum sentence. As such, Mr. Brooks argues that the 25-year sentence imposed on that count is illegal and should be vacated.

The State concedes that the Justice Reinvestment Act ("JRA") changed the sentencing enhancement scheme under CR § 5-608 by eliminating mandatory minimum sentences. Thus, the State admits that "[r]elying on the State's erroneous assertion, the trial court wrongly believed that Brooks was subject to a mandatory minimum sentence of 25 years' incarceration for this third-time drug offense." However, the State takes the position that this mistake does not render the sentence illegal because the court still had the legal authority, under the statute, to sentence Mr. Brooks as a third-time offender to 25 years' imprisonment. *See, e.g., State v. Bustillo*, 480 Md. 650, 679 (2022). The State adds that while Mr. Brooks did not preserve this claim, the State nonetheless, opts not to raise this argument because it invited the error in this case. Thus, the State asks this Court to vacate Mr. Brooks' sentence on Count 11 and remand for resentencing on this count.

B. Analysis

At the sentencing hearing, the State argued that Counts Ten, 11, and 15 were subject to mandatory minimum sentences under CR § 5-608. The trial court, seemingly relying on the State's assertion, also indicated that Mr. Brooks, as a third time offender under CR § 5-608(c), was subject to a mandatory minimum sentence of 25 years' incarceration. As a result, the court sentenced Mr. Brooks to "the required" 25 years for Count 11.

In fact, there are no longer mandatory minimums under CR § 5-608. In 2016, the General Assembly enacted the Justice Reinvestment Act ("JRA"), 2016 Md. Laws ch. 515. The JRA, among other things, repealed mandatory minimum sentences for certain offenses involving the distribution of a CDS. As it reads now—and in 2022 when Mr. Brooks was sentenced—a third time offender "is subject to imprisonment *not exceeding* 25 years." CR § 5-608(c) (emphasis added). Thus, the court clearly erred in its application of the statute.

Further, the fact that Mr. Brooks did not object to this application of the statute does not bar him from raising the issue on appeal because the sentence was illegal.[16] Maryland Rule 4-345(a) permits a court to correct an illegal sentence at any time. *See Bryant v. State*, 436 Md. 653, 662 (2014) ("There are limited grounds on which a sentence may be properly reviewed by this Court despite the failure to object at the time of the proceedings. One such avenue for review . . . is Md. Rule 4-345(a) . . .").

[16] We note that the State chose not to raise a preservation argument because it admits that it invited the error in this case by affirmatively telling the trial court that Mr. Brooks was subject to a mandatory minimum sentence for Count 11, when, in fact, he was not. We commend the State for acknowledging its mistake and as a result, requesting that this Court vacate and remand for resentencing on this Count.

An illegal sentence means a substantive error in the sentence itself. *Id.* at 663. *See Clark v. State*, 218 Md. App. 230, 257 (2014). In *Clark*, the circuit court sentenced a defendant to 15 years, with all but a mandatory ten years suspended, despite the statute providing a mandatory minimum sentence of five years and a maximum of 15 years. *Id.* at 256-57. It appeared to us that the court thought—incorrectly—that the appellant was subject to a mandatory minimum sentence of ten years. *Id.* at 257-58. As such, we concluded the court's sentence was "contrary to law," vacated it, and remanded for resentencing on that count in accordance with the statute. *Id.* at 258.

We find *Clark* instructive here. In the case at bar, the trial court sentenced Mr. Brooks to "the required" 25 years, despite the statute only imposing a *maximum* sentence of 25 years. Based on the record, it is clear that the trial court thought—incorrectly—that the appellant was subject to a mandatory minimum of 25 years. The fact that Mr. Brooks could have been sentenced to 25 years under a correct reading of the statute does not change our analysis. In *Clark*, although the appellant *could* have been sentenced to ten years under an appropriate reading of the relevant statute, we nonetheless ruled that the sentence was inherently or substantively illegal. Therefore, we conclude that the court's sentence as to Count 11 was illegal, and we vacate that sentence, and remand for resentencing on that Count in accordance with CR § 5-608(c).

III. We Decline to Exercise Plain Error Review to Determine whether the Trial Court Erred in Not, Sua Sponte, Precluding the State from Eliciting Evidence, and Making Arguments Based on, Mr. Brooks' Refusal to Give Officers the Pass Code for his Phone.

A. Parties' Contentions

Finally, Mr. Brooks argues that the trial court violated his Constitutional right to remain silent by permitting the State to elicit testimony and indicate to the jury in opening and closing arguments that Mr. Brooks' refusal to give officers the pass code to his cellphone shows his guilt. Conceding that Mr. Brooks' defense counsel did not object to Detective Potter's testimony that Mr. Brooks refused to give officers his pass code and the State's arguments based thereon, appellant urges us to review this issue for plain error. Specifically, Mr. Brooks argues that the contested error is clear and obvious, and it affected the outcome of the trial.

In response, the State argues that we should decline to exercise plain error review of this issue because Mr. Brooks cannot establish that the error was clear and obvious based on our State's case law, nor can he show that the error affected the outcome of the trial.

B. Analysis

During the trial, the State elicited testimony that Mr. Brooks declined to give his cell phone pass code to officers, and made arguments in opening and closing based on this evidence. First, as part of its opening, the State told the jury that when officers recovered Mr. Brooks' phone, "he refused to give the pass code for that phone." Then, after Detective Potter testified that he advised each adult of his or her *Miranda* rights, he testified about Mr. Boothe's and Mr. Brooks' willingness to provide pass codes for their respective phones:

> [PROSECTUOR]: Okay. And when did [Mr. Boothe] give you the pass code for [his cell phone]?
>
> [DETECTIVE POTTER]: While we were at the house as it was being collected.

> …
>
> [PROSECUTOR]: Okay. And while on scene Mr. Boothe gave a pass code. Did Mr. Brooks make any statements regarding the black Motorola?
>
> [DETECTIVE POTTER]: He told us that it was his phone, but he refused to give us the pass code for that phone.

At no point did Mr. Brooks' defense counsel object to this testimony.[17] Finally, as part of its closing argument, the State reiterated this evidence:

> And who out of everyone, who refused to give their passcode to that phone? The defendant. [Mr. Boothe] gave his up. He knew he wasn't the seller. He is just a buyer. He was just there buying drugs, drug – buying his fix for the day. He gave his passcode up, here, you can have my phone and my passcode. Who did not? The defendant. That's his consciousness of guilt.

Generally, "under [Maryland] Rules 4-323 and 8-131, unless the record reveals an objection by trial counsel to the admission of a particular piece of evidence, the issue is not preserved for appellate review." *Davis v. State*, 207 Md. App. 298, 315 (2012). However, "for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial[,]" an appellate court may exercise "plain error" review. *Newton v. State*, 455 Md. 341, 364 (2017). To constitute plain error, four conditions must be met:

> (1) there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant; (2) the legal error must be clear or obvious, rather than subject to reasonable dispute; (3) the error must have

[17] Appellant's counsel notes in his brief that Mr. Brooks' defense counsel was disbarred soon after the sentencing hearing due to a history of professional misconduct, including failing to adequately prepare for his clients' cases. Appellant goes on to say that "[t]hroughout the representation of Mr. Brooks, [defense counsel] made few objections despite objectively ample opportunities to do so." However, it is well established in Maryland that "a claim of ineffective assistance of counsel generally should be raised in a post-conviction proceeding." *Smith v. State*, 394 Md. 184, 199 (2006). As this issue is not appropriately before us, we will not address it.

> affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.

Id. (*State v. Rich*, 415 Md. 567, 578 (2010)) (internal quotation marks omitted). It is "rare" to find plain error. *Id.* (*Yates v. State*, 429 Md. 112, 131 (2012)).

Because Mr. Brooks' defense counsel did not object to Detective Potter's testimony that Mr. Brooks refused to provide officers with the pass code to his cell phone, or the State's comments regarding that evidence, we consider whether its admission warrants plain error review.

As "the failure to make a timely assertion of a right" is not the "intentional relinquishment or abandonment of a known right," *Rich*, 415 Md. at 580, we turn to whether the admission of this testimony and argument based thereon was a clear or obvious legal error.

Mr. Brooks asserts that the trial court committed clear error when it permitted the State to elicit testimony about Mr. Brooks' refusal to give officers the passcode to his phone, and to invite the jury to infer that such an exercise of his Constitutional right to remain silent demonstrates guilt. As Mr. Brooks points out, the Fifth Amendment of the United States Constitution and Article 22 of the Maryland Declaration of Rights "prohibit the prosecutor in a criminal case from making an adverse comment upon the defendant's failure to testify." *Simpson v. State*, 442 Md. 446, 448 (2015) (citing *Griffin v. California*, 380 U.S. 609 (1965)). In the case at bar, however, the State made an adverse comment about the defendant's refusal to provide his passcode, not necessarily his refusal to testify.

The State posits that a court could reasonably perceive Mr. Brooks' refusal to provide his passcode as analogous to *Thomas v. State*, 397 Md. 557 (2007), in which the Supreme Court of Maryland ruled that a defendant's "refusal to provide a blood sample demanded by police pursuant to a search warrant was admissible in evidence as consciousness of guilt." *Id.* at 561. *See also Stevenson v. State*, 222 Md. App. 118, 146 (2015) (affirming the trial court's admission of testimony about a defendant's "initial refusal to provide a DNA sample to police during [the victim's] murder investigation" for consciousness of guilt). *But see Longshore v. State*, 399 Md. 486, 537 (2007) (explaining that a person's assertion of a constitutional right—in this case refusing to consent to a warrantless search of his or her automobile—may not later be used to implicate guilt). In light of these cases, we cannot conclude that it was clear and obvious error to allow the State to elicit testimony and make arguments based on Mr. Brooks' refusal to provide officers with the passcode to his phone.[18]

[18] Although Mr. Brooks relies on both Maryland and federal self-incrimination law, "we shall rest our decision, as we have often done in the past, solely upon the Maryland provisions[,]" which are generally *in para materia* with the Fifth Amendment. *Marshall v. State*, 415 Md. 248, 259-60 (2010) ("This Court has on several occasions pointed out that the privilege against self-incrimination protected by Article 22 of the Maryland Declaration of Rights "*generally*" is "*in para materia*" with the Self-Incrimination Clause of the Fifth Amendment.") (collecting cases). In fact, our Supreme Court has even "interpreted Maryland's privilege against self-incrimination to be more comprehensive than that of the federal government." *Id.* (quoting *Crosby v. State*, 366 Md. 518, 527 n.8 (2001)). Further, the Court has noted that "[t]here is no inconsistency between this Court's statement that Maryland self-incrimination law is 'generally *in pari materia*' with the Fifth Amendment and our holdings that, to some extent, Maryland self-incrimination law grants greater protections to the individual than the Fifth Amendment." *Id.* at 259 n.4.

Nonetheless, even if the trial court did clearly err in permitting this testimony and arguments, that error likely did not affect the outcome of the trial. For starters, none of the information extracted from Mr. Brooks' phone was admitted into evidence; only the information extracted from Mr. Boothe's phone was admitted into evidence. Moreover, even without this testimony and the prosecutor's arguments based thereon, as discussed above the jury still had enough evidence to reasonably sustain Mr. Brooks' convictions. For the distribution charges, the State presented testimony from the officers who conducted the search that they found Mr. Brooks and Mr. Boothe in the living room of his girlfriend's residence, with capsules of heroin and fentanyl, as well as a large sum of cash, on his person, and a capsule of heroin and fentanyl on the floor between the two of them. In the kitchen, officers testified that they discovered more capsules and items commonly used to distribute drugs. The State also presented text messages between Mr. Brooks and Mr. Boothe reasonably supporting the inference that Mr. Brooks on numerous occasions leading up to the date of the search, sold "caps" or "dope" to Mr. Boothe; and a recorded call from jail, in which Mr. Brooks admitted that he had at least four or five capsules, and a large wad of cash on him at the time of his arrest. As for the firearms possession charges, the State presented evidence that Mr. Brooks was within arms-reach of the handguns, which were in a camera bag on the living room coffee table of his girlfriend's residence, in the same room as his minor child. Additionally, the State played recorded jail calls during which Mr. Brooks suggested that he was only charged with three of something and later discussed "drums." Under these circumstances, we conclude that even if the trial court erred in admitting testimony—and arguments based on—Mr. Brooks' refusal to provide

officers with the passcode to his phone, Mr. Brooks has not demonstrated that it affected the outcome of the trial. Thus, we decline to exercise plain error review of this issue.

JUDGMENTS OF SAINT MARY'S COUNTY AFFIRMED EXCEPT AS TO COUNT 11. CONVICTION ON COUNT 11 AFFIRMED, BUT SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING ON THAT COUNT CONSISTENT WITH THIS OPINION. APPELLANT TO PAY 2/3 OF THE COSTS; REMAINING 1/3 COSTS TO BE PAID BY SAINT MARY'S COUNTY.