

Circuit Court for Montgomery County  
Case No. 133934C

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 141

September Term, 2019

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AWA EBI

v.

STATE OF MARYLAND

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Arthur,  
Shaw Geter,  
Sharer, J., Frederick  
(Senior Judge, Specially Assigned)

JJ.

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Opinion by Shaw Geter, J.

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Filed: April 23, 2020

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

On December 12, 2018, a jury in the Circuit Court for Montgomery County convicted appellant of possession with intent to distribute cocaine and possession of cocaine. Appellant was sentenced to 20 years' incarceration, with all but 18 months suspended, and 3 years of supervised probation for the distribution count. The misdemeanor possession conviction was merged.

Appellant timely noted this appeal and presents the following questions for our review, which we have slightly reworded:<sup>1</sup>

1. Did the circuit err in excluding appellant's post-arrest positive drug tests?
2. Did the circuit court err in excluding vehicle registration records showing ownership?
3. Did the circuit court err in excluding lottery tickets proffered to establish a group lottery pool?

For the reasons set forth below, we affirm.

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<sup>1</sup> The questions as presented in appellant's brief read as follows:

Did the circuit court err in ruling that the appellant's positive drug tests were not relevant and inadmissible when he proffered them in the defense case to rebut the states inferential evidence of intent to distribute the controlled substance for which he tested positive?

Did the circuit court err in ruling that the vehicle registration record was inadmissible hearsay when the appellant introduced the record in the defense case to show that the vehicle he was arrested in and which contained items of evidence admitted against him to inferentially establish intent to distribute was registered and owned by a third party?

Did the circuit court err in ruling that lottery tickets introduced by the defense had not been properly authenticated when the tickets were proffered to show that ledgers found in the vehicle were related to a group lottery pool, rather than distribution of cocaine as argued by the state?

## **BACKGROUND**

On May 16, 2018, Officer Michael Hartman observed a maroon Chrysler parked in front of a restaurant in the Layhill Shopping Center. He saw an individual exit the restaurant, approach the vehicle's passenger side window, and walk back into the restaurant. As the car exited the parking lot, Hartman notified his team to begin surveillance.

Officer Goode stopped the vehicle a few miles away and noted that appellant was the driver and sole occupant. Goode approached the driver's side and requested appellant's license and registration. Officers Moris and Hartman arrived, and approached the passenger side of the vehicle. They saw a clear plastic "tear-off" baggie in the center console. Officer Hartman asked appellant about the baggie. Appellant passed it to the officer, saying it was "just weed." Appellant was then ordered to exit the car and placed under arrest. During a search incident to arrest, officers seized a yellow notebook and \$100 from him. While conducting a search of the vehicle, appellant was observed by officers throwing a baggie, they suspected contained a Controlled Dangerous Substance, from his underwear. It was later analyzed and determined to be cocaine.

Officers Smith and Moris recovered cell phones, a scale, a bag of suspected marijuana, a bottle of inositol and plastic bags from the inside of the vehicle. Appellant's wallet was found on the front passenger seat, with a learner's permit inside. A black backpack that contained a book with numbers in it, multiple pieces of paper containing

numbers, lottery tickets, a digital scale, and a metal measuring cup with burn marks on it was recovered from the vehicle's trunk.

Prior to trial, the court held a hearing where appellant sought to admit the results of post-arrest drug tests as evidence the drugs were for personal use rather than distribution. He proffered that Hasan Chowdhury, an employee of the court's pre-trial services unit, would testify that he tested positive for cocaine. He argued the testimony was relevant to rebut an inference, typically made by the State, that the suspect "doesn't use the drugs, he's only a dealer." The State objected, arguing the evidence was irrelevant. The court ultimately excluded the evidence.

The State's case consisted of the testimony of various police officers who were on the scene of the incident, made observations of the appellant, searched the vehicle and recovered items. The analyzing chemist was also called as a witness.

Detective Ryan Street testified as an expert in drug distribution and drug trafficking investigations. According to him, the 6.7 grams of cocaine recovered from the baggie found on appellant had a street value of \$300–\$350 and Hartman's observation in front of the restaurant was "consistent" with "how drug deals occur." He described the two notebooks obtained from appellant's pocket and the backpack found inside the trunk. One of the notebooks contained entries consistent with what he commonly saw in drug ledgers, while in the other notebook he stated that, "some of the content written on there appear[ed] to be consistent with what I see when I see drug ledgers. Other items do not."

Street also noted that there was a lottery receipt with four-digit numbers written on it, which was not what he would commonly see in a drug ledger. Street concluded the circumstances were “consistent with distribution.” Appellant attempted to cross-examine Street about a stack of lottery tickets found in the vehicle, but the court sustained the State’s objection to the line of questioning.

During the cross-examinations of Hartman and Street, appellant sought to introduce evidence of the vehicle’s registration to show that he did not own it. During the cross-examination of Hartman, appellant’s counsel asked him, “. . . who is the owner of the vehicle.” Hartman initially stated that he did not remember, but when given a document to refresh his recollection and asked the question again, the State immediately objected stating, “that’s hearsay.” The court sustained the objection. Appellant, during the cross-examination of Street, asked “[a]nd so do you know who the owner of the car is?” The State objected and the court sustained the objection. On neither occasion, did appellant’s counsel proffer the basis for his argument.

Following deliberations, the jury convicted appellant of both counts.

### **STANDARD OF REVIEW**

Appellate review of a trial court’s decision to admit evidence involves a two-step analysis. “An appellate court must consider ‘first, whether the evidence is legally relevant.’” *Santiago v. State*, 458 Md. 140, 161 (2018) (quoting *State v. Simms*, 420 Md. 705, 725 (2011)). We review a determination of relevancy *de novo*. *Simms*, 420 Md. at 725. “Once a finding of relevancy has been made, we are generally loath to reverse a trial

court unless the evidence is plainly inadmissible under a specific rule or principle of law, or there is a clear showing of an abuse of discretion.” *Thomas v. State*, 397 Md. 557, 579 (2007) (quoting *Merzbacher v. State*, 346 Md. 391, 404–405 (1997)).

## DISCUSSION

### **I. The circuit court did not err in excluding appellant’s post-arrest drug test.**

Appellant contends the positive results of his post-arrest tests were clearly admissible. The fact that the tests were administered after his arrest “merely went to the weight of the evidence, a matter within the province of the jury.” He asserts it was “important exculpatory evidence” that would refute the State’s position that the cocaine was for distribution rather than personal use. The State conversely argues the trial court properly excluded the evidence.

Maryland Rule 5-401 defines “relevant evidence” as evidence having “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Evidence that is relevant is generally admissible; evidence that is not relevant is not admissible. Md. Rule 5-402. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Md. Rule 5-403. Evidence that is relevant has two characteristics, materiality and probative value. *Smith v. State*, 218 Md. App. 689, 704 (2014).

Evidence is material if it bears on a fact of consequence to an issue in the case. Probative value relates to the strength of the connection between the

evidence and the issue, to the tendency of the evidence to establish the proposition that it is offered to prove.

*Id.* (internal citations and quotations omitted).

Here, appellant’s contention that the evidence was relevant was based on a projection that the State would argue that drug dealers are not drug users. However, the State never made that argument. Rather, the State used a spoon found in the vehicle that was burned at the bottom to argue “[w]hat do drug dealers do? They test their drugs.” Thus, the positive drug tests were not material to the issues actually argued in the case.

Appellant further argues *Shemondy v. State*, 147 Md. App. 602 (2002), supports his argument that post-arrest evidence was relevant and admissible. In *Shemondy*, the trial court properly admitted into evidence, numerical data obtained from a pager seized from the appellant. 147 Md. App. at 613. The State used the pager to establish that people were contacting appellant to purchase cocaine. *Id.* Appellant there argued that the “evidence was not relevant because the State did not prove when the pages were received.” *Id.* In holding that the trial court did not abuse its discretion in admitting the evidence, we held:

The State did not have to prove when the pages were received in order to have this information entered into evidence . . . It was sufficient that the State established that the pager was seized from appellant, that it was working at that time, and that Detective St. Louis had turned it off two days after appellant’s arrest.

*Id.*

As we see it, the proffered evidence here is quite different from that in *Shemondy*. There, the evidence admitted was seized from the accused at the time of arrest and maintained in police custody. *Id.* The court noted, it was relevant to establish that appellant

was a drug dealer. Here, appellant sought to admit post-arrest testing which was neither material nor probative as to appellant’s conduct on the date of the incident. We conclude the results of the drug tests did not “make the existence of any fact more probable or less probable than it would (have been) without the evidence.” Md. Rule 5-401. Further, there was a substantial danger of misleading the jury and confusing the issues because the evidence related to events that occurred after appellant’s arrest. The trial court properly excluded the testimony.

**II. The circuit court did not err in excluding the vehicle registration.**

Appellant contends evidence of the vehicle’s ownership would have caused the jury to “question the weight” they should attribute to the items recovered in the vehicle, “which the State’s Drug Expert had considered in reaching his opinion that the recovered items contributed to his opinion that the circumstances were consistent with an intent to distribute.” He argues the evidence falls under the “public record and reports” exception to the hearsay rule, which provides for the admission of information in a public agency record of “matters observed pursuant to a duty imposed by law, as to which matters there was a duty to report.” Md. Rule 5-803(b)(8)(A)(ii). The State contends that the court did not err or abuse its discretion by excluding information about the registration.

To be sure, the public records exception is a clearly recognized exception to the hearsay rule. Md. Rule 5-803. In this context, “we review [a] trial judge’s ruling for legal error rather than for abuse of discretion; that is because hearsay is never admissible on the basis of the trial judge’s exercise of discretion.” *Thomas v. State*, 429 Md. 85, 98 (2012).

“The initial inquiry is that of to whom is allocated the burden of proof.” *Morten v. State*, No. 215 (2017). When urging an exception to a rule of exclusion, the burden is upon the proponent of the exception. The correct procedural posture is, “Hearsay will be excluded, unless the proponent demonstrates its probable trustworthiness.” *Cassidy v. State*, 74 Md. App. 1, 8, cert. denied, *State v. Cassidy*, 312 Md. 602 (1988).

At trial, appellant’s counsel was silent as to the reason why the registration testimony was admissible. He did not proffer Hartman or Street’s testimonies were an exception to the hearsay rule. When the prosecutor stated the basis for his objection, appellant did not counter, nor did he attempt to admit the document as a “public record or report.” In sum, he did not seek to establish its admissibility as an exception.

Arguably, his theory was that the items in the car relating to an illegal drug trade belonged to another person or the owner of the vehicle. However, the evidence in the case was focused on the events that occurred on the night of the incident where appellant was the sole occupant of the vehicle, appellant’s conduct during what appeared to be a hand to hand drug transaction, records recovered from his person, and drugs thrown by appellant from his underwear. As such, vehicle ownership testimony was not probative, and appellant failed to proffer a theory as to how it was possibly relevant.

**III. The circuit court did not err in excluding lottery tickets that were not properly authenticated.**

Appellant next claims the trial court abused its discretion in excluding lottery tickets which would have established that he was operating a lottery pool, rather than a drug operation. He contends the evidence would have shown that he purchased large numbers

of lottery tickets as a participant in a pool and the numbers on the lottery tickets could be matched to the numbers in the ledgers, thus establishing the ledgers were not drug related. The State argues the trial court acted within its discretion in precluding the admission of the lottery tickets because they were not properly authenticated.

During cross examination of Street, the following colloquy occurred:

[DEFENSE COUNSEL]: I'm going to show you what's been marked for identification purposes—I'm going to show you what's been marked for identification purposes as Defense Exhibit 2. And what's the first number on the line here?

[STREET]: It looks like it might be ripped off, but I see 908.

[DEFENSE COUNSEL]: And what's the first ticket there?

[STREET]: 7015.

[DEFENSE COUNSEL]: Not—

[STREET]: Okay, I gotcha. Right here. Pick 3 with 908.

[DEFENSE COUNSEL]: All right, and the next number here?

[COURT]: I'm sorry, what is it that you—it needs to be identified.

[DEFENSE COUNSEL]: Oh, I'm sorry.

[DEFENSE COUNSEL]: Defense Exhibit 2, what is this that I just handed you?

[STREET]: A stack of lottery tickets.

[DEFENSE COUNSEL]: The second number here, what is that?

[STATE]: Objection.

- [COURT]: Sustained.
- [DEFENSE COUNSEL] . . . Could you please look through the stack of tickets and look up when you’ve had a chance to read them all? And if you can please keep the clips on?
- [COURT]: Counsel, will you approach, please? . . . What are you doing? He hasn’t identified it. For what purpose are you having him review it?
- [DEFENSE COUNSEL]: So. I’m trying to show that—
- [COURT]: Now what are you trying to show—what are you doing? Because I have sustained the objection. If you have a question, you can ask a question in order to lay a foundation but just ordering him to review it is not appropriate.
- [DEFENSE COUNSEL]: I was having him review it so that I could ask a question.
- [COURT]: Okay, the objection was already sustained. If you want to lay a foundation as to why he would know what these are and what the relevance is to this case, you’re free to lay a foundation. But it’s not proper for you to just have the witness look at documents that I’ve already sustained an objection to without laying any foundation as to its admissibility.

As we see it, the court explained what was needed to establish a proper foundation, but counsel failed to ask questions appropriate for the court’s consideration. In order to be admitted into evidence, a document must be authenticated. Md. Rule 5-901. Maryland Rule 5-901(b)(4) provides that evidence is admitted through a witnesses’ testimony about the “appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the evidence is what it is claimed to be.” Counsel eliciting such

testimony asks about “distinctive characteristics” of the object in question, but absent such distinctive characteristics, the object has not been authenticated and may not be admitted as evidence. *Griffin v. State*, 419 Md. 343, 357 (2011).

Here, the trial court simply ruled that appellant had not established a foundation through the witness for admissibility. Counsel then proceeded to ask the Detective a succession of questions directed at his theory that he was engaged in a lottery pool rather than in drug distribution. While the stack of lottery tickets was not admitted, his theory, through the testimony of the expert witness, was before the jury for their consideration. We hold the court’s ruling was within its sound discretion and further, the exclusion of the lottery tickets, if error, was harmless.

**JUDGMENT OF THE CIRCUIT COURT  
FOR MONTGOMERY COUNTY  
AFFIRMED; COSTS TO BE PAID BY  
APPELLANT.**