Circuit Court for Baltimore City
Case Nos. 118096009 and 118128034

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 432 & 554
September Term, 2019

CONSOLIDATED CASES

MARCUS CANTY

v.

STATE OF MARYLAND

Kehoe,
Beachley,
Raker, Irma S.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Kehoe, J.

Filed: January 22, 2021

After a jury trial in the Circuit Court for Baltimore City, Marcus Canty was convicted of conspiracy to distribute a controlled dangerous substance, distribution of heroin and distribution of a mixture containing heroin and fentanyl. He was sentenced to incarceration for a term of eleven years on the conspiracy to distribute heroin conviction, a concurrent term of eleven years for distribution of heroin, and a consecutive term of ten years for distribution of a mixture containing heroin and fentanyl.

Canty presents two questions for our consideration, which we have reworded:

> 1. When a defendant is charged with distribution of controlled dangerous substances and distribution of heroin and fentanyl, does the trial court err in failing to instruct the jury, as requested, (a) as to the elements of possession of a controlled dangerous substance, and (b) that proof of *scienter* is required to establish possession of those substances?[1]
>
> 2. Did the trial court err in denying his motion for a mistrial and accepting a partial verdict?

[1] In his brief, Canty articulates the issues as:

> 1. Where the defendant was charged with distribution of heroin and fentanyl, did the lower court err in failing to instruct the jury, as requested, as to the elements of possession of a controlled substance and, specifically, the scienter required to establish possession of those substances?
>
> 2. Did the lower court err in failing to declare a mistrial, and receiving a partial verdict under coercive circumstances, where the verdict was taken, over objection, after jurors complained of "bullying" in the jury room, revealed conflicting indications as to unanimity as to some charges, and two jurors were selectively and directly questioned in view of their peers?

(continued)

The State concedes that the trial court erred in failing to give the requested instruction as to possession but argues that the error was harmless. For the reasons set forth below, we will vacate Canty's convictions and remand these cases for a new trial.

Background

Canty was charged by separate indictments in the Circuit Court for Baltimore City with numerous counts relating to the distribution of controlled dangerous substances.[2] In brief summary, the evidence presented at trial was as follows:

In July 2017, officers from State and Federal law enforcement agencies began a months-long investigation of drug trafficking in the Brooklyn Park area of Baltimore City. During the course of this effort, police identified Robert King as being involved in the street-level dealing of heroin in that neighborhood. Officers obtained a court order authorizing the interception of phone calls and text messages to and from telephone numbers associated with King and Canty. From these intercepted communications, officers identified Donnel Chambers as the source of supply for King's drugs. Investigators also concluded that Chambers had introduced King to Canty, who continued to provide drugs to King after Chambers took a step back from day-to-day distribution.

In late March 2018, the police believed that King and Canty were planning several meetings to resupply King. Although no officer observed Canty handing drugs to anyone or receiving money from King, the investigators concluded that those exchanges had

[2] The cases were consolidated for trial. Canty filed a timely notice of appeal from his convictions, and we granted his unopposed motion to consolidate his appeals.

occurred from results of their electronic surveillance. On March 30, 2018, after one of those suspected exchanges, police stopped King and found 175 gel caps, packaged for street-level distribution, hidden in his groin area. Chemical analysis identified the contents of the gel caps seized from King as heroin with the presence of fentanyl.

A warrant was issued for Canty and he was arrested at a Home Depot in Ellicott City. The police seized Canty's mobile telephone from his person. He consented to a search of his vehicle, where police found a flip phone. Police successfully downloaded the contents of the flip phone but were unable to download the contents of the phone recovered from Canty's person. A prosecution expert witness in the distribution of controlled dangerous substances told the jury that, in his opinion, Canty, Chambers, and King were involved in a conspiracy to distribute narcotics in the Brooklyn Park area and that Canty and Chambers supplied the narcotics to King.

Prior to the close of the State's case, the trial court and counsel for the parties discussed the jury instructions. The State advised the court that it did not "want a possession count going back to the jury" and that the pattern instruction for distribution of a controlled dangerous substance was sufficient.[3] Referring to MPJI-Cr 4:24.2, defense counsel argued that an instruction on possession was appropriate, stating:

[3] The prosecutor was referring to MPJI-Cr 4:24.2:

> The defendant is charged with the crime of distribution of (controlled dangerous substance), which is a controlled dangerous substance. In order to convict the defendant, the State must prove:

(continued)

> [W]hen reading the distribution jury instruction, the language in number 1,[4] where he sold, exchanged or transferred, transferred gives a, I would argue, possession from one person to another, so I think it would be helpful to instruct the jury about what – you know, transferred or gave away, that implies that somebody possessed something. So I think possession of something to give it to another human being, you have to know what you're possessing before you can give it away to make it illegal.

After the close of the evidence, the parties revisited the issue of an instruction on possession. Defense counsel argued that the use of the word "transfer" in the jury instruction for distribution "implies to me that somebody has to have something to transfer, so that means possession of something." Defense counsel continued, stating that because the definition of distribution includes the transfer of an item, "you actually have to possess that." Counsel asked the court to give the pattern jury instruction on possession of a controlled dangerous substance, MPJI-Cr 4:24. The State objected to an instruction on

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> (1) that the defendant sold, exchanged, transferred, or gave away (controlled dangerous substance); and
> (2) that the substance was (controlled dangerous substance).

[4] Defense counsel was referring to MPJI-Cr 4:24, which states in pertinent part (emphasis added):

MPJI-Cr 4:24 states in pertinent part:

> The defendant is charged with the crime of possession of (controlled dangerous substance), which is a controlled dangerous substance. . . .
> In order to convict the defendant of possession of (controlled dangerous substance), the State must prove:
> (1) that the defendant knowingly possessed the substance;
> (2) that the defendant knew the general character or illicit nature of the substance; and
> (3) that the substance was (controlled dangerous substance).
>
> * * *

possession on the ground that there would be "a substantial danger of confusion" for jurors between the distribution charges that were before them and an instruction on possession, an offense that would not be presented for the jury's consideration. The State argued that "[i]f an additional possession instruction is needed in every case where distribution is charged, it would be incorporated into the model jury instructions." After further discussion, the following colloquy occurred:

> [PROSECUTOR]: And, once again, if that's the case, then I think the definition of possess is embedded in "sold, exchanged, transferred or gave away." You can't do any of those without possessing something.
>
> [DEFENSE COUNSEL]: And I guess that's my point. So the legal definition that needs to be done on [sic] possession. I understand he's not charged with possession, but just in a logical sense, that's what the jury has to at least come to that, at least first part of it. If I'm going to sell something, I'm going to transfer it, I have to have—possess[ed] it at some sort [sic]. And the law requires that I know what it is. And generally what's the nature. And it does kind of track where it says, you know, number 2[5] in distribution says that the substance was heroin and fentanyl. And that kind of tracks with possession, as well, initially.
>
> [PROSECUTOR]: Your Honor, once again, the plain language suffices. It's just going to confuse the jury.

[5] Context indicates that defense counsel was referring to clause MPJI-Cr 4:24, which states in pertinent part (emphasis added):

> In order to convict the defendant of possession of (controlled dangerous substance), the State must prove:
> (1) that the defendant knowingly possessed the substance;
> (2) *that the defendant knew the general character or illicit nature of the substance*. . . .

> THE COURT: Well, you know, the thing is with these pattern jury instructions, as counsel pointed out, it just says the State has to prove that he sold it, exchanged it, transferred it, or gave it away.
>
> [PROSECUTOR]: Yes, Your Honor.
>
> THE COURT: And that it was heroin.
> [PROSECUTOR]: Thank you, Your Honor.
>
> THE COURT: So I'm not going to give the possession. I don't think it's applicable here. You can always argue he didn't know what it was.

The jury was asked to return verdicts on one count of conspiracy to distribute a controlled dangerous substance, twenty-six counts of distribution of heroin and twenty-six counts of distribution of a mixture containing heroin and fentanyl. No count for possession of any drug was submitted to the jury. The trial court instructed the jury on the charges of distribution of heroin and fentanyl as follows:

> The Defendant is charged with the crime of distribution of heroin and distribution of fentanyl, which is a controlled dangerous substances—which are controlled dangerous substances. And as I indicated, there are several counts of each charge, but they have different dates.
>
> In order to convict the Defendant, the State must prove, one, that the Defendant sold, exchanged, transferred, or gave away heroin, or that the Defendant sold, exchanged, transferred, or gave away fentanyl; and two, that the substance was, in fact, heroin, or was, in fact, fentanyl.

As we have stated, the jury returned guilty verdicts as to conspiracy to distribute a controlled dangerous substance, distribution of heroin and distribution of a mixture containing heroin and fentanyl.

Analysis

A. The jury instructions

Canty contends that his convictions must be vacated for two reasons. First, he argues that the trial court erred when it declined to instruct the jury as to the elements of the crime of possession of a controlled dangerous substance. This is so, he says, because he could not be found guilty of distributing heroin or fentanyl absent proof of his awareness of the illicit character and nature of the substances that he was charged with distributing. According to him, the trial court's instruction on distribution did not make this clear.

Second, he asserts that the trial court erred when it failed to instruct the jury that the State was required to prove that he was aware that the substance he was distributing contained fentanyl in order to convict him of violating Crim. Law § 5-608.1.

1. The possession instruction

In criminal cases, the trial court "may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." Md. Rule 4-325(c). However, the court "need not grant a requested instruction if the matter is fairly covered by instructions actually given." *Id.* The Court of Appeals has interpreted Rule 4-325(c) to require the trial court to give a requested instruction when (1) it "is a correct statement of the law"; (2) it "is applicable under the facts of the case"; and (3) its "content . . . was not fairly covered elsewhere in the jury instruction[s]." *Thompson v. State*, 393 Md. 291, 302 (2006) (quoting *Ware v. State*, 348 Md. 19, 58 (1997)). Unless the trial court has made an error of law, we review its decision to give a jury instruction for abuse of

discretion. *Id.* at 311. The question in this appeal is whether the court's instructions were a correct statement of the law. They were not; the error was one of omission.

The parties agree, as do we, that the distribution counts required proof of possession and the *mens rea* for possession and, therefore, the trial court erred in failing to give the requested instruction on possession. In *Anderson v. State*, 385 Md. 123 (2005), the Court of Appeals made clear that it is not possible to distribute a controlled dangerous substance without first possessing that substance:

> It is not possible, under [Maryland's controlled dangerous substances] statutes, to "distribute" a controlled dangerous substance in violation of § 5-602 unless the distributor has actual or constructive possession (dominion or control) of the substance. Thus, possession of the substance distributed is necessarily an element of the distribution.

Id. at 133.

Possession requires that the defendant knew "of both the presence and the general character of the substance." *Dawkins v. State*, 313 Md. 638, 651 (1988). Because the trial court's instruction to the jury did not make this clear, the trial court erred in failing to instruct the jury that distribution required proof of knowledge after Canty requested such an instruction. On appeal, the State concedes that the trial court erred but maintains that reversal is not required because the error was harmless. We disagree and explain.

Error is harmless if "a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict[.]" *Dionas v. State*, 436 Md. 97, 108 (2013) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). In support of its argument that the failure to instruct the jury on

possession was harmless, the State directs our attention to *Lucas v. State*, 116 Md. App. 559 (1997), and *Heckstall v. State*, 120 Md. App. 621 (1998). But those cases are distinguishable from the one before us.

Lucas was arrested by police when they raided an apartment rented by Lucas's brother for use as a "stash house"[6] for the siblings' drug-dealing activities. *Lucas,* 116 Md. App. at 562–63. In their search, the police discovered a variety of drug-distribution paraphernalia for the processing of powered cocaine into crack cocaine, crack cocaine itself, powdered cocaine on the seat of a toilet that had just been flushed, and powdered cocaine on Lucas' hands. *Id.* at 563. Among other things, Lucas was charged with possession of cocaine with intent to distribute. His defense counsel, relying on *Dawkins*, *supra*, objected to the court's jury instruction on possession with intent to distribute because it failed to address the knowledge requirement, specifically, that the accused was aware of the "general character or illicit nature of the substance." *Lucas*, 116 Md. App. at 565–66 (quoting *Dawkins*, 313 Md. at 651).

In considering the issue on appeal, we held that the trial court's failure to instruct on the knowledge requirement was harmless because there was no question that Lucas knew

[6] The *Lucas* Court explained that:

> According to the State's expert witness, a stash house is used by mid-level drug dealers to store, process, and package drugs for distribution. Generally, drug dealers do not sell their products from, nor do they permit customers to consume drugs at stash houses

116 Md. App. at 562.

that what he possessed was illicit. In reaching this conclusion, we pointed to the fact that defense counsel told the jury that Lucas was in the apartment to purchase cocaine, and that when he heard the police entering, he "grabbed what he could, he tossed it, and sat in the bedroom and waited." *Id.* at 566. Lucas's version of the incident was that he had cocaine powder on his hands because he was testing it before deciding whether to make a purchase. *Id.* In closing argument, defense counsel stated that "possession is what [Lucas] ought to be found guilty of; nothing more, but nothing less." *Id.* We concluded that because Lucas conceded that the powdered substance found on his hands and in the apartment was cocaine, the trial court's failure to include the element of knowledge in the definition of possession of cocaine did not constitute reversible error. *Id.*

In *Heckstall*, police observed the defendant engage in several drug transactions. He was arrested and charged with, among other offenses, distribution of heroin, possession of heroin with intent to distribute, and possession of heroin. *Heckstall*, 120 Md. App. at 624. On appeal, Heckstall argued that in its instructions to the jury, the trial court should have included the statement, "possession requires the State to show knowledge of the illicit character of the substance beyond a reasonable doubt." *Id.* at 628. In considering that issue on appeal, we concluded that, after an independent review of the record, it was "inconceivable that the jury, after considering the evidence before it, could have come to any other conclusion than that [Heckstall] was aware of the general character and illicit nature; of the substance being sold." *Id.* at 629 (cleaned up).

Neither *Lucas* nor *Heckstall* is of any real assistance to the State in the present case. Unlike *Lucas*, Canty was not arrested in a drug stash house with powdered CDS on his hands, nor did his counsel concede at trial that he possessed an illicit substance. And, unlike *Heckstall*, law enforcement officers did not observe Canty in actual possession of the drugs he was accused of distributing and conspiring to distribute. In contrast, in the present case, police did not observe Canty handing drugs to anyone or receiving money from King in exchange for drugs. In the absence of such evidence, we cannot conclude beyond a reasonable doubt that the failure to instruct the jury on possession and scienter had no impact on the jury's findings of guilt on the two counts of distribution.

Canty makes an additional point that we think is cogent. The instruction as given failed to convey to the jury the need for proof that Canty "knew the general character or illicit nature of the substance[s]" that he was accused of distributing. MPJI-Cr 4:24. By failing to make this point clear to the jury, the trial court, in effect, turned the crime of distribution into a strict liability offense. Such a result conflicts with *Dawkins*, wherein the Court of Appeals concluded that the "statutory scheme implies a 'knowing; possession on the part of the accused." 313 Md. at 649; *see also Handy v. State*, 175 Md. App. 538, 563 (2007) ("[T]he 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.'" (quoting *Dawkins*, 313 Md. at 651). The convictions for distribution must be vacated.

Moreover, the conviction for conspiracy to distribute a controlled dangerous substance required the jury to find that Canty entered an unlawful agreement to commit the crime of

distribution. For the same reasons set forth above, we conclude that the failure to instruct the jury as to possession affected the conspiracy conviction because a conspiracy requires the "specific intent to commit the offense which is the object of the conspiracy," in this case distribution. *Alston v. State*, 414 Md. 92, 114–15 (2010) ("[T]he defendant, to be found guilty of conspiracy, must have a specific intent to commit the offense which is the object of the conspiracy."); *Mitchell v. State*, 363 Md. 130, 146 (2001) ("When the object of the conspiracy is the commission of another crime, as in conspiracy to commit murder, the specific intent required for the conspiracy is not only the intent required for the agreement but also, pursuant to that agreement, the intent to assist in some way in causing that crime to be committed.").

2. The scienter instruction

Canty also argues that, because he was charged with distributing a mixture containing fentanyl under Crim. Law § 5-608.1, the State had to prove that he "knowingly" violated Crim. Law § 5-602[7] which governs the crime of distribution. Section 5-608.1 provides that "[a] person may not knowingly violate § 5-602 of this subtitle with: (1) a mixture that contains heroin and a detectable amount of fentanyl or any analogue of fentanyl; or (2) fentanyl or any analogue of fentanyl." Crim. Law § 5-608.1(a). Canty points out that Crim.

[7] Section 5-602 of the Criminal Law Article provides:

> 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.

Law § 5-608.1 prohibits the knowing distribution of fentanyl or a mixture containing fentanyl. Thus, he asserts, even if distribution under Crim. Law § 5-602 did not require proof of *scienter*, distribution of fentanyl or a mixture containing fentanyl under Crim. Law § 5-608.1 did, and the jury should have been so instructed.

The fatal difficulty with this argument is that it is not preserved for review because it was not presented to the trial court. Md. Rule 4-325(e) states that "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." *See also* Md. Rule 8-131(a) (Ordinarily, we "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

B. The motion for a mistrial

In light of our decision to vacate Canty's convictions and remand the cases for a new trial, we need not address his contention that the trial court erred in denying his motion for mistrial and accepting a partial verdict.

We vacate the convictions and remand these cases to the circuit court for a new trial.

THE JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY ARE VACATED AND THE CASES REMANDED FOR A NEW TRIAL. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.