Circuit Court for Anne Arundel
Case No. 02CR16001540

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 630

September Term, 2017

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DAVON THOMAS

v.

STATE OF MARYLAND

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Wright,
Kehoe,
Harrell, Glen T.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Wright, J.

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Filed: May 23, 2018

A jury in the Circuit Court for Anne Arundel County convicted appellant, Davon Thomas, of possession of marijuana, possession with intent to distribute marijuana, possession of a firearm with a nexus to a drug trafficking crime, using, wearing, carrying, or transporting a firearm while engaged in a drug trafficking crime, unlawful possession of a regulated firearm while under 21 years of age, and wearing, carrying and transporting a handgun upon his person. The circuit court sentenced Thomas to a total of ten years in prison, suspending all but six years (the first five years without the possibility of parole). Thomas timely appealed, asking us to consider the following questions:

> 1. Did the circuit court err by denying the motion to suppress?
>
> 2. Did the circuit court err by allowing a sheriff to trail Appellant in the courtroom?
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> 3. Did the circuit court err by limiting Appellant's right to cross-examination?
>
> 4. Was the evidence insufficient to sustain Appellant's convictions for the firearm and handgun offenses, and did the circuit court err by denying Appellant's motion for a new trial on grounds that the verdict was contrary to the evidence?
>
> 5. Did the circuit court err by allowing the prosecutor to call Appellant a "drug dealer" in closing argument and by refusing to allow defense counsel to refer to one of the State's expert witnesses as a "hired gun" in closing argument?
>
> 6. Did the circuit court err by failing to merge sentences?

Because the State concedes, and we agree, that the separately imposed sentences for possession of a firearm with a nexus to a drug trafficking crime and using, wearing, carrying, or transporting a firearm while engaged in a drug trafficking crime should merge,

we vacate the sentence for the former crime. For the reasons that follow, we shall otherwise affirm the judgments of the circuit court.

## FACTS AND LEGAL PROCEEDINGS

### Hearing on the Motion to Suppress

On the afternoon of June 30, 2016, Annapolis Police Department Officer Joseph Mann located a blue Honda minivan, which was operating as a taxi cab, after receiving a tip that its occupants may be involved in drug activity. He followed the vehicle and observed it exceed the speed limit and go through two stop signs without stopping. Off. Mann radioed Detective Ascione,[1] who was in the area, and related his observations and the belief that the vehicle was involved in drug activity.

Det. Ascione observed the Honda traveling at speeds upwards of 70 miles per hour in an area with a posted speed limit of 40 miles per hour. Det. Ascione initiated a traffic stop; the vehicle pulled over, but before it came to a complete stop, the rear-seat passenger-side occupant, later identified as Dexter Burnside, jumped out of the car and ran away. As Detective Timothy Lathe had by that time reached the scene of the traffic stop, Det. Ascione chased Burnside on foot, catching up with him approximately a minute later.

Det. Lathe approached the taxi and asked the driver for the keys. The driver complied. Det. Lathe observed two passengers remaining in the taxi, Lance Logan in the front passenger seat and Thomas in the rear driver's-side seat. As the lone officer on the

[1] Detective Ascione's given name is not provided in the transcripts.

scene, Det. Lathe ordered the occupants to keep their hands in the air. Because the van's windows were tinted, Det. Lathe opened the back sliding door of the van for his safety and immediately smelled what he knew from his training, knowledge, and experience to be raw marijuana. When Logan stopped obeying the orders to keep his hands up, Det. Lathe moved to the front of the taxi where he saw Logan drop a clear bag of pills to the floor.

Det. Lathe said that Thomas was "cooperative," keeping his hands up. When backup arrived at the scene, Officer Jamal Davis ordered Thomas to exit the vehicle, at which point a black and red plastic bag containing approximately 12 ounces of suspected marijuana fell from his lap to the ground. Off. Davis arrested Thomas after the suspected marijuana was discovered.

Defense counsel did not challenge the police officers' stop of the taxi in which Thomas was a passenger, conceding that the taxi was speeding and running stop signs, and the police therefore had probable cause to stop the vehicle. Instead, counsel urged the court to suppress the evidence of the marijuana found in the bag on Thomas's person following the stop, arguing that the police had no probable cause to arrest Thomas, a passenger in the taxi who had not "done anything wrong other than have the bad luck to be in a fleeing taxi cab."[2] Det. Lathe had admitted that until his removal from the vehicle and placement in custody, Thomas had complied with police orders; the officers had no probable cause to

[2] Counsel stated that he did not contest the recovery of a gun found in the taxi, claiming that because the gun did not belong to Thomas, he had no standing to object to its recovery.

believe he had committed a crime, and, in the absence of probable cause, neither his belongings nor his person were lawfully subject to a search. Finally counsel contended that the bag was a personal belonging and "part of him"—like a purse—such that the officers had no right to "start rummaging around in it," regardless of the smell of marijuana, when he had committed no crime.

The prosecutor disagreed, responding that as soon as Det. Lathe smelled marijuana, he had probable cause to search the vehicle and every container therein. And, as soon as the police officers recovered the suspected marijuana, they had the right to arrest Thomas.

The circuit court ruled, as follows:

> THE COURT: No, thank you. All right, the testimony that the Court received and listened to testimony of the officers [sic] particularly that of Detective Lathe. At this point, the Court has no reason to find that any of the testimony presented by an[y] of the officers was not credible and therefore meets a finding at least for purposes of this hearing that their testimony was credible.
>
> With regard to whether or not there was the ability to believe that there was contraband or evidence that might be found in the vehicle after finding the pills in the event and after smelling what appeared to be based on the training and experience of Detective Lathe to be raw marijuana emanating from the back-driver's side of the vehicle and then asking the Defendant in this case to step of out of the vehicle—to exit the vehicle at that time.
>
> The officer indicates that at that point it is because he intends to search. And as he goes to get out presumably the testimony is saw that his hands has been up [sic], as he goes to move out of the car, the container—plastic bag as it has been described to the Court falls to the ground.
>
> I don't believe, counsel, that because it falls to the left on the ground or to the right and into the well of the vehicle, that in and of itself changes the right of the officer to be able to search that compartment or to search that bag.

> And for those reasons—for that reason in particular, the Court is going to deny your motion to suppress.

**Trial**

The trial testimony generally repeated, but added to, the testimony presented at the suppression hearing. The evidence revealed that at approximately 4:00 p.m. on June 30, 2016, Off. Mann was conducting surveillance outside a community in Annapolis when a blue Honda Odyssey minivan, registered as a taxicab, caught his attention. When the Honda left the community, Off. Mann followed but lost sight of it. Later in the day, however, he observed the Honda at the Chesapeake Market and followed it as it left the area. He again lost sight of the vehicle due to its excessive speed but alerted other officers in the area to be on the lookout for the vehicle.

Det. Ascione located the vehicle travelling 70 miles per hour or more in a 40 mile per hour zone and pulled in behind it, activating his emergency equipment. As the vehicle slowed, Det. Ascione observed at least four people inside. Before the vehicle had come to a complete stop, the rear passenger door slid open and Burnside jumped out and ran across several lanes of traffic toward a nearby shopping center.

As Det. Lathe had arrived at the scene of the traffic stop, Det. Ascione gave chase on foot, noticing that Burnside was holding the right front of his waistband and digging into the waistband is if trying to retrieve something. To Det. Ascione, that movement was characteristic of an armed person. As Burnside reached a fence, he jumped, placing both arms over the fence, and then dropped back down to the ground to where he started his leap.

Det. Ascione took Burnside into custody. A search on the other side of the fence turned up a silver Bersa 380 handgun.[3] Det. Ascione then returned to the scene of the traffic stop, where he issued the driver of the taxi a number of traffic citations.

Three people remained in the Honda—the driver, a front-seat passenger, and a rear-seat, driver's-side passenger, later identified as Thomas. When Det. Lathe opened the doors to the Honda, he "immediately" smelled the odor of fresh marijuana coming from the vehicle. Det. Lathe saw a black and red bag on Thomas's lap and instructed all of the Honda's occupants to keep their hands up. The front seat passenger kept lowering his right hand between himself and the door, out of Det. Lathe's view. As Det. Lathe walked around the vehicle to make contact with that passenger, he saw the passenger throw a bag containing pills onto the ground.

Det. Lathe instructed Off. Davis to remove Thomas from the van, and as he did, Off. Davis observed that Thomas had a black and red bag on his lap, which Thomas placed on the floorboard before exiting the vehicle.[4] Neither Det. Lathe nor Off. Davis saw Thomas make any other movements with his hands. Off. Davis placed Thomas in handcuffs and in the back of his police cruiser. The bag was recovered and found to contain suspected

[3] Later DNA testing of the Bersa 380 excluded Thomas from its DNA profile, and he was not charged with any offenses in relation to that gun.

[4] According to Det. Lathe's testimony, as Thomas stepped out of the vehicle, "the bag that was on his lap drop[ped] right onto the ground. Right outside the vehicle."

(continued)

marijuana.[5] Subsequent search of the vehicle revealed a loaded "SIG Sauer camouflage handgun" [6] under the rear seat and $1,058.00 in U.S. currency "shoved" between the driver's seat and the door.[7]

At the close of the State's case-in-chief, Thomas moved for judgment of acquittal with regard to the firearm and conspiracy charges.[8] Pertinent to the issues he raises on appeal, Thomas argued that the State had failed to prove that the firearm recovered from the taxi met the "very specific definition" of a handgun, that is, that it had a length less than 16 inches. In addition, he concluded, the State had adduced insufficient evidence that he possessed the firearm, by failing to show that he had any knowledge or dominion or control over the weapon in a vehicle shared by three other people. The circuit court granted the motion with regard to conspiracy with Burnside but denied it as to the remaining counts.

[5] Later testing confirmed that the substance comprised 337.82 grams (approximately 12 ounces) of marijuana. Detective Christopher Brown, the State's drug expert, opined that the items recovered—approximately 12 ounces of marijuana with a street value of approximately $225.00 per ounce, the large amount of money, the guns, and the absence of paraphernalia for personal use—indicated possession of the marijuana with intent to distribute.

[6] Subsequent test fire of the SIG Sauer confirmed its operability. No fingerprints were recovered from the gun. DNA testing of the SIG Sauer revealed a mixture of DNA profiles from more than one person, at least one a male, but the "low level of DNA present" was not suitable for comparison to Thomas's DNA sample.

[7] The cab driver, Zahid Syed, stated that Thomas put the money into the front seat of the cab when the police were searching the other occupants of the cab.

[8] He submitted on the possession and possession with intent to distribute marijuana charges.

Thomas elected not to testify or put on any evidence, and the court again denied his renewed motion at the close of all the evidence.

## DISCUSSION

### I.

Thomas first argues that the circuit court erred in denying his motion to suppress the marijuana evidence. Although he concedes that the stop of the vehicle in which he was a passenger was permissible as a result of the driver's violation of traffic laws, Thomas, relying on our decision in *State v. Funkhouser*, 140 Md. App. 696 (2001), avers that the bag containing the marijuana, which had been on his lap at the time of the traffic stop, was "intimately a part of his person" and therefore not subject to a warrantless seizure and search following the traffic stop.

Our review of a circuit court's denial of a motion to suppress is ordinarily limited to information contained in the record of the suppression hearing and not the record of the trial. *McCracken v. State*, 429 Md. 507, 515 (2012). When, as here, the motion to suppress has been denied, we are further limited to considering the facts in the light most favorable to the State as the prevailing party. *Id.*

In considering the evidence presented at the suppression hearing, we extend great deference to the fact-finding of the suppression court, and when conflicting evidence is presented, we accept the facts as found by the court unless it is shown that those findings were clearly erroneous. *Brown v. State*, 397 Md. 89, 98 (2007). We review *de novo*,

however, all legal conclusions, making our own independent determinations of whether the search was lawful or a constitutional right has been violated. *Id.*

The Fourth Amendment to the United States Constitution protects against "unreasonable searches and seizures." U.S. Const. amend. IV. Subject to certain exceptions, "'[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant.'" *Bowling v. State*, 227 Md. App. 460, 467-68, *cert. denied*, 448 Md. 724 (2016) (quoting *Riley v. California*, —– U.S. ——–, 134 S.Ct. 2473, 2482 (2014)).

One exception to the warrant requirement is the "automobile exception" or "*Carroll* doctrine," named after *Carroll v. United States*, 267 U.S. 132 (1925). Pursuant to the *Carroll* doctrine, the police may search a vehicle and the containers in it without a warrant, provided that the officer has probable cause to believe that an item connected with a crime is in the car. *State v. Wallace*, 372 Md. 137, 146 (2002). And, to facilitate the search, a police officer may order the driver and passengers out of the car, with an occupant's property left inside the vehicle falling within the permissible scope of a *Carroll* doctrine search. *Id.* (citing *Maryland v. Wilson*, 519 U.S. 408, 410-11 (1997) and *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)).

In this matter, there is no question that the police lawfully initiated a traffic stop of the taxi in which Thomas was a passenger. And, Thomas does not dispute the fact, nor can he, that once Det. Lathe smelled marijuana in the taxi, he had probable cause to search the vehicle and the containers within it, pursuant to the *Carroll* doctrine. *See United States v.*

*Johns*, 469 U.S. 478, 482 (1985) ("After the officers came closer and detected the distinct odor of marihuana, they had probable cause to believe that the vehicle contained contraband."); *Robinson v. State*, 451 Md. 94, 128 (2017) ("a warrantless search of a vehicle is permissible upon detection of the odor of marijuana emanating from the vehicle.").[9]

Conceding the foregoing, Thomas, relying upon our discussion in *State v. Funkhouser*, 140 Md. App. 696 (2001), nonetheless argues that the bag containing the marijuana, which had been on his lap while he was seated in the taxi, was "intimately a part of his person," much like a "fanny pack" or a purse, and therefore not subject to warrantless search pursuant to *Carroll*. We find the facts of this matter to be distinguishable from those in *Funkhouser*, but even were we to agree that the warrantless search of the plastic bag was not lawful under the *Carroll* doctrine, we would still find it to be permissible under the plain view doctrine.

In *Funkhouser*, the police stopped a vehicle that, based on a tip, was suspected of containing drugs. Although a drug sniffing dog alerted to the presence of drugs in the vehicle, a search of the vehicle did not reveal any contraband. 140 Md. App. at 701-02. The object of the search then turned to Funkhouser himself, who was walking around unrestrained after having been removed from the vehicle. *Id*. at 711. Funkhouser was

[9] In *Robinson*, 451 Md. at 137, the Court of Appeals explained that this precedent remains good law, despite 2014 legislation that decriminalized possession of less than ten grams of marijuana.

wearing a "fanny pack" strapped around his waist; the police officer removed the fanny pack and searched it, yielding cocaine. *Id*.

At the suppression hearing, the State advanced a *Carroll* doctrine argument that Funkhouser, by virtue of his recent presence in the vehicle, was a mere extension of the vehicle, that is, he was constructively still in the car at the time of the search of his fanny pack. *Id*. at 712. The trial court disagreed and granted Funkhouser's motion to suppress the drug evidence, on the basis that the police officer conducting the search did not have the right to unbuckle the fanny pack from Funkhouser's person and "just go in there and search that pouch." *Id*. at 701.

In deciding the State's appeal of that ruling, this Court concluded that the initial traffic stop was unlawful, so everything that occurred following the stop, including the search of the fanny pack and subsequent discovery of the cocaine, was the fruit of the poisonous tree. *Id*. at 705-06. Although we proceeded to address several additional arguments, the remainder of the *Funkhouser* opinion is *dicta* and therefore provides only tangential support, at best, for Thomas's appellate argument.

In *Funkhouser*, we went on to explain that, even had the traffic stop been legitimate, the fanny pack was not inside the vehicle during the *Carroll* doctrine search of the car, but that "[h]ad it been and *had it not been attached to the body of Funkhouser*, it would unquestionably have been vulnerable to a warrantless search under *Wyoming v. Houghton* and *United States v. Ross.*" *Id*. at 715 (emphasis added). Indeed, we framed the issue as

the propriety of "what was, in effect, the search of Funkhouser's person," *id*. at 702, something not at issue here.

Our focus was on the fact that "the 'fanny pack,' strapped around the waist of Funkhouser, was as much a part of Funkhouser's outer clothing as was the overcoat worn by John Terry in *Terry v. Ohio*, 392 U.S. 1, 24-25, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). It was as intimately a part of his person as would have been a money belt strapped around his waist, a wallet in his pocket, or a woman's purse actually being held in the hand of its owner." 140 Md. App. at 716. The search of it, therefore, could not have fallen under the *Carrol* doctrine search of the vehicle, even had the vehicle search been legally permissible. *Id*. at 717.

Our dicta in *Funkhouser* does not help Thomas. Here, the only testimony regarding the bag containing the marijuana was that it was a red and black plastic bag resting on Thomas's lap at the time of the traffic stop. There was no testimony or argument that it was in the nature of a wallet or purse in which Thomas could maintain a reasonable expectation of privacy as an extension of his person, nor was the bag attached to his person when he was inside, or removed from, the taxi.[10]

[10] The only assistance the *Funkhouser* dicta arguably provides to Thomas is our analysis therein of *Wyoming v. Houghton*, 526 U.S. 295 (1999), which held that, to be vulnerable to a warrantless automobile search, a container must be *in* the automobile. 140 Md. App. at 715. But, even that proclamation must be viewed through the lens of the issue at hand in *Funkhouser*, that the fanny pack had not been left in the vehicle when Funkhouser exited, but was attached to his person. It does not specify that a container, which is not worn on or considered an extension of the occupant, is not subject to a *Carroll* doctrine search if the container falls just outside the vehicle, as opposed to the floor of the (continued)

The applicability of the *Carroll* doctrine to the facts of this matter is somewhat beside the point in any event because we agree with the State's assertion that the plain view doctrine served to render the search of the bag permissible. The plain view doctrine is another exception to the warrant requirement, one that permits a police officer to seize clearly incriminating evidence that is "discovered in a place the officer has a right to be." *Cason v. State*, 140 Md. App. 379, 395 (2001).

The U.S. Supreme Court has explained that the plain view doctrine is based on the proposition that as soon as a police officer is lawfully in a position to observe an item, its owner loses his or her privacy interest in that item. *Wengert v. State*, 364 Md. 76, 87-88 (2001) (quoting *Illinois v. Andreas*, 463 U.S. 765, 771 (1983)). The seizure of property in plain view "involves no invasion of property and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." *Id*. at 88 (quoting *Payton v. New York*, 445 U.S. 573, 587 (1980)).

And, our courts have made clear that the plain view doctrine rationale is not limited to sight "but can accommodate any of the senses." *State v. Jones*, 103 Md. App. 548, 574 (1995), *rev'd on other grounds*, 343 Md. 448 (1996). There is no dispute that "plain smell alone . . . can yield probable cause to authorize a search warrant for a suitcase . . . or to authorize a warrantless *Carroll* Doctrine search of a truck." 103 Md. App. at 974. "The

vehicle, when the passenger exits the vehicle. We agree with the suppression court that a container, otherwise properly subject to a *Carroll* doctrine search, is not rendered unsearchable by the fortuity of it falling to the ground just outside the car when the occupant exits, rather than falling to the floorboard of the vehicle in the other direction.

smelling or sniffing of the exterior surface of an otherwise protected repository (automobile, suitcase, locker, etc.) is not a 'search' within the contemplation of the Fourth Amendment. It, therefore, need[s] no justification." *Funkhouser*, 140 Md. App. at 711 (citing *United States v. Place*, 462 U.S. 696, 707 (1983)).

Here, the taxi had been lawfully detained, and the occupants lawfully removed from the vehicle, when the bag that had been on Thomas's lap fell to the ground. By that time, Det. Lathe had already smelled marijuana "where the Defendant was sitting" and could "smell it strongly coming from the bag" once it fell to the ground. Therefore, given the plain smell of marijuana coming from the bag, Thomas had lost his privacy interest in it once it reached the ground, and Det. Lathe needed no further justification to search the bag.[11]

**II.**

Thomas next contends that the circuit court abused its discretion when it permitted a sheriff to "trail" him each time he approached the bench with his attorney. That action, he argues, was akin to shackling a criminal defendant and "other inherently prejudicial security measures" that signaled to the jurors he might be dangerous. In his view, the

[11] The fact that the suppression court predicated its ruling on another basis is of no moment. The Court of Appeals has explained that "an appellee is entitled to assert any ground adequately shown by the record for upholding the trial court's decision, even if the ground was not raised in the trial court," and "if legally correct, the trial court's decision will be affirmed on such alternative ground'" *Unger v. State*, 427 Md. 383, 406 (2012), *cert. denied*, 457 Md. 401 (2018).

proximity of the sheriff every time he approached the bench was not justified by a compelling State interest in safety or order in the courtroom.

During the State's case-in-chief on the first day of trial, defense counsel complained to the court: "I know for security purposes, the Sheriff has to be present, but he is following my client around kind of like a hawk and it makes my client (inaudible). And I am wondering if there is a way he can sort of maybe have him back off a little bit?" The court, having failed to notice such action by the sheriff, assured counsel it would "be on the lookout" for the sheriff's movement in relation to Thomas.

On the second day of trial, defense counsel again raised the issue:

> [DEFENSE COUNSEL]: Your Honor, can we somehow address the Bailiff following—trailing my client again.
>
> THE COURT: Okay. Based on the (inaudible) Sheriff and he is to stay with him (inaudible) six feet, so I do not—
>
> [DEFENSE COUNSEL]: No, but it is not the fact that he is in the proximity it is the trailing. Every time we come to the Bench—
>
> THE COURT: I think that that is for security, he needs to within a certain distance of—
>
> [DEFENSE COUNSEL]: Yes, Your Honor, I understand that is for security. But again, perception is everything, that is why he is not in green scrubs with handcuffs on. But it looks—shows him to be a dangerous person, that every time he comes up here—
>
> THE COURT: Okay. I disagree, so I do not think—as I said it is—the reflects [sic] that he is to stay away from him, so I do not (inaudible) at least six feet away from him, so he don't [sic] make any actions that are necessary.

[DEFENSE COUNSEL]: Okay. I want the record to reflect that every time we come to the Bench he moves from his position and follows us up to the Bench.

THE COURT: He does.

[DEFENSE COUNSEL]: And only comes when my client comes. Doesn't—a few times my client has stayed there, he does not come.

THE COURT: He does. The record—

[DEFENSE COUNSEL]: So, please let the record reflect that.

THE COURT: That is an accurate reflection. Okay.

"It is obvious that some security is necessary or desirable in most, if not all, criminal trials." *Bruce v. State*, 318 Md. 706, 718 (1990). And, "'[t]he decision as to the method and extent of courtroom security is left to the sound discretion of the trial judge.'" *Wagner v. State*, 213 Md. App. 419, 476 (2013) (quoting *Miles v. State*, 365 Md. 488, 570 (2001), *cert. denied*, 502 U.S. 839 (1991)). Appellate courts, therefore, "'uniformly rely upon an abuse of discretion standard for reviewing the action of trial judges in the matter of restraint . . . .'" *Hunt v. State*, 321 Md. 387, 408 (1990) (quoting *Bowers v. State*, 306 Md. 120, 132 (1986)).

"Overtly suggestive" security measures, such as shackling, generally are not permitted during a criminal trial, *In re D.M.*, 228 Md. App. 451, 464 (2016), but "[t]his does not mean . . . that every practice tending to single out the accused from everyone else in the courtroom must be struck down." *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986). Judicial review of a complaint of security measures taken by a trial court "is limited to determining whether what [jurors] saw was so inherently prejudicial as to pose an

unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over." *In re D.M.*, 228 Md. App. at 451 (quoting *Holbrook*, 475 U.S. at 572). "The determination of whether courtroom security measures violate a defendant's due process rights must be made upon a case-by-case basis." *Bruce*, 318 Md. at 721.

Not all security measures will result in prejudice to the defendant. Even the appearance of guards during the trial may not offend due process:

> The chief feature that distinguishes the use of identifiable security officers from courtroom practices we might find inherently prejudicial is the wider range of inferences that a juror might reasonably draw from the officers' presence. While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status. Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm.[12]

318 Md. at 718-19 (quoting *Holbrook*, 475 U.S. at 569).

In *Bruce*, the Court of Appeals held that permitting a single deputy sheriff to remain on the same side of the rail as the defendant was a proper exercise of the trial court's discretion. *Id*. at 720. Similarly, here, we are not presented with an inherently prejudicial

[12] This has become all but commonplace after September 11, 2001.

practice, like shackling during trial, which can only be justified by "compelling state interests in the specific case." *Id.* at 721. We are also not presented with "an extensive security force so close to the defendant that it could 'create the impression in the minds of the jury that the defendant is dangerous or untrustworthy.'" *Id*. (quoting *Kennedy v. Cardwell,* 487 F.2d 101, 108 (6th Cir.1973), *cert. denied*, 416 U.S. 959 (1974)).

The courtroom security measure of a single sheriff remaining six feet away from Thomas as he moved about the courtroom, with no indication of physical contact between the two, was not unreasonable. Our inquiry "is not whether less conspicuous measures might have been feasible, but whether the measures utilized were reasonable and whether, given the need, such security posed an unacceptable risk of prejudice to the defendant." *Id*. (citing *Holbrook* 475 U.S. at 572). We find nothing in the record to indicate that the nature of the sheriff's movements reflected any suspicion regarding Thomas or concern that he was a dangerous individual; nor is there anything in the record to indicate an unacceptable risk of prejudice in the security measures to which the jury may have been exposed, and, therefore, we hold that the trial court did not abuse its discretion in permitting the courtroom security utilized in the instant case.

**III.**

Next, Thomas avers that the circuit court abused its discretion in limiting his cross-examination of the State's forensic chemist, who analyzed the substance in the plastic bag recovered from the scene of the traffic stop and determined it to be marijuana. The court's failure to permit him to question the chemist about whether her promotion to the

position of quality assurance manager of the crime lab, in which she conducted her analysis, was the result of her predecessor's arrest for drug possession was, in his view, an improper limit to his ability to impeach the witness regarding the integrity of her lab when its leader's arrest put "everything that that lab does . . . at question."

Jennifer Hanburger, an Anne Arundel County Police Department forensic chemist, was tasked with the analysis of the suspected marijuana. The twelve-year veteran of the lab, accepted by the court as an expert in the analysis of controlled dangerous substances, determined, through procedures generally accepted within the scientific community, that the substance comprised 337.82 grams of marijuana.

Upon cross-examination, defense counsel ascertained that Hanburger had recently been promoted to the position of quality assurance manager of the crime lab. When he asked whether Hanburger had been promoted because her predecessor had been arrested for possession of drugs, the prosecutor objected, moved to strike, and asked for a curative instruction to the jury.

The circuit court agreed that the information sought by defense counsel had nothing to do with the quality of the lab or the case before it. The prosecutor proffered that an audit had been conducted of the lab but that no final report had yet been submitted. She did not believe, however, that "any cases or similar case or active cases were flagged in that audit. And there was no request for discovery with regard to the results to that audit." Therefore, she concluded, defense counsel's inquiry of the witness amounted to "pure speculation."

Defense counsel countered that if the "president" of the lab had been arrested for stealing or using drugs, "everything that that lab does i[s] at question" such that he should be able to question the new holder of that position. The circuit court sustained the State's objection and instructed the jury to disregard defense counsel's comments about Hanburger's predecessor and not to make any inferences from the question that had been asked.

As we explained in *Ashton v. State*, 185 Md. App. 607, 621 (2009):

> A criminal defendant's right to confront witnesses is guaranteed by the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. Central to that right is the opportunity to cross-examine witnesses. However, the defendant's right to cross-examine is not limitless, as judges have wide latitude to establish reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. Thus, the scope of the cross-examination lies largely within the discretion of the trial judge. Whether the trial court abused its discretion depends on the individual circumstances of the case. We must determine whether the trial judge imposed limitations upon cross-examination that inhibited the ability of the defendant to receive a fair trial.

(Internal quotation marks and citations omitted).

To be sure, Md. Rule 5-616(a) permits a defendant to attack the credibility of a prosecution witness through questions aimed at showing "that the facts are not as testified to by the witness" or that "an opinion expressed by the witness is not held by the witness or is otherwise not worthy of belief."[13] Presumably, Thomas's goal in attempting to cross-

[13] Md. Rule 5-616(a) provides, in pertinent part:

(continued)

examine Hanburger about the alleged illegal activity of her predecessor was to suggest that the entire lab, including Hanburger as an employee, was tainted, and therefore her expert opinion was not worthy of belief.

Assuming as true the assertion that the police lab's former quality assurance manager had been arrested for drug theft or possession, that fact would not make Hanburger's analysis of the suspected drug evidence less reliable. First, the prosecutor proffered to the circuit court that, although a final report of an audit of the lab had not been filed, she did not believe that any similar or active drug case had been flagged in the audit as questionable. Second, Hanburger testified that she had been employed as a forensic analyst for 12 years and had conducted her analysis of the suspected drug evidence according to procedures generally accepted within the scientific community, and defense counsel offered no challenge to either the procedure in general or to Hanburger's personal methodology. Absent any reasonable connection between the alleged crimes of Hanburger's predecessor and the lab's drug analysis and safety protocols or Hanburger's

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> (a) **Impeachment by inquiry of the witness.** The credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at:
>
> * * *
>
> (2) Proving that the facts are not as testified to by the witness;
>
> (3) Proving that an opinion expressed by the witness is not held by the witness or is otherwise not worthy of belief[.]

own analysis, of which Thomas offers none, the court acted within its discretion in refusing to permit the requested cross-examination of the witness because the information sought was irrelevant and likely to confuse the issues for the jury.

**IV.**

As his next assignment of error, Thomas contends that the evidence was insufficient to sustain his convictions of the firearm and handgun offenses, all of which required proof of his possession of the weapon. He claims that, in failing to adduce any evidence of his knowledge of the presence of the gun in the back seat of the taxi, the State failed to prove his joint and constructive possession of the gun. Given the insufficiency of the evidence to prove the firearm and handgun offenses, he concludes, the trial court also erred in denying his motion for new trial on that basis or on the ground that the verdict on those charges was contrary to the evidence.

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. That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone. Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence. This is because weighing the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact. Thus, the limited question before an appellate court is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.

*Darling v. State*, 232 Md. App. 430, 465, *cert. denied*, 454 Md. 655 (2017) (alterations in original) (internal quotation marks and citations omitted).

To convict a defendant of possession of a controlled dangerous substance, the State must prove beyond a reasonable doubt that the defendant "exercise[d] actual or constructive dominion or control over" the contraband. Md. Code (2012 Repl. Vol., 2017 Supp.), § 5-101(v) of the Criminal Law Article ("CL"). The analysis of possession of a controlled dangerous substance has been applied to offenses involving other contraband. *See Handy v. State*, 175 Md. App. 538, 564 (2007), and cases cited therein.

The State need not show that the defendant had actual or sole possession of the contraband, as possession may be "actual or constructive" and "exclusive or joint in nature" to support a conviction. *Moye v. State*, 369 Md. 2, 14 (2002). The "mere fact that the contraband is not found on the defendant's person does not necessarily preclude an inference by the trier of fact that the defendant had possession of the contraband." *Smith v. State*, 415 Md. 174, 198 (2010) (quoting *State v. Suddith*, 379 Md. 425, 432 (2004)). Knowledge of the contraband, however, is an "essential element of crimes of possession" because "an individual ordinarily would not be deemed to exercise 'dominion or control' over an object about which he is unaware." *Moye*, 369 Md. at 14 (quoting *Dawkins v. State*, 313 Md. 638, 649 (1988)).

In determining whether the evidence is sufficient to support a finding of possession in constructive and/or joint possession cases, the Court of Appeals has identified four pertinent factors: 1.) the defendant's proximity to the contraband; 2.) whether the

contraband was in plain view of and/or accessible to the defendant; 3.) whether there was indicia of mutual use and enjoyment of the contraband; and 4.) whether the defendant has an ownership or possessory interest in the location the police discovered the contraband. *Smith*, 415 Md. at 198. None of these factors are, alone, conclusive of possession. *Id*.

Addressing the *Smith* factors in turn, first, the State established Thomas's close proximity to the gun recovered from the back seat of the taxi, near where he had been sitting. *See Folk v. State*, 11 Md. App. 508, 518 (1971) (observing that when the defendant is in the same vehicle as the contraband and within arm's length of every other occupant, "[p]roximity could not be more clearly established").

Second, although it does not appear from the police officers' testimony that the gun was in plain view when they first looked into the vehicle, the gun was under the back seat of the van, the same area where Thomas was sitting. It was, therefore, accessible to him without a stretch from his seat.

Third, Thomas's presence in the vehicle and his actual possession of the marijuana are indicia of mutual use and enjoyment of the drugs and the gun. The Court of Appeals has acknowledged that "[g]uns often accompany drugs, and many courts have found an 'indisputable nexus between drugs and guns.'" *Bost v. State*, 406 Md. 341, 360 (2008) (quoting *United States v. Sakyi*, 160 F.3d 164, 169 (4th Cir.1998); *see also Dashiell v. State*, 143 Md. App. 134, 153 (2002) (noting that "[p]ersons associated with the drug business are prone to carrying weapons").

Finally, although Thomas did not appear to have a possessory interest in the taxi, we have held that a permissible inference may be drawn that people who know each other and are traveling together in a vehicle "in circumstances indicating drug use or selling activity are operating together, and thus are sharing knowledge of the essentials of their operation." *Larocca v. State*, 164 Md. App. 460, 481 (2005), disagreed with on other grounds by, *Grimm v. State*, 477 Md. 482 (2016).

Considering all the permissible inferences under the statutory definition of possession, a rational trier of fact could have found beyond a reasonable doubt that Thomas possessed the SIG Sauer recovered from beneath the back seat of the taxi, in which he was a passenger, when it was stopped by the police. The evidence was, therefore, sufficient to sustain the convictions relating to possession of the firearm.

Thomas's related argument, that the trial court erred in denying his motion for a new trial, is nothing more than a request to re-litigate his case, a request not permitted under law. "[I]nsufficiency of the evidence is today a singularly inappropriate basis for ordering a new trial, because if the evidence was insufficient to go to the jury in the first place, double jeopardy principles preclude a new trial." *In re Petition for Writ of Prohibition*, 312 Md. 280, 313 (1988), *disapproved of on other grounds by State v. Manck*, 385 Md. 581 (2005).

Alternatively, Thomas asks that we review the circuit court's denial of his motion for a new trial based on the weight of the evidence. However,

> [m]otions for new trial on the ground of weight of the evidence are not favored and should be granted only in exceptional cases, when the

> evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to let the verdict stand. And in the area of credibility, a reviewing judge ordinarily should not make a credibility determination if there is nothing more than conflicting testimony; there should usually be at minimum substantial impeachment of a witness before the judge finds that witness's testimony deficient on the basis of credibility.

312 Md. at 326-27. Here, not only was there no "substantial impeachment of a witness," there was no conflicting testimony at all. Therefore, a finding that the verdict was against the weight of the evidence is not warranted. Moreover, there is nothing in the record to support the idea that a "miscarriage of justice" would occur if Thomas's firearm convictions were allowed to stand; he provides no specific support for his argument or instances that his is an "exceptional case" that warrants granting his motion for a new trial. Accordingly, we affirm the circuit court's ruling, which denied the motion for new trial.

**V.**

Thomas next argues that the circuit court abused its discretion in permitting the prosecutor to call him a "drug dealer" during her closing argument but then refusing to permit defense counsel to refer to Detective Christopher Brown, the State's expert who opined that the facts of the case supported a finding of possession of marijuana with the intent to distribute, as a "hired gun." The prosecutor's statement, he says, labeled him a "scourge" to his prejudice and relied on facts not in evidence, as he was not charged with distributing drugs. The error continued, he says, with the trial court's refusal to grant him a new trial on the ground of improper closing argument. On the other hand, Thomas avers, defense counsel's characterization of Brown as a "hired gun" was "a perfectly legitimate rhetorical flourish based on undisputed evidence that Officer [sic] Brown was brought in

by the State as an expert and paid overtime for his time sitting in court and then testifying." Therefore, in his view, the court further erred in refusing to permit defense counsel to make the comment during his own closing argument.

The Court of Appeals has consistently stated that attorneys are afforded "considerable leeway in closing argument, and that regulation of closing arguments falls within the sound discretion of the trial court." *Frazier v. State*, 197 Md. App. 264, 283 (2011). In general, "counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom." *Mitchell v. State*, 408 Md. 368, 380 (2009) (quoting *Wilhelm v. State*, 272 Md. 404, 412 (1974)). There are, of course, lines that counsel may not cross in delivering a closing argument. For example, the Court of Appeals has explained that counsel may not: comment on facts not in evidence; claim what he or she would have proven; appeal to the prejudices or passions of the jurors; or invite the jurors to abandon the objectivity that their oaths require. 408 Md. at 381.

What exceeds the limits of permissible commentary during closing argument depends on the facts of each case. *Degren v. State*, 352 Md. 400, 430-31 (1999) (quoting *Wilhelm*, 272 Md. at 415). And, "[b]ecause the trial judge is in the best position to gauge the propriety of argument in light of such facts, we have also held that '[a]n appellate court should not disturb the trial court's judgment absent a clear abuse of discretion by the trial court of a character likely to have injured the complaining party.'" *Mitchell*, 408 Md. at 380-81 (quoting *Grandison v. State*, 341 Md. 175, 225 (1995)). Even if counsel makes improper remarks during closing argument, however, reversal would only be merited if the

comments "actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Spain v. State,* 386 Md. 145, 158 (2005) (quoting *Degren,* 352 Md. at 431).

**A. The Prosecutor's Reference to Thomas as a "Drug Dealer."**

The prosecutor made the following comments during her closing argument:

> [PROSECUTOR]: . . . You heard Detective Brown testify. He testified that based on his training, knowledge and experience and his expertise opinion [sic] that this marijuana found, this bag of marijuana found was not for personal use but was consistent with possession with intent to distribute. And what is the main reason of that? The amount. The amount. This is more marijuana, in his opinion, than one person would carry around on them at the same time, if they were just a user. He said users don't stockpile this kind of thing.
>
> We take his numbers and consider that, it's about $30.00 a gram, said this is mid-level marijuana, times 337, that is $6,740.00. So, does a user walk around with between six and seven thousand dollars worth of marijuana on their person? No.
>
> Who walks around with this type of marijuana on their person? A drug dealer.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: The Defendant is a drug dealer not—
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> [DEFENSE COUNSEL]: We approach?
>
> [PROSECUTOR]:--user—
>
> THE COURT: You may.

(Whereupon, a Bench Conference follows.)

[DEFENSE COUNSEL]: Your Honor, that is an inflammatory term and it cannot be used to characterize my client.

THE COURT: I overrule.

[DEFENSE COUNSEL]: Just—

THE COURT: Okay. I overrule. Thank you.

(Whereupon, the Bench Conference was concluded.)

[PROSECUTOR]: And we can take it by the ounce because two thousand—well, if it is $225.00 an ounce, times 12, that is $2,700.00. A drug user doesn't walk around with $2,700.00 worth of marijuana on their person. A drug dealer does, because the Defendant is a drug dealer.

Then, in her rebuttal closing argument, when discussing Det. Brown's testimony, the prosecutor stated: "The test that he did was he looked at the amount, he looked and the circumstances and he came to a conclusion. And that conclusion is this amount is consistent with possession with intent to distribute. And that is because the Defendant did not possess these drugs for his own personal use. The Defendant is a drug dealer. He possessed them with the intent to distribute."

Although Thomas was charged with possession with intent to distribute marijuana and related firearm charges with a nexus to drug trafficking, and not distribution of marijuana, we have explained that "[i]ntent to distribute controlled dangerous substances is seldom proved directly, but is more often found by drawing inferences from facts proved which reasonably indicate under all the circumstances the existence of the require intent." *Purnell v. State*, 171 Md. App. 582, 614 (2006) (citing *Smiley v. State*, 138 Md. App. 709,

716 (2001)). And, "[h]ow better to prove an intent to sell than to prove that one is in the habit of selling!" *Anaweck v. State*, 63 Md. App. 239, 255 (1985), *overruled on other grounds by Wynn v. State*, 351 Md. 307 (1998).

To prove Thomas's intent to distribute marijuana, the State presented the testimony of Det. Brown, who opined that the circumstances of the matter—the amount of marijuana in the bag possessed by Thomas, the large amount of money recovered from the taxi, the proximity of firearms to the drugs because guns "are commonly found on drug dealers," and the absence of paraphernalia for personal use—meant that the marijuana was possessed to sell. If the jury accepted Det. Brown's testimony and believed that Thomas possessed the marijuana with the intent to sell it (and likely had sold some of it, based on the large amount of money he threw into the front seat of the taxi), Thomas would, indeed, be a drug dealer. Therefore, the appellation "drug dealer," as used by the prosecutor, was based on facts in evidence or deducible on inferences therefrom.

We are not persuaded by Thomas's argument that the term is as much a pejorative and on par with characterizations deemed by our courts to be improper, such as "monster," or "animal," or "pervert." The term "drug dealer" in relation to a person who deals drugs is a factual label, while calling a child sexual abuser a "monster," as in *Lawson v. State*, 389 Md. 570, 597 (2005), or an "animal" and "pervert," as in *Walker v. State*, 121 Md. App. 364 (1998), serves to inflame the emotions of the jury in a way that calling one a drug

dealer in most instances is not.[14] *See Lawson*, 389 Md. at 597 ("Prosecutors should not appeal to the prejudices of the jury.").

The circuit court acted within its discretion in overruling Thomas's objections to the prosecutor's use of the term "drug dealer" in her closing arguments. Therefore, we further find no error in the court's denial of Thomas's motion for new trial based on the same ground.

**B. Defense Counsel's Reference to Detective Brown as a "Hired Gun."**

During defense counsel's opening statement, he stated that Thomas "had no knowledge, he had no dominion, he had no control, [the gun] was not on his person. This is not his gun. They will bring in Officer [sic] Brown, the expert, the hired gun--" At that point, the prosecutor objected to the reference of the expert as a "hired gun," as "[i]t is the course of his duty as a police officer. He is not being paid extra whatsoever in this case. It is part of his being a police officer." Defense counsel agreed to wait until closing to make further statements. The circuit court ruled it would wait until Det. Brown testified to determine if he was being paid other than in the regular course of his duties.

Det. Brown testified that he had been employed as an officer with the Anne Arundel County Police Department for over ten years and was currently assigned to the Heroin Task Force, having completed a six and a half month police academy drug training course and

[14] There is nothing in the record to indicate that Thomas's illegal action lead to serious injury or death. *Patrick Joseph Thomas A/K/A Patrick Joseph Patrick v. State*, ___ Md. App. ___ (2018) (No. 1115, Sept. Term 2016 (slip op. 6 ) (filed April 4, 2016).

other classes related to drug identification. He had been involved in approximately 300 drug arrests, of which approximately 150 to 200 involved marijuana. After he opined that the facts as presented during the trial supported a finding of possession of marijuana with the intent to distribute, the prosecutor asked if he was being paid by the State's Attorney's Office—either in monetary compensation, lunch, mileage, or hotel costs—for his court appearance. He responded that he was not but was only testifying as part of his job as a police officer. Upon cross-examination, he agreed he was not appearing *pro bono* on his own time and that after the trial had concluded the day before, he had gone to work the night shift, thereby earning approximately $42.00 per hour overtime for the court appearance.

At the close of the evidence, the prosecutor moved in *limine* to preclude defense counsel from referring to Det. Brown as a hired gun in his closing argument, as that was "not a fair description of him." Defense counsel argued that it was appropriate argument, as that "is essentially what an expert is. An expert is someone that has been hired to give an expert opinion." In his opinion, all experts are hired guns, and he therefore averred that he "should be able to refer to [Det. Brown] in any sort of argumentative way." He then conceded, however, that the DNA expert was not a hired gun because "[t]hat was part of her job." The circuit court, failing to see any distinction between the two experts, granted the State's motion and instructed defense counsel not to refer to Det. Brown as a hired gun.

Thomas claims that the description was "a perfectly legitimate rhetorical flourish based on undisputed evidence that Officer Brown [sic] was brought in by the State as an

expert and paid overtime for his time sitting in court and then testifying." In his view, the court abused its discretion in granting the State's motion in *limine*. We disagree.

Det. Brown testified that his court appearance was one of his job responsibilities with the Anne Arundel County Police Department, a job for which he received a salary. His training as a drug identification expert came during his employment and was intended for use in that employment. He was paid overtime for his court appearance, as it was beyond his regular work hours, but he was not hired and compensated by the State specifically and solely for the purpose of testifying favorably, as would an expert witness outside the police department. Indeed, defense counsel conceded that the police DNA expert would not be a hired gun because her testimony was part of her job. Like the circuit court, we see no distinction between the two experts.

Moreover, defense counsel was permitted to get his point across when he argued, over objection, that the "only reason" Det. Brown was testifying as an expert by saying "whatever you want to hear" was to collect overtime:

> [DEFENSE COUNSEL]: . . . First of all, the only reason he is here is so he can collect his $42.00—
>
> [PROSECUTOR]: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> [DEFENSE COUNSEL]: His $42.00 an hour in overtime. That's why he's here. Great. I can sit through two days of testimony, forty-two bucks, fantastic. Write a report where I didn't do anything, see anything, talk to anybody, great. I'll tell you whatever you want to hear.

We perceive no prejudice to Thomas in the circuit court's ruling and no error or abuse of discretion on the part of the court in declining to permit defense counsel from referring to Det. Brown as a hired gun.

**VI.**

Finally, Thomas argues that the circuit court erred in failing to merge, for sentencing purposes, his convictions of possession of a firearm under sufficient circumstances to constitute a nexus to a drug trafficking crime and using, wearing, carrying, or transporting a firearm in relation to a drug trafficking crime under either the required evidence test, the rule of lenity, or a unit of prosecution analysis. The State agrees that Thomas should have received only one sentence for those two convictions, "at least . . . under the rule of lenity," and asks us to vacate one of the two sentences.

Thomas was convicted of, *inter alia*, the two firearm charges listed above, in violation of CL § 5-621(b)(1) and (2), which read:

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

For those convictions, the circuit court sentenced Thomas to concurrent prison terms of ten years each, suspending all but six years, the first five years without the possibility of parole.

"The merger of convictions for purposes of sentencing derives from the protection against double jeopardy afforded by the Fifth Amendment of the federal Constitution and by Maryland common law." *Brooks v. State*, 439 Md. 698, 737 (2014) (citing *Nicolas v. State*, 426 Md. 385, 400 (2012)). "Merger protects a convicted defendant from multiple punishments for the same offense." *Id.* A trial court's failure to merge convictions for sentencing purposes when required to do so comprises reversible error. *Britton v. State*, 201 Md. App. 589, 598-99 (2011).

Generally, we analyze whether offenses merge under the required evidence test. *State v. Smith*, 223 Md. App. 16, 34 (2015).

> The required evidence test focuses upon the elements of each offense; if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter. Stated another way, the required evidence is that which is minimally necessary to secure a conviction for each [ ] offense. If each offense requires proof of a fact which the other does not, or in other words, if each offense contains an element which the other does not, there is no merger under the required evidence test even though both offenses are based upon the same act or acts. But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, and where both offenses are based on the same act or acts, [ ] merger follows [ ].

Id. (quoting *Nicolas*, 426 Md. at 401-02 (citations omitted)). "When a merger is required, separate sentences are normally precluded; instead, a sentence may be imposed only for the offense having the additional element or elements." *Abeokuto v. State*, 391 Md. 289, 353 (2006).

Merger may also be appropriate when a defendant is convicted of multiple offenses based on the same conduct. *See Morris v. State*, 192 Md. App. 1, 39 (2010) (noting

unconstitutionality of multiple punishments for same conduct unless intended by the legislature). In conducting a merger analysis, we first determine whether the two offenses arose out of the same conduct, and, if so, then we examine whether the General Assembly intended multiple punishments. *Wiredu v. State*, 222 Md. App. 212, 220 (2015).

In *Handy v. State*, 175 Md. App. 538, 588 (2007), we, applying the rule of lenity, held that the unit of prosecution under CL § 5-621 is the drug offense, rather than the gun. Here, Thomas was convicted of one drug offense while in possession of one gun. There is no indication that Thomas used, wore, or carried the gun that was found under the back seat of the taxi, leaving its transportation in the vehicle as the only manner in which he could have been convicted under CL § 5-621 (b)(2). Therefore, because we fail to discern how the gun's presence in the taxi, which was required for his possession, is an element distinct from the gun being in the taxi while it was transported, the two charges under CL § 5-621(b) should have merged for the purposes of sentencing.

**SENTENCE FOR POSSESSING A FIREARM WITH A NEXUS TO A DRUG TRAFFICKING CRIME VACATED; JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY OTHERWISE AFFIRMED; COSTS ASSESSED AS FOLLOWS: 85% TO BE PAID BY APPELLANT AND 15% TO BE PAID BY ANNE ARUNDEL COUNTY.**