BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CM-433

DEVON GREENFIELD, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Cr. No. 2022-CMD-7141

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ISSUES PRESENTED

I. Whether police had probable cause to arrest appellant Devon Greenfield and search him incident to that arrest, thereby recovering three vials of PCP inside a neoprene case in his shoulder bag, when police (1) entered a park known to them as a locale for the sale of PCP; (2) observed Greenfield walking hastily away from police after appearing to observe them; (3) detected the strong, unique smell of PCP emanating from Greenfield, who was walking alone; and (4) asked Greenfield if they could see what was in his shoulder bag, and he responded by removing an opened bottle of whiskey.

II. Whether the trial court abused its discretion by permitting the government to reopen its case at the close of the defense case to introduce the drug evidence, Government Exhibit 4, where the exhibit had been identified in the government's case-in-chief and used by both parties during testimony, the government mistakenly believed it had introduced the evidence, and Greenfield never sought further questioning or to reopen his case and even on appeal fails to proffer any evidence he would have sought to offer in rebuttal.

III. Whether the government presented sufficient evidence of Greenfield's attempted possession of PCP, where the trial court found that Greenfield was carrying three vials of PCP in his shoulder bag, Greenfield was alone when stopped by police and the vials smelled strongly of the unique odor of PCP, the PCP Greenfield carried was inconsistent with personal use and he was stopped in a park known as a locale for the sale of PCP, and Greenfield took multiple actions at his stop indicating his consciousness of guilt.

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COUNTERSTATEMENT OF THE CASE

By superseding information filed on December 9, 2022, appellant Devon Greenfield was charged with attempted unlawful possession of a controlled substance (phencyclidine, that is, PCP) (D.C. Code §§ 48-904.01(d), 48-904.09) and possession of an open container of alcohol (POCA) (D.C. Code § 1001(a)(1), (d)) (Record on Appeal (R.) 5). On March 28, 2023, Greenfield moved to suppress tangible evidence found on his person, and on April 5, 2023, the government opposed (R.9, 10). After a

combined motions hearing and bench trial on April 19-20, 2023, before the Honorable Deborah J. Israel, the trial court denied the motion to suppress and convicted Greenfield of both counts (R.A:7-9; 4-19-23 Tr. 230-32; 4-20-23 Tr. 29-39). On April 20, 2023, the trial court sentenced Greenfield to 180 days' incarceration for attempted possession and time served for POCA (R.16). On May 19, 2023, Greenfield timely noted his appeal (R.17).

THE COMBINED TRIAL AND MOTIONS HEARING

The Government's Evidence

Metropolitan Police Department (MPD) Officer Carter Moore, a member of an MPD team assigned to conduct narcotics and firearm investigations, testified that he had received training on the packaging, sale, and odor of liquid PCP (4-19-23 Tr. 78-80). He had been involved in 50 to 60 PCP cases and was familiar with the smell of PCP (*id*. at 81, 94). He was familiar with the park in the 5700 block of Dix Street, Northeast, because his unit had received multiple calls from citizens reporting the use and sale of PCP in the park, particularly after dark (*id*. at 81, 88-89).

On December 6, 2022, at around 5:35 p.m., Officer Moore and two other officers entered the park after seeing three people gathered by a

footbridge in the park (4-19-23 Tr. 81-89, 94). As the officers approached the footbridge, Officer Moore smelled in the air PCP, which he described as a "very, very distinct chemical smell that is very hard to conceal" (*id.* at 92-93). The group of people appeared to notice the police and one of the men, Greenfield, began to walk away "hastily" (*id.* at 89, 94). The officers were dressed in full uniform and carrying flashlights (*id.* at 91-92). As the officers approached Greenfield, the smell of PCP grew stronger, and Officer Moore believed Greenfield was in possession of PCP (*id.* at 94, 97-98). At this point, there was no one else in the area (*id.* at 96).

The officers told Greenfield to stop, informing him he was being stopped by the police (4-19-23 Tr. 98). Greenfield had a bag on his back (*id.* at 99). Officer Moore asked Greenfield in a normal tone if he had any firearms in his bag, and he answered that he had a beer in his bag and that he was just drinking a beer (*id.* at 98-99). Officer Moore asked Greenfield if he would show him what was inside his bag so that he could be sure it did not contain weapons; Greenfield said, "it's just a beer," unslung his bag, opened it, and pulled out a bottle of Fireball whiskey that had been opened (*id.* at 99). As he did so, Officer Moore "began smelling a very, very strong odor of PCP [coming] from the book bag" (*id.*

at 101). He told the other officers to handcuff Greenfield and place him under arrest, and then searched Greenfield's bag, locating three vials smelling of PCP inside of a neoprene headphone case (*id*. at 101-03). Officer Moore opined that the amount of PCP in the three vials was consistent with packaging for sale, because "three vials is more than a normal person would be able to smoke in a single setting" (*id*. at 103-04). He identified Government Exhibit (GX) 4 as an MPD plastic heat-sealed bag containing the three vials he recovered from Greenfield's bag (*id*. at 107-08, 238).[1]

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[1] The court received GX.1, body-worn camera of Officer Moore (4-19-23 Tr. 86-87). A copy of GX.1 is attached to the government's motion to supplement the record on appeal. In the video, two officers are seen jogging into the park and across a footbridge with two persons on it; as they cross, Officer Moore states, "I smell PCP" (GX.1 17:35:47). As the officers cross the bridge, Greenfield is visible walking away in a grassy area ahead and to the right (*id*. at 17:35:51). As they draw near Greenfield, the officers state, "hey, hey, my man, stop, stop, stop, stop, stop, What's that you got in your hand?"; Greenfield turns his hands palm upwards with nothing visible in them (*id*. at 17:35:58). Greenfield keeps walking away, and Officer Moore puts his hand on the inside of Greenfield's left elbow to stop him (*id*. at 17:36:00). Officers tell Greenfield, "stop, stop, stop, you are being stopped, yes, relax" (*id*. at 17:36:03). An officer asks, "Is there a reason that you're just walking away from over there?," and Greenfield answers, "Yeah, I was drinking a beer" (*id*. at 17:36:04). That officer leaves, and Officer Moore has the

(continued . . .)

Officer Moore stated that he could still smell the PCP through the seal of the bag (4-19-23 Tr. 119). He also opined, based on his experience, that when a person smells PCP for the first time "they typically are taken aback . . . because it is a very, very strong chemical odor" (*id.* at 120). He

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following exchange with Greenfield, during which time a second officer is standing nearby holding a flashlight:

- Drinking a beer?
- *Yeah.*
- You ain't got no guns in your bag or nothin'?
- *Nah.*
- Mind if I see?
- *Yeah, I ain't got no guns.*
- You mind if I see in your bag make sure there ain't no gun in there?
- *I ain't got no guns, just beer* (*id.* at 17:36:23).

Greenfield then swings his bag off his shoulder and starts unzipping it (*id.*). Officer Moore asks, "Just beer, no PCP?," and Greenfield responds, "Nah," and removes a partially-consumed bottle of Fireball whiskey from his bag (*id.* at 17:36:36). Greenfield then removes a can of apparently unopened beer from his bag, and says "beer" (*id.* at 17:36:38). Officer Moore then asks Greenfield, "Why I smell PCP coming from your bag, man," Greenfield responds, "Yeah, I was just drinking a beer," to which Officer Moore states, "Yeah, but I smell PCP coming from your bag," and tells other officers to place Greenfield in handcuffs (*id.* at 17:37:04). Officer Moore then searches Greenfield's bag, opens the small black case, and tells Greenfield, "You're under arrest man. You've got PCP on you. I can smell it coming from your bag." (*Id.* at 17:37:12.)

further opined, based on his experience, that, for a person familiar with PCP, "Everybody knows when PCP is present" (*id*. at 122).

MPD Officer Scott Brown testified that he had been a police officer for 32 years, had worked on thousands of narcotics cases, including PCP cases, and was familiar with the manner in which PCP is packaged, sold, and used in Washington, D.C. (4-19-23 Tr. 38-47). The court received him as an expert in drug investigations, specifically the manner in which narcotics, including PCP, are packaged, sold, and used in D.C., and the specific characteristics, including appearance, odor, and identification. of PCP (*id*. at 47-48). Officer Brown had no first-hand knowledge of Greenfield's case (*id*. at 48).

Officer Brown explained that PCP is generally packaged for street sale in a glass vial of various sizes; some vials are single-use whereas others are multiple-use, including perfume bottles (4-19-23 Tr. 49). He also explained that the single use of PCP is distributed as a "dipper," a cigarette partially dipped into liquid PCP and then smoked (*id*.). He further explained that in D.C., PCP is sold in liquid form, has a light yellow to amber color, and has a unique chemical odor that is strong and pungent (*id*. at 49-51). He testified that at room temperature, liquid PCP

tends to vaporize, and the smell would be recognizable even in a glass vial if the glass vial were brought into the room (*id.* at 52).

Officer Brown examined GX.4, which he described as a heat-sealed plastic bag containing three perfume-bottle-sized vials with plastic caps containing a yellowish liquid (4-19-23 Tr. 53-56). He testified that he could smell the unique smell of PCP emanating from the seal of the heat-sealed bag, and offered his opinion that the vials contained liquid PCP (*id.* at 57).[2]

The Trial Court's Verdict

The trial court found that it was able to "clearly see and hear" both Officers Brown and Moore, and credited both witnesses (4-20-23 Tr. 30). The court found that Officer Brown had handled thousands of narcotics cases, including PCP cases, was an expert in drug pricing and market values, had received additional PCP training, and had served as an expert in a handful of cases (*id.* at 30-31). The court found it had qualified

[2] The court denied Greenfield's general motion for judgment of acquittal (4-19-23 Tr. 233). Greenfield marked exhibits, but they were not admitted into evidence (see *id.* at 128, 134, 138, 149, 173, 188). In Argument I.A. of the text, we summarize the trial court's ruling denying Greenfield's motion to suppress.

Officer Brown as an expert in the packaging of PCP as well as the color, odor, and characteristics of PCP, and summarized his testimony (*id.* at 31-32). The court further found that Officer Brown had identified the odor of PCP emanating from GX.4, the heat-sealed envelope containing three liquid vials, and had identified those vials as containing PCP (*id.* at 32).

The court summarized the testimony of Officer Moore, including his handling of 50 to 60 PCP cases, his assignment to the park at 5700 Dix Street in response to tips and calls from citizens, and the park's identification as a "high-use, high-drug, high-volume area for the use and sale of PCP, particularly at night" (4-20-23 Tr. 32-33).

The court reviewed Officer Moore's body-worn camera (BWC) (GX.1), finding that as Officer Moore walked into the park he stated "I smell PCP," and that as he crossed the footbridge he stated a second time more emphatically, "there's a smell of PCP" (4-20-23 Tr. 35). The court found that the officers jogged across the footbridge, passing two persons, and then came into the view of Greenfield in the background "hastily walking away" (*id.* at 35-36). The officers slowed to a walk, and began to engage Greenfield; they were clearly marked in MPD uniforms (*id.* at 36).

The court found that GX.1 further showed Greenfield "still continuing to walk . . . away" as the police say to him, "stop, stop, stop" (4-20-23 Tr. 36). An officer tells Greenfield, "You're being stopped" (*id.*). An officer inquires why Greenfield is walking away, and Greenfield answers he was "just drinking beer" (*id.*). Greenfield says he did not want to stop (*id.*). The court further found that, in GX.1, Greenfield tells the police he has no guns in his bag; when Officer Moore asks him, "do you mind if I see to make sure you don't have a gun," Greenfield pulls the bag he is carrying off his shoulder and says, "no guns, just beer" (*id.* at 36-37). In response to a question from an officer, "no PCP?," Greenfield answers, "nah" (*id.* at 37). Greenfield then pulls a partially-consumed whiskey bottle from his bag, and "concedes" he is drinking in the park (*id.*). The court found that Greenfield "tries to partially open the backpack because he's trying to just show the bottle of Fireball [whiskey]" (*id.*). Greenfield puts his hand back into his bag and pulls out a large can of unopened beer (*id.*).

Continuing to review GX.1, the court found that the officer then asked, "why am I smelling PCP from your bag," to which Greenfield replied, "I'm just drinking beer" (4-20-23 Tr. 37). Greenfield is arrested,

and an officer searches his bag with a flashlight, locating the small black bag, apparently neoprene, with a zipper (*id*.). Officer Moore later described the case as a headphone case (*id*.). The court found that the BWC video shows the vials, and Officer Moore smelling the PCP and identifying the vials as PCP (*id*.). The court also found that there was no one else around during Greenfield's exchange with police (*id*. at 36).

After reviewing the law applicable to attempted possession of a controlled substance (4-20-23 Tr. 33-35), the court found beyond a reasonable doubt that Greenfield possessed what he believed was a controlled substance (*id*. at 38). The court found that Greenfield walked away from police and "continuously tried to leave," which the court found to be indicative of his belief [that he was carrying a controlled substance on his person] (*id*.). The court further found that the bag smelled like PCP; it had a "unique, strong signature odor" (*id*.). The court found that the park in which police stopped Greenfield is a "known location" for sale and use of PCP (*id*.). The court found that Greenfield was carrying the bag, that no one else was around him, and that there was no possible reasonable doubt that the bag was his (*id*.). The court further found that inside the bag were three vials that were inconsistent with personal use

(*id.*). Finally, the court found that Greenfield "gave up and conceded quickly the alcohol because he was hoping no one else was going to look in the bag further" (*id.* at 39). The court found that Greenfield opened the bag "just enough" to show the whiskey and the beer can, but was hiding the pouch and its contents (*id.*). The court stated that the government had proven attempted possession "absolutely" (*id.*).

SUMMARY OF ARGUMENT

The trial court did not err by denying Greenfield's motion to suppress the PCP recovered from his shoulder bag. Police had reasonable articulable suspicion to stop Greenfield based on the strong odor of PCP emanating from his person and his walking away hastily from police in a park known for the sale of PCP. That suspicion ripened into probable cause to arrest Greenfield. As police drew near to him, they detected the increasingly strong odor of PCP coming from his bag, Greenfield resisted orders to stop, he claimed he was doing no more than drinking beer, and he produced an opened bottle of whiskey. The totality of these circumstances established a probability that Greenfield was committing possession of PCP and/or POCA. Finally, police were permitted to search

Greenfield's bag incident to his arrest and locate the three vials of PCP therein.

Contrary to Greenfield's claim, the trial court did not abuse its discretion by permitting the government to reopen its case at the close of the defense case to introduce the drug evidence. The government mistakenly believed the exhibit had been admitted and moved for admission as soon as it recognized its error. The exhibit was highly relevant. Moreover, the exhibit had been identified during the government's case-in-chief, and both parties had referred to it in testimony. Finally, Greenfield was not prejudiced because he never sought additional questioning or to reopen his case, and even now fails to proffer evidence he would have sought to develop in rebuttal.

Nor was there insufficient evidence of Greenfield's attempted possession of PCP. As the court found without clear error, when Greenfield was stopped by police, he was alone and carrying three vials of PCP in his shoulder bag and the PCP smell emanating from his bag was strong and recognizable. In addition, Greenfield carried an amount of PCP inconsistent with personal use and did so in a known location for the sale of PCP. Finally, Greenfield took multiple actions—quickly

walking away, resisting a police order to stop, attempting to conceal the contents of his bag—that the court reasonably found reflected Greenfield's awareness of his guilt.

ARGUMENT

I. The Trial Court Did Not Err By Denying Greenfield's Motion to Suppress Evidence.

Greenfield urges (at 30-43) that the trial court erred by denying his motion to suppress the PCP recovered from his person. He claims that police lacked probable cause to arrest him, and that even if they had justification for an arrest, they lacked a lawful basis to search the interior of his bag or the neoprene case containing the vials of PCP. His claim lacks merit.

A. Additional Background

In his March 28, 2023, motion and subsequent argument, Greenfield argued that police lacked reasonable articulable suspicion to stop him, that his stop constituted an arrest for which police lacked probable cause, and that his arrest rendered his consent to search his bag involuntary (R.9; see also 4-19 Tr. 214-24). In its April 5, 2023, opposition and subsequent argument, the government contended that police had

reasonable articulable suspicion to stop Greenfield, which ripened into probable cause to arrest him when he told them he had been drinking in the park, and/ or when he voluntarily displayed the opened bottle of whiskey in his bag (R.10:5-8; see also 4-19-23 Tr. 224-30). The government further contended that police independently obtained probable cause to arrest Greenfield when they detected the strong odor of PCP coming from Greenfield's bag, which odor was linked to Greenfield because he was carrying the bag and no one else was around (R.10:8-9). The government claimed the probable cause to arrest Greenfield permitted them to search his bag incident to his arrest for further evidence of his open container or drug-possession violations (*id*. at 9).

In denying the motion, the court found that police obtained reasonable articulable suspicion to stop Greenfield when they smelled the strong odor of PCP coming from him (4-19-23 Tr. 230-31). In addition, police knew it was nighttime and there had been calls and reports from tipsters concerning use and sale of PCP in the park at night (*id*. at 231). Moreover, when police tried to get Greenfield to slow down or stop, he did not do so, and police had to place a hand on him because he would not stop (*id*.). The court found at that point that Greenfield was stopped (*id*.).

The court found that police asked Greenfield if he had guns on him, and he said no (4-19-23 Tr. 231). The court further found that police then asked Greenfield if he would show his bag, and he voluntarily opened his bag and displayed the open container of alcohol, at which point he was arrested (*id.* at 231-32).

The court found that as police were arresting Greenfield, an officer searched the half-open bag incident to the arrest (4-19-23 Tr. 232). The searching officer smelled the PCP, felt the neoprene case to see if was safe, and then opened it, discovering the three small vials of what the officer identified as PCP (*id.*). The court found that police had probable cause to arrest Greenfield and search his bag incident to his arrest (*id.*).

B. Standard of Review

When reviewing the denial of a motion to suppress, "the facts and all reasonable inferences therefrom must be viewed in favor of sustaining the trial court ruling." *Plummer v. United States*, 983 A.2d 323, 330 (D.C. 2009) (citing *(Morris) Shelton v. United States*, 929 A.2d 420, 423 (D.C. 2007)). In addition, this Court "must defer to the motions court's findings of fact as to the circumstances surrounding the appellant's encounter with the police and [must] uphold them unless they are clearly

erroneous." *Plummer*, 983 A.2d at 330 (citing *(Morris) Shelton*, 929 A.2d at 423).

C. Analysis

1. Police Had Reasonable Articulable Suspicion to Support Their Stop.

The trial court found that as police crossed the footbridge in the park, they noticed the distinctive smell of PCP, and as they approached Greenfield, who by that time was not near anyone else, the smell of PCP grew increasingly stronger (4-19-23 Tr. 230-31; see also *id*. at 94, 97-98). These findings were supported by the testimony of Officer Moore and corroborated by his BWC, GX.1 (see supra pp. 2-6). The court's finding regarding the distinctive smell of the liquid PCP was grounded in the testimony of Officers Moore and Brown, whom the court credited, and who testified that liquid PCP gives off a strong, distinctive, chemical odor, particularly when the liquid is left at room temperature (4-19-23 Tr. 49-52, 119-22). Officer Moore was well aware of this smell and able to recognize it because he had been involved in 50-60 PCP cases (*id*. at 81, 94). Accordingly, the court's findings were not plainly wrong or without evidence to support them. D.C. Code § 17-305(a).

On the strength of these findings alone, police had reasonable articulable suspicion for their stop. *See Griffin v. United States*, 878 A.2d 1195, 1199 (D.C. 2005) (police had reasonable articulable suspicion to stop defendant after entering hotel lobby and smelling "a very strong odor of marijuana" coming from defendant).

In addition, as Officer Moore testified without objection and the court found without clear error, citizens had informed police that the park was commonly used by persons using and selling PCP, particularly at night (4-19-23 Tr. 231). The court also found that Greenfield was moving hastily away, and refused initial police requests that he stop until an officer placed a hand on his elbow (*id.*). These factors contributed to the totality of the circumstances authorizing police to stop Greenfield. *See Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000) (unprovoked flight upon noticing police combined with presence in high-crime area sufficient to establish reasonable articulable suspicion for *Terry* stop).

Greenfield does not contest the basis for his stop, but he contends (at 25) that his leaving the scene in response to the police presence was not a factor supporting his stop. He is incorrect. To start, Greenfield did not "merely walk[] away," as he claims (at *id.*). He walked away "hastily"

(4-19-23 Tr. 94-95). Although Greenfield suggests that only headlong flight is relevant, this Court has rejected such a claim. *See Howard v. United States*, 929 A.2d 839, 845–46 (D.C. 2007) (defendant's act of "quickly walk[ing]" away from uniformed police supported reasonable articulable suspicion for stop); *Wilson v. United States*, 802 A.2d 367, 370 (D.C. 2002) (defendant's increased pace into an apartment building after seeing the police, coupled with his frantic pounding on an apartment door, was "an unprovoked instance of evasive behavior sufficient" to give rise to reasonable, articulable suspicion; rejecting argument that only "headlong" flight can support a stop).

Greenfield also errs in arguing (at 28-29) that his location in a park known for PCP sales is not relevant. Police were permitted to consider citizen reports of illegal PCP sales in the park after dark as a relevant circumstance in stopping Greenfield. *See Howard*, 929 A.2d at 845 (defendant's act of flagging down cars in area known for illegal drug transactions contributed to reasonable suspicion for stop); *Singleton v. United States*, 998 A.2d 295, 300 (D.C. 2010) ("Various factors are considered in determining whether a *Terry* stop is justified, including the time of day, flight, the high crime nature of the location.") (cleaned up);

see also Wardlow, 528 U.S. at 124 ("[O]fficers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation[;].... [T]he fact that the stop occurred in a 'high crime area' [is] among the relevant contextual considerations in a *Terry* analysis.").

2. Police Had Probable Cause to Support Their Arrest.

Contrary to Greenfield's claim (at 30, 32-37), police had probable cause to arrest him. Under D.C. law, a law enforcement officer may make a warrantless arrest of a person when the officer has probable cause to believe that person has committed or is committing a felony or a misdemeanor in the officer's presence. D.C. Code § 23-581(a)(l)(A)&(B). Probable cause to arrest exists where "the facts and circumstances within an officer's knowledge are sufficient to warrant a prudent police officer in believing that the suspect[ ] ha[s] committed or [is] committing an offense." *Butler v. United States*, 102 A.3d 736, 740 (D.C. 2014) (internal quotation marks and citations omitted).

"[P]robable cause 'deals with probabilities and depends on the totality of the circumstances.'" *District of Columbia v. Wesby*, 583 U.S.

48, 57 (2018) (quoting *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)). It is "a fluid concept" that is "not readily, or even usefully, reduced to a neat set of legal rules," and "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 232, 243-44 n.13 (1983). Probable cause accordingly "is not a high bar." *Kaley v. United States*, 571 U.S. 320, 338 (2014). "[P]robable cause . . . 'does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands.'" *Enders v. District of Columbia*, 4 A.3d 457, 471 (D.C. 2010) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 121 (1975)); *see also Jenkins v. District of Columbia*, 223 A.3d 884, 890 (D.C. 2020) (explaining that probable cause is a lower standard of proof than preponderance of the evidence); *Texas v. Brown*, 460 U.S. 730, 742 (1983) (probable cause is a "flexible, common-sense standard" that "does not demand any showing that [the arresting officer's belief in a suspect's guilt] be correct or more likely true than false").

Here, the totality of circumstances established probable cause to arrest Greenfield for either or both possession of PCP and POCA.

a. Possession of PCP

First, as the court found, a police officer trained to recognize the distinctive smell of PCP observed that distinctive smell emanating from Greenfield, the smell got stronger as the officer drew closer to Greenfield, and Greenfield was alone in a park so that police could fairly link the odor to him or his bag (4-19-23 Tr. 230-31). This Court has held that the distinctive smell of PCP alone can provide not only reasonable articulable suspicion but also probable cause. *See Minnick v. United States*, 607 A.2d 519, 525 (D.C. 1992) (distinctive smell of PCP alone was sufficient probable cause to search occupied vehicle); *see also Speight v. United States*, 671 A.2d 442, 453 (D.C. 1996) ("no expectation of privacy in the distinctive smell of PCP emanating from the vehicle"); *Butler*, 102 A.3d at 741 ("odor may serve as the basis or principal basis for probable cause to arrest [where the officer is] able to link the unmistakable odor of [the contraband] to a specific person") (cleaned up).

Additional facts bolstered the "probability or substantial chance," *Gates*, 462 U.S. at 243-44 n.13, that Greenfield possessed PCP. As we have noted in our discussion of reasonable suspicion, Greenfield was in a park that was known for PCP sales at the time of day he was there. He

walked hastily away when uniformed police arrived. He ignored police attempts to get him to stop and only did so when an officer placed a hand on his arm. Furthermore, when asked why he did not stop, he claimed he was simply drinking beer, despite the obvious smell of the PCP. *See, e.g., Nieves v. Bartlett*, 139 S. Ct. 1715, 1724, (2019) ("[A] suspect's untruthful and evasive answers to police questioning c[an] support probable cause.") (internal citation omitted); *Stansbury v. Wertman*, 721 F.3d 84, 92 (2d Cir. 2013) (defendant's evasive answers to questions a factor relevant to probable cause); *United States v. $242,484.00*, 389 F.3d 1149. 1164 (11th Cir. 2004) (defendant's "suspicious and evasive answers," although far from dispositive, add to probable cause); *United States v. Ameling*, 328 F.3d 443, 449 (2003) (suspects' "apparently false statements" supported probable cause).

Under the totality of the circumstances, police had ample cause to arrest Greenfield for possession of PCP before they searched his bag. *See Butler*, 102 A.3d at 741-42 (police officer had probable cause to arrest defendant for drug-related offense where he smelled the strong odor of marijuana coming from defendant's car and defendant was sole occupant of the vehicle); *Dalton v. United States*, 58 A.3d 1005, 1013 (D.C. 2013)

(strong chemical odor of PCP coming from defendant and recognized by officers, in addition to fact that defendant had his hands in his waistband and failed to respond to several police orders to show his hands gave rise to probable cause to arrest and search defendant); *Wilson*, 802 A.2d at 372 (reasonable suspicion grounded in flight in high-crime area turned into probable cause when an officer, familiar with the odor and packaging of PCP, smelled PCP coming from defendant's person and observed tin foils of PCP being removed from pocket of person with defendant).

Greenfield suggests (at 42) that the police could not rely on the plain smell of PCP because the smell could have been on him if he had been in proximity to others smoking PCP. His argument lacks merit. As the court found, police identified the strong smell of PCP coming from Greenfield (4-19-23 Tr. 230-31). Moreover, the court credited testimony from Officer Moore that Greenfield was alone when police approached him and that the smell of PCP got stronger the closer the police drew to Greenfield (*id.* at 91-98). On these facts, the "unmistakeable odor" of PCP was linked to a "specific person"—Greenfield—and under the totality of the circumstances, police thereby obtained probable cause to arrest him. *Butler*, 102 A.3d at 741.

Greenfield also claims (at 42-43) that police could not develop probable cause on a plain-smell theory without a drug-sniffing dog. This Court has never imposed such a requirement, particularly where, as here, the court credited the officer's testimony that he recognized the distinctive smell and could link it to Greenfield. *See Butler*, 102 A.3d at 741; *Wilson*, 802 A.2d at 372; *Minnick*, 607 A.2d at 525

b. POCA

Second, as the trial court found without clear error, Greenfield told police after he was stopped that he had been drinking a beer, and he voluntarily showed police a capped but unsealed bottle of whiskey (4-19-23 Tr. 231-32). At that point as well, police had probable cause to arrest him for POCA. *See* D.C. Code § 25-1001(a)(1) ("no person in the District shall . . . possess in an open container an alcoholic beverage in . . . (1) A . . . park . . ."); § 25-101(35) ("'Open container' means a bottle, can, or other container that is open or from which the top, cap, cork, seal, or tab seal has at some time been removed"); *Bean v. United States*, 17 A.3d 635, 637 (D.C. 2011) (police had probable cause to arrest defendant who possessed unsealed bottle of cognac).

Relying on *Dozier v. United States*, 220 A.3d 933, 940 (D.C. 2019), Greenfield contends (at 32-35) that his display of the whiskey bottle was involuntary because he had been seized unlawfully at the time of his consent. *Dozier* does not help him. In *Dozier*, the Court found that the defendant was illegally seized, without reasonable articulable suspicion, because he was surrounded by police at night, in a secluded alley partially blocked by a police cruiser, and subjected to "repeated questioning and escalating requests, culminating in a request to put his hands on the wall for a pat-down." *Id.* at 941. The Court found that the illegal seizure tainted the defendant's consent to a search. *Id.* at 940 ("[W]hen 'statements and conduct evidencing consent to a search are given contemporaneously with the illegal seizure, with no break in the causal chain, the actions of the person seized are not free from the taint of unlawful detention and are thus insufficient to show consent.'") (quoting *Jones v. United States*, 154 A.3d 591, 598 n.20 (D.C. 2017)). Here, by contrast, there was no illegal seizure. Greenfield had been stopped by police upon (at least) reasonable articulable suspicion when he showed them the whiskey bottle. Unlike in *Dozier*, there was no taint to purge.

Greenfield notes (at 34-35) that he was an African American man alone at night in a dark park, separated from his two companions, and surrounded by two to three police officers asking him what he terms "accusatory" questions. We do not agree that the police accused Greenfield of anything. They simply asked him whether he had any guns and whether they could see inside his backpack. In any event, the factors Greenfield cites would be relevant under *Dozier* to whether was seized. But there is no dispute that he was seized, and, as we have discussed, the seizure was lawful. The mere fact of lawful seizure did not render his display of the bottle involuntary. *See United States v. Watson*, 423 U.S. 411, 424 (1976) (the "fact of custody alone has never been enough in itself to demonstrate a coerced . . . consent to search").[3]

Greenfield presents no free-standing argument (at 32-35) that his display of the whiskey bottle was not voluntary. Nor is there any basis for the Court to conclude that his "will [was] overborne and his capacity

[3] Contrary to Greenfield's claim (at 35-37) the trial court did not err in identifying the time of arrest. As discussed in the text, at the time police searched Greenfield's bag, they had probable cause for his arrest and were justified in searching his bag incident to his arrest even if the formal arrest followed "quickly on the heels" of the search. *See Butler*, 102 A.3d at 739; *Millet v. United States*, 977 A.2d 932, 935 (D.C. 2009).

for self-determination critically impaired." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). The voluntariness of consent to search is a fact-bound question that must be determined from the totality of the circumstances. *Id.* at 248-49; *see also In re J.M.,* 619 A.2d 497, 500 (D.C. 1992) (en banc). A court must consider both the characteristics of the defendant and the details of the encounter, including the length of the detention, "repeated and prolonged" questioning, and any physical punishment. *Bustamonte*, 412 U.S. at 226; *accord Basnueva v. United States*, 874 A.2d 363, 369 (D.C. 2005).

Applied to this case, those factors show that Greenfield made a voluntary decision to show the officers the whiskey bottle. Greenfield was 32 years old at the time (R.1 (noting Greenfield's date of birth)). He has not suggested he suffered from low intelligence or lack of education. The police spoke to Greenfield in conversational tones and issued no commands; the entire interaction took seconds (GX.1). Although one officer touched his arm to stop him, he let go when Greenfield stopped (see *id.*), and Greenfield does not suggest that he was otherwise restrained or that police touched or drew their weapons. As the court found, the police investigation consisted of two questions—whether he

had guns on him and whether he would show his bag (4-19-23 Tr. 231). Taken together, these circumstances establish that when Greenfield responded, "Yeah" and pulled the bag from his shoulder to show the bottle, he acted voluntarily. And based on that voluntary display of an opened bottle of alcohol, the police has probable cause to arrest him for POCA.

3. Police Were Authorized to Search Greenfield's Bag Incident to His Arrest.

Having obtained probable cause to arrest Greenfield, police were authorized to search him incident to his arrest. *Chimel v. California*, 395 U.S. 752, 762-63 (1969); *Green v. United States*, 231 A.3d 398, 406 (D.C. 2020).[4] That is, police were permitted to "search [Greenfield's] person and the area within his immediate control, in order to prevent [Greenfield] from gaining possession of a weapon or destructible evidence." *Howard*, 929 A.2d at 846. The bag slung over Greenfield's shoulder was within the ambit of this lawful search. *See, e.g., Dalton*, 58 A.3d at 1014 (lawful

[4] Contrary to Greenfield's claim (at 43), the trial court did not find (see 4-19-23 Tr. 232), and the government does not suggest, that police were permitted to search his bag because of exigency.

search incident to arrest encompassed black plastic bag that fell from defendant's person as police placed him under arrest); *Young v. United States*, 670 A.2d 903, 909 (D.C. 1996) (lawful search incident to arrest encompassed search of plastic shopping bag found next to defendant after defendant was handcuffed). That search yielded destructible evidence—three vials of PCP inside a neoprene headphone case (4-19-23 Tr. 103-04).

Greenfield further urges (at 37-40) that the *Chimel* search incident to his arrest should be limited by *Arizona v. Gant*, 556 U.S. 332, 343 (2009), and, if so, was unlawful under *Gant*. This argument lacks merit. *Gant* restricted automobile searches under the *Chimel* rationale to those situations in which "the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *United States v. Taylor*, 49 A.3d 818, 822 (D.C. 2012) (citing *Gant*, 556 U.S. at 343). *Gant* also recognized, however, a new justification for searches of automobiles incident to arrest, "one that 'does not flow from *Chimel*,'" for searches "when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Taylor*, 49 A.3d at 822 (quoting *Gant*, 556 U.S. at 343 (cleaned up)). This Court has held that a *Gant*

evidence search of a vehicle is permissible when police possess reasonable articulable suspicion to believe evidence relevant to the crime of arrest might be found in the car. *Id*. at 824.

Greenfield's argument lacks merit because this Court has never held that *Gant* applies outside of the vehicle context. *See, e.g., (Gregory) Smith v. United States*, 283 A.3d 88, 97 (D.C. 2022) (police lacked reasonable articulable suspicion to search "otter box" in defendant's car incident to his arrest for POCA); *Taylor*, 49 A.3d at 818 (police lacked reasonable articulable suspicion to search glove box of defendant's car incident to his arrest for driving under the influence where he was handcuffed in the back of a patrol car at the time of the search). Indeed, this Court has emphasized that *Gant* "restricted automobile searches under the *Chimel* rationale" and that the *Gant* evidence search did not rely on a *Chimel* rationale at all. *See, e.g. Taylor*, 49 A.3d at 821-82.[5]

[5] Greenfield relies (at 38) on *United States v. Davis*, 997 F.3d 191 (4th Cir. 2021), to support his argument that *Gant* should be extended outside the automobile context. Federal circuits are split on this question. *Compare United States v. Perez*, 89 F.4th 247, 259 (1st Cir. 2023) (declining to extend *Gant* beyond the automobile context) *with Davis*, 997 F.3d at 193; *United States v. Knapp*, 917 F.3d 1161, 1168 (10th Cir. 2019); *United States v. Cook*, 808 F.3d 1195, 1199 n.1 (9th Cir. 2015); *United States v. Shakir*, 616 F.3d 315, 318 (3rd 2010).

This Court need not address that question, however, because even if *Gant* did apply to Greenfield's arrest on foot in a public park, Greenfield was "unsecured and within reaching distance of [his bag] at the time of the search," such that the search of his bag would not require reasonable suspicion that the bag contained evidence of the crime of arrest. *Gant*, 556 U.S. at 343; *Taylor*, 49 A.3d at 822. Greenfield does not contend that a *Chimel* search incident to arrest, as opposed to a *Gant* evidence search, would not have lawfully discovered the three vials of PCP.

Finally, even if *Gant* were to apply and the search were construed to be a *Gant* evidence search, police had more than the required reasonable suspicion to open the headphone case. *Taylor*, 49 A.3d at 824. As discussed supra, police possessed probable cause to arrest Greenfield for possession of PCP; as they opened the bag the smell of PCP grew stronger (4-19-23 Tr. 232), thereby giving police reasonable suspicion that even a small container in Greenfield's bag could contain evidence relevant to the crime of his arrest. *See Minnick*, 607 A.2d at 524-25 (strong smell of PCP gave police probable cause to search purse found in car). For all of these reasons, there was no infirmity with the search of Greenfield's bag.

II. The Trial Court Did Not Abuse Its Discretion By Permitting the Government to Reopen its Case to Introduce the Drug Evidence.

Greenfield urges (at 44-47) that the trial court abused its discretion by permitting the government to introduce GX.4, the drug evidence, after the close of the defense case. His claim lacks merit.

A. Additional Background

Officer Brown, who testified first because of scheduling issues, was asked to describe GX.4; he stated that GX.4 was a heat-sealed plastic envelope, called an MPD 95, containing three glass vials smelling of PCP (4-19-23 Tr. 53-57). He further explained that the MPD 95 heat-sealed envelope had a label on the front containing fields for police to record the defendant's information, the contents of the bag, who recovered the items inside the bag, and the signature of the person sealing the bag (*id.* at 55). Officer Brown further testified that on top of the MPD 95 heat-sealed envelope "is a DEA-7 which contains the information regarding the arrest, the items that are inside the heat seal" (*id.*).[6] Officer Brown did

[6] A photograph of GX.4, taken during briefing in this appeal and which the government will move to include in the record on appeal, shows the DEA-7 form stapled to the front of the MPD-95. A DEA-7 is commonly (continued . . .)

not describe the contents of the fields on the DEA-7, and the government did not move to admit the exhibit through the witness (*id.*).

Officer Moore testified that he recognized the vials inside GX.4 as those he had recovered from Greenfield because this case was his first experience with that kind of vial (4-19-23 Tr. 108). He also stated he recognized the vials because the label on the heat-sealed envelope was marked with the "same information, the CCN numbers, the date, . . ." (*id.*). Greenfield objected to the lack of foundation for admission of GX.4; the court overruled the objection on the ground that Greenfield's objection went to the weight of the evidence, not its admissibility, because Officer Moore put the drugs in the heat-sealed bag and transported the drugs to the police station (*id.*). The prosecutor then asked whose name

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understood to be a drug analysis report prepared by the Drug Enforcement Administration (DEA). *See Fields v. United States*, 952 A.2d 859, 860 (D.C. 2008). As the photograph of GX.4 illustrates, however, the top of the form contains fields to be completed by MPD as part of its request to the DEA to conduct a chemical analysis of the attached evidence. As the photograph also demonstrates, the fields at the top of the DEA-7 in this case were completed with the case information and the description of the contents, but the fields for the chemical analysis by the DEA were blank. There is no indication in the record that the trial court received any evidence of a chemical analysis of the drugs recovered from Greenfield's bag.

was on the heat-sealed envelope; Greenfield objected on hearsay grounds and the government countered that it was attempting to establish the "full chain of custody" (*id.* at 110). The court overruled the objection on the ground that the name was not being elicited for the truth of the matter, and Greenfield's objections pertained to the weight of the evidence, not its admissibility (*id.* at 111-13). Officer Moore did not describe the contents of the fields on the label, and the government did not otherwise elicit that information at trial (*see id.* at 108-16). The government did not move to admit GX.4 in its case-in-chief.

After the court denied Greenfield's motion to suppress, Greenfield announced he would not be presenting a defense case, the court confirmed that Greenfield had made a knowing and voluntary decision not to testify, and the defense rested (4-19-23 Tr. 233-35). The court then asked the parties if GX.4, the subject of the suppression motion, had been admitted, or if the parties had held off on its admission subject to the court's ruling (4-19-23 Tr. 236). Defense counsel stated that GX.4 had never been admitted; the prosecutor stated it had (*id.*). The court stated that it would have to check its notes; the court recalled that Officer Brown had identified GX.4 because "he remembered in particular . . . the style

of the vials" (*id*. at 236-37). The prosecutor then moved to admit the exhibit as a rebuttal exhibit "to the extent it wasn't" already admitted (*id*. at 237). Greenfield objected on the ground that both parties had rested; the court stated, "They get a rebuttal case" (*id*.). Greenfield renewed his hearsay objection, which the court denied, and admitted the exhibit (*id*. at 237-38). Greenfield did not seek further cross-examination of Officer Moore or to reopen the defense case.

B. Standard of Review and Applicable Legal Principles

The decision to allow a party to reopen a case to admit evidence "is a question within the trial court's sound discretion, and its decision will not be disturbed unless the court is shown to have abused its discretion." *Austin v. United States*, 292 A.3d 763, 777 (D.C. 2023) (cleaned up); *(Antwon) Shelton*, 983 A.2d 979, 987 (D.C. 2009). "In determining whether the court abused its discretion in permitting a party to reopen the record, this court considers, among other factors (1) the timeliness of the motion, (2) the nature of the evidence, including its relevance, and (3) prejudice to the opposing party." *Austin*, 292 A.3d at 777 (cleaned up); *(Antwon) Shelton*, 983 A.2d at 987.

C. Analysis

Contrary to Greenfield's claim (at 44-47), the trial court did not abuse its discretion by admitting GX.4 after the close of the defense case. Although Greenfield complains (at 44-45) that admission of the exhibit was improper rebuttal evidence, the trial court's ruling is best understood as a decision to permit the government to reopen its case-in-chief to permit introduction of an exhibit both parties had used at trial, for which the foundation for admission had already been laid, and which the government mistakenly believed it had already introduced.

Here, it was permissible to permit the government to reopen: (1) the government moved to admit the evidence as soon as it recognized its mistake; (2) the drug evidence was highly relevant to the government's attempted possession count; and (3) Greenfield was not prejudiced because he was familiar with the exhibit, had cross-examined the witnesses using the exhibit, and the finder of fact had observed the exhibit when it was identified. *See Austin*, 292 A.3d at 777; *(Antwon) Shelton*, 983 A.2d at 987. Moreover, Greenfield never sought additional cross-examination or to re-open his case. Indeed, even on appeal Greenfield proffers no evidence or testimony that he wanted to elicit but

could not. In the absence of prejudice, admission of GX.4 was within the trial court's sound discretion. *See Austin*, 292 A.3d at 777-78 (no abuse of discretion to permit government to reopen its case to introduce recorded jail calls after jury commenced deliberations; government moved for admission as soon as it realized its error, evidence was relevant, and defendant was not prejudiced because recordings had been played to the jury and both sides had referred to them during closing argument); *(Antwon) Shelton*, 983 A.2d at 987 (same, PD-251 incident report; evidence admitted before closing arguments, defendant was familiar with the evidence and could not claim surprise, and defendant failed to proffer what evidence he could have offered in response); *Rambert v. United States*, 602 A.2d 1117, 1119–20 (D.C. 1992) (same, testimony of eyewitness; defendant was not prejudiced because he never sought a continuance to investigate the witness and the witness's testimony "merely corroborated" testimony from other government witnesses); *see also Bryant v. District of Columbia*, 102 A.3d 264, 270 (D.C. 2014) (trial court abused its discretion by denying plaintiff's motion to reopen the case where the evidence was "crucial" and both parties were aware of the evidence and were not surprised by its content).

Greenfield suggests (at 46-47) that he was prejudiced because the court erred by overruling his objections to GX.4. As the court properly concluded (4-19-23 Tr. 108-13, 237-38), Greenfield's hearsay objections lacked merit because the substantive information on the PD-95 and the DEA-7 was not elicited in testimony, and to the extent it was received when GX.4 was admitted, it was not offered for the truth of the matter asserted. *See Carter v. United States*, 614 A.2d 542, 545 n. 9 (D.C. 1992) ("[I]f a statement is not offered to prove the truth of the matter asserted, it is not hearsay.")

Nor, contrary to Greenfield's claim (at 46) were drug analysis results elicited without confrontation; the DEA-7 was incomplete and contained no such information.[7] *See Fields v. United States*, 952 A.2d 859, 860 (D.C. 2008) (admission of chemical analysis on DEA-7 without live testimony violates defendant's Confrontation Clause rights under the Sixth Amendment). Nor was Greenfield prejudiced merely because the government's case would have been weaker without the drug evidence (see Brief for Appellant at 46). Without more, Greenfield's assertion that

[7] Because GX.4 is narcotics evidence, Greenfield's appellate counsel did not have access to the exhibit when writing his brief.

the case against him would have been weaker without admission of the drug evidence fails to establish *unfair* prejudice. *See, e.g. (Antwon) Shelton*, 983 A.2d at 987 (applying prejudice standard); *Rambert*, 602 A.2d 1119–20.[8]

Even if the trial court is understood to have admitted GX.4 in rebuttal (see 4-19-23 Tr. 237 ("They get a rebuttal case")), Greenfield shows no basis for reversal. We recognize that because Greenfield chose not to present evidence, there was nothing for the government to rebut. *See Beynum v. United States*, 480 A.2d 698, 704 (D.C. 1984) ("Rebuttal evidence refutes, contradicts, impeaches, or disproves an adversary's evidence."). Yet any technical misstep in calling the exhibit "rebuttal" evidence, rather than evidence in a reopened case, did not prejudice Greenfield. For the reasons stated above, Greenfield cannot claim to have been surprised by the evidence. *See (Antwon) Shelton*, 983 A.2d at 985-86 ("In order to protect a defendant from surprise, the government should not advance new arguments on rebuttal."). In the absence of a viable

[8] Greenfield provides no authority for his claim (at 46) that if the government failed to introduce GX.4, testimony *describing* GX.4 would have to be struck.

theory of prejudice, and under the considerably deferential standard applied to the trial court's evidentiary decisions, *see id.*, the trial court did not abuse its discretion.

III. The Evidence Was Sufficient to Sustain Greenfield's Conviction for Attempted Possession of PCP.

Contrary to Greenfield's claim (at 22-30), the evidence was sufficient to convict him of attempted possession of PCP.

A. Standard of Review and Applicable Legal Principles.

In assessing evidentiary-insufficiency claims, this Court views the evidence "in the light most favorable to the government, giving full play to the right of the fact-finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact, and making no distinction between direct and circumstantial evidence." *White v. United States*, 207 A.3d 580, 587 (D.C. 2019). The trier of fact is entitled "to draw reasonable inferences from basic facts to ultimate facts." *Davis v. United States*, 834 A.2d 861, 866 (D.C. 2003). "The evidence need not compel a finding of guilt or negate every possible inference of innocence." *Lattimore v. United States*, 684 A.2d 357, 359 (D.C. 1996); *accord Miller v. United States*, 115

A.3d 564, 570 (D.C. 2015). The government need only present some probative evidence on each element of the crime. *Jennings v. United States*, 431 A.2d 552, 555 (D.C. 1981). This Court will reverse only where "there has been no evidence produced from which guilt can be reasonably inferred." *Joiner-Die v. United States*, 899 A.2d 762, 764 (D.C. 2006).

To convict a defendant of attempted possession of a controlled substance, "the government must prove that the defendant intended to possess an unlawful substance, but it need not prove (as it must in order to obtain a conviction for possession) that the substance involved was actually unlawful." *(Edwin) Smith v. United States*, 966 A.2d 367, 391 (D.C. 2009); *see* D.C. Code § 48-904.01(d). "What matters is that a defendant believed" the substance to be a controlled substance." *Newman v. United States*, 49 A.3d 321, 324 (D.C. 2012) (cleaned up). The identity of the controlled substance or a defendant's "belief that he was dealing in controlled substances[] may be proved by circumstantial evidence." *Fields*, 952 A.2d at 866.

B. Analysis

The evidence from Officer Brown and Moore—both of whom the trial court credited—established that Greenfield carried in his shoulder

bag three vials of a substance that both officers identified by packaging, appearance, and smell as PCP (4-19-23 Tr. 53-57, 103-04, 119). The court was permitted to infer that Greenfield had knowledge of the items in his actual possession. *See, e.g., Rivas v. United States*, 783 A.2d 125, 135 (D.C. 2001) (reasonable to infer that owner and driver of car had knowledge of and intent to control its contents).[9]

In addition, as the court found, Greenfield was walking alone and his bag gave off the "unique strong signature odor of PCP" (4-20-23 Tr. 38), an odor that Officer Moore described as recognizable to anyone who had ever encountered PCP previously (4-19-23 Tr. 120-22). The obvious PCP smell strengthened the inference that Greenfield knew or believed he was carrying PCP. *See Duvall v. United States*, 975 A.2d 839, 846 (D.C. 2009) (testimony of MPD officer trained to recognize the scent of marijuana probative of whether defendant possessed marijuana). *Cf. Butler*, 102 A.3d at 741 (odor of drugs established probable cause to arrest

[9] By contrast, in *Fields*, 952 A.2d at 865-66, the evidence of the defendant's attempted possession of marijuana was insufficient because there was no evidence that the green leafy material that fell out of his pants was actually marijuana—in fact, the evidence suggested it was a "burn bag"—and there was no other circumstantial evidence that he believed he possessed marijuana.

when linked to specific person); *Minnick*, 607 A.2d at 525 (distinctive smell of PCP established probable cause to search car).

Finally, the trial court permissibly inferred that Greenfield displayed consciousness of his own guilt—his hasty attempted exit from the park, his resistance to police requests that he stop, his ready admission to drinking in the park and display of the whiskey bottle, which suggested he was trying to avoid further search of his bag (see 4-20-23 Tr. 38-39). *See Rivas*, 783 A.2d at 137 (flight or other evidence of consciousness of guilt is probative of knowing possession of contraband).

On the strength of this evidence, the evidence was more than sufficient that Greenfield possessed the three vials believing they were an illegal substance, specifically PCP. *See, e.g., Lesher v. United States*, 149 A.3d 519, 525 (D.C. 2016) (the appearance, smell, packaging, and concealment of a substance sufficiently established that defendant attempted to possess a controlled substance, marijuana); *Newman*, 49 A.3d at 326 ("the appearance, smell, and packaging of the substance, and [the defendant's] eagerness to discard it" established that the defendant believed the substance was marijuana).

Relying (at 22-24) on *Seeney v. United States*, 563 A.2d 1081, 1083-84 (D.C. 1989), Greenfield complains that his actions were "commonplace or equivocal" and reflected insufficient intent of his criminal state of mind. *See id*. ("Where a defendant's acts are of themselves commonplace or equivocal, and are as consistent with innocent activity as they are with criminal, it will be necessary for the government to adduce objective facts to establish criminal intent."). Here, the court was not obliged to agree with Greenfield's suggestion that his possession of the PCP and flight from police were innocent. *See Hart v. United States*, 863 A.2d 866, 873 (D.C. 2004) ("[W]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

Greenfield claims (at 25-28) that the government is judicially estopped from relying on the smell to show his knowledge because at trial it argued to admit expert testimony about the smell. The government never suggested that only an expert witness could opine on the smell of PCP; instead, the government suggested that a lay witness would require specialized knowledge to opine on the smell of PCP "which is not something that we would expect a fact-finder in general to have" (4-19-23 Tr. 20). Indeed, whereas Officer Brown offered expert testimony

broadly based on his training and experience (see 4-19-23 Tr. 47-48), Officer Moore offered lay testimony regarding the smell of PCP based on his personal experience participating in 50 to 60 PCP cases (*id*. at 81, 94). *See King v. United States*, 74 A.3d 678, 682 (D.C. 2013) ("lay testimony is that which 'results from a process of reasoning familiar in everyday life,' whereas 'an expert's testimony results from a process of reasoning which can be mastered only by specialists in the field.'") (quoting Fed. R. Evid. 701, advisory committee's note to 2000 amendment). The trial court reasonably could infer that Greenfield was aware of the strong chemical odor coming from his backpack and, moreover, knew the reason for the smell.

Finally, Greenfield contends (at 28-29) that evidence the park was a "high-crime area where drug transactions take place" was irrelevant to the court's intent finding. But the court's finding was more specific—that the park was "a known PCP location for sale and use," particularly at night, and that the vials in Greenfield's possession were inconsistent with personal use (4-19-23 Tr. 81, 88-89; 4-20-23 Tr. 38). This Court has previously held that indicia of sale—including the "drug selling locale"—are probative of a defendant's intent to possess illegal drugs. *See Seeney*,

563 A.2d at 1082 (evidence of attempted possession PCP sufficient even though drugs were never recovered; defendant approached a car "as it entered a drug selling locale," and shouting to its two occupants words denoting that he was selling drugs).

For all these reasons, Greenfield fails to show that the government produced "no evidence . . . from which guilt can be reasonably inferred." *Joiner-Die*, 899 A.2d at 764.

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing appellee's brief to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Richard P. Goldberg, Esq., Goldberg & Goldberg, PLLC, Richard.goldberg@goldberglawdc.com, on this 16th day of May, 2024.

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