Circuit Court for Cecil County
Case No. C-07-CR-18-001092

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3279

September Term, 2018

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ROBERT LEE FIGGS

v.

STATE OF MARYLAND

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Berger,
Friedman,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Berger, J.

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Filed: March 4, 2020

Robert Lee Figgs, appellant, was convicted, following a bench trial in the Circuit Court for Cecil County, of possession of a shotgun after a conviction of a crime of violence, in violation of Public Safety Article ("PS") § 5-206; possession of a shotgun after a disqualifying conviction, in violation of PS § 5-205; and keeping a common nuisance. As to both counts of illegal firearm possession, the predicate conviction was a Delaware conviction, in 1994, of third-degree burglary. After the court sentenced him to a total term of 20 years' imprisonment, with all but 3 years suspended,[1] Figgs noted this appeal, raising the following issues, which we have reordered for ease of exposition:

> I. Whether the evidence was sufficient to show that: (1) Figgs possessed a shotgun; or (2) his prior conviction in Delaware of that State's offense of third-degree burglary constitutes a prior conviction for a crime of violence, or a "disqualifying crime," under Maryland law, prohibiting possession of a shotgun; and
>
> II. Whether there was a fatal variance between the allegation in the indictment that Figgs had a prior conviction in Delaware for second-degree burglary and the proof that he only had a prior conviction in Delaware for third-degree burglary.

We shall hold that the evidence was sufficient to establish that the weapon seized was a shotgun; and that, under Maryland law and the evidence presented, Figgs's prior Delaware third-degree burglary conviction is not a "crime of violence" but is a "disqualifying crime." Therefore, the evidence was insufficient to prove possession of a

[1] The court sentenced Figgs as follows: for the violation of PS § 5-206, 15 years' imprisonment, with all but 18 months suspended; and, for keeping a common nuisance, a consecutive term of 5 years' imprisonment, with all but 18 months suspended, to be followed by 3 years' probation. The court merged the PS § 5-205 conviction into that for PS § 5-206.

shotgun after a conviction of a crime of violence but sufficient to prove possession of a shotgun after a disqualifying conviction. Finally, we shall hold that there was no fatal variance between the charges and the proof. Accordingly, we vacate the conviction and sentence for possession of a shotgun after a conviction of a crime of violence, affirm the conviction and sentence for keeping a common nuisance, and remand for resentencing for possession of a shotgun after a disqualifying conviction.

## BACKGROUND

Only a single witness testified at Figgs's trial: Maryland State Trooper First Class John Wildman. Trooper Wildman testified that, on August 13, 2018, while conducting follow-up interviews in an unrelated case, he and "other police officers" visited Figgs at his residence in North East, Maryland, in Cecil County. After Figgs consented to allowing Trooper Wildman to enter the residence, the trooper and Figgs entered the home, through a side door, and then walked through a vestibule, into the kitchen, and, ultimately, into the dining room, "exchanging pleasantries" as they did so.

Upon arriving in the dining room, Trooper Wildman noticed "what appeared to be a firearm on the table." Asked to elaborate, the trooper stated that the firearm "appear[ed] immediately" to him to be "a break barrel shotgun[.]" Trooper Wildman asked Figgs about the weapon, and, according to the trooper, Figgs replied that he had "recently acquired it[.]" Trooper Wildman became uneasy at the sight of the shotgun because a number of other people, besides Figgs, who were known drug users, frequented the premises. As a result, the trooper left the premises.

Thereafter, Trooper Wildman sought to determine whether Figgs "was legally allowed to possess a firearm." The trooper discovered that, in 1995, Figgs had pleaded guilty, in the Superior Court of Delaware in and for New Castle County, to third-degree burglary, in violation of 11 Delaware Code, section 824. Having concluded that the Delaware burglary conviction precluded Figgs from legally possessing a shotgun, under Maryland law, Trooper Wildman obtained a search warrant for "[f]irearms and ammunition" at Figgs's residence.

On August 16, 2018, three days after the previous encounter, Trooper Wildman, along with other law enforcement officers, executed that search warrant. In "the same room" where he previously had noticed the shotgun, Trooper Wildman "observed the same firearm propped against a wall," behind a mattress. The officers also recovered "ammunitions of various calibers," including a 12-gauge shell "that would . . . be fireable through a 12-gauge shotgun," as well as methamphetamine, syringes, and other "narcotics paraphernalia."

One month later, a three-count indictment was returned, in the Circuit Court for Cecil County, charging Figgs, in pertinent part,[2] as follows:

> **FIRST COUNT**
>
> THE GRAND JURY on its oath and affirmation charges that the aforesaid Defendant, on or about the aforesaid date [August 16, 2018], at the location aforesaid [Figgs's address], in the County aforesaid, did possess a shotgun after having been convicted of: Burglary Second Degree.
> PS 5-206; CJIS 1-1610 (Rifle/Shotgun - Poss. w/Felony Conviction)

[2] The third count of the indictment charged Figgs with keeping and maintaining a common nuisance. No issue has been raised in this appeal concerning that count.

**SECOND COUNT**

> THE GRAND JURY on [its] oath and affirmation also charges that the aforesaid Defendant, on or about the aforesaid date, at the location aforesaid, in the County aforesaid did possess a shotgun after being convicted of a disqualifying crime, to wit: Burglary Second Degree, a violation classified as a felony in the state that carries a statutory penalty of more than 2 years.
> PS 5-205(b); CJIS 1-0439 (Rifle/Shotgun Poss. - Disqualify)

The matter proceeded to a bench trial. After the State presented its case-in-chief, Figgs's counsel moved for judgment of acquittal as to Counts One and Two, because those counts had stated second-degree burglary as the predicate offense, whereas the evidence adduced made it plain that the actual Delaware conviction had been to a lesser charge, third-degree burglary, and, thus, there was, according to the defense, a fatal variance between the allegations in the indictment and the evidence adduced at trial. Figgs further maintained that the State had failed to prove that the weapon seized satisfied the statutory definition of "shotgun," under the Maryland Code. Finally, he maintained that the Delaware conviction did not, under Maryland law, disqualify him from possessing the shotgun. The court denied the motion for judgment of acquittal and, ultimately, found Figgs guilty of all three charges. After sentence was imposed, Figgs noted this timely appeal.

## DISCUSSION

### Standard of Review

Because the proceeding below was a bench trial, our review is governed by Maryland Rule 8-131(c), which requires that we "review the case on both the law and the evidence," upholding the trial court's factual findings unless clearly erroneous, and giving

"due regard to the opportunity of the trial court to judge the credibility of the witnesses." For the same reason, Figgs is entitled, on appeal, to a full examination of the sufficiency of the evidence.[3] *See Ennis v. State*, 306 Md. 579, 595 (1986) (holding, in a bench trial, that no motion for judgment of acquittal is required to preserve for appeal a claim of insufficient evidence) (decided under Rules 886 and 1086, which are substantially similar to Rule 8-131(c)).

**I.**

Figgs contends that the evidence was insufficient to sustain his convictions of either firearms possession offense. In support of that contention, he raises several arguments: first, that there was insufficient evidence that the item he possessed was, in fact, a shotgun, as defined in Maryland Code (2002, 2018 Repl. Vol.), Criminal Law Article ("CL"), § 4-201; second, that his prior Delaware third-degree burglary conviction is not a "crime of violence," under Maryland Code (2003, 2018 Repl. Vol.), Public Safety Article ("PS"), § 5-101, and is therefore not a valid predicate to sustain a conviction under PS § 5-206; and, finally, that his Delaware burglary conviction is not a "disqualifying crime," under PS § 5-101, and is therefore not a valid predicate to sustain a conviction under PS § 5-205.

In reviewing a claim that the evidence was insufficient to sustain a conviction, we must determine "whether, after considering the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "We do not

[3] We, therefore, decline the State's invitation to find that some of Figgs's sufficiency arguments were not preserved for appeal.

second-guess the [fact-finder's] determination where there are competing rational inferences available." *Smith v. State*, 415 Md. 174, 183 (2010). "We give deference in that regard to the inferences that a fact-finder may draw." *Id.* (citation and quotation omitted). Moreover, we do "not decide whether the [fact-finder] could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *Id.* at 184 (citation omitted). To the extent our inquiry requires us to interpret a statute, we apply a de novo standard of review, applying the ordinary principles of statutory construction. *See, e.g.*, *Tarray v. State*, 410 Md. 594, 607-09 (2009).

Because neither firearms conviction can stand if the evidence was insufficient to establish that the weapon seized from Figgs was a shotgun, we take the State's suggestion and examine that claim first. We shall then address whether the Delaware third-degree burglary conviction was either a "crime of violence" or a "disqualifying crime," under Maryland law.

**A. Whether the Evidence was Sufficient that the Weapon Seized was a Shotgun**

"'Shotgun' has the meaning stated in § 4-201 of the Criminal Law Article." PS § 5-201(e). Section 4-201(h)(1)-(2) of the Criminal Law Article, in turn, defines a "shotgun" as a weapon that is "designed or redesigned, made or remade, and intended to be fired from the shoulder"; and "designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore one or more projectiles for each pull of the trigger." According to Figgs, the evidence was insufficient to establish that the firearm seized from Figgs's residence "had a smooth, not rifled, bore";

or that the firearm at issue used "fixed" ammunition. Thus, as he would have us hold, the firearm at issue was not proven to satisfy the statutory definition of a "shotgun."

Trooper Wildman testified that the weapon he had observed, initially, at Figgs's residence, "appear[ed]" to be "a break barrel shotgun." Then, three days later, while executing a search warrant at that same location, Trooper Wildman recovered, in the "same room" where he had previously observed the suspected shotgun, "the same firearm propped against a wall." In open court, that weapon was identified by Trooper Wildman as a single break barrel "Victor Plain" 12-gauge shotgun and was received into evidence. The trooper further testified that, while executing the search warrant, he recovered a "shell for a l2-[gauge] shotgun, in addition to other ammunitions for various calibers, and a magazine for other calibers." As for the 12-gauge shell, Trooper Wildman testified that it "would . . . be fireable through a twelve-gauge shotgun."

Simply put, the trial court was entitled to conclude, from Trooper Wildman's testimony, that the weapon seized was a shotgun, as defined in the Maryland Code. *See Smith, supra,* 415 Md. at 183-84 (observing that, in reviewing evidentiary sufficiency, an appellate court does not "second-guess the [fact-finder's] determination where there are competing rational inferences available," nor do we "decide whether the [fact-finder] could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence"). It was well within the trooper's training and experience that he would recognize a shotgun, upon handling it, and that he would recognize the ammunition found as designed to be fired from that weapon.

The statute requires nothing more.[4] We hold that the evidence was sufficient to prove that the weapon at issue was a "shotgun," as defined in CL § 4-201.

### B. Whether Delaware Third-degree Burglary is Either a "Crime of Violence" or a "Disqualifying Crime" Under Maryland Law

Initially, we observe that the State's evidence that Figgs had committed a prior, disqualifying offense comprised a true test copy of his Delaware third-degree burglary conviction, to which was attached a copy of the indictment and plea agreement in that case. The State did not introduce into evidence a transcript from the Delaware plea hearing, and, thus, no factual basis for the Delaware guilty plea was entered into evidence in the instant case.

A difficulty arises because the State asks that we draw factual conclusions from the indictment in the Delaware burglary case. We might be willing to consider doing so had Figgs pleaded guilty to the same offense as charged in the Delaware indictment. That was not the case, however, as Figgs originally had been charged with second-degree burglary but was permitted to plead guilty to the lesser charge of third-degree burglary, an offense

[4] The unmistakable thrust of Figgs's argument is that expert testimony was required to prove that the weapon satisfied the statutory definition of a "shotgun." We disagree. It is well within the experience of a lay person, and especially a police officer, to recognize such a weapon on sight. But even had the court erred in admitting Trooper Wildman's testimony, without previously having qualified him as a firearms expert (Figgs does not make that claim, pointing, instead, to the purported inadequacy of Trooper Wildman's testimony), that would still not affect our conclusion that the evidence was sufficient to prove that the weapon seized was a shotgun. *See Lockhart v. Nelson*, 488 U.S. 33, 40-41 (1988) (holding that retrial was permitted where a trial court had erroneously admitted evidence, without which "there was insufficient evidence to support a judgment of conviction").

that comprises fewer elements.[5] Under these circumstances, we are reduced to a more abstract comparison of the Delaware third-degree burglary statute with the various Maryland burglary offenses.

We first address whether the evidence was sufficient to establish that Figgs's Delaware third-degree burglary conviction was a "crime of violence" under Maryland law. Then, we shall consider whether the evidence was sufficient to establish that the same conviction was a "disqualifying crime."

**1. Crime of Violence**

We begin by setting forth the Maryland statute, PS § 5-206, which proscribes possession of a rifle or shotgun by a person who was previously convicted of, among other things, a crime of violence:

> (a) A person may not possess a rifle or shotgun if the person was previously convicted of:
>
> > (1) a crime of violence as defined in § 5-101 of this title;
> >
> > (2) a violation of § 5-602, § 5-603, § 5-604, § 5-605, § 5-612, § 5-613, or § 5-614 of the Criminal Law Article; or
> >
> > (3) an offense under the laws of another state or the United States that would constitute one of the

[5] In particular, although Figgs had been charged with "knowingly and unlawfully entering a **dwelling** . . . with the intent to commit the crime of Theft therein," in violation of 11 Del. Code § 825(a)(1), (emphasis added), he ultimately pleaded guilty to a violation of 11 Del. Code § 824, which requires merely knowingly and unlawfully entering a **building** with the intent to commit a crime therein. To the extent an otherwise analogous Maryland offense would require breaking and entering a **dwelling**, we cannot presume that the Delaware conviction satisfied that element of the Maryland offense.

> crimes listed in item (1) or (2) of this subsection if committed in this State.
>
> (b) A person who violates this section is guilty of a felony and on conviction is subject to imprisonment not exceeding 15 years.
>
> (c) Each violation of this subsection is a separate crime.

In turn, as pertinent here, "crime of violence" includes "burglary in the first, second, or third degree[.]" PS § 5-101(c)(4).

The Delaware crime, to which Figgs previously had pleaded guilty and which was the predicate offense in the present case, is third-degree burglary, as defined under the Delaware Code:

> A person is guilty of burglary in the third degree when the person knowingly enters or remains unlawfully in a building with intent to commit a crime therein.
>
> Burglary in the third degree is a class F felony.

11 Del. Code § 824.

According to Figgs, Delaware third-degree burglary cannot be deemed a "crime of violence," under Maryland PS § 5-101, because the Delaware offense is not equivalent to any of the enumerated Maryland burglary offenses in subsection (c)(4). First, Figgs contends that Delaware third-degree burglary proscribes either knowingly entering **or** unlawfully remaining in a building, whereas each Maryland offense requires breaking **and** entering a building.[6] Therefore, the Delaware statute subsumes conduct -- specifically,

[6] Maryland CL § 6-202(a), (b) (first-degree burglary); CL § 6-203(a), (b) (second-degree burglary); CL § 6-204(a) (third-degree burglary).

merely remaining unlawfully in a building -- that would not constitute Maryland burglary in either the first, second, or third degree. Second, Figgs asserts, Delaware third-degree burglary does not require a breaking, whereas each of the Maryland offenses does. And third, he maintains, under the Delaware statute, a person may form the intent to commit a crime subsequent to the initial unlawful entering or remaining on the premises,[7] whereas, under Maryland law, that intent must either precede or, at most, be formed contemporaneously with the breaking or unlawful entry.

Figgs's first and second contentions, that unlawfully remaining in a building, without a breaking, is sufficient to sustain a conviction under the Delaware third-degree burglary statute but not Maryland first-, second-, or third-degree burglary, are refuted by Maryland case law interpreting our burglary statutes. In *Wagner v. State*, 160 Md. App. 531 (2005), we noted that a breaking of a structure "may be actual, as where physical force is applied, or constructive, as where entry is gained through fraud or trickery." *Id.* at 562-63 (quoting *Finke v. State*, 56 Md. App. 450, 467 (1983), *cert. denied*, 299 Md. 425 (1984), *cert. denied*, 469 U.S. 1043 (1984)). As for his third contention, that the specific intent required under the Delaware statute may be formed after the unlawful entry, whereas in Maryland, the requisite specific intent must have been formed no later than at the time of the breaking, we note that Delaware case law states otherwise, notwithstanding the text of

[7] Figgs cites 11 Del. Code § 829(e), which, at the time of Figgs's Delaware conviction, provided: "The 'intent to commit a crime therein' may be formed prior to the unlawful entry, be concurrent with the unlawful entry or such intent may be formed after the entry while the person remains unlawfully." (An identical provision now appears at 11 Del. Code § 829(f).)

its burglary statutes. In *Dolan v. State*, 925 A.2d 495 (Del. 2007), the Supreme Court of Delaware held that, to be convicted of second-degree burglary under 11 Del. Code § 825(a),[8] "a person must form the intent to commit a crime inside before or at the time he enters the dwelling." *Id.* at 496.

There is, however, a different reason that Delaware third-degree burglary does not satisfy the statutory definition of a "crime of violence," under Maryland PS § 5-101(c)(4). First, Maryland first- and third-degree burglary both require that the structure violated be a "dwelling," *see* CL §§ 6-202(a), (b); 6-204(a), whereas Delaware third-degree burglary requires merely that it be a "building." 11 Del. Code § 824. And second, Maryland second-degree burglary requires the specific intent to commit theft, a crime of violence, arson in the second degree, or theft of a firearm, *see* CL § 6-203(a), (b), whereas Delaware third-degree burglary requires merely the specific intent to commit a crime. 11 Del. Code § 824. We conclude that Delaware third-degree burglary is not equivalent to Maryland first-, second-, or third-degree burglary and is therefore not "an offense under the laws of another state . . . that would constitute one of the crimes listed in item (1) [that is, a crime of violence] . . . if committed in this State." PS § 5-206. Accordingly, we hold that the evidence was insufficient to sustain Figgs's conviction under PS § 5-206. We, therefore vacate that conviction and its attendant sentence.

[8] Delaware second- and third-degree burglary require the same specific intent, namely, the intent to commit a crime within the unlawfully occupied building. *Compare* 11 Del. Code §§ 824, 825(a)-(b).

**2. Disqualifying Crime**

Maryland Public Safety Article, § 5-205(b)(1), proscribes possession of a rifle or shotgun by a person who "has been convicted of a disqualifying crime as defined in § 5-101 of this title[.]" A "disqualifying crime" includes, as relevant here, "a violation classified as a misdemeanor in the State that carries a statutory penalty of more than 2 years." PS § 5-101(g)(3).

Maryland's fourth-degree burglary statute includes several related offenses,[9] but for our purposes the relevant provisions are CL § 6-205(a) and (b), which, respectively, state that a person may not break and enter the "dwelling" or the "storehouse" of another. The penalty provision of the Maryland statute states: "A person who violates this section is guilty of the misdemeanor of burglary in the fourth degree and on conviction is subject to imprisonment not exceeding 3 years." CL § 6-205(e).

As we explained in the previous section of this opinion, Maryland recognizes constructive breaking as sufficient to sustain a burglary. Moreover, the terms "dwelling" and "storehouse," as used in Maryland CL § 6-205, taken together, are substantially coterminous with the term "building," as used in the Delaware burglary statutes (as well as those of other states).[10] Therefore, we conclude that every violation of the Delaware

[9] See *Herd v. State*, 129 Md. App. 77 (1999), for a detailed analysis of this statute, as previously codified at Article 27, § 32.

[10] *See, e.g.*, Florida Stat. Ann. § 810.02; 720 Ill. Con. Stat. 5/19-1; N.Y. Penal Law § 140.20; 68 A.L.R.4th 425 (1989) ("What is 'building' or 'house' within burglary or breaking and entering statute).

third-degree burglary statute entails conduct that would, had it occurred in Maryland, constitute a violation of either CL § 6-205(a) or (b), depending upon whether the "building" at issue was a dwelling or not. Moreover, Maryland fourth-degree burglary, a misdemeanor that carries a maximum penalty of three years' imprisonment, is plainly a "disqualifying crime," under PS § 5-101(g)(3).[11] We therefore conclude that Delaware third-degree burglary is a "disqualifying crime," under Maryland PS § 5-205(b)(1).

**II.**

Figgs contends that there was a fatal variance between the allegations in the charging document and the proof adduced at trial and that, therefore, his convictions must be vacated.[12] We disagree.

The source of the rights at issue (and allegedly violated) is Article 21 of the Maryland Declaration of Rights, which provides in pertinent part: "That in all criminal prosecutions, every man hath a right to be informed of the accusation against him;" and "to

[11] In *Brown v. Handgun Permit Review Bd.*, 188 Md. App. 455, 479-80 (2009), *cert. denied*, 412 Md. 495 (2010), we explained that, under PS § 5-101(g)(3), "a disqualifying conviction from another state is any violation that would be classified in Maryland as a misdemeanor that carries a statutory penalty of more than two years."

[12] Since a claim of a variance between the allegations in the charging document and the evidence adduced at trial "may be . . . raised by a timely motion for judgment of acquittal," *Green v. State*, 23 Md. App. 680, 685 (1974), *cert. denied*, 274 Md. 728 (1975), then, presumably, were we to find merit in the claim, the remedy should be entry of a judgment of acquittal and not merely vacatur of the conviction. Language suggesting otherwise, *see, e.g.*, *Melia v. State*, 5 Md. App. 354, 363 (1968), predates the decision of the Supreme Court in *Benton v. Maryland*, 395 U.S. 784 (1969), which held that the Double Jeopardy Clause of the Fifth Amendment applies to the states through incorporation by the Fourteenth Amendment.

have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence[.]" The constitutional guarantee serves several critical purposes, among which is "to put the accused on notice of what he is called upon to defend by characterizing and describing the crime and conduct[.]" *Counts v. State*, 444 Md. 52, 57 (2015) (quoting *Ayre v. State*, 291 Md. 155, 163 (1981)). In furtherance of that purpose,

> [f]irst, it is essential that [the charging document] characterize the crime, and second, it should furnish the defendant such a description of the particular act alleged to have been committed as to inform him of the specific conduct with which he is charged. . . . As to the former of these dual requisites, where a statutory offense is alleged, it has generally been held in Maryland that, at least where the terms of the statute include the elements of the criminal conduct, the crime may be sufficiently characterized in the words of the statute.

*Id.* at 58 (quoting *Ayre*, 291 Md. at 163-64).

Because of the constitutional mandate in Article 21, the "evidence in a criminal trial must not vary from those allegations in the indictment which are essential and material to the offense charged." *Green v. State*, 23 Md. App. 680, 685 (1974) (citation omitted), *cert. denied*, 274 Md. 728 (1975). When a defendant is charged with illegal possession of a firearm, based upon a prior, disqualifying conviction, proof of that prior conviction is an "essential element" of the offense. *Carter v. State*, 374 Md. 693, 699 (2003).[13]

[13] Among other things, *Carter* held that, when a defendant is charged with possession of a regulated firearm after having been convicted of a disqualifying offense and elects a jury trial, he is not entitled to bifurcation of the prior-conviction element of that charge from its other elements. *Carter*, 374 Md. at 709-15. In *Hemming v. State*, No. 48, Sept. Term, 2019 (argued Feb. 7, 2020), the Court of Appeals has been asked to revisit this holding. Regardless of its resolution of that issue, it would have no bearing on this appeal, which was taken from judgments entered after a bench trial.

Presumably, to avoid the preclusive effect of an acquittal, the State may, as it attempted unsuccessfully in this case, seek to amend an indictment during trial. Maryland Rule 4-204 places strict limits on such attempts. It provides:

> On motion of a party or on its own initiative, the court at any time before verdict may permit a charging document to be amended except that if the amendment changes the character of the offense charged, the consent of the parties is required. If amendment of a charging document reasonably so requires, the court shall grant the defendant an extension of time or continuance.

Because Rule 4-204 requires the defendant's consent to amend an indictment, during trial, if that amendment "changes the character of the offense involved," cases addressing such amendments shed significant light on the issue before us, which is whether the variance between Count Two of the indictment and the evidence adduced at trial was material.

In *Thompson v. State*, 371 Md. 473 (2003), the Court of Appeals addressed a claim that a trial court had erred in permitting the State to amend an indictment during trial because that amendment, Thompson claimed, had altered "the character of the offense charged." The Court noted that, generally, we look only to the language in the body of the indictment when construing the "character of the offense." *Id.* at 489. If, however, the body of the indictment is "insufficient to charge any crime," we also consider the statutory reference because it "supplie[s] a necessary element of the characterization of an offense charged." *Id.* at 492 (citation omitted).

Because we held that the evidence was insufficient to prove Count One of the indictment (illegal possession of a shotgun by a person previously convicted of a crime of violence), we need consider only Count Two. Count Two of the indictment alleged that

Figgs "did possess a shotgun after being convicted of a disqualifying crime, to wit: Burglary Second Degree, a violation classified as a felony in the state that carries a statutory penalty of more than 2 years," followed by a statutory reference to "PS 5-205(b)."

The body of Count Two misstates the statutory language from Maryland PS § 5-101(g), which defines "disqualifying crime" for purposes of PS § 5-205(b):

> "Disqualifying crime" means:
>
> (1) a crime of violence;
>
> (2) a violation classified as a felony in the State; or
>
> (3) a violation classified as a misdemeanor in the State that carries a statutory penalty of more than 2 years.

Because, as we have previously explained, the prior conviction actually qualified as a "misdemeanor in the State that carries a statutory penalty of more than 2 years," the discrepancy from the statutory language is not fatal. Moreover, any possible ambiguity is adequately resolved by considering the statutory reference. *Thompson*, 371 Md. at 492.

Nevertheless, a more significant difficulty arises because the indictment states "Burglary Second Degree" as the disqualifying prior conviction, whereas in fact, and as proven at trial, the disqualifying prior conviction was Delaware third-degree burglary. That leads us to consider examples of amendments to charging documents that were, or were not, deemed to have changed "the character of the offense charged," Md. Rule 4-204, to determine how the instant case compares.

In *Thompson*, the Court of Appeals held that a mid-trial amendment -- substituting one statutory reference for another (and where the substituted statute carried a greater penalty) -- was permissible because the original count in the indictment quoted the necessary statutory text to charge the intended offense. *Thompson*, 371 Md. at 488-95.

In contrast, in *Johnson v. State*, 358 Md. 384 (2000), the Court held that an amendment, seeking to substitute "cocaine" for "marijuana" in a charging document alleging CDS offenses, could not be made over a defense objection because that amendment changed the character of the offenses charged. *Id.* at 387-93. It was important, in the Court's analysis, that the amendment sought to substitute charges which carried a greater penalty, and, moreover, it sought to change an element of one or more of the offenses charged. *Id.* at 391. Similarly, in *Counts, supra*, the Court held that an amendment to an indictment, seeking to substitute theft of property having a value of at least $1,000 but less than $10,000, for theft of property having a value less than $1,000, could not be made over a defense objection because the amendment added an additional element to the offense charged and subjected the defendant to a potentially greater penalty. *Counts*, 444 Md. at 58-66.

The instant case is more similar to *Thompson* and less similar to *Johnson* and *Counts*. Although no amendment was permitted in this case, it remains true that the variance between Count Two of the indictment and the evidence adduced at trial was not material. Regardless of whether the predicate prior offense had been as stated in the indictment or as was proven at trial (and which was a lesser included offense of what initially had been alleged in the Delaware case), the penalty Figgs faced was exactly the

same, and the Maryland statutory section at issue was the same. Moreover, any deficiency in notice, which may have ensued from the drafting error in the indictment, was cured by discovery, which took place well before trial. Figgs was and always had been aware that the prior offense charged was the Delaware conviction for third-degree burglary. Accordingly, we hold that Figgs was properly convicted of possession of a shotgun after previously having been convicted of a disqualifying crime, under Maryland PS § 5-205.

**JUDGMENT OF CONVICTION FOR POSSESSION OF A SHOTGUN AFTER PREVIOUSLY HAVING BEEN CONVICTED OF A CRIME OF VIOLENCE VACATED; JUDGMENT OF CONVICTION FOR MAINTAINING A COMMON NUISANCE AFFIRMED; CASE REMANDED FOR SENTENCING ON CONVICTION FOR POSSESSION OF A SHOTGUN AFTER PREVIOUSLY HAVING BEEN CONVICTED OF A DISQUALIFYING CRIME. COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANT AND CECIL COUNTY.**