HEADNOTE: ***Garner v. State,*** **No. 26, September Term, 2009**

EVIDENCE; THE RULE AGAINST HEARSAY; NON-HEARSAY "VERBAL ACTS;" ADMISSIBILITY OF EVIDENCE THAT THE DEFENDANT WAS IN POSSESSION OF A CELL PHONE CALLED BY AN UNKNOWN PERSON WHO REQUESTED TO PURCHASE COCAINE: When a telephone is used to receive illegal wagers or to receive orders called in by persons who wish to purchase a controlled dangerous substance, the telephone becomes an instrumentality of the crime. While there may be an "implied assertion" in almost any question, when the only assertion implied in the anonymous caller's question was the assertion that the caller had the funds to purchase the drugs that he wanted to purchase, the rule against hearsay does not operate to exclude evidence of a "verbal act" that established that the defendant was in possession of a telephone called by a person who requested to purchase cocaine.

CRIMINAL PROCEDURE; MARYLAND RULE 4-215; TRIAL COURT'S OBLIGATION TO DETERMINE WHETHER DEFENSE COUNSEL HAS BEEN DISCHARGED: Members of the Maryland Bar are officers of the court who have an obligation to comply with the Rules of Professional Conduct. While serving as trial counsel to a criminal defendant who has been granted permission to discharge counsel, Rule 1.2 requires that the lawyer abide by the defendant's decision concerning the services to be performed on the defendant's behalf, and Rule 3.3 prohibits the lawyer from making a false statement to the trial court. When the lawyer states, "**I'm still in the case**," the trial court is entitled to rely upon that statement and is not required to make any further inquiry.

IN THE COURT OF APPEALS

OF MARYLAND

No. 26

September Term, 2009

ALPHONSO GARNER

v.

STATE OF MARYLAND

Bell, C.J.
Harrell
Battaglia
Greene
Murphy
Adkins
Barbera,

JJ.

Opinion by Murphy, J.,
which Harrell, J., joins Part II only.
Bell, C.J., and Harrell, J., Dissent.

Filed: May 18, 2010

In the Circuit Court for Queen Anne's County, a jury convicted Alphonso Garner, Petitioner, of possession of cocaine with intent to distribute and related offenses. Although Petitioner concedes that the State's evidence was sufficient to establish that he committed those offenses on the afternoon of June 22, 2006, he argues that there are two reasons why he is entitled to a new trial: (1) the Circuit Court erroneously admitted hearsay evidence of what was said by an unknown person who had placed a call to Petitioner's cell phone, and (2) the Circuit Court failed to comply with the requirements of Md. Rule 4-215 when ruling on Petitioner's request to discharge his trial counsel.

After those arguments were rejected by the Court of Special Appeals in *Garner v. State*, 183 Md. App. 122, 960 A.2d 646 (2008), Petitioner requested that this Court issue a writ of certiorari to answer four questions:

> 1. Did the Court of Special Appeals, purporting to rein in the "expansionist tide that produced" this Court's decisions in *Stoddard* [*v. State*, 389 Md. 681, 887 A.2d 564 (2005)] and *Bernadyn* [*v. State*, 390 Md. 1, 887 A.2d 602 (2005)], err in holding that an out-of-court statement by a non-testifying, unnamed caller to Petitioner's cell phone in which the caller said, "can I get a 40," was not hearsay?
>
> 2. Where Petitioner unequivocally expressed a desire to discharge counsel, the trial court ruled that he could do so, and the docket entry reads: "[c]ourt finds defendant has a right to proceed without counsel today and [attorney] may advise," did the Court of Special Appeals err in holding that counsel was not "discharged" for purposes of Rule 4-215, because Petitioner responded affirmatively when the trial court asked him, "[w]ould you like me to have him [the attorney] stay to be -- sit next to you at the trial table to be on call if you need his help during the trial," and the attorney participated in all stages of the trial?

3. Is the State precluded from arguing that counsel was not "discharged" by the prosecutor's concession at the motion for new trial hearing that "the court allowed [the attorney] to stay to assist"?

4. Did the trial court fail to comply with the requirements of Maryland Rule 4-215?

That request was granted. 408 Md. 148, 968 A.2d 1064 (2009). For the reasons that follow, we hold that (1) the "out-of-court statement by a non-testifying, unnamed caller to Petitioner's cell phone in which the caller said, 'can I get a 40,'" was properly received into evidence, and (2) it is clear from a review of the trial transcript that Petitioner is not entitled to a new trial on the ground that a docket entry indicated a "finding" by the Circuit Court that Petitioner "has a right to proceed without counsel today and [Petitioner's trial counsel] may advise." We shall therefore affirm the judgments of the Circuit Court.

Factual Background

I.

The opinion of the Court of Special Appeals includes the following factual summary that is relevant to question 1:

> At 3:45 in the afternoon on June 22, 2006, Trooper Jeremy Gussoni of the Maryland State Police and Scott Myers, a State Police Academy candidate, stopped the appellant, who was driving on U.S. Route 301 in Queen Anne's County, for no less than three minor traffic infractions. As they approached the appellant's stopped car, they heard him yell into a cell phone that he had been "profiled." The appellant immediately handed Trooper Gussoni an identification card and volunteered that his

> driver's license had been suspended. Trooper Gussoni verified the fact that the driver's license had been revoked. Trooper William Heath arrived on the scene and arrested the appellant for driving on a revoked license. A search incident to the appellant's arrest revealed 13 individually wrapped baggies containing what turned out to be cocaine "secreted in the vehicle's glove box, inside a fuse box." The aggregate weight of the cocaine was 6.9 grams.

183 Md. App. at 125-26, 960 A.2d at 650-651.

According to Petitioner (in the words of his Petition):

> This case presents "a fascinating evidentiary issue," as described by the Court of Special Appeals. At the police station, Mr. Garner was stripped of his personal items, including his cell phone. Trooper Gussoni subsequently answered the cell phone. Gussoni was allowed to testify, over objection, that after he said "hello" a male caller replied, "can I get a 40," and then hung up when asked his name. The State relied upon the caller's utterance to characterize Petitioner's possession as commercial in nature and not as simple possession for personal use. During opening statement, the prosecutor told the jurors that the caller "said he needed a 40 . . . you'll hear from Corporal Michael a 40 is slang for a $40 piece of cocaine." During closing argument he told the jury, "why pr[ay]-tell [sic], would you call [a] user and ask him for a 40. Because he is not a user." And during rebuttal he told the jury, "[b]ut I keep coming back, I know I said this before, you do not, you do not ca[ll] [a] user a mere user of cocaine and ask him for a 40." The question before this Court is whether the utterance, "can I get a 40," which the State offered to prove that Petitioner was a dealer, was hearsay.

The record shows that the following transpired during Trooper Gussoni's direct examination:

> Q While you were filling out your paperwork, back in the trooper's room, what happened?

A While I was typing, Mr. Garner's cell phone -- the cell phone I received off of him, was ringing non-stop. I had spoken with his girlfriend earlier, I was figuring she might be calling him, wanting to know what's happening, not knowing if he's allowed to keep his cell phone on his person.

Q What happened when you noticed the phone ringing?

A Again, it was just continually ringing, ringing. I picked up the telephone and said hello. On the other line was a male voice. He said --

MR. ANDERSON: Objection, Your Honor, as to what the other -- as to what the voice on the other line said. Objection as to what the voice on the other line said and I believe that might be hearsay, Your Honor.

THE COURT: Overruled.

BY [STATE'S ATTORNEY]:

Q You can answer.

A On the other line was a male voice, sounded like a male. I said hello. He said, yo, can I get a 40. I asked his name, he then hung up the telephone.

Q Did you tell him who you were?

A Not that one, but that phone was ringing off the hook.

Q Is that the only time you answered it?

A I answered it twice, the next one was a female. After that, another member of the drug task force answered the phone.

II.

The following factual background is relevant to questions 2, 3, and 4:

Petitioner's initial appearance before the Circuit Court occurred on September 8, 2006. On October 10, 2006, Curt Anderson, Esq. entered his appearance as Petitioner's privately-engaged trial counsel. When Petitioner's case was called for trial, on November 30, 2006, Mr. Anderson informed the Circuit Court that Petitioner "doesn't think that I have his best interests at heart with regard to this case," and Petitioner stated to the Circuit Court that defense counsel "is trying to force a plea, make me take a plea that I don't want to take." The Circuit Court stated to Petitioner, (1) "I'm not going to make you take a plea," and (2) "I'm not going to postpone this case." The following transpired at this point:

> THE COURT: Are you going -- do you want to discharge him, is that it?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right. Would you like me to have him stay to be -- sit next to you at the trial table to be on call if you need his help during the trial? What I'm saying is we are going to have a trial today.
>
> THE DEFENDANT: Is there any kind of way I can discharge him from representing me?
>
> THE COURT: I said you can do -- you have an absolute right to represent yourself, if you want to. You have an absolute right to get an attorney. You can't wait until the day of trial and come in and tell me that you are going to fire your attorney.
>
> THE DEFENDANT: Well, I didn't know to go to --
>
> THE COURT: What?

> THE DEFENDANT: I didn't know who to go to to let anybody know, know what I mean, what kind of situation it was. My best interests was to come to the judge that's hearing the case and let him know that I don't --
>
> THE COURT: I don't have anything to do, you chose the attorney. If you had problems, you had to work it out with him. Mr. Anderson is a member of the bar, I'm sure if you told him what your feelings were, I'm sure he would have done something about it.
>
> THE DEFENDANT: I have told him.
>
> THE COURT: What?
>
> THE DEFENDANT: He can sit there.
>
> THE COURT: Okay. Thank you. Go ahead.

The following transpired when the jury panel entered the courtroom:

> MR. ANDERSON: **I'm still in the case** and on Mr. Garner's behalf, I want to make a motion here, not in the presence of the jury, to dismiss this jury pool as not being representative of Mr. Garner's peers.

(Emphasis supplied). That motion was denied, and jury selection followed, during which the following transpired:

> THE COURT: Thank you. Mr. Anderson, would you stand up, please. Does any member of the prospective panel know Mr. Curtis Anderson, the attorney for the defendant in this case? I see no responses. Mr. Anderson, would you introduce your client, please.
>
> MR. ANDERSON: Stand up.
>
> THE COURT: Turn around and face the jury. Does any member of the prospective panel know Mr. Alphonso Garner, the defendant in this case? You may have a seat, Mr. Garner.

Do you have any other witnesses you'd like to introduce?

MR. ANDERSON: I do have one, Your Honor.

THE COURT: Yes.

MR. ANDERSON: Would Tina Brisco please stand up. Come forward, please. You can stand right there.

THE COURT: Does any member of the prospective panel know this young lady. I see no responses. You may sit down. Thank you. Anyone else?

MR. ANDERSON: No, sir.

THE COURT: All right. You may have a seat.

The following transpired at the conclusion of the jury selection process:

THE COURT: Is the jury as seated acceptable to the State?

[STATE'S ATTORNEY]: Yes, Your Honor.

THE COURT: To the defense?

MR. ANDERSON: Yes, Your Honor.

* * *

THE COURT: . . . Swear the jurors. Everything okay with you?

[STATE'S ATTORNEY]: Yes, Your Honor.

THE COURT: Mr. Anderson?

MR. ANDERSON: Yes. Thank you, sir.

The following transpired at the conclusion of the prosecutor's opening statement:

THE COURT: Yes, Mr. Anderson.

MR. ANDERSON: Thank you, Your Honor.

THE COURT: I also note that, for the record, your objection to the portion of the opening statement that dealt with the matter that we discussed at the bench. I saw you stand up.

MR. ANDERSON: Yes, sir.

THE COURT: But then you saw that I saw it. I just wanted to put it on the record.

MR. ANDERSON: Thank you, Your Honor.

THE COURT: You did make the objection. Go ahead.

MR. ANDERSON: Good morning. My name is Curt Anderson. I'm the attorney for Mr. Garner. Mr. Garner is seated right here. First, what I'd like to do is thank you all for being here today.

As noted by the Court of Special Appeals:

> Mr. Anderson professionally and ably conducted the complete defense of this case from start to finish. He conducted the voir dire examination of the prospective jurors and then selected the jury. He made a motion in limine. He delivered the opening statement. He cross-examined the State's witnesses and made objections. He called the [Petitioner's] girlfriend as a defense witness. He made motions, at the end of the State's case and at the end of the entire case, for a judgment of acquittal. He delivered a closing argument. He referred to the [Petitioner] as "my client." The State referred to him as "counsel": "Your Honor, I'm going to file the additional penalties I previously served on counsel, subsequent offender notice." He represented the appellant at sentencing. He filed and argued a new trial motion. . . .
>
> * * *
>
> From the opening gavel through the conclusion of the motion for a new trial, there was never the remotest indication that Mr.

> Anderson was not full-fledged counsel for the defense. The appellant himself did not actively participate in the conduct of his trial in any way nor did he protest his passive role.

183 Md. App. at 133, 960 A.2d at 655.

Discussion

I.

Petitioner cites *Stoddard v. State*, 389 Md. 681, 887 A.2d 564 (2005) and *Bernadyn v. State*, 390 Md. 1, 887 A.2d 602 (2005) in support of his argument that the Circuit Court should have sustained the "hearsay" objection to Trooper Gussoni's testimony about the call to Petitioner's cell phone. Although those cases hold that certain "implied assertions" constitute hearsay evidence as that term is defined in Md. Rule 5-801(c),[1] neither *Stoddard* nor *Bernadyn* presented the issue of whether the "verbal part of an act" is subject to exclusion under the rule against hearsay, or the issue of whether the rule against hearsay is applicable to every out-of-court declaration that constitutes circumstantial evidence of the declarant's state of mind.[2] We need not either reaffirm or

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[1] In *Stoddard*, the out-of-court declaration was uttered by an 18 month old child who asked her mother, "is [the defendant] going to get me?" The State argued to the jury that this question proved that the child was an eyewitness to a murder committed by the defendant. Although all seven judges of this Court agreed that the Circuit Court should have excluded testimony about that question, only four agreed that "implied assertions" should be excluded under the rule against hearsay.

[2] In *Connor v. State*, 225 Md. 543, 171 A.2d 699 (1961), while affirming a murder conviction, this Court rejected the defendant's argument that the victim's "dying declaration" should have been excluded for lack of a foundational showing of her awareness that death was near and certain. The victim in this case was Mrs. Connor, who stated to a police officer, "It was no accident," when the officer asked her, "Was this an

overrule either of those fact-specific cases in order to hold that the rule against hearsay was not violated by Trooper Gussoni's testimony about the telephone call at issue.

When a telephone is used to receive illegal wagers or to receive orders called in by persons who wish to purchase a controlled dangerous substance, the telephone becomes an instrumentality of the crime. As the Court of Special Appeals stated:

> The making of a wager or the purchase of a drug, legally or illegally, is a form of contract. *Little v. State*, 204 Md. 518, 522-23, 105 A.2d 501 (1954). There is an offer and an acceptance. The telephoned words of the would-be bettor or would-be purchaser are frequently categorized, therefore, as verbal parts of acts. They are not considered to be assertions and do not fall under the scrutiny of the Rules Against Hearsay.

183 Md. App. at 140, 960 A.2d at 659. We agree with that analysis, which is entirely consistent with the prior opinions of this Court.

In *Baum v. State*, 163 Md. 153, 161 A. 244 (1932), while affirming gambling convictions based in part on a Sergeant's testimony that he placed a bet on a horse race by calling the number of a telephone proven to have been installed at the residence of one of

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accident or was it deliberate?" To establish that the victim was fully aware of her impending death at that point in time, the State presented testimony that, just before answering the officer's question, she said, "get a priest," and "take care of my baby." While rejecting the argument that a dying declaration is inadmissible unless it is preceded by the victim's acknowledgment that he or she is unlikely to survive, this Court stated:

> Her anguished entreaty that someone take care of her baby plus the fact that she called for a priest before making the declaration was strong evidence that she was aware of her condition.

225 Md. at 551, 171 A.2d at 703. Neither *Stoddard* nor *Bernadyn* overrules *Connor*.

the defendants, this Court explained why that testimony was admissible even though the witness did not know the identity of the person who took the bet:

> The question raised by the next exception to be considered is the contention that testimony as to a telephone conversation with an unidentified person is not admissible in evidence. The identity of the person answering the phone at the house in question, when called by Sergeant Hitzelberger, was not known to him, and no effort is being made to identify any of the appellants as being the particular person who talked with Hitzelberger. The purpose was to show that the police officer attempted to, and actually did, place a bet on a horse race with the person who answered the phone located at 129 West Mt. Royal Avenue.

Id. at 160, 161 A. at 247.

In *Courtney v. State*, 187 Md. 1, 48 A.2d 430 (1946), this Court affirmed bookmaking convictions based in part on a Baltimore City police officer's testimony that, during the execution of a search warrant at a premises used by the defendants, he answered the telephone and received bets from unidentified persons. While holding that the Circuit Court correctly overruled hearsay objections to that testimony, this Court stated:

> The appellants earnestly contend that evidence as to the placing of bets over the telephone with Officer Trencamp was inadmissible, because the bettors were not identified. . . . In *Beard v. United States*, 65 App. D.C. 231, 82 F. 2d 837 [(1936)], officers overheard bets being called in by telephone. The court said (65 App. D. C. at page 235, 82 F. 2d at page 841): "The case, therefore, is not one in which evidence of a telephone conversation is introduced against a particular person. In such case, it is, of course, necessary to establish the identity; but here the evidence, as we have seen, was offered to show that the place in question was a gambling place and that some or all

> of the persons found therein were engaged in taking bets in violation of law. For these purposes it was proper." Similar questions have been considered by the California courts, where it has been held that bets called in during a raid constitute a part of the *res gestae*. See *People v. Reifenstuhl*, 37 Cal. App. 2d 402[,405], 99 P. 2d 564[, 566 (1940)]; *People v. Kelly*, 22 Cal. 2d 169[, 176], 137 P. 2d 1, 5 [(1943)]; and *People v. Klein*, 71, Cal. App. 2d 588[, 591-592], P. 2d 71, 73 [(1945)].

187 Md. at 5-6, 48 A.2d at 432.

In *Little v. State*, 204 Md. 518, 105 A.2d 501 (1954), the proprietor of a Cumberland pool room who was convicted of gambling violations argued that the State's *admissible* evidence was insufficient to establish that he maintained a premises for the purpose of accepting bets on horse races, and that the Circuit Court should have prohibited the State from presenting evidence that two State Police plainclothes officers went to the pool room and placed a bet with a person named Edward Capel. While affirming the convictions, and rejecting the appellant's argument that the Circuit Court should have excluded testimony about conversations that he neither participated in nor overheard, this Court stated:

> The appellant contends that the officers' testimony as to Capel's statement to them, "I got it up," is hearsay, made out of the presence of the accused, and hence inadmissible. We think, however, that it was part of the *res gestae*. . . . The verbal act of taking a bet, with or without the knowledge or consent of Little, was germane to the charge of maintaining premises for gambling.

Id. at 522-23, 105 A.2d at 503.

Telephone calls like the one testified to by Trooper Gussoni have been held to be

admissible in an unbroken line of state and federal appellate decisions.[3] Although some commentators have disagreed with the courts' analysis of precisely *why* such testimony is admissible, the commentators have not asserted that the testimony should be excluded. Professors Mueller and Kirkpatrick have stated:

> **Courts often reach the right outcomes, but few opinions penetrate the problem well.** Those that admit such evidence sometimes justify the result by saying the behavior is not an assertion or is not offered to prove what the actor/speaker asserted -- positions at odds with reality. Here are some examples:
>
> 1. *Bets and drug orders.* During searches or raids of drug houses or bookmaking establishments, investigating officers often intercept incoming calls from people trying to place bets or buy drugs. Such calls are usually a mix of act and assertion. The voice on the line might commit the caller to a bet or purchase on certain terms, virtually binding him to perform if the terms are accepted. Or the voice simply make inquiries that convey an interest in doing business, amounting to an attempt to do so or to set something up.
>
> Whether the caller makes a commitment or just tries to make a bet or buy drugs, placing the call is not simply an assertion but action seeking to achieve these ends, and the

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[3] The state cases include *Best v. State*, 71 Md. App. 422, 526 A.2d 75 (1987). In *Best*, the Circuit Court overruled a "hearsay" objection to a detective's testimony about a drug purchase and sale conversation that he had with a person who called the telephone on the premises being searched, and the Court of Special Appeals affirmed that ruling on the ground that the detective's "testimony was not hearsay at all, but evidence of a verbal act." *Id*. at 432, 526 A.2d at 80.

Most of the federal cases hold that such evidence is an "implied assertion," and that an "implied assertion" is not "hearsay" under Rule 801 of the federal rules of evidence. *See e.g., United States v. Groce*, 682 F.2d 1359, 1364 (11th Cir. 1982); 4 J. Weinstein & M. Berger, *Weinstein's Evidence* P801(a)(01) (1988).

> performative quality of such behavior justifies nonhearsay treatment when it is proved as a means of showing that bets are taken or drugs are sold where the call is received. **Courts admit such evidence in both gambling and drug cases, and this result seems sensible.** In some settings, one might also avoid the hearsay objection by using the incoming calls as proof of the illegal use to which the premises are put, which is tantamount to saying that placing bets and buying drugs (or attempting to do either one) are themselves elements of an offense relating to the premises.

Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence*, § 8.22 at 773 (4th ed. 2009). (Emphasis supplied) (footnotes omitted).

Professor Graham has stated:

> [A]ssume 20 policemen accompanied by 20 clergy of various denominations place tape recorders on 40 telephones and record 100 calls each answered by a police officer or clergy and each proceeding something like, "This is Tom, put $2 to win on Acne Pimple in the third at Belmont." While occasionally considered not hearsay as either a statement characterizing an act or as circumstantial evidence not being offered for the truth of the matter asserted but solely for the fact said, the plain and simple fact is that such statements fall clearly within the definition of hearsay. There is no independently relevant act, apart from the statements placing the bets themselves, for the statements to characterize. The statements are irrelevant if offered solely for the fact they were said. For any of the telephone calls to be relevant to establish that the establishment where the 40 telephones were located was a betting parlor, the declarant who placed the telephone call must have intended to call the number reached. Moreover, the declarant must have believed that the number dialed was a betting parlor. In addition, the declarant must have intended to place a bet, instead of, for example, playing a practical joke. Finally, and most importantly, the declarant's intention to place a bet must have been formed in reliance upon previously acquired personal knowledge that the number dialed is in fact a betting parlor. Thus the out-of-court statement placing a bet is relevant only

> when offered to prove the truth of the matter necessarily implicitly being asserted by the out-of-court declarant, i.e., that the establishment reached is in fact a betting parlor. **As presented such statements also fall within the residual hearsay exception of Rule 807.**

Michael H. Graham, *Evidence, An Introductory Problem Approach* 81 (2002). (Emphasis supplied).

In *United States v. Lewis*, 902 F.2d 1176 (5th Cir. 1990), the appellant argued that he was entitled to a new trial on drug trafficking charges on the ground that the United States District Court for the Southern District of Mississippi overruled "hearsay" objections to the following evidence:

> At the time of their arrest, each appellant had in his possession an electronic pager or "beeper." These pager were seized by the Ridgeland Police. Later that day, at the police station, the pager associated with Lewis began beeping. Officer Jerry Price called the number displayed on the pager and identified himself as Lewis. The person on the other end asked Price "Did you get the stuff?" Price answered affirmatively. The unidentified person then asked "Where is Dog?" Price responded that "Dog" was not available. He then tried to arrange a meeting with the unknown caller, but no one showed up at the appointed rendezvous. The evidence at trial revealed that "Dog" is Wade's nickname.

Id. at 1179. While affirming the ruling of the district court, the United States Court of Appeals for the Fifth Circuit stated:

> The questions asked by the unknown caller, like most questions and inquiries, are not hearsay because they do not, and were not intended to, assert anything. D. Binder, *Hearsay Handbook* § 2.03 (2d. ed. & 1989 supp.); *Inc. Publishing Corp. v. Manhattan Magazine, Inc.*, 616 F. Supp. 370, 388 (S.D.N.Y. 1985).

* * *

> Accordingly, we conclude that because the questions asked by the unknown caller were not assertions, the questions were not hearsay, and the district court properly allowed Officer Price to repeat them in his testimony.

Id. (Footnotes omitted).

In *United States v. Rodriguez-Lopez*, 565 F.3d 312 (6th Cir. 2009), while reversing a district court ruling that excluded a DEA agent's testimony about ten requests to purchase heroin made by persons who called the defendant's cellular telephone shortly after his arrest, the United States Court of Appeals for the Sixth Circuit stated:

> Because the district court did not conduct an evidentiary hearing, the record does not reveal exactly what the anonymous callers said to Agent Perryman. We do not even know whether the callers phrased their statements as declarations ("I want some heroin."), questions ("Can I get some heroin?"), or commands ("Bring me some heroin."). But whatever their grammatical mood, the statements are not hearsay because the government does not offer them for their truth. Indeed, if the statements were questions or commands, they could not -- absent some indication that the statements were actually code for something else -- be offered for their truth because they would not be assertive speech at all. They would not assert a proposition that could be true or false. *See United States v. Wright*, 343 F.3d 849, 865 (6th Cir. 2003) ("[A] question is typically not hearsay because it does not assert the truth or falsity of a fact."); *United States v. Thomas*, 451 F.3d 543, 548 (8th Cir. 2006) ("Questions and commands generally are not intended as assertions, and therefore cannot constitute hearsay." (citations omitted)). Even if the statements were assertions, the government offers them, not for their truth, but as evidence of the fact that they were made. The fact that Rodriguez received ten successive solicitations for heroin is probative circumstantial evidence of his involvement in a conspiracy to distribute heroin. *See Headley v. Tilghman*, 53 F.3d 472, 477 (1st Cir. 1995)

> (Questions from an unidentified caller were not admitted for their truth but as circumstantial evidence that the defendant used his beeper to receive requests for drugs).

Id. at 314-315.

While there may be an "implied assertion" in almost any question, in the case at bar, the only assertion implied in the anonymous caller's question was the assertion that the caller had the funds to purchase the drugs that he wanted to purchase. Because the caller's request did not constitute inadmissible hearsay evidence, the rule against hearsay does not operate to exclude evidence of the "verbal act" that established a consequential fact: Petitioner was in possession of a telephone called by a person who requested to purchase cocaine.

II-IV.

Petitioner argues that he is entitled to a new trial on the ground that the Circuit Court failed to comply with the requirements of Md. Rule 4-215(a)(3) when responding to Petitioner's assertion that he did not want Mr. Anderson to represent him. According to Petitioner (in the words of his Petition), "[t]he trial . . . proceeded with Mr. Anderson acting in a standby advisory capacity. The docket entry documenting this event reads: 'Court finds defendant has a right to proceed without counsel today and Mr. Anderson may advise.'" While rejecting the argument that Petitioner actually represented himself at trial, the Court of Special Appeals stated:

> The bottom line is that [Mr.] Anderson was never discharged as counsel for the [Petitioner] and that the

provisions of Rule 4-215(a)(3), therefore, never came into play.

Our concern, and the concern of Rule 4-215, is with the fundamental right of a defendant to have the effective assistance of counsel when going to trial in a criminal case. That basic purpose was well expressed by Judge Orth in *Parren v. State*, 309 Md. 260, 281-82, 523 A.2d 597[, 607] (1987):

> It is perfectly clear that *the purpose of Rule 4-215 is to protect that* most important *fundamental right to the effective assistance of counsel*, which is basic to our adversary system of criminal justice, and which is guaranteed by the federal and Maryland constitutions to every defendant in all criminal prosecutions.

(Emphasis supplied).

As we assess whether the [Petitioner] received that constitutionally guaranteed effective assistance of counsel, we will look to what actually took place at [his] trial and not at what looked as if it might take place in the waning moments before the trial began. Although the colloquy at that time was a bit vague, there loomed at least the possibility that [Mr.] Anderson might be discharged and might remain available only in a standby capacity by way of giving legal advice if such advice were to be sought by the pro se defendant. In fact, no such watered down relationship ever asserted itself.

* * *

In this case, it was Mr. Anderson and not the [Petitioner] who "called the shots" from start to finish. Judge Orth described the difference in roles.

> *When a defendant appears pro se, it is he who calls the shots*, albeit, *perhaps, with the aid, advice and allocution of counsel* in the discretion of the trial judge. *When a defendant*

> *is represented by counsel, it is counsel who is in charge of the defense* and his say as to strategy and tactics is generally controlling, but again with such participation by the defendant as the trial judge deems appropriate.
>
> 309 Md. at 265, 523 A.2d [at 600] (emphasis supplied). In the last analysis, the potential Rule 4-215 problem turns out to have been a non-starter.

183 Md. App. at 132-34, 960 A.2d at654-655. From our review of the record,[4] we agree with this analysis.[5] Members of the Maryland Bar are officers of the court who have an obligation to comply with the Rules of Professional Conduct. While serving as Petitioner's trial counsel, Rule 1.2 required that Mr. Anderson abide by Petitioner's decision concerning the services to be performed on Petitioner's behalf, and Rule 3.3 prohibited Mr. Anderson from making a false statement to the Circuit Court. When Mr. Anderson stated, "**I'm still in the case**[,]" the Circuit Court was entitled to rely upon that statement and was not required to make any further inquiry.

Judge Harrell authorizes me to state that he joins Part II of this opinion.

JUDGMENT AFFIRMED;
PETITIONER TO PAY THE COSTS.

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[4] It is well settled that if there is a contradiction between the transcript and the docket entries, the transcript controls.

[5] There is no merit in the argument that a party's "concession" on a matter of law made during a trial court "hearing" is binding on an appellate court.