Circuit Court for Baltimore City
Case No. 117068010

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1631

September Term, 2017

DOMINIC WHITEHEAD

v.

STATE OF MARYLAND

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

JJ.

Opinion by Meredith, J.

Filed: March 19, 2020

Dominic Whitehead, appellant, was convicted by a jury in the Circuit Court for Baltimore City of possession of cocaine, distribution of cocaine, and possession with intent to distribute cocaine. When he was arrested, Whitehead had no cocaine in his possession. He did have $257 in cash and some small baggies of suspected marijuana in a non-criminal amount. The recovery of the marijuana was depicted on the body-camera footage of the arresting officer that was admitted in evidence despite Whitehead's repeated objections. In a motion in limine, Whitehead argued that the evidence regarding his possession of marijuana should be suppressed because it was not relevant and not admissible pursuant to Maryland Rule 5-404(b), which provides generally that "[e]vidence of other wrongs, crimes, or acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith." The trial court denied the motion.

During the trial, the court allowed the State, over objection, to present evidence and testimony regarding Whitehead's possession of the suspected marijuana at the time of his arrest. But, after the close of evidence, the court instructed the jury that "[t]he fact that the defendant was in possession of less than 10 grams of suspected marijuana is not at issue in this case, and you are not to consider it in relation to whether or not the defendant is guilty of the crimes charged."

After Whitehead was convicted of the cocaine charges, he sentenced to nine years in prison. This appeal followed.

Whitehead presented two questions in his brief: (1) "Did the trial court err in allowing the State to introduce admittedly irrelevant marijuana evidence?" (2) "Was the introduction of evidence concerning Defendant's possession of marijuana, in a trial concerning the alleged possession and distribution of cocaine, unduly prejudicial under the circumstances of this case?" For the reasons that follow, we answer "yes" to question 1, but we answer "no" to question 2. Because we conclude that the error was harmless beyond a reasonable doubt, we shall affirm the judgments of the circuit court.

FACTS AND PROCEDURAL HISTORY

The evidence in the record revealed the following. At around 10:40 a.m. on February 16, 2017, Officer Dane Hicks, an 11-year veteran of the Baltimore Police Department assigned to patrol the Eastern District, was sitting in a marked police cruiser in the 2400 block of East Lafayette Avenue. Officer Hicks was assigned to a post in this sector and was familiar with the area; he knew it as a "high crime/high drug area[.]" As Officer Hicks watched, his view clear and unobstructed, he saw Whitehead standing on the corner of North Port Street and East Lafayette Avenue. A red SUV pulled up and parked at the corner. The female driver exited the vehicle and spoke to Whitehead. Officer Hicks observed the driver hand money to Whitehead. Whitehead then walked over to the broken steps in front of the vacant rowhouse at 2413 East Lafayette Avenue, removed a loose brick, retrieved a large clear plastic bag, removed a small object that was "consistent with the size of narcotics" from the large bag, and then replaced the clear plastic bag under the brick. Whitehead then returned to the corner and gave the small

item he had removed from the bag to the driver of the SUV. Officer Hicks—who was accepted by the court as "an expert in the area of narcotics, narcotic law violations, street level distribution schemes, [and] packaging of narcotics, especially cocaine, in Baltimore City"—testified at trial: "Through my experience and expertise, I believed a narcotics transaction took place."

As soon as the driver got back into her SUV, Officer Hicks pulled up and parked right behind her. When he approached the driver of red SUV, the driver immediately said, "I know what you want," and handed him "a Ziploc bag of [suspected] cocaine."

Meanwhile, Officer Hicks was continuing to watch Whitehead, and he saw that Whitehead had started walking up North Port Street. Officer Hicks "had [his] eye on the suspect," while dealing with the SUV driver, as the officer explained:

> [BY THE STATE]: What did you do next?
>
> [BY THE WITNESS]: Again, at the same time, I had my eye on the suspect. I got on the radio, and I gave a description --- a clear description to the dispatcher, and I gave a clear description to the other officers as well, description on what he was wearing, and where he was located, and where he was walking.
>
> Q. And when you say, "the other officers," what are you talking about?
>
> A. Just all officers that are working close in the area.
>
> Q. And was this on a particular channel? . . . Describe the process of your communication with these other officers.
>
> A. What I did was --- I'll just do --- I'll just tell you what I did that day. I just gave a description of No. 1 male. He had on a green jacket, black sleeves, and gray hoodie, walking down Port Street toward North Avenue. And at that time, I'm saying ["]I need assistance with having the suspect (indiscernible).["]

> Q. And what were you doing as you radioed this description to these other officers?
>
> A. I'm still with the white female [SUV driver]. Still here. She hasn't moved. I'm still with her. Also had my eye on him as well.

After he could no longer see Whitehead, Officer Hicks placed the SUV driver under arrest. "Once she was secured," he testified, "I walked over to [2413 E. Lafayette Avenue] where the stash was." Officer Hicks moved the loose brick from the broken steps in front of 2413 E. Lafayette Avenue and discovered beneath it "a clear plastic bag with 12 Ziploc -- clear Ziplocs with white substance." He visually confirmed that the appearance of the 12 smaller Ziploc bags inside the large clear Ziploc bag matched the small Ziploc that he had recovered from the SUV driver.

Less than three minutes after Officer Hicks had radioed for assistance, Whitehead was apprehended by several other officers a short distance away. Officer Derek Bristow, an Eastern District patrolman, testified that he was in the vicinity when he heard Officer Hicks's description of the suspect on the police radio, that he responded to the area from which Officer Hicks had radioed, and that, in responding to the call, he "was looking for . . . a black male wearing a green jacket with black sleeves." Officer Bristow saw such a person in the 1800 block of North Milton Street, approximately 150 to 200 feet east of where Officer Hicks had first observed Whitehead and the SUV driver interact. Officer Bristow testified that the suspect "was already being stopped by my partners. His hands were being put on top of his head, and I searched the male." Officer Bristow testified that the suspect matched the broadcast description, as he was wearing a green jacket with

black sleeves over a gray hooded sweatshirt. Additionally, Officer Bristow identified Whitehead in court as the person he searched on February 16, 2017.

In his search of Whitehead, Officer Bristow recovered $257 in cash and "three Ziplocs with a green plant substance." The search, including the recovery of the "green plant substance," was captured on Officer Bristow's body worn camera. The "green plant substance" and the cash were inventoried. A photograph was taken showing four items of evidence: a large clear plastic bag; twelve little Ziploc bags filled with a white powdery substance; three Ziploc bags (that appear to have three to four times the capacity of the previously-mentioned little Ziplocs containing white powder) filled with a greenish-brown substance; and a single little baggie filled with a white powder substance that was similar in appearance to the twelve previously-mentioned Ziploc bags.

Prior to trial, Whitehead filed a motion seeking to suppress the cash and the marijuana. The motion was heard on August 9, 2017, prior to the first day of trial. Whitehead argued initially that the marijuana and the cash had to be suppressed because there was no confirmation that the person arrested was the same person Officer Hicks had observed participating in a hand-to-hand transaction with the SUV driver. The following colloquy reflects the court's denial of the motion to suppress:

> [BY COUNSEL FOR WHITEHEAD]: Your Honor, I understand the case law is what it is on this particular point. I am moving to suppress that marijuana and the money that was recovered from Mr. Whitehead, the biggest point of concern that has [sic]. I'm not sure there's any confirmation that the person who was arrested is actually the same person as who was observed earlier.

> I --- it's unclear to me and the officer says that he thinks that he saw Mr. Whitehead at the district, but I --- it was not testified to that he is actually the same person.[1]
>
> So for those reasons I am moving to suppress those items that were recovered f[r]o[m] Mr. Whitehead.

[1] This is not a completely accurate characterization of the record. Officer Hicks was asked by Whitehead's counsel:

> [BY COUNSEL FOR WHITEHEAD]: So you did not actually observe the person who was arrested to determine whether or not it was, in fact, whether Mr. Whitehead was the same person you saw earlier?
>
> [BY OFFICER HICKS]: I believe --- I'm trying to recall. I can't recall exactly how it happened because I think he was at the district for a brief moment, but not too long, though, because I had to return to the district at that point.
>
> Q. Okay. But you didn't observe him?
>
> A. **I did observe him. Yes.**
>
> Q. When?
>
> A. At the wagon --- I believe it was at the wagon at that point and then he was transported from there because he was going to be taken by wagon by him and the white female which occurred at that point ---
>
> Q. So ---
>
> A. --- that I can recall.
>
> Q. --- **the observation was at the district or on the street?**
>
> A. **I believe it was at the district.**

(Emphasis added.) Additionally, Officer Hicks testified that he was already familiar with Whitehead because "I've seen him several times in that area."

[BY THE COURT]: I think through the motion you probably have developed some information that you can use for cross of Officer Hicks at trial. My question is, first, Mr. [Prosecutor], he's not charged, is he, with anything related to the marijuana?

[BY THE STATE]: No, ma'am. The amount of marijuana was less than 10 grams.

[THE COURT]: Is there any argument you want to make that --- regarding its relevance? **What's the relevance of the marijuana if he's not charged with it?**

[THE STATE]: **Judge, overall I don't think that there is any.** The only issue would be that there is body [worn] camera of the defendant's arrest which I expect will become part of the presentation either by the defense or by the --- by the State. And that is clearly observed being seized from his person. And although he's not charged with any marijuana violation, that is going to be part and parcel of the film footage.

[BY COUNSEL FOR WHITEHEAD]: And, Your Honor, I would respond to that that if [the State] intends to introduce that footage **I would be asking that portions of the tape that involve the seizure of marijuana be redacted.**

[THE COURT]: And here's the problem I have with that is the appearance to the jury that the tape was in some way altered.

[COUNSEL FOR WHITEHEAD]: Uh-huh.

[THE COURT]: Given everything that I have in front of me **I was questioning the relevance of the officer finding the marijuana.**

That said, the evidence being what it is I --- I do think that the --- if --- if the State would [be] required to alter that evidence that it would appear that there [was] some nefarious purpose in having done that. I --- **I don't believe that any prejudicial effect of introducing anything related to the non-criminal marijuana would have any bearing on the charge that is at issue here.**

So did you --- I mean, regarding the money do you have any argument other than ---

[COUNSEL FOR WHITEHEAD]: My argument is mostly as to identity.

[THE COURT]: All right. And certainly I do think that you've produced some, you know, good ground for cross-examination at trial of Officer Hicks.

But given everything that I have in front of me **I certainly don't find any reason to suppress the items taken from Mr. Whitehead based on Officer Hicks' testimony.** I do believe there was --- that this was an appropriate search and certainly at this point the --- your motion is respectfully considered and denied.

(Emphasis added.)

The next morning, prior to *voir dire*, Whitehead supplemented his motion to suppress the evidence of marijuana, and focused on the lack of relevancy:

[BY COUNSEL FOR WHITEHEAD]: I was ruminating more over night on the issue of the body camera footage. **I still think that any evidence of the marijuana would be impermissible under Maryland Rule 5-608(b) [sic] as other crimes evidence**, and I don't think that we can surmount that the test is required to admit that evidence because I don't think there's any other purpose for which it's admissible.

Whether or not there's body camera footage is not really the central issue in this case. I was going to ask if the Court is concerned about the redacted portion of the body camera footage then we may as well not admit it at all and just have the officer testify as to its contents. Because it's the only ---

[BY THE COURT]: **And you know in this day and age that wouldn't have anywhere near the effect for a jury that playing the body camera would. I appreciate your advocacy for your client, but I'm not going to tell them they can't play the tape.**

[COUNSEL FOR WHITEHEAD]: Well, then **I still am going to renew my objection and ask for the portions that relate to the recovery of the marijuana be excluded from the tape**.

[THE COURT]: Your motion has been respectfully considered and denied. Under --- number one, **I don't think it's evidence of other**

> **crimes. It is all part and parcel of the same event**. ***I was questioning what the relevance of the marijuana that was recovered was but*** **when [the State] appropriately pointed out that the evidence is inextricable because of the body camera footage,** ***the evidence is inextricable from that which is clearly admissible***.
>
> So therefore, if I asked the State to somehow edit the video, it would look like it was dockered [sic]. **And frankly**, with the analysis that I'm called upon to do, **it does not appear to me that the probative value is outweighed by the prejudicial effect; it certainly is not.**
>
> We're dealing with a couple of --- with a small amount of marijuana. If you do want me to give an instruction regarding the fact that the amount of marijuana that Mr. Whitehead is alleged to have had on him is not criminal, I will certainly give that instruction. But your objection is noted and overruled.

(Emphasis added.)

Whitehead's counsel next asked that the court redact the portion of the drug-lab report identifying the "green plant substance" as marijuana. The State said it would defer to the court but noted that it intended to introduce the inventory photograph that showed the cocaine and the marijuana side by side in a single photograph: "All of the drugs are collectively photographed. The marijuana is going to be there. It's going to be on the body-worn camera and it is what it is." The court granted Whitehead's motion to redact the portion of the lab analysis regarding the marijuana, arguing that "the weight and nature of the marijuana is not an essential element to any of the crimes charged," but the

court denied the motion with respect to the photograph showing the suspected marijuana.[2]

During the trial, Officer Hicks testified as he did at the suppression hearing, describing his surveillance of the corner of Port and Lafayette on the morning of February 16, 2017, his observations of what he believed to be a hand-to-hand drug transaction, and the actions he took in response. He testified that he broadcasted over the police radio a description of a black male, wearing a green jacket with black sleeves and a gray hoodie, walking along Port Street toward North Avenue. Officer Hicks testified that he retrieved the stash of packages of cocaine from the spot where he had seen Whitehead place it, and Officer Hicks confirmed that the baggie of cocaine he had recovered from the SUV driver appeared similar to the little baggies with the large bag he had recovered from under the loose brick. He later saw Whitehead at the Eastern District lockup. Whitehead was wearing clothes that matched the description Officer Hicks said he had broadcasted to the other officers. Officer Hicks told the jury about recovering from Whitehead's inventory search "three clear Ziploc bags with green plant substance" and cash in the amount of $257. Officer Hicks photographed these items, along with the cocaine, and the photograph showing the suspected marijuana next to the baggies of cocaine was admitted as State's Exhibit 4, over Whitehead's objection.

[2] Whitehead also asked that the court preclude the State from referring to Whitehead by an alias that he did not use in this case. The court granted that motion because the unused alias was not "relevant to the crime charged in this case."

Officer Hicks described the inventorying process. When the State moved for the admission of State's Exhibit 8, which was a package containing the cocaine and the suspected marijuana, Whitehead objected, pointing out that only the cocaine should be published to the jury. The court overruled the objection, stating:

> Yeah. I note your objection. Again, I do think the --- based on what I stated earlier and how I still feel, number one, **I do feel like the marijuana is not going to be nearly as prejudicial as anything else that's included in there. If you want a limine [sic] instruction, I will certainly give one, but I believe that the jury is entitled to a fair picture of everything that was recovered *mainly because it would be inextricable on the video*.**
>
> Given that evidence and everything flowing from it, I'm going to limit the State to the extent that I can on the [drug-lab] analysis [report], things like that, but frankly, I --- your objection is noted and overruled.

(Emphasis added.) The package containing the cocaine and the suspected marijuana was admitted into evidence.

On the morning of the second day of trial, counsel for Whitehead renewed the objection to the entire body-camera recording coming into evidence, arguing again that the portion showing the seizure of the marijuana was not relevant to anything for which Whitehead was on trial. The court asked the State if the entire footage was relevant, and the State responded merely, "[I]t is. The exhibit is submitted in its entirety." The court again overruled Whitehead's objection to the entire, unredacted body-camera footage being admitted into evidence, and not just the portion of the footage documenting the recovery of the cocaine:

> [BY THE COURT]: Right. Here's my thing, I mean, frankly if you want to play the entirety of it, you can, but if the witness is able to authenticate the video he's --- I don't believe that the State's under any obligation to play it

> in its entirety. Once it's been authenticated, it's obviously relevant, it's Mr. Whitehead depicted.

On cross, Officer Hicks confirmed that he had seen Whitehead at the Eastern District lockup following his arrest, and that Whitehead was the same person he had seen conducting a hand-to-hand drug transaction that morning at the corner of Port and Lafayette.

Officer Bristow testified, as he had at the hearing on the motion to suppress. He recounted that he was on duty in the area on the morning of February 16, 2017, when he heard Officer Hicks's radio broadcast describing a black male suspect wearing a green jacket with black sleeves. Officer Bristow responded to the vicinity from which Officer Hicks made the call and saw a suspect matching the description in the 1800 block of North Milton, and that suspect was already being detained by other officers. Officer Bristow activated his body-worn camera and recorded his participation in the arrest. The State introduced, as State's Exhibit 9, a video recording made by Officer Bristow's body-worn camera. The three-minute recording, which showed Officer Bristow searching Whitehead's person and recovering cash and "weed," was admitted over Whitehead's continuing objection regarding the evidence of marijuana. Officer Bristow also identified Whitehead in court as the same person he had searched in the 1800 block of North Milton on the morning of February 16, and he noted that the location of Whitehead's arrest was approximately 150 to 200 feet from where the drug transaction at issue had taken place.

After Officer Bristow's testimony, the State rested. The defense rested without putting on any evidence. Whitehead's motion for judgment of acquittal was denied.

Pursuant to Whitehead's request, the court instructed the jury (as part of its instructions after the close of evidence):

> You've heard evidence that the defendant possessed less than 10 grams of suspected marijuana. It is not a crime in Maryland to be in possession of less than 10 grams of marijuana.
>
> The fact that the defendant was in possession of less than 10 grams of suspected marijuana is not at issue in this case, and you are not to consider it in relation to whether or not the defendant is guilty of the crimes charged.

Whitehead was convicted of all three cocaine charges for which he stood trial. In this appeal, he argues that the court erred in admitting the evidence of his possession of marijuana, which had no relevance to the cocaine charges and therefore had no probative value. He contends that the error was neither cured by the court's instruction to the jury to disregard the irrelevant marijuana evidence, nor harmless beyond a reasonable doubt.

We agree with Whitehead that the court erred in admitting evidence of his possession of suspected marijuana, but, based upon our independent review of the record, we have concluded, beyond a reasonable doubt, that the error in no way influenced the jury's verdict.

STANDARD OF REVIEW

Whitehead contends that the court improperly admitted irrelevant evidence of other bad acts (*i.e.*, possession of suspected marijuana) that had no probative value to the issues in the case and which unfairly caused Whitehead irreparable prejudice. While the standard of review for a court's evidentiary decision is, under most circumstances, abuse of discretion, the Court of Appeals has interpreted Maryland Rule 5-402 to provide that a

court has no discretion to admit irrelevant evidence. The Court of Appeals explained in *State v. Simms*, 420 Md. 705, 724–25 (2011):

> Trial judges generally have "wide discretion" when weighing the relevancy of evidence. *Young v. State*, 370 Md. 686, 720, 806 A.2d 233, 253 (2002) ("Trial courts have wide discretion in determining the relevance of evidence."); *accord Schmitt*, 140 Md. App. at 17, 779 A.2d at 1013 (noting that "with respect to evidentiary rulings on admissibility generally and rulings with respect to relevance specifically, the trial judge is vested with wide, wide discretion"). While trial judges are vested with discretion in weighing relevancy in light of unfairness or efficiency considerations, **trial judges do not have discretion to admit irrelevant evidence**. *See Pearson v. State*, 182 Md. 1, 13, 31 A.2d 624, 629 (1943) (noting that "the rule [of discretion] will not be extended to facts obviously irrelevant as well as prejudicial to the defendant"). In *Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 17 A.3d 676 (2011), we explained the standards by which we review the admission, or exclusion, of evidence, stating:
>
> > It is frequently stated that the issue of whether a particular item of evidence should be admitted or excluded "is committed to the considerable and sound discretion of the trial court," and that the "abuse of discretion" standard of review is applicable to "the trial court's determination of relevancy." *See e.g. Merzbacher v. State*, 346 Md. 391, 404–05, 697 A.2d 432, 439 (1997). **Maryland Rule 5–402, however, makes it clear that the trial court does not have discretion to admit irrelevant evidence. . . . [T]he "de novo" standard of review is applicable to the trial judge's conclusion of law that the evidence at issue is or is not "of consequence to the determination of the action."** *Parker v. State*, 408 Md. 428, 437, 970 A.2d 320, 325 (2009), (citations omitted) (quoting *J.L. Matthews, Inc. v. Md.-Nat'l Capital Park & Planning Comm'n*, 368 Md. 71, 92, 792 A.2d 288, 300 (2002)).

Ruffin, 418 Md. at 619, 17 A.3d at 690–91. Thus, we must consider first, whether the evidence is legally relevant, and, if relevant, then whether the evidence is inadmissible because its probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns as outlined in Maryland Rule 5–403. *See Thomas v. State*, 372 Md. 342, 350, 812 A.2d 1050, 1055 (2002) (*Thomas I*) ("The fundamental test in assessing

> admissibility is relevance."). During the first consideration, we test for legal error, while the second consideration requires review of the trial judge's discretionary weighing and is thus tested for abuse of that discretion. *See J.L. Matthews*, 368 Md. at 92, 792 A.2d at 300, n. 18 ("Although at first glance such a determination may appear to be a legal conclusion, at its core it is based on a trial judge's independent weighing of the probative value of the evidence against its harmful effects. As such, it is subject to the abuse of discretion standard.").
>
> * * *
>
> Maryland Rule 5–401 defines "relevant evidence" as evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5–401 (2011). **Irrelevant evidence is inadmissible. *See* Md. Rule 5–402**; *see e.g., Simmons v. State*, 392 Md. 279, 300, 896 A.2d 1023, 1035 (2006) (holding that a trial judge's prevention of an irrelevant line of questioning regarding the intention of a potential witness to invoke her Fifth Amendment privilege was correct).

(Emphasis added.)

DISCUSSION

Maryland Rule 5-401 defines "relevant evidence": "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Maryland Rule 5-402 addresses admissibility as follows: "Except as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible. **Evidence that is not relevant is not admissible.**" (Emphasis added.) And Rule 5-403, further provides that even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the

jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

We have struggled in vain to discern any reason that Whitehead's possession of suspected marijuana might meet the definition of relevant evidence—that is, how it might be said to have "any tendency to make the existence of any fact that is of consequence to the determination of [this] action more probable or less probable than it would be without the evidence." Our conclusion is that the evidence of Whitehead's possession of suspected marijuana was not relevant evidence, and therefore, it was error to admit it in contravention of Maryland Rule 5-402 over Whitehead's objection.

Although the prosecutor suggested at trial that the bodycam recording of discovering the baggies of suspected marijuana was inextricably intertwined with the recording of the arrest and the seizure of cash, our review of the recording that was introduced on a DVD marked as State's Exhibit No. 9 does not support the claim that there would have been any difficulty in excluding from the trial exhibit the portion of the video showing the seizure of Whitehead's "weed." And doing so did not require the State to alter the recording in any manner that would have made it appear to the jury that the recording had been doctored.

It is not clear from the transcript whether the audio portion of the recording was played for the jury, but, because the DVD was in evidence and available for the jury to play, we shall assume that the jury heard the recorded audio. During the first ten seconds of the recording, Officer Bristow asks Whitehead: "You got anything on you we should

know about?" Whitehead replies: "Just weed." It would have been a simple matter to begin playing the recording immediately after Whitehead gave that answer. The officer systematically went through Whitehead's pockets and clothing, and pulled out a variety of personal items, including a phone. Approximately 42 seconds after the recording begins, the officer says: "Your money." The recording shows the officer pulling out a large wad of paper currency from Whitehead's pocket. The search then proceeds for over 60 more seconds before the officer asks: "This is the weed, right?" Whitehead's response is unintelligible. And the officer asks a follow up question: "Now, be honest, if you got anything else on you." Whitehead replies: "Nope." The search of Whitehead's person continues for another minute, and the recording ends as an officer begins to escort Whitehead away from the search location. Clearly, the video recording could have been stopped well before the searching officer asks Whitehead if "[t]his is the weed, right?" Nothing further of significance is depicted after the officers seized the large wad of cash. And, by that point, the recording clearly showed that Whitehead was wearing a distinctive looking green jacket with black sleeves over a gray hoodie. In short, the evidence of marijuana was not inextricably intertwined with the relevant evidence showing Whitehead's arrest and the recovery of the large wad of cash he was carrying.

Similarly, the photograph of the physical evidence, admitted as State's Exhibit No. 4, could have easily been redacted by cropping or blocking out the portion of the photograph showing the three baggies of suspected marijuana. We conclude that there

was no hardship or exigency that justified admitting the evidence of possession of marijuana.

Nevertheless, we find no reasonable possibility that the admission of the evidence in this case contributed in any way to the jury's finding that Whitehead was guilty of the crimes of possession of cocaine, possession of cocaine with intent to distribute, and distribution of cocaine. The evidence of those crimes was so overwhelming that we are persuaded beyond a reasonable doubt that the evidence that Whitehead was in possession of a non-criminal amount of marijuana when he was arrested in no way contributed to any juror finding him guilty of the cocaine offenses.

We recognize that the standard for finding that an error by the trial judge was harmless error is very difficult to satisfy. In *Dionas v. State*, 436 Md. 97, 109 (2013), the Court of Appeals discussed at length the fact that the harmless error standard "'is the standard of review most favorable to the defendant short of an automatic reversal.'" (Quoting *Bellamy*, 403 Md. at 333, 941 A.2d at 1121). And it is not appropriate for the appellate court to substitute its own view of the evidence for that of the jury. As the *Dionas* Court explained, *id.* at 116-17, the proper application of the harmless error standard does not assess the evidence on an "'otherwise sufficient' basis: [*i.e.*, it is not enough to say that] if the evidence is sufficient without the improper evidence, if the jury could have convicted without it, harm could not have resulted."

Similarly, the Court of Appeals explained in *DeVincentz v. State*, 460 Md. 518, 560–61 (2018):

> [W]hen an appellant, in a criminal case, establishes error, unless 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, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of — whether erroneously admitted or excluded — may have contributed to the rendition of the guilty verdict.

[Quoting *Dorsey v. State*, 276 Md. 638, 659 (1976).]

"[O]nce error is established, the burden falls upon the State . . . to exclude this possibility beyond a reasonable doubt." *Dionas v. State*, 436 Md. 97, 108, 80 A.3d 1058 (2013).

We apply the harmless error standard without encroaching on the jury's domain. *Id.* at 109, 80 A.3d 1058. In a criminal case, the jury is the trier of fact and bears the responsibility "for weighing the evidence and rendering the final verdict." *Id.* Assessing a witness's credibility and deciding the weight to be assigned to that witness's testimony are tasks solely delegated to the jury. *Fallin v. State*, 460 Md. at 153–55, 188 A.3d 988, 2018 WL 3410022, at *12; *Bohnert v. State*, 312 Md. 266, 277, 539 A.2d 657 (1988).

Maryland courts have recognized that "where credibility is an issue and, thus, the jury's assessment of who is telling the truth is critical, an error affecting the jury's ability to assess a witness'[s] credibility is not harmless error." *Dionas*, 436 Md. at 110, 80 A.3d 1058; *see also Martin v. State*, 364 Md. 692, 703, 775 A.2d 385 (2001); *Howard v. State*, 324 Md. 505, 517, 597 A.2d 964 (1991); *Wallace-Bey v. State*, 234 Md. App. 501, 546, 172 A.3d 1006 (2017).

The proper inquiry in applying the harmless error test is not to consider the sufficiency of the State's evidence, excluding [the challenged evidence], but "whether the trial court's error was unimportant in relation to everything else the jury considered in reaching its verdict." *Dionas*, 436 Md. at 118, 80 A.3d 1058.

Here, Whitehead argues that the admission of the irrelevant evidence of his possession of marijuana "posed an unacceptably high risk of unfair prejudice, since there

was a strong probability that the jury could infer from the evidence that a person who possessed baggies of marijuana is more prone to possess and/or distribute other narcotics." Although that possibility might influence a juror's analysis of the evidence in a case in which the evidence of the crimes charged was more equivocal, this was not such a case.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.