Circuit Court for Baltimore City
Case No. 117311018

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2203

September Term, 2018

TERRANCE SMALL

v.

STATE OF MARYLAND

Arthur,
Gould,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: September 6, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following a jury trial in the Circuit Court for Baltimore City, Terrance Small, appellant, was convicted of possession with intent to distribute cocaine and possession of a firearm in relation to a drug trafficking offense. He raises three issues on appeal: (1) whether the trial court abused its discretion in refusing to propound a missing evidence instruction; (2) whether the trial court erred in admitting reports prepared by two expert witnesses because, he claims, they were inadmissible hearsay; and (3) whether there was sufficient evidence to sustain his conviction for possession of a firearm in relation to a drug trafficking offense. For the reasons that follow, we affirm.

At trial, Baltimore City Police Officers James Deasel and Eric Winston testified that they were driving in their marked police vehicle when they observed a group of men, which included Mr. Small, playing dice. When the officers approached the men, they all fled in different directions. Both officers noticed that Mr. Small was wearing a blue shoulder bag, that "bounced off his body" when he turned, as if it contained a heavy object. The officers chased Mr. Small but lost sight of him for a "brief moment." When they saw Mr. Small again, he no longer had the bag. After the officers apprehended Mr. Small, they returned to the area where they had lost sight of him and recovered a blue backpack, that appeared to be the same backpack Mr. Small had been carrying. The backpack contained an operable handgun, a hairbrush, and ten small vials, one of which was tested and found to contain cocaine. Officer Deasel was qualified as an expert in the area of narcotics packaging and distribution and testified that the ten glass vials, in and of themselves, were "[n]ot necessarily indicative of selling or buying [drugs]." However, he stated that, in his

experience, "a firearm located with that quantity [of drugs] would be indicative of distribution."

I.

Because the hairbrush recovered from the backpack was not introduced as evidence by the State and was never tested for the presence of DNA, Mr. Small requested a missing evidence instruction, which the trial court declined to provide. Mr. Small now contends that the court's failure to propound the missing evidence instruction constituted an abuse of discretion.

Generally, the decision to give a missing evidence instruction rests within the sound discretion of the trial court. *McDuffie v. State*, 115 Md. App. 359, 364-66 (1997). However, because a trial court generally need not instruct on the presence, or not, of factual inferences, the Court of Appeals has held that a missing evidence instruction "generally need not be given" and "the failure to give such an instruction is neither error nor an abuse of discretion." *Patterson v. State*, 356 Md. 677, 688 (1999). Nonetheless, the Court of Appeals has held that in an "exceptional" case, a trial court may abuse its discretion by not giving a missing evidence instruction when the missing evidence is: highly relevant and "goes to the heart of the case"; the type of evidence that ordinarily would be collected and analyzed; and "completely within State custody." *Cost v. State*, 417 Md. 360, 380 (2010). Nevertheless, the Court emphasized that its holding did not require trial courts to give missing evidence instructions "as a matter of course, whenever the defendant alleges the non-production of evidence that the State might have introduced." *Id*. at 382.

The logic that produced the holding in *Cost* does not apply to the facts in the case at bar. As an initial matter, we note that, although not addressed by the trial court, it is not clear that the hairbrush constituted "missing evidence" as Officer Winston testified that he submitted the hairbrush to the Evidence Control Unit and nothing in the record suggests that it was destroyed or otherwise unavailable for testing by the defense.

Nevertheless, even if we assume that the hairbrush was missing and the type of evidence that would normally be analyzed for DNA, we are not persuaded that testing of the hairbrush would have resulted in the production of evidence that went to the heart of the case or would have been "highly relevant" to Mr. Small's defense. On the one hand, if testing of the hairbrush had revealed the presence of Mr. Small's DNA, that would have hurt, not helped, his case. On the other hand, the absence of his DNA, or the presence of someone else's DNA, on the hairbrush would not have exonerated Mr. Small because two officers observed him with the backpack several minutes before it was recovered, and he need not have owned the backpack or its contents to have been guilty of possessing them. *See Gimble v. State*, 198 Md. App. 610, 630-31 (2011) (holding that the trial court did not abuse its discretion in declining to give a missing evidence instruction where the State accidentally destroyed a backpack containing contraband, as well as other items that were inside the backpack, because even if those items had been fingerprinted, and the results were as favorable as possible to the appellant, it would not have negated the other evidence indicating that he had possessed the backpack). Because this is not an exceptional case where a missing evidence instruction was required, the trial court did not abuse its discretion by declining to give one.

II.

Mr. Small also asserts that the court abused its discretion in admitting the reports of Mohammad Majid, who was admitted as an expert in chemical analysis, and Jennifer Ingretson, who was admitted as an expert in firearm operability and handgun recognition. He claims that their reports were hearsay and that the State failed to lay a sufficient foundation for them to be admitted under any hearsay exception. However, we need not decide this issue because, even if we assume that the experts' reports were inadmissible, the relevant information contained in the reports, specifically that one of the vials found in the backpack contained cocaine and that the firearm found in the backpack was operable, was cumulative of Mr. Majid and Ms. Ingretson's trial testimony, which was admitted without objection. Consequently, we are persuaded that any error in admitting the reports was harmless beyond a reasonable doubt. *See Yates v. State*, 429 Md. 112, 120 (2012) ("This Court has long approved the proposition that we will not find reversible error on appeal when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury *without objection* through the prior testimony of other witnesses.") (internal quotation marks and citations omitted).

III.

Finally, Mr. Small claims that there was insufficient evidence to sustain his conviction for possession of a firearm in relation to a drug trafficking offense. Specifically, he contends that his possession of the gun could not be used to prove both "the intent element of the predicate crime of possession with intent to distribute, and as an element of

the separate crime of possession of such a weapon in relation to a drug trafficking crime." Although Mr. Small frames the issue as sufficiency of the evidence, he does not actually contend that the evidence was insufficient to establish one or more elements of the crime of possession of a firearm in relation to a drug trafficking offense. For example, he does not assert that there was insufficient evidence that he committed a drug trafficking offense, that he possessed a firearm, or that the possession of the firearm was related to the drug trafficking offense. Moreover, he does not cite any case law, and we are not aware of any, to support his claim that a fact proven at trial cannot be used to establish more than one criminal offense. Therefore, Mr. Small has not raised a proper sufficiency of the evidence claim.[1]

Instead, Mr. Small appears to be raising a double jeopardy claim, specifically that he cannot be punished for both possession with intent to distribute cocaine and possession of a firearm in relation to that offense when his possession of the firearm was factually necessary to prove his intent to distribute the contraband. Construing Mr. Small's argument in this manner is further supported by the fact that he asks us to review the issue on "both unit of prosecution grounds and basic fairness [grounds]," both of which are tests to determine whether offenses should merge for double jeopardy purposes.

[1] In any event, such claim would lack merit. Mr. Small does not contest that there was sufficient evidence to sustain his conviction for possession with intent to distribute cocaine, which is a drug trafficking offense under § 5-621 of the Criminal Law Article. And, based on the evidence that a gun was found in the backpack with the cocaine, the jury could reasonably find that he possessed it in relation to the crime of possession with intent to distribute.

But to the extent Mr. Small raises a double jeopardy claim, it lacks merit. Even if we assume that possession with intent to distribute cocaine is a lesser included offense of possession of a firearm in relation to a drug trafficking offense and that Mr. Small's convictions for those offenses were based in part on the same act, "[d]ouble jeopardy is not violated if the legislature has authorized multiple punishments for the same act." *Moore v. State*, 163 Md. App. 305, 3310 (2005). And § 5-621 of the Criminal Law Article, which proscribes the possession or use of a firearm related to a drug trafficking offense, specifically provides that the punishment for the offense shall be "[i]in addition to the sentence provided for the drug trafficking crime[.]" Thus, we are persuaded that the legislature intended for dual convictions under the circumstances. *See, e.g.*, *Whack*, 288 Md. at 137 (holding that even though the appellant's convictions for armed robbery and use of a handgun in the commission of a felony were based on a single act of robbery with a handgun, his consecutive sentences did not violate the Fifth Amendment prohibition against double jeopardy where the General Assembly clearly intended to authorize separate punishments for those offenses). Consequently, merger of Mr. Small's convictions is not required.

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