UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0331

September Term, 2015

KEVIN MINOR

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: January 21, 2016

Kevin Minor, appellant, was charged in the Circuit Court for Baltimore City, with, *inter alia*, multiple weapons offenses, including wearing, carrying, and transporting a handgun (Count 4); possession of a regulated firearm after having been convicted of a crime of violence (Count 5); possession of a regulated firearm after having been convicted of a violation classified as a misdemeanor (Count 6); and possessing, owning, carrying, and transporting a firearm after having been convicted of a controlled dangerous substance felony (Count 7).[1] Pursuant to the verdict sheet, the jury convicted appellant of wearing, carrying or transporting a handgun and possession of a regulated firearm after conviction of a disqualifying crime.[2] The court sentenced appellant to ten years, the first five years without parole, on the conviction for possession of a regulated firearm after conviction of a crime of violence.

On appeal, appellant raises two questions for our review, which we have rephrased slightly, as follows:

1. Did the circuit court err in disclosing to the jury during voir dire that appellant had a prior conviction for a misdemeanor and a felony and then failing to take curative action?

2. Did the circuit court err in admitting "suspected marijuana" evidence?

[1] He also was charged with possession of a controlled dangerous substance (marijuana) with intent to distribute (Count 1), possession of a controlled dangerous substance (marijuana) (Count 2), and possession of a firearm during and in relation to a drug trafficking case (Count 3). These charges were not submitted to the jury (apparently due to the lack of a chemist to testify), and the docket entries reflect that the charges were closed by operation of law.

[2] The circuit court and counsel below agreed that the jury verdict of guilty of possession of a regulated firearm after a disqualifying crime resulted in a guilty finding on Counts 5, 6, and 7. The single question was presented to the jury to avoid potential prejudice from listing each crime separately.

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On August 18, 2014, at approximately 2:45 p.m., four Baltimore City Police Officers, Stephen Anderson, John Brandt, David Austin, and Michael McGrath, were walking through an area of Baltimore City, following up on a lead in a matter unrelated to this case. As the officers turned a corner into the 900 block of Stoddard Court, they saw a group of three individuals, including appellant, gathered in front of 948 Stoddard Court, and they smelled a strong odor of marijuana. When the officers were approximately 25 feet away from appellant and the other two men, one of the other two men touched a black book bag next to him and stated, unprovoked: "This isn't mine." The officers walked closer, and when they were "within arm's reach," appellant stated: "That bag ain't theirs. Whatever's in it's mine." Officer Brandt, who was closest to the book bag, then peered into the book bag, which was open. He saw what he suspected was marijuana.

At that point, the officers detained the three individuals. Officer Brandt then opened the book bag and retrieved suspected marijuana, a scale, and a handgun. As the officers retrieved the contents of the book bag, appellant stated: "That's mine. I'll take the charge." After accompanying the officers and the other two men to the police station, appellant was advised of his rights and provided a recorded statement to the same effect.

DISCUSSION

I.

Voir Dire

Appellant's first contention of error involves the court's description of the charges in its voir dire. He asserts that the court abused its discretion in disclosing to the jury that he was charged with possession of a firearm after conviction of a misdemeanor and possession of a firearm after conviction of a felony. He argues that the court's "disclosure of the nature of [his] prior convictions to the jury pool, after having discussed with counsel that a stipulation on the subject was forthcoming, resulted in irreparable prejudice." He further asserts that, after defense counsel objected to the description of the charges, the court "failed to consider or take curative action," despite that it had "multiple remedies at its disposal."

The State responds in several ways. Initially, it contends that this Court should decline to address appellant's claims of error because they are not preserved. It notes that, although appellant ultimately objected to the court's summary of the charges, he "failed to interpose a timely objection when the trial court said before voir dire that it intended to describe the charges as it did," and he failed to object the first time the court summarized the charges. The State asserts that appellant's belated objection precludes him from raising this unpreserved issue on appeal. With respect to the claim that the court abused its discretion in failing to take corrective action once the objection was made, the State argues that this claim similarly is not preserved for review because appellant never asked the court

to take corrective action, and in fact, he acquiesced when the court indicated that it would be more harmful to read the charges a third time.

In any event, the State argues, even if the issue was preserved, the court properly exercised its discretion in conducting voir dire "given the limited information provided to [it] about the nature of the stipulation and the fact that no other curative measures were requested or suggested" by appellant. Finally, the State contends that any error was harmless because the jury learned through the stipulation, placed on the record after voir dire, that appellant had more than one conviction, and the evidence against appellant, which included appellant's voluntary admission that the book bag and its contents belonged to him, was overwhelming.

A.

Proceedings Below

Counts five, six, and seven charged appellant with possession of a regulated firearm based on three different types of disqualifying offenses: a prior crime of violence, a prior misdemeanor, and a prior felony. Before the court conducted voir dire, defense counsel asked the court how it intended to summarize the charges. The following transpired:

> THE COURT: Well, we're not going – it's not my practice to go over voir dire. I do voir dire, and then you can object to it or ask for additional voir dire.
>
> [APPELLANT'S COUNSEL]: How will you summarize the charges?
>
> THE COURT: I list them. Possession with intent to distribute marijuana, possession of marijuana, firearm with a relationship – I can't remember the wording, because I got it from a statute, because the Nexus word is not actually in the statute. Wear, [carry], and transport was in. I took it out. It's going back in. Use of firearm in a crime of violence. *Use of firearm after* –

> *or, possession of firearm after being convicted of disqualifying misdemeanor, and possession of firearm after being convicted of disqualifying felony.*
>
> [APPELLANT'S COUNSEL]: So if the State has no intention of submitting the drug charges to the jury, why are we still –
>
> THE COURT: Oh, that's right. There is no drug charge.

(emphasis added).

The prosecutor and the court then discussed how the court could advise the jury that there would be some mention of marijuana or suspected marijuana without suggesting that appellant had been charged with a crime involving marijuana. Appellant's counsel expressed no objection to the proposed mention of either the marijuana or the statutory designation of appellant's prior disqualifying convictions as a felony and a misdemeanor.

The prosecutor then inquired regarding the procedure for providing the docket entries of appellant's prior convictions, which would be put in the court file in support of a stipulation that would be given to the jury. The court advised that the State could provide them at the beginning or the end of the case. Neither the State nor defense counsel advised the court of the contents of the stipulation to which they referred.

The court then began voir dire. It summarized the charges against appellant as follows:

> The case now under consideration is the State of Maryland versus Kevin Minor. It is a criminal case in which Mr. Minor is charged with wearing, carrying, or transporting a firearm, use of [a] firearm in a crime of violence, possession of [a] firearm after a conviction of a misdemeanor, which would disqualify him from possessing a firearm, possession of a firearm after conviction of a felony, which would prohibit his possession of a firearm, which is alleged to have occurred on August 18, 2014, in the 900 block of Stoddard Court in Baltimore City, Maryland.

The prosecutor and appellant's counsel approached the bench and advised the court that it inadvertently included a charge that appellant was not accused of committing, i.e., use of a firearm in the commission of a crime of violence. The court offered to re-read the charges, and defense counsel agreed to that solution.

The court then advised the prospective venire as follows:

> Ladies and gentlemen, I was – the attorneys have advised me I was mistaken as to what I indicated the charges are in this case.
>
> The charges are wearing, carrying, or transport of a firearm, possession of a firearm after conviction of a misdemeanor, which would disqualify him from possessing a firearm, and possession of a firearm after a conviction of a felony, which would prohibit his possession of a firearm, which is alleged to have occurred on August 18. 2014, in the 900 block of Stoddard Court, Baltimore City, Maryland.

Appellant's counsel asked to approach the bench again. At that point, for the first time, he objected to the court's mention of the statutory designation of the prior convictions as "misdemeanor" and "felony." The following transpired:

> [APPELLANT'S COUNSEL]: Um, I don't know that the clerk can do anything, but I would object to the record – I think reading to the jury the specific, the specific prohibited person charges –
>
> THE COURT: Is there going to be a stipulation?
>
> [APPELLANT'S COUNSEL]: Yeah, there is.
>
> THE COURT: There's a stipulation to that effect, that he's been convicted of a –
>
> [APPELLANT'S COUNSEL]: But it doesn't say the misdemeanor and felony, it just says that –
>
> THE COURT: Well, they're two different charges for which he could be convicted, so there's got to be some differentiation, otherwise they would

> look to be the same charge. I mean, if there were multiple misdemeanors. But, I mean, they're two categories of offense.
>
> [APPELLANT'S COUNSEL]: I mean, you really don't see that, though, until, I guess, the verdict sheet. I don't even know if the verdict sheet says it that way.
>
> THE COURT: Yeah, but – yeah. I'm going to ask you to sit down, and we're going to continue. *We were up here. I read that before. I said I was going to read again the charges. I've read them twice. Now, I don't know how I could change that.*
>
> [APPELLANT'S COUNSEL]: *Okay.*

(emphasis added).

At the conclusion of voir dire, but before jury selection began, the court asked if the State or appellant's counsel had any objections, exceptions, or requests for additional voir dire. The following colloquy ensued.

> [APPELLANT'S COUNSEL]: Um, just an exception to the specifying of the felony –
>
> THE COURT: Okay.
>
> [APPELLANT'S COUNSEL]: -- and misdemeanor convictions.
>
> THE COURT: All right. There's no way that I can alter that, and that's what the charge is, so.
>
> [APPELLANT'S COUNSEL]: Okay.
>
> THE COURT: Unless you have some other suggestion.
>
> ***
>
> [APPELLANT'S COUNSEL]: My suggestion was in my submitted voir dire.[3]

[3] In appellant's proposed voir dire, he described the charges as "possession of marijuana and illegally possessing a regulated firearm."

THE COURT: Oh. So you wanted me to ask it, ask it a different way than I did. Okay.

[APPELLANT'S COUNSEL]: Yeah, just in the summary part. Not in the, not in the questioning.

THE COURT: But I have asked that, and asked it twice, so.

[APPELLANT'S COUNSEL]: I know.

THE COURT: Okay.

[APPELLANT'S COUNSEL]: I know.

THE COURT: I can't –

[APPELLANT'S COUNSEL]: Yes.

THE COURT: To go back and ask it a different way just, I think, highlights it even more. Okay. Whenever you're ready.

After the jury had been selected, appellant's counsel reiterated his objection to the court's summary of the charges:

[APPELLANT'S COUNSEL]: I just want to make my record as to the, um, the summation that the [c]ourt read of the, of the charges in the beginning.

THE COURT: Okay.

[APPELLANT'S COUNSEL]: And specific –

THE COURT: You don't like the fact that I mentioned misdemeanor and felony.

[APPELLANT'S COUNSEL]: Yeah. And it was specifically pointed out by our very first respondent when she said, I already know that he has a misdemeanor conviction.

THE COURT: And she was excused.

[APPELLANT'S COUNSEL]: She was. But, I mean, who – she was smart enough to tell us. So hopefully no one else.

> THE COURT: That's what the charge is.
>
> [APPELLANT'S COUNSEL]: It is, but the stipulation itself isn't that specific.
>
> THE COURT: Well, okay.
>
> [APPELLANT'S COUNSEL]: So, that's my objection. Thank you.
>
> THE COURT: The stipulation will tell them you're convicted of crimes. So you think your version, her opinion would have been different knowing that there were convictions – alleged convictions of crimes in the defendant's past, she would have said, well, it doesn't matter? It matters because they are misdemeanors or felonies?
>
> [APPELLANT'S COUNSEL]: She specifically used the word felony, which was surprising to me.[4]
>
> THE COURT: Well, okay. All right. Your record is preserved. Are we ready to proceed?

Just prior to presenting its first witness, the State introduced into evidence the stipulation referred to during voir dire. The stipulation was as follows: "The stipulation of fact is that the defendant has been charged with the offense of possession of a regulated firearm. The parties hereby stipulate the defendant is prohibited from possession of a regulated firearm because of previous convictions that prohibit his possession of a regulated firearm."

After the jury found appellant guilty on all the firearm-related charges, appellant's counsel moved for a new trial, arguing, *inter alia*, that "it is highly likely that the jury

[4] Prospective Juror 4253 stated that she would be biased because of "the prior convictions." She did not, as defense counsel asserted, state that she knew that appellant had a prior misdemeanor or felony conviction.

reached a verdict by considering the Defendant's prior convictions instead of only considering the weight of the evidence." The court denied the motion, stating:

> The difficulty – one of the things that your motion says – well, one of the jurors told us the prior convictions. Well, the problem was, they were told about prior convictions. There was a stipulation as to prior convictions. So, in fact, without prior convictions, which is a predicate of, if you will, offense for the charge, that it would not have been possible to find him guilty irrespective of what may have been said or was said during the voir dire. The instructions and the stipulations, I think, clarify those issues.

B.

Preservation

We agree with the State that appellant has not preserved his claim of error for review. Maryland Rule 4-323(c) provides:

> For purposes of review by the trial court or on appeal of any other ruling or order [aside from evidentiary rulings], it is sufficient that a party, *at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court.* The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

(emphasis added). The purpose of the rules governing preservation of error are: "'(a) to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings, and (b) to prevent the trial of cases in a piecemeal fashion, thus accelerating the termination of litigation.'" *Paige v. State*, ___ Md. App. ___, No. 2105, Sept. Term, 2014 at 28 (filed Nov. 30, 2015) (quoting *Fitzgerald v. State*, 384 Md. 484, 505 (2004)).

Here, appellant had several opportunities to voice his objection to the court's summary of charges in voir dire, but he failed to make a timely objection. Initially, appellant failed to object when the court stated that it intended to describe the charges as possession of a firearm after a conviction of a felony and possession of a firearm after conviction of a misdemeanor.

Moreover, when the court initially summarized the charges using the terms felony and misdemeanor, appellant again did not object, objecting only to the language stating that he had been charged with a crime of which he had not been charged, i.e., use of a handgun in the commission of a crime of violence. In discussing the appropriate remedy for this inadvertent error, appellant expressly agreed that the court should read the charges a second time.

It was only after the court re-read the charges, including using the felony and misdemeanor language for a second time, that appellant objected to that language. This objection, however, was too late. As the court explained, the charges already had been explained to the jury twice, without objection. Under these circumstances, appellant's contention that the court erred in using the words misdemeanor and felony in describing the charges is not preserved for this court's review.

Appellant contends, however, that the court should have taken corrective action at the time defense counsel objected, and it was abuse of discretion to fail to do so. This contention similarly is not preserved for this Court's review.

Appellant never asked the court to undertake any corrective action. Even when the court asked if appellant had any suggestions, given the court's two prior explanations of

the charges, defense counsel had no suggestion other than that the court initially should have read his proposed voir dire summarizing the charge as "illegally possessing a regulated firearm." Indeed, appellant's counsel implicitly agreed with the court that summarizing the charges a third time, would merely highlight the prior convictions, rather than dissipate any potential prejudice. Under these circumstances, the contention that the court failed to take corrective action is not preserved for this Court's review, and we will not address it. *See Watkins v. State*, 328 Md. 95, 99-100 (1992) (where party acquiesces in court's ruling, there is no basis for appeal for that ruling), *overruled on other grounds*, *Calloway v. State*, 414 Md. 616 (2010).

II.

"Suspected Marijuana"

Appellant next contends that the court abused its discretion in admitting into evidence the suspected marijuana found in the bag. He asserts that the suspected marijuana was irrelevant to the firearms-related charges, and even if it had some probative value, it was outweighed by the danger of unfair prejudice. Appellant asserts that, "in a gun case, putting a backpack full of drugs in front of a jury is improperly prejudicial."

The State contends that this claim is not preserved for review because appellant did not object to the admission of the evidence on relevance grounds in a timely manner. In any event, the State asserts that the court properly exercised its discretion in admitting the evidence because it was "probative and material circumstantial evidence that the firearm was operable," and it was "relevant to rebut claims made in defense counsel's cross-examination and closing argument that the police officers were lying when they said they

could smell the unburnt marijuana in the backpack as they claimed." Indeed, the State notes that defense counsel, although objecting "for the record," acknowledged that the suspected marijuana was necessary to explain "what went on here." Finally, the State argues that, even if the court abused its discretion in admitting the evidence, any error was harmless beyond a reasonable doubt because the evidence of appellant's guilt was overwhelming, and the marijuana was mentioned and discussed "numerous times throughout the trial, from voir dire to closing argument, by the judge, the prosecutor, the witnesses, and defense counsel," without objection, and the "possession of suspected marijuana is hardly the kind of unsavory conduct that is likely to prejudice the minds of the jurors or lead them to convict where they might otherwise find the evidence lacking, particularly where, as here, [appellant] was charged with possession of a regulated firearm, but not marijuana."

A.

Proceedings Below

During the first day of trial, the State offered into evidence "State's Exhibit Number 5, which is the marijuana." Appellant's counsel objected on the ground that the State referred to the exhibit as "marijuana," stating that it should be referred to as "suspected marijuana" because the State was not presenting a chemist to identify the substance. The following then occurred:

> [APPELLANT'S COUNSEL]: Just, I think the State keeps saying marijuana. It's got to always be suspected marijuana.
>
> THE COURT: Well, the officer already testified it was marijuana.

> [APPELLANT'S COUNSEL]: Well –
>
> THE COURT: So the State is just referring to it as the witness identified it.
>
> [APPELLANT'S COUNSEL]: Well, I would ask that the [c]ourt instruct the jury that his answer be stricken and that it's all suspected.
>
> The court then instructed the jury as follows:
>
> THE COURT: . . . Ladies and gentlemen, the officer previously testified it's marijuana. There is no testimony that has been offered that it's been tested and established chemically to be marijuana. Officer, I believe you mean it's suspected marijuana. Is that correct?
>
> THE WITNESS: Yes, sir.

State's Exhibit 5 was then admitted into evidence without objection.

The officer's testimony resumed, and appellant's counsel subsequently objected to the admission of the "suspected marijuana" on the grounds of relevance:

> [APPELLANT'S COUNSEL]: Your Honor, I clearly did not, uh, I didn't respond when the drugs were being admitted, but I will object to – for the record – as to their relevance. I understand the need to be discussed, um, as to what went on here.
>
> THE COURT: Okay.
>
> [APPELLANT'S COUNSEL]: You know, they're in the statement and they're part of the seizure. But it's clearly prejudicial when the only charges here are handgun charges, to lump them in with drug charges that aren't even going to be decided by the jury.
>
> THE COURT: Okay. I understand what you're saying. I'm not sure – I mean, on one hand you say you understand why it has to be discussed, but you're objecting to the admissibility of the contents of the bag.
>
> ***
>
> But it's certainly relevant to certain facts that have been suggested in this case. So your objection will be overruled.

B.

Preservation

Several preservation principles are implicated here. Initially, as indicated, Maryland Rule 4-323(a) requires that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived."

Moreover, a claim of error is "waived if, at another point during the trial, evidence on the same point is admitted without objection." *DeLeon v. State*, 407 Md. 16, 31 (2008). *Accord Berry v. State*, 155 Md. App. 144, 172 ("The failure to object as soon as the . . . evidence was admitted, and on each and every occasion at which the evidence was elicited, constitutes a waiver of the grounds for objection."), *cert. denied*, 381 Md. 674 (2004). *See also Yates v. State*, 429 Md. 112, 120 (2012) ("Where competent evidence of a matter is received, no prejudice is sustained where other objected to evidence of the same matter is also received.") (citation and quotations omitted).

And finally, "'[w]here a party asserts specific grounds for an objection, all other grounds not specified by the party are waived.'" *Webster v. State*, 221 Md. App. 100, 111 (2015) (quoting *Thomas v. State*, 183 Md. App. 152, 177 (2008)). *Accord Gutierrez v. State*, 423 Md. 476, 488 (2011) (reiterating that, "'when an objector sets forth the specific grounds for his objection . . . the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified'") (quoting *Sifrit v. State*, 383 Md. 116, 136 (2004)).

Here, when the State offered the suspected marijuana into evidence, appellant did object, but not on the grounds he now asserts, i.e., that the evidence was irrelevant and prejudicial. In fact, appellant initially did not object to the admission of the marijuana, but rather, he objected to the State referring to the exhibit as "marijuana," as opposed to "suspected marijuana." Subsequently, appellant objected again, "for the record," on the ground of relevance. At that point, however, the "suspected marijuana" was already admitted into evidence, however, and counsel himself recognized the "need" for it to be discussed, "as to what went on here." Accordingly, given appellant's untimely objection, along with his explicit acknowledgment of the necessity for the evidence to be discussed during trial, his appellate contention that the evidence was irrelevant is not preserved for this Court's review.

Moreover, the marijuana evidence was mentioned numerous times throughout trial without objection. For example, during the State's opening statements, the prosecutor mentioned that the officers had smelled marijuana as they approached appellant and the other individuals, and appellant made no objection. The prosecutor stated that the officers walked over and looked into the open bag and saw what they believed to be marijuana, and when they investigated further, they found what "smell[ed] and look[ed] like marijuana." Again, appellant's counsel made no objection. Later, Officer Anderson testified that, as the officers rounded the corner, they "immediately smelled the strong odor of marijuana," and that as they got closer to the group, "the smell of marijuana got stronger and stronger and stronger." Officer Brandt testified that, upon inspection of the book bag, he found "[m]ultiple bags of marijuana." Again, appellant's counsel failed to object, aside from his

objection that marijuana be referred to as "suspected marijuana." Under the circumstances, appellant's contention that the admission of the "suspected marijuana" was irrelevant and unduly prejudicial is not preserved for this court's review.

C.

Exercise of Discretion

Even if the issue were preserved, we would find that the circuit court properly exercised its discretion in admitting the suspected marijuana. 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." "[R]elevant evidence is admissible, under Maryland Rule 5-402, subject to the court's exercise of discretion to exclude it, under Maryland Rule 5-403, 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" *Odum v. State*, 412 Md. 593, 615 (2010). Evidence that is not relevant is inadmissible. Md. Rule 5-402.

The Court of Appeals explained in *State v. Simms*, 420 Md. 705 (2011), that the appellate court reviews a trial court's decision to admit evidence for abuse of discretion, but we conduct an independent analysis of whether evidence is relevant:

> "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.'. . . 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.'"

Id. at 724-25 (quoting *Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 619-20 (2011)). *Accord Donati v. State*, 215 Md. App. 686, 708-09, *cert. denied*, 438 Md. 143 (2014). As appellant notes, however, "[i]t is not enough . . . for evidence to be relevant. Under Maryland Rule 5-403, the trial court should exclude relevant evidence if the probative value of the evidence 'is substantially outweighed by the danger of unfair prejudice.'" *Smith v. State*, 218 Md. App. 689, 704 (2014). In determining "whether a particular piece of evidence is unfairly prejudicial," we balance "the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case." *Id.* at 705.

Here, we agree with the State that the suspected marijuana was both relevant and probative circumstantial evidence that the firearm was operable. At the motions hearing, the court precluded the State from calling its firearms examiner to testify about the operability of the handgun because of a discovery violation. *See Brown v. State*, 182 Md. App. 138, 167 n.16 (2008) ("A weapon must be an operable firearm to sustain a conviction for carrying a handgun."). Operability, however, may be proven circumstantially. *Mangum v. State*, 342 Md. 392, 398 (1996). Indeed, a trier of fact may infer operability without the aid of expert testimony based on the totality of the evidence. *Id*. at 400-01. Based on the large quantity of suspected marijuana appellant was carrying, the jury could reasonably infer that appellant needed the handgun for protection, and therefore, that the handgun was operable. *See id.*

Moreover, defense counsel agreed, even while objecting, that the suspected marijuana was necessary to explain "what went on here." And it was relevant to rebut

appellant's suggestions, made during cross-examination of the police officers and in closing argument, that the police officers were lying when they stated that they could smell unburnt marijuana in the book bag.

With respect to the possibility of prejudice, the State argues that "possession of suspected marijuana is hardly the kind of unsavory conduct that is likely to prejudice the minds of the jurors or lead them to convict where they might otherwise find the evidence lacking, particularly where, as here, [appellant] was charged with possession of a regulated firearm, but not marijuana." We agree. The circuit court did not abuse its discretion in admitting the suspected marijuana into evidence.

III.

Illegal Conviction

In his reply brief, appellant argued that he was illegally convicted of multiple violations under Maryland Code (2014 Supp.) § 5-133 of the Public Safety Article ("PS"). He asserts that he was convicted under PS § 5-133(c) for possession of a firearm by a person previously convicted of a crime of violence, and his conviction under PS § 5-133(b)(1), for possession of a firearm by a person previously convicted of a misdemeanor must be vacated because, pursuant to *Melton v. State*, 379 Md. 471 (2004), "a defendant may not be convicted of multiple counts under PS § 5-133 for the possession of the same firearm." He asserts that "only the charge with the greatest potential penalty –

here, for violating PS § 5-133(c) – should have gone to the jury." Appellant contends that the State conceded as much in a footnote in its brief.[5]

Initially, we note that this issue was raised for the first time in appellant's reply brief. As this Court has explained:

> "[T]he function of a reply brief is limited. The appellant has the opportunity and duty to use the opening salvo of his original brief to state and argue clearly each point of his appeal. The reply brief must be limited to responding to the points and issues raised in the appellee's brief . . . To allow new issues or claims to be injected into the appeal by a reply brief would work a fundamental injustice upon the appellee, who would then have no opportunity to respond in writing to the new questions raised by the appellant."

Williams v. State, 188 Md. App. 691, 703 (2009) (quoting *Hollingsworth & Vose Co. v. Connor*, 136 Md. App. 91, 125 (2000)), *aff'd on other grounds*, 417 Md. 479 (2011). Because appellant did not raise this issue in his initial brief, or below, and because the court imposed only one sentence on these charges, we will not address the issue.

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

[5] In its footnote, the State indicated that, under *Melton v. State*, 379 Md. 471, 474, 485, 498 (2004), if, "a defendant stipulates to the prior conviction that carries the greatest potential penalty under [Md. Code (2014 Supp.) § 5-133(c) or § 5-133(b) of the Public Safety Article], only that charge should be submitted to the jury." Here, the parties agreed that the charges on the verdict sheet encompassed three charges and resulted in three convictions. The circuit court sentenced only on the charge of possession of a regulated firearm after conviction of a crime of violence. It did not sentence on the other convictions, but the commitment record indicates that the convictions were merged.