

Circuit Court for Anne Arundel County
Case No. C-02-CR-22-000139

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1926

September Term, 2022

DERRON DALEY

v.

STATE OF MARYLAND

Wells, C.J.,
Beachley,
Raker, Irma S.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, C.J.

Filed: April 3, 2024

*This is an unreported opinion. It may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

On September 25, 2021, Maryland State Troopers stopped a motor vehicle in which appellant Derron Daley was riding in the right-rear passenger seat along with four other individuals. The troopers stopped the vehicle because it had a faulty brake light. During the stop, the troopers smelled cannabis coming from inside the car and asked the occupants to get out of the vehicle. Later, the troopers searched the car. There, they found three and a half ounces of cannabis, three handguns, and over \$10,000 in cash. After the troopers discovered the contraband, all five occupants were handcuffed and questioned about the ownership of the drugs and handguns. Subsequently, the troopers arrested and charged Daley and two others.

Daley was ultimately convicted of possession with intent to distribute cannabis, possession of over ten grams of cannabis, three counts of transporting a loaded handgun in a vehicle, three counts of possession of a regulated firearm while being under thirty years old and prohibited from possessing regulated firearms, three counts of possessing a regulated firearm while being a fugitive from justice, and three counts of transporting a firearm while engaged in a drug trafficking crime. He was sentenced to thirty years with all but nine years suspended to be followed by five years of probation.

On appeal Daley submits two questions for our review, which we have rephrased:¹

¹ Daley’s questions, presented verbatim, were as follows:

1. Whether the trial court erred by denying a motion for a judgment of acquittal where there was no reliable evidence appellant possessed three guns, about 3.5 ounces of marijuana, and \$11,000 in cash not in plain view in the car in which he was the right rear seat passenger?

1. Was the evidence legally insufficient for the jury to convict Daley of possessing the handguns and cannabis?
2. Did the circuit court commit plain error when it admitted Daley’s statements, or if not plain error, was counsel’s failure to object or move to suppress, ineffective assistance of counsel?²

For the following reasons, we answer “no” to each question and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 25, 2021, Maryland State Police Trooper Kelvin Smith stopped a vehicle for a faulty brake light. There were five young men in the vehicle, including Daley, who was seated in the right-rear passenger seat. A recording from Tpr. Smith’s dashboard mounted video camera shows that Tpr. Smith approached the vehicle, identified himself, mentioned the reason for the stop, and asked for the driver’s license and registration. The trooper also noted he could smell cannabis coming from inside the vehicle.

-
2. Whether it was plain error to admit Appellant’s statements when they were involuntary, not Mirandized, and recorded in violation of Maryland wiretap law. If not plain error, whether the counsel’s failure to object to the statements was ineffective assistance of counsel that prejudiced the defense?

² Daley’s original brief included a third question arguing some of his firearm convictions violated the Second Amendment and the precedent set forth in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). The State filed a separate, unopposed motion to stay the appeal pending the Maryland Supreme Court’s decision in *Fooks v. State*, No. COA-REG-24-2022, which was granted. Daley then filed an unopposed motion to vacate the stay, in which he “decided he would like to abandon the Second Amendment arguments made in his brief and pursue only the remaining arguments.” This Court granted the motion; therefore, we will only address the other two arguments Daley presented.

The driver could not provide either a license or a registration, so Tpr. Smith ran the vehicle's license plates and discovered they did not belong to the vehicle. Tpr. Smith called for backup, after which several officers arrived approximately thirty minutes after the stop.

After the other troopers arrived, they had the young men exit the vehicle, patted them down, and then the vehicle's occupants sat on the guardrail on the side of the road. In the video recording of the encounter, Tpr. Smith can be heard to explain that he asked the men to exit the vehicle because he smelled cannabis emanating from inside the vehicle. In the video, Daley quickly responded, "We smoke weed." He also mentioned there was some "weed" inside the car.

At that point, the troopers searched the vehicle and found a backpack in the back-left passenger seat containing two bags of cannabis, a Ruger handgun, and over \$10,000 in cash. Small amounts of cannabis were also found throughout the vehicle. The total amount of cannabis found in the vehicle was three and a half ounces. Later, at trial, the State's expert, Sergeant Patrick Lane, who specializes in the packaging, pricing, and methods of street-level distribution of controlled dangerous substances, testified that the value of the cannabis recovered was worth between \$500 and \$750. The troopers also found more cash, beyond what was discovered in the backpack, concealed in a plastic bag behind the front passenger seat. Upon finding these items, the troopers handcuffed all five men.

Tpr. Smith asked who owned the gun in the backpack. He told the men if no one claimed ownership of the gun they would all be arrested. Tpr. Smith did not mention *Miranda* rights or tell the men that they were being recorded. After this brief exhortation,

Tpr. Smith went back to the vehicle, took the backpack, went to the hood of his patrol vehicle, and began unpacking the backpack. At this point, while the troopers were inspecting the gun, Daley said something like, “it’s just a gun charge.” Tpr. Smith walked back over to the occupants and began to speak to them.

During this phase of the encounter with the troopers, on the dashcam footage Daley can be heard saying either “the gun is clean” or “if the gun is clean” the charge wouldn’t be “bad” or “not a big deal.” Exactly what Daley said and what he meant were contested at trial. As can be seen on the video footage, after Daley makes statements about the gun, the driver, Nathaniel Fisher, stated “it’s mine” apparently referring to the Ruger.

While the troopers continued searching the car, Daley said he “bought” the car from his brother and knew the tags did not belong on the car. The search uncovered two additional handguns in hidden, Velcro-sealed compartments in the backseat area on both sides of the vehicle. One gun, a Glock 17, was secured in the back of the driver’s seat. The other, a Glock 45, was secreted in the back of the front passenger’s seat where Daley was seated. Fisher, however, did not claim ownership of these two guns. The troopers then arrested and charged Daley, Fisher, and a third individual, Womack, whose first name does not appear in the record.

Daley was charged with twenty counts, including those he was ultimately convicted of: possession with intent to distribute cannabis, under Md. Code. Crim. Law (“CR”) § 5-602; possession of over ten grams of cannabis, under CR § 5-601(a)(1); three counts of transporting a loaded handgun in a vehicle, under CR § 4-203(a)(1)(v); three counts of

possession of a regulated firearm while being under thirty years old and prohibited from possessing regulated firearms, under Md. Code Pub. Safety (“PS”) § 5-133(b)(13); three counts of possessing a regulated firearm while being a fugitive from justice, under PS § 5-133(b)(3); and three counts of transporting a firearm while engaged in a drug trafficking crime, under CR § 5-621(b)(2).

Daley was tried by a jury in the Circuit Court for Anne Arundel County on August 2-3, 2022. A point of contention during trial was the import of Daley’s statements regarding the Ruger handgun. During both opening and closing arguments Daley argued, that his statements about the gun being “clean,” were not an admission that he knew the handgun was in the car, as the prosecutor argued. Daley argued he was only encouraging the owner of the gun to step forward.

At the end of the State’s case and again at the close of the evidence, Daley moved for judgment of acquittal arguing there was insufficient evidence to show he possessed the guns or cannabis. The circuit court denied both motions. The jury convicted Daley of the offenses mentioned. On December 8, 2022, the court sentenced Daley to a total of thirty years with all but an aggregate of nine years suspended, followed by five years of probation. Daley timely filed this appeal.

We will provide additional facts in our analysis when necessary.

DISCUSSION

I. The Circuit Court Did Not Err in Denying the Motion for Judgment of Acquittal.

A. Parties’ Contentions

Daley contends the State produced insufficient evidence to prove he was in possession of the three handguns or the cannabis. Daley asserts the State’s entire case relied upon a misinterpretation of his statement about the Ruger. Daley argues the State misled the jury by arguing that he said, “the gun is clean,” essentially confessing that he knew the handgun was in the vehicle. Daley claims his statement was prefaced with the word “if.” He asserts he was encouraging the owner of the handgun to come forward. Daley relies upon Tpr. Smith’s testimony in which the latter admitted that Daley used the word “if.” Further, shortly after Daley said, “if the gun is clean, it’s no big deal,” Fisher (the driver) admitted he owned the Ruger and by extension the cannabis that was also in the backpack. Consequently, so Daley argues, he cannot be convicted of possession with intent to distribute the cannabis or possession of the Ruger. Daley further argues that a statement Womack made to Fisher, chastising Fisher for bringing the guns, absolves Daley of complicity in their possession. Consequently, according to Daley, there is no legal grounds for any of his convictions.

The State contends the evidence was legally sufficient to support the convictions. Specifically, the State points out that under Maryland law a person may possess an item through actual or constructive control, and such possession can be exclusive or joint in nature. The State argues that the evidence here was sufficient to show a joint drug distribution enterprise, where all five occupants in the vehicle possessed the guns and cannabis together. Additionally, the State contends Daley’s admitted ownership of the vehicle, and behavior during the traffic stop, showed he was the group’s “ringleader.” The

State points out that it was Daley who initially told the troopers that there was “weed” in the car, told the troopers that “the gun is clean” multiple times, and generally did most of the talking. Thus, based on a theory of constructive possession, the State argues, the evidence was sufficient to sustain Daley’s convictions.

B. Standard of Review

“Under Maryland Rule 4-324, a criminal defendant may move for judgment of acquittal at the close of the State’s case-in-chief. The defense may renew its motion for judgment of acquittal at the conclusion of all the evidence in the case.” *State v. Payton*, 461 Md. 540, 556 (2018). The trial court’s decision to deny the defendant’s motion is reviewable, but appellate review is limited. *Id.* at 557 (*citing Morgan v. State*, 134 Md. App. 113, 126 (2000)). The reviewing court “merely ascertains whether there is any relevant evidence, properly before the jury, legally sufficient to sustain a conviction.” *Id.*

When reviewing the relevant evidence to determine its legal sufficiency, we must view “the evidence in the light most favorable to the prosecution” and ask if “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Hobby v. State*, 436 Md. 526, 537-38 (2014) (*citing Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *see also Derr v. State*, 434 Md. 88, 129 (2013); *Dawson v. State*, 329 Md. 275, 281 (1993). In applying the standard, the Maryland Supreme Court stated:

The purpose is not to undertake a review of the record that would amount to, in essence, a retrial of the case. Rather, because the finder of fact has the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence. We recognize that the finder of fact has

the ability to choose among differing inferences that might possibly be made from a factual situation, and we therefore defer to any possible reasonable inferences the trier of fact could have drawn from the admitted evidence and need not decide whether the trier of fact could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence.

Titus v. State, 423 Md. 548, 557-58 (2011); *see also Moye v. State*, 369 Md. 2, 12 (2002) (“We give due regard to the [fact finder’s] finding of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.” citations omitted)).

C. Analysis

After reviewing the relevant evidence produced at trial, we disagree with Daley that the evidence was insufficient to show that he possessed the handguns or cannabis. Viewing the evidence in the light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to convict Daley of possession of the contraband. We explain.

For both drugs and firearms, similar restrictions apply regarding possession. Under Maryland law, possession of illegal drugs requires “exercise actual or constructive dominion or control over a thing by one or more persons.” Md. Code Crim. Law § 5-101(v). “Possession may be constructive or actual, exclusive or joint.” *Taylor v. State*, 346 Md. 452, 458 (1997); *see also Moye*, 369 Md. at 14 (“The State did not need to show that [defendant] exercised sole possession of the drugs . . .”). However, the “evidence must show directly or support a rational inference that the accused did in fact exercise some dominion or control over the prohibited” contraband. *Moye*, 369 Md. at 13.

The Maryland Supreme Court explained that courts should consider certain factors to determine whether a defendant constructively possessed illegal drugs:

Our review of the law of CDS possession in Maryland reveals that possession is determined by examining the facts and circumstances of each case. In sum, we have found several factors to be relevant in the determination of whether an individual was in possession of the CDS, including, (1) the defendant's proximity to the drugs, (2) whether the drugs were in plain view of and/or accessible to the defendant, (3) whether there was indicia of mutual use and enjoyment of the drugs, and (4) whether the defendant has an ownership or possessory interest in the location where the police discovered the drugs

Smith v. State, 415 Md. 174, 198 (2010); *see also State v. Gutierrez*, 446 Md. 221, 234 (2016) (“[T]he 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.”); *Bordley v. State*, 205 Md. App. 692, 721 (2012) (An individual may have constructive possession of prohibited contraband if he “has knowledge of it, maintained dominion or control over the premises where the contraband is located, and demonstrated the ability, desire, and design to render any necessary aid” during the commission of a crime). However, “mere proximity to the drug, mere presence on the property where it is located, or mere association, without more, with the person who does control the drug or property on which it is found, is insufficient to support a finding of possession.” *Moye*, 396 Md. at 16.

For firearms, although there is no statutory definition in Maryland, both the Supreme Court and this Court applied a similar meaning for constructive or joint possession. *See, e.g., Parker v. State*, 402 Md. 372, 407 (2011) (“In order for the evidence supporting the handgun possession conviction to be sufficient, it must demonstrate either

directly or inferentially that [defendant] exercised ‘some dominion or control over the’ firearm); *State v. Hall*, 214 Md. App. 208, 228 (2013) (“In determining whether a Defendant has indirect possession of an object, you should consider all of the surrounding circumstances and these circumstances include the distance between the Defendant and the object in this case, the gun.”).

Here, there was sufficient evidence for a rational jury to find Daley constructively possessed both the drugs and the firearms. *First*, regarding proximity to the contraband, Daley was in the back-right passenger seat of the vehicle, and he had easy access to all three firearms and the backpack that contained cannabis and nearly \$11,000. One firearm was directly beside him in the Velcro-concealed compartment, the second was in the backpack, situated one seat over from him in the backseat of the medium-sized vehicle, and the third was in a similar Velcro compartment behind the driver’s seat. There was no dispute as to where Daley was seated or where the contraband was in the vehicle. A rational jury could very well believe he constructively possessed the items that were all within his arms reach.

Second, the State’s expert, Sergeant Lane, who specializes in the packaging, pricing, and methods of street-level distribution of controlled dangerous substances, testified that the amount of cannabis found in the vehicle was “too much for a small number of people to be realistically using for personal use.” Sgt. Lane further testified the totality of the circumstances was indicative of drug distribution. The nearly \$11,000 found in the backpack on the rear-driver-side passenger seat, in conjunction with the quantity of

cannabis found, could lead a reasonable jury to think there was a joint, mutual use of the drugs for a criminal operation. Especially when three handguns were also present, which Maryland courts determined are commonly associated with illegal drug enterprises. *See Parker*, 402 Md. at 376.

Third, although not dispositive on its own, Daley admitted ownership of the vehicle where all the contraband was found. Ownership of the premises or automobile where the contraband is found is a factor weighed against Daley. Ownership of the vehicle plus, as Sgt. Lane testified, Daley’s participation in a drug distribution enterprise, would allow a rational jury to determine Daley demonstrated the ability and desire to aid in the commission of a crime. *See Bordley*, 205 Md. App. at 721.

Fourth, the State introduced evidence suggesting that Daley was the “ringleader” of the group based on his behavior during the traffic stop. Specifically, the State claimed Daley was the only one of the five men in the car to tell the police the occupants smoked “weed”, and he was doing “all the talking.” While Daley argues the State miscast what he said about whether the gun was “clean,” the fact is that Daley said some variation of the same statement multiple times throughout his encounter with the troopers. Listening to the video, one can hear his repeated statement sometimes with “if,” sometimes without. The jury heard and saw the entire dashcam video and they could evaluate what Daley meant.

When considering all of the evidence here, a rational jury could have found Daley constructively possessed the drugs and firearms seized, all of which were indicative of a

drug enterprise run by Daley as its leader. Therefore, the circuit court did not err in denying Daley’s motion for judgment of acquittal.

II. Daley Did Not Preserve the Issue of the Alleged Involuntariness of His Statements and We Decline to Review for either Plain Error or Ineffective Assistance of Counsel.

A. Plain Error Review

As far as Daley’s argument regarding his statements to the troopers being involuntary, not *Mirandized*, and illegally recorded in violation of the Maryland Wiretap Act, we start by noting that these issues have not been preserved for our review. At trial, the defense did not object or otherwise bring to the court’s attention the fact that Daley’s statements to the troopers might have been made in violation of his Fifth Amendment right against self-incrimination or in violation of the Wiretap Act.

Maryland Rule 4-252(a)(3)-(4) provides that “a statement [that] was unlawfully obtained or intercepted is ‘waived’ unless ‘raised by motion’ within 30 days after initial appearance.” According to this Court, Rule 4-251 additionally provides that:

in the circuit court, a motion claiming an unlawfully obtained admission, statement, or confession must be raised in conformity with the Rule, shall be in writing unless directed otherwise by the court *and shall state the grounds upon which it is made*. Rule 4–252(a)(4), (e). Unless a defendant shows good cause to excuse lack of conformity with the rule, *it is waived*. Rule 4–252(a). This Rule applies to a failure to file a motion to suppress as well as to a failure to include on the trial level the specific theory raised on appeal.

Savoy v. State, 218 Md. App. 130, 141-42 (2014) (emphasis in the original). Additionally, under Maryland Rule 8-131(a), “[o]rdinarily, an appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial

court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.”

The second clause in the Rule (beginning with “but the Court may decide”) allows us to review unpreserved issues by exercising what is commonly referred to as “plain error review.” We rarely exercise that discretion. As the Supreme Court of Maryland has cautioned appellate courts, plain error review is “reserved for errors that are compelling, extraordinary, exceptional, or fundamental to assure the defendant of a fair trial.” *Newton v. State*, 455 Md. 341, 364 (2017) (quoting *Robinson v. State*, 410 Md. 91, 111 (2009)). The error must be “so material to the rights of the accused as to amount to the kind of prejudice [that] precluded an impartial trial.” *Id.* (quoting *Diggs v. State*, 409 Md. 260, 286 (2009)).

Appellate precedent shows that plain error occurs when the error “undermined a core value of constitutional criminal jurisprudence.” *Id.*; *see, e.g., State v. Hutchinson*, 287 Md. 198, 208 (1980) (the court failed to instruct the jury that they could find the defendant not guilty). However, the vast majority of appellate courts have declined to exercise discretion. *See, e.g., Trimble v. State*, 300 Md. 387, 399 (1984) (declining to find plain error where the jury instructions omitted intellectual disability as a basis for insanity to find the defendant not guilty); *Boulden v. State*, 414 Md. 284, 313 (2010) (declining to conduct plain error review of efficacy of jury trial waiver); *Rubin v. State*, 325 Md. 552, 588 (1992) (declining to find plain error when the State said in its closing arguments, without any evidentiary basis, that the defendant had attempted to poison someone).

Consequently, “because of the difficulty of demonstrating facts that are sufficiently compelling to invoke plain error review, it remains ‘a rare, rare, phenomenon,’ especially when the alleged error involves a missing or erroneous jury instruction.” *Steward v. State*, 218 Md. App. 550, 566 (2014) (quoting *Morris v. State*, 153 Md. App. 480, 507 (2003)). As a predicate to exercising our discretion regarding plain error review, there are four conditions that must be met:

(1) there must be an error or defect, some sort of deviation from the legal rule, that has not been intentionally relinquished or abandoned, i.e., affirmatively waived by the appellant; (2) the legal error must be clear or obvious, rather than subject to reasonable dispute; (3) the error must have affected the appellant’s substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the . . . court proceedings; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.

Newton, 455 Md. at 364 (quoting *State v. Rich*, 415 Md. 567, 578 (2010) (cleaned up)).

In beginning our plain error analysis, we look at the first prong, which requires us to find a legal error that Daley did not affirmatively waive. We hold Daley affirmatively waived the possible legal error relating to his suppression argument; thus, we need not discuss the other three factors.

This Court has considered the waiver issue in the plain error context on several occasions. The analysis in those cases is helpful. *First*, in *Savoy v. State*, the appellant was convicted after providing statements to police that he argued were the product of coercive tactics, thus they were involuntary. 218 Md. App. at 139. However, on appeal, the defendant argued his statements were inadmissible for other reasons—made during plea negotiations—and asked the Court to review the matter for plain error. *Id.* The Court

provided that “there is tension . . . between rule 8-131 . . . and Rule 4-252” because “[t]he language of affirmative waiver suggests that plain error review is unavailable.” *Id.* at 142. Consequently, the Court declined to exercise plain error review, reasoning that “appellant offer[ed] no reason for the failure to raise the issue below, other than possible appellate after-thought, which is insufficient. Because appellant did not raise his *Miranda* theory of suppression to the circuit court, we hold that pursuant to Rule 4-252, that argument is affirmatively waived.” *Id.*

Additionally, in *Carroll v. State*, 202 Md. App. 487 (2011), *aff’d*, 428 Md. 679 (2012), the defendant filed a motion to suppress, but withdrew the motion before trial and hence, the trial court never held a suppression hearing. *Id.* at 507-08. On appeal, appellant argued the trial court’s admission of the evidence was plain error. *Id.* at 508. After examining the history of Rule 4–252, and the interplay between Rule 8–131 and 4–252, we held that Rule 4–252 trumps 8–131, and that plain error review is not available to a defendant who fails to conform to the requirements of 4–252. *See Savoy*, Md. App. at 143 (discussing *Carroll*, 202 Md. App. at 509-15); *see also Joyner v. State*, 208 Md. App. 500, 518 (2012) (“[A] failure to raise a suppression issue at the trial level constitutes a waiver in several contexts: (1) if the defendant fails to comply with the time requirements for filing a motion under the rule; (2) if the defendant files a notice but fails to pursue it; and (3) if there is a hearing on the motion, but the defendant fails to present any grounds to support the motion.”)

Savoy and *Carroll* are persuasive. Daley failed to raise his *Miranda* issue to the circuit court and provides us with no explanation for his failure to do so. Maryland law requires proper conformity with Rule 4-252, and that conformity is lacking here. The three main concerns Daley raises—involuntariness, *Miranda*, and unlawful communication under the Wiretap Act—must all be raised by mandatory motion under Rule 4-252. *See Ray v. State*, 435 Md. 1, 14 (2013), *Huggins v. State*, 479 Md. 433, 443-44 (2022), *Murphy v. State*, 105 Md. App. 303, 313 (1995), *Zadeh v. State*, 258 Md. App. 547 (2023), and *Boston v. State*, 235 Md. App. 134 (2017) (all discussing Rule 4-252’s mandatory application to the issues Daley asserts). As we held previously, Rule 4-252 controls, and failure to properly conform to the Rule’s requirements results in a waiver of the argument on appeal. Accordingly, because Daley fails the first prong, no further plain error analysis is necessary.

B. We Decline to Address Daley’s Claim of Ineffective Assistance of Counsel on Direct Appeal

As a separate issue, we decline to review Daley’s claim of ineffective assistance of counsel on direct appeal. It is well-settled that ineffective assistance of counsel claims should be reviewed at the trial court level on post-conviction review rather than on direct appeal. *Mosley v. State*, 378 Md. 548, 565 (2003). Post-conviction proceedings are preferred for ineffective assistance of counsel claims “because the trial record rarely reveals why counsel acted or omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to the allegations of counsel’s ineffectiveness.” *Id.* at 560; *see also Bailey v. State*, 464 Md. 685 (2019) (“[T]he

trial record does not ‘clearly illuminate’ why counsel’s actions were ineffective. We will not second-guess counsel’s actions on direct appeal when there is an opportunity to introduce testimony and evidence directly related to this issue. We decline to make counsel’s actions in this matter a *per se* instance of an ineffective assistance of counsel.”)

However, there “may be exceptional cases where the trial record reveals counsel’s ineffectiveness to be so blatant and egregious that review on appeal is appropriate.” *Id.* at 562 (internal citations omitted). The Maryland Supreme Court has held that “the rare instances in which we have permitted review on direct appeal” are “only when the facts in the trial record sufficiently illuminate the basis for the claim of ineffectiveness of counsel.” *Id.* at 566; *see also In re Parris W.*, 363 Md. 717, 726 (2001) (the exception applies “when the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim”).

This is not one of those rare cases. The record does not “clearly illuminate” why counsel failed to move to suppress Daley’s statements or playing the entire dashcam video for that matter. As the Supreme Court explained, if “we [can] not conclude that the evidence was insufficient to sustain the defendant’s conviction, [we can] not determine whether his counsel was ineffective.” *Bailey*, 464 Md. at 705 (citing and discussing *Mosley*, at 571). Daley argues clear ineffective assistance of counsel with regard to his roadside statements, but there is nothing in the record to suggest why Daley’s counsel did not move to suppress those statements. *See Walker v. State*, 338 Md. 253, 261-62 (1995) (The Maryland Supreme Court declined to evaluate counsel’s performance on direct review even

though counsel remained silent throughout the trial because we believed a “full record concerning relevant factual issues” needed to be developed in a post-conviction proceeding).

We have no evidence of counsel’s thinking, such as whether counsel thought suppression was merited and why. Accordingly, we cannot say with whether counsel’s performance adversely prejudiced Daley. The statements at issue were not the only evidence weighing in favor of conviction. Even without the statements, a rational jury could have found there was sufficient evidence to convict Daley. For example, excluding Daley’s “if the gun is clean” statements, the jury could have considered that Daley was part of a drug selling enterprise based on his proximity to the contraband, as we analyzed in the earlier section of this opinion. Under the circumstances, we conclude that a post-conviction proceeding is the appropriate venue to evaluate Daley’s ineffective assistance of counsel claim.

**THE JUDGMENTS OF THE CIRCUIT
COURT FOR ANNE ARUNDEL
COUNTY ARE AFFIRMED.
APPELLANT TO PAY THE COSTS.**

The correction notice(s) for this opinion(s) can be found here:

<https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/1926s22cn.pdf>