Circuit Court for Calvert County
Case No. 04-K-15-000162

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 505

September Term, 2017

ENRICK BELLOSI

v.

STATE OF MARYLAND

Graeff,
Nazarian,
Fader,

JJ.

Opinion by Fader, J.

Filed: June 11, 2018

A Calvert County jury convicted Enrick Bellosi of possession of Oxycodone with intent to distribute and conspiracy to distribute Oxycodone. Mr. Bellosi argues that the trial court erred in: (1) allowing the State to question him about his post-arrest failure to provide exculpatory evidence; (2) denying his motion to suppress; (3) admitting certain expert witness testimony; (4) prohibiting testimony regarding statements allegedly made by his doctors; and (5) failing to grant his motion for acquittal.[1] We hold that the trial court erred in allowing the State to question Mr. Bellosi about his post-arrest silence. Because that error was not harmless beyond a reasonable doubt, we vacate and remand for a new trial. For guidance on remand, we also review the other questions presented by Mr. Bellosi

[1] Mr. Bellosi framed his questions presented as:

1) Did the trial court err in concluding that the search of Bellosi's vehicle and of Bellosi's person did not occur after a period of unlawful detention?
2) Did the trial court err in concluding that the search of Bellosi's person was lawful [] even though it occurred prior to his formal arrest?
3) Did the trial court err in permitting McCourt to testify as an expert witness regarding (i) the data extracted through the use of the Cellebrite machine; (ii) his interpretation as to the meaning of certain text messages; and (iii) his opinion that the facts and circumstances known to him indic[a]ted that the oxycodone pills seized from Bellosi were possessed with the intent to distribute?
4) Did the trial court err in restricting Bellosi from testifying regarding statements made to him by a physician when those statements were not offered for the truth of the matter but rather to explain Bellosi's actions?
5) Did the trial court err in failing to grant a mistrial when Bellosi was cross-examined regarding his failure to volunteer information to the arresting officer after he was arrested?
6) Did the trial court err in denying Bellosi's motion for judgment of acquittal?

that (1) were preserved and (2) are likely to be at issue on remand. We conclude that none of those other claims have merit.

BACKGROUND

The Traffic Stop and Arrest

At approximately 12:33 a.m. on April 21, 2015, Corporal Eric Basham pulled over a car being driven by Mr. Bellosi for an inoperable tag light.[2] Corporal Basham, who had recently been reassigned after eight years with the Drug Enforcement Unit, recognized Mr. Bellosi's passenger, Tina Shaner, from prior drug cases. At Mr. Bellosi's request, Corporal Basham opened and closed the trunk, which caused the tag light to come back on. Corporal Basham decided to write Mr. Bellosi a warning, rather than a repair order.

Corporal Basham returned to his patrol car at 12:35 a.m. with the vehicle's registration and driver's licenses for both Mr. Bellosi and Ms. Shaner. He promptly placed a call for a K-9 drug-sniffing unit, initiated a license and registration check, and began writing the warning. This process took longer than it might have because (1) Mr. Bellosi's out-of-state driver's license took longer to process, (2) Corporal Basham had not yet been issued an electronic ticket-writing system for his cruiser, and (3) he had not written a warning or ticket for several years.

When the K-9 officer, Deputy Chris Childress, arrived at 12:41 a.m. with his drug-sniffing dog, Flip, Corporal Basham was still in his patrol car writing the warning. At

[2] A tag light illuminates the rear license plate of a vehicle and must "render [the license plate] clearly legible from a distance of 50 feet to the rear" of the vehicle. Md. Code Ann., Transp. § 22-204(f) (2012 Repl.).

Deputy Childress's request, Corporal Basham asked two backup officers to remove Mr. Bellosi and Ms. Shaner from the vehicle. Moments later, Corporal Basham finished writing the warning, got out of his car, and approached Mr. Bellosi to present and explain the warning. Mr. Bellosi took the opportunity to complain about the presence of the K-9 unit. At 12:42 a.m., while this conversation continued and in "[l]ess than 10 seconds" of beginning the scan, Flip alerted to the presence of controlled dangerous substances on Mr. Bellosi's car.

The officers placed Mr. Bellosi and Ms. Shaner in handcuffs. According to Corporal Basham, "[t]hey weren't under arrest at that time, they were just being detained." Corporal Basham and Deputy Childress then searched the car and Mr. Bellosi. On Mr. Bellosi, they found prescription pill bottles (in Mr. Bellosi's name) for Xanax and Oxycodone and $1,305 in cash. In the car, the officers found a glass crack cocaine smoking device and, in Ms. Shaner's purse, they found an additional $373 in cash. Although both prescriptions had been filled the day before for 112 pills, the Xanax bottle contained only seven pills and the Oxycodone bottle only 48. The officers placed Mr. Bellosi and Ms. Shaner under arrest.

Pre-Trial Motion to Suppress the Evidence

Mr. Bellosi moved to suppress the drugs and the money. The court denied the motion at the conclusion of a hearing at which Corporal Basham, Deputy Childress, and Mr. Bellosi testified. The court found that the traffic stop was ongoing when Flip alerted on the car because Corporal Basham had not yet successfully returned and explained the

warning to Mr. Bellosi. The court also found that Corporal Basham had not delayed in completing the traffic stop; to the contrary, "the only delay [in the encounter] occurred as a result of Mr. Bellosi complaining" to Corporal Basham. Finally, the court concluded that "Corporal Basham had probable cause to arrest [Mr. Bellosi] based on the K-9 positive reaction, as well as the [controlled dangerous substances] and [paraphernalia] that were in the vehicle." The court thus concluded that the stop, search, and arrest were all valid.

Mr. Bellosi's Trial, Conviction, and Sentencing

Over a three-day jury trial for possession with intent to distribute Oxycodone and conspiracy to distribute Oxycodone, the jury heard testimony from Corporal Basham, Deputy Childress, Sergeant Brian McCourt, Mr. Bellosi's two daughters, and Mr. Bellosi. The court accepted Sergeant McCourt as an expert witness on topics we discuss below. The State's case focused largely on: (1) the pills missing from the Oxycodone bottle; (2) the amount of cash possessed by Mr. Bellosi and Ms. Shaner, which roughly approximated Sergeant McCourt's opinion as to the street value of the missing pills; and (3) an exchange of text messages between Mr. Bellosi and Ms. Shaner.

Mr. Bellosi's core defense was that he had not sold the missing pills, but had instead left half of them at his mother's house. On cross-examination, the court permitted the State to question Mr. Bellosi about whether, once he was released from custody pending trial, he had brought the pills to the police or told them the same story he had just told the jury. Mr. Bellosi acknowledged that he had not.

The jury found Mr. Bellosi guilty on both counts. The court sentenced Mr. Bellosi to 20 years, all but 12 suspended, for possession with intent to distribute; ten years, consecutive, all suspended, on the conspiracy count; and five years' probation. This appeal followed.

DISCUSSION

Mr. Bellosi argues multiple grounds for reversal of his convictions. We conclude that one—his complaint that the trial court erred in allowing the State to question him about his post-arrest silence—has merit. We also address those of his other claims that were preserved and are likely to be at issue on remand.

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE STATE TO QUESTION MR. BELLOSI ABOUT HIS POST-ARREST SILENCE.

Mr. Bellosi argues that the trial court erred in allowing the State to question him regarding whether, after his release pending trial, he brought the pills he claimed to have left at his mother's house to the police station to prove his story.[3] Admission of this testimony, Mr. Bellosi contends, violated both his Fifth Amendment right to remain silent and Maryland evidentiary rules that render post-arrest silence inadmissible. Because we find that the trial court erred in allowing the State to question Mr. Bellosi about his post-arrest silence under Maryland evidence law, we do not address his constitutional argument. *See Parker v. State*, 408 Md. 428, 435 (2009) ("[T]his Court has regularly adhered to the

[3] Although Mr. Bellosi framed the question presented in his appellate brief as a challenge to the trial court's denial of his motion for mistrial, the substance of his argument challenges the trial court's evidentiary ruling that allowed the State to question his post-arrest silence.

principle that we will not reach a constitutional issue when a case can properly be disposed of on a non-constitutional ground.") (quoting *State v. Lancaster*, 332 Md. 385, 403 n.13 (1993)).

"Subject to supervening constitutional mandates and the established rules of evidence, evidentiary rulings on the scope of witness testimony at trial are largely within the dominion of the trial judge." *Crosby v. State*, 366 Md. 518, 526 (2001). Generally, we "will not interfere with such rulings unless there has been an abuse of discretion." *Id.* However, "even with respect to a discretionary matter, a trial court must exercise its discretion in accordance with correct legal standards." *Schisler v. State*, 394 Md. 519, 535 (2006) (quoting *LeJeune v. Coin Acceptors, Inc.*, 381 Md. 288, 301 (2004)). If the evidentiary ruling "involves an interpretation and application of Maryland constitutional, statutory, or case law, our Court must determine whether the lower court's conclusions are 'legally correct' under a *de novo* standard of review." *Schisler*, 394 Md. at 535 (quoting *Garfink v. Cloisters at Charles, Inc.*, 392 Md. 374, 383 (2006)).

A. The Trial Court Erred in Allowing the State to Question Mr. Bellosi About His Post-Arrest Silence.

The Fifth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." *Lupfer v. State*, 420 Md. 111, 122 (2011). Article 22 of the Maryland Declaration of Rights similarly guarantees "[t]hat no man ought to be compelled to give evidence against himself in a criminal case." Both provisions "guarantee the innocent and guilty alike the right to remain

silent," which includes "remain[ing] free from adverse presumptions surrounding the exercise of such right." *Newman v. State*, 384 Md. 285, 314-15 (2004). Thus, any reference to a criminal defendant's silence after he or she has been arrested and given *Miranda* warnings violates the Due Process Clause of the Fourteenth Amendment.[4] *Brecht v. Abrahamson*, 507 U.S. 619, 628-29 (1993); *Newman*, 384 Md. at 315 (citing *Wainwright v. Greenfield*, 474 U.S. 284, 292 (1986) & *Doyle v. Ohio*, 426 U.S. 610, 619 (1976)).

Even before the Supreme Court held that post-*Miranda* silence was inadmissible, "it long had been settled as a matter of Maryland evidentiary law that evidence of post-arrest silence was inadmissible." *Kosh v. State*, 382 Md. 218, 228 (2004); *see also id.* at 228-34 (discussing the history of Maryland's adoption of this rule). "[S]ilence is evidence of dubious value that is usually inadmissible," *Kosh*, 382 Md. at 227, "because '[i]n most circumstances silence is so ambiguous that it is of little probative force,'" *Grier v. State*, 351 Md. 241, 252 (1998) (quoting *United States v. Hale*, 422 U.S. 171, 176 (1975)). Moreover, "[t]he prejudice to a defendant resulting from reference to his silence is often substantial," including because "most laymen view an assertion of the Fifth Amendment privilege as a badge of guilt." *Grier*, 351 Md. at 263 (quoting *Walker v. United States*, 404 F.2d 900, 903 (5th Cir. 1968)); *see also Hale*, 422 U.S. at 176 ("permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent . . . .").

[4] The record does not reflect whether Mr. Bellosi was given *Miranda* warnings.

The State argues that we should recognize an exception to this longstanding rule for the limited circumstance in which (1) the testimony at issue is specifically addressed to a period of time in which the defendant was not in custody and (2) the testimony is solicited for impeachment purposes. Addressing that claim requires us to first examine the testimony at issue here.

The State first asked Mr. Bellosi whether, on the night he was arrested, he told Corporal Basham that he had left the missing Oxycodone pills at home. The trial court sustained Mr. Bellosi's objection.[5] The State then sought to get at the same point by asking about Mr. Bellosi's silence after he was released from custody pending trial:

> [State]: After you were released from custody, did you go to the Police Department and provide them the pills that you claim you left at your mother's house?
>
> [Defense Counsel]: Objection.
>
> THE COURT: Overruled.
>
> You can answer the question, sir.
>
> [Mr. Bellosi]: After I was released from jail did I go to the Police Department and give them my pills?

[5] At the time he made the objection, Mr. Bellosi also moved for a mistrial, which the court denied. Mr. Bellosi contends that denial was also erroneous. We disagree. The decision whether to grant a mistrial is "within the sound discretion of the trial judge and . . . will not be disturbed on appeal unless there is abuse of discretion." *Simmons v. State*, 436 Md. 202, 212 (2013) (quoting *Carter v. State*, 366 Md. 574, 589 (2001)). "[T]he judge ha[d] his finger on the pulse of the trial" and was in the best position to determine whether the prosecution's improper question prejudiced Mr. Bellosi. *Simmons*, 436 Md. at 212 (quoting *State v. Hawkins*, 326 Md. 270, 278 (1992)); *see also Dillard v. State*, 415 Md. 445, 454 (2010) (discussing the same). The trial court concluded that Mr. Bellosi was not prejudiced by the improper question. We find no abuse of discretion in that determination.

> [State]: And show them that here were the other half of your prescription that you left at your mother's house?
>
> [Mr. Bellosi]: I showed them to somebody, wasn't – but it wasn't the Police Department.
>
> [State]: So you never went to the Sheriff's Department to say here is my other pills, this was all a big mistake?
>
> [Mr. Bellosi]: No, I did not.

At the conclusion of Mr. Bellosi's testimony, his counsel unsuccessfully moved for a mistrial based on this testimony.

The State referred to this testimony in its closing argument, stating that Mr. Bellosi "never went to the police to say, hey, there has been a mistake, here is my prescription, here is my doctor's records, here is the other half of the medication I didn't have with me just last night, there has been a mistake. . . . That, ladies and gentlemen, doesn't make sense." The State returned to the same theme in rebuttal argument, imploring the jurors to ask themselves, "[W]hy didn't he ever tell anyone I left half of my pills at home before he came in here?"

The State argues that inquiry into post-arrest silence is permissible as long as it is targeted to a time when the defendant was not in custody. The sole case on which the State relies for this proposition is *Robeson v. State*, 39 Md. App. 365 (1978). *Robeson*, however, was expressly limited to cross-examination about the defendant's *pre-arrest* conduct. *Id.* at 369 (identifying the question presented as whether restrictions on cross-examination regarding silence at the time of arrest "apply to cross-examination concerning 'pre-arrest silence' with respect to exculpatory testimony offered by a defendant for the first time at

the trial on the merits"); *id.* at 374 ("In this case we note that the cross-examination was with reference to pre-arrest conduct only.") Indeed, we relied in *Robeson* on the differences between the probity of pre-arrest silence as compared to post-arrest silence. *Id.* at 372-77. *Robeson* is thus inapposite.

The State conceded at oral argument that it was unaware of any other authority that would authorize inquiry into a defendant's post-arrest silence. We decline to recognize such an exception to the well-established evidentiary principle that a defendant's post-arrest silence is simply not probative of his or her guilt. The State's inquiry went to Mr. Bellosi's conduct immediately following his release from custody, at a time when he had just been arrested, charged, and processed for drug crimes and knew he would soon be facing trial. In that context, his failure to come to the police to attempt to prove his innocence could have been simply because he was under no obligation to do so, and knew that the police could not use his silence against him. *Grier*, 351 Md. at 254 ("Citizens ordinarily have no legal obligation to come forward to the police.").

The Court of Appeals has repeatedly held that a "defendant's failure to come forward does not constitute an admission, and lacks probative value." *Lupfer*, 420 Md. at 125 (quoting *Grier*, 351 Md. at 254). That is true as to any defendant who has been arrested and faces criminal charges, whether or not she or he has been released from custody pending trial. The trial court thus erred in overruling Mr. Bellosi's objection to the State's inquiry into his post-arrest silence.

B. The Admission of Testimony About Mr. Bellosi's Post-Arrest Silence Was Not Harmless Beyond a Reasonable Doubt.

We review the erroneous admission of evidence regarding a defendant's post-arrest silence for harmless error. *Lupfer*, 420 Md. at 140. "In order for the error to be harmless, we must be convinced, beyond a reasonable doubt, that the error in no way influenced the verdict." *Weitzel v. State*, 384 Md. 451, 461 (2004). The burden is on the State to prove harmlessness. *Simpson v. State*, 442 Md. 446, 462 (2015). To do so, "the record must affirmatively show that the error was not prejudicial." *Dionas v. State*, 436 Md. 97, 109 (2013). If we are not convinced, beyond a reasonable doubt, that the error exerted no influence on the jury's verdict, then the defendant's convictions must be vacated and a new trial ordered. *Weitzel*, 384 Md. at 462; *Dupree v. State*, 352 Md. 314, 333 (1998).

The State does not argue that the trial court's error was harmless. It would be hard-pressed to do so. Mr. Bellosi's defense rested almost entirely on his testimony that he kept half of his Oxycodone prescription at home to protect it from loss or theft. That defense hinged largely on Mr. Bellosi's credibility. The prejudice that attaches from the natural implication of Mr. Bellosi's "silence, and thus his guilt, lay dangling for the jury to grab hold." *Dupree*, 352 Md. at 333; *see also Weitzel*, 384 Md. at 461 (discussing the prejudice that naturally accompanies notice of a defendant's assertion of the right to remain silent arising from the layman's understanding of that right); *Grier*, 351 Md. at 263 (same). Thus, the State's cross-examination questions and closing argument statements "struck at the jugular of his trial testimony . . . and went to the heart of his sole defense." *Dupree*, 352 Md. at 334 (internal quotations, citations, and alterations omitted); *see also Lupfer*, 420

Md. at 117-20, 140-41 (finding error not harmless where State's questions undercut "[t]he viability of Petitioner's defense at trial" because that defense "hinged on Petitioner's credibility"); *Weitzel*, 384 Md. at 462 (finding error not harmless where the jury could have concluded that testimony of a State witness, absent "corroborative evidence of [the defendant's] silence," was "insufficiently trustworthy to establish guilt beyond a reasonable doubt"); *Dionas*, 436 Md. at 110 (stating "that, where credibility is an issue and, thus, the jury's assessment of who is telling the truth is critical, an error affecting the jury's ability to assess a witness' credibility is not harmless error").

We cannot say beyond a reasonable doubt that the State's questions and comments using Mr. Bellosi's post-arrest silence to attack his credibility in no way influenced the jury's verdict. We therefore vacate Mr. Bellosi's convictions and remand for a new trial.

II. THE TRIAL COURT DID NOT ERR IN DENYING MR. BELLOSI'S MOTION TO SUPPRESS THE EVIDENCE SEIZED AT THE TIME OF HIS ARREST.

Mr. Bellosi also challenges the circuit court's denial of his motion to suppress the evidence seized during the traffic stop. Mr. Bellosi argues: (1) that Corporal Basham impermissibly delayed the stop to allow the K-9 scan to occur; and (2) that Corporal Basham lacked probable cause to arrest him at the time of the search. We disagree.

When reviewing a ruling on a motion to suppress evidence, we defer to the suppression court's findings of fact unless they are clearly erroneous, only consider the facts presented at the motions hearing, and view those facts in the light most favorable to the prevailing party. *Holt v. State*, 435 Md. 443, 457 (2013); *Belote v. State*, 411 Md. 104, 120 (2009). The suppression court's legal conclusions are reviewed de novo, and we

"mak[e] our own independent constitutional evaluation as to whether the officer's encounter with the defendant was lawful." *Sizer v. State*, 456 Md. 350, 362 (2017).

Mr. Bellosi argues that Corporal Basham impermissibly delayed the original traffic stop by writing the warning slowly, which he claims was "clearly a stalling technique" to allow time for the K-9 unit to arrive. His argument is predicated on his assertion that Corporal Basham's "conduct . . . must be viewed in the context of the fact that he was a former narcotics investigator and that, in that role, he had prior contact with [Ms.] Shaner." In other words, Mr. Bellosi would have us (1) impute to Corporal Basham an intent to delay the traffic stop and (2) infer that this intent manifested in actual delay.

As to the first of these contentions, an officer's subjective intent is irrelevant to the constitutionality of an otherwise-valid stop. *Carter v. State*, 236 Md. App. 456, 468 (2018) (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)). To the extent Corporal Basham's background and suspicions might have impacted the credibility of his testimony regarding whether he engaged in any delay, that was for the suppression court to assess. *Holt*, 435 Md. at 457 ("The credibility of the witnesses . . . fall[s] within the province of the suppression court.")

Second, Mr. Bellosi's contention that Corporal Basham did, in fact, engage in delay is contradicted by the suppression court's finding that Corporal Basham did not. And that finding is, in turn, supported by evidence in the record. *Id.* (stating that a suppression court's findings of fact will only be overturned if clearly erroneous). Corporal Basham testified that he never abandoned writing the warning. He also provided an explanation

that the court found credible as to the time it took him to conduct the relevant records checks and write the warning. According to testimony from the officers involved, Corporal Basham was still in his cruiser when the K-9 unit arrived, he continued to attend to the traffic stop while other officers conducted the K-9 search, and Flip alerted before the traffic stop was completed. Moreover, only approximately nine minutes elapsed from the beginning of the stop until the alert. Although the absolute amount of time a stop takes is not dispositive, *Byndloss v. State*, 391 Md. 462, 485 (2006) ("We will not simply determine that a stop was unreasonable due to the length of time over which it occurred."), nothing about a stop of nine minutes is itself unreasonable, *see, e.g.*, *id.* at 469, 491-92 (upholding detention of approximately 30 minutes); *Carter*, 236 Md. App. at 471 (stop of 17 minutes was not per se unreasonable); *State v. Ofori*, 170 Md. App. 211, 243 (2006) (stating that a "24-minute period of delay was not, in and of itself, especially inordinate"); *Jackson v. State*, 190 Md. App. 497, 512 (2010) (noting that "[i]n almost all of the cases, the critical breaking point between permissible and unreasonably prolonged traffic detentions occurs at somewhere near the 20 to 25 minute marker").[6]

[6] Mr. Bellosi also contends that the removal of Ms. Shaner and him from the car improperly delayed the original traffic stop, because their removal was unrelated to the purpose of completing the stop. However, "during a lawful traffic stop officers can compel the driver [and passengers] of a vehicle to exit the car." *State v. Wallace*, 372 Md. 137, 146 (2002) (citing *Maryland v. Wilson*, 519 U.S. 408, 410 (1997) & *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam)); *see also State v. Johnson*, ___ Md. ___, 2018 WL 1887200, *3 (Apr. 20, 2018) (indicating it was "the police department's policy" to remove occupants of a vehicle for a K-9 scan). Moreover, doing so in this case does not appear to have delayed the traffic stop at all, as Corporal Basham did not himself remove Mr. Bellosi and Ms. Shaner from the car.

Mr. Bellosi also argues that Corporal Basham lacked probable cause to arrest him at the time of the search of his person because the officer testified that he had not yet arrested Mr. Bellosi. This argument is a non sequitur. Whether Corporal Basham believed Mr. Bellosi was under arrest when he was searched has no bearing on whether Corporal Basham had probable cause to arrest Mr. Bellosi. It is well established that a K-9 alert provides probable cause to arrest the driver of a vehicle. *State v. Harding*, 196 Md. App. 384, 390 (2010). Moreover, "[o]ur cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause." *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004); *see also Belote*, 411 Md. at 117 (indicating that a court only looks to the subjective intent of an officer in effectuating an arrest if the officer's objective conduct is ambiguous).

III. THE TRIAL COURT'S ADMISSION OF CERTAIN PORTIONS OF EXPERT WITNESS TESTIMONY

Mr. Bellosi next argues that the trial court erred in three different respects regarding Sergeant McCourt's testimony: (1) by accepting Sergeant McCourt as an expert in the use of Cellebrite technology to extract data from cellphones; (2) by allowing Sergeant McCourt to opine on the meaning of several phrases used in text messages between Ms. Shaner and Mr. Bellosi; and (3) by effectively allowing Sergeant McCourt to testify as to the ultimate issue of Mr. Bellosi's intent to distribute Oxycodone.

Whether expert witness testimony is admissible "is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal." *Roy v. Dackman*, 445 Md. 23, 38-39 (2015)

(quoting *Bryant v. State*, 393 Md. 196, 203 (2006)). The trial court's decision is, however, "reviewable on appeal, and may be reversed if founded on an error of law or some serious mistake, or if the trial court has clearly abused its discretion." *Gutierrez v. State*, 423 Md. 476, 486 (2011) (quoting *Raithel v. State*, 280 Md. 291, 301 (1977)). A trial court abuses its discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Levitas v. Christian*, 454 Md. 233, 243 (2017) (quoting *Neustadter v. Holy Cross Hosp. of Silver Spring, Inc.*, 418 Md. 231, 241 (2011)) (emphasis removed).

A. Mr. Bellosi Waived His Claim Challenging Sergeant McCourt's Cellebrite Testimony by Failing to Appropriately Brief the Issue.

We decline to address Mr. Bellosi's argument regarding Sergeant McCourt's Cellebrite-related testimony because Mr. Bellosi has not preserved it. Mr. Bellosi's opening brief includes only a single conclusory sentence in its argument on this issue, without any citation to legal authority or to the record. That is insufficient to preserve this argument for review. *See, e.g.*, Md. Rule 8-504(a)(6) ("A brief shall . . . include . . . [a]rgument in support of the party's position on each issue."); *Darling v. State*, 232 Md. App. 430, 465-66 (2017) (refusing to address argument contained in only a single, conclusory statement). "We cannot be expected to delve through the record to unearth factual support favorable to appellant and then seek out law to sustain his position." *Van Meter v. State*, 30 Md. App. 406, 408 (1976); *see also Ubom v. SunTrust Bank*, 198 Md. App. 278, 285, 285 n.4 (2011) (collecting cases dismissing claims for failure to properly cite authority or reference the record).

B. The Trial Court Did Not Err in Allowing Sergeant McCourt to Interpret the Meaning of Certain Text Messages.

Mr. Bellosi also challenges the trial court's admission of Sergeant McCourt's interpretation of "common terms . . . not requiring an expert opinion" contained in text messages. The only specific objection Mr. Bellosi makes is to Sergeant McCourt's explanation of the term "hooking up," which Mr. Bellosi argues the jury could interpret without assistance.

Maryland Rule 5-702 provides that "[e]xpert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." Words and phrases often have multiple meanings, and "the meanings of even common words may be context-dependent." *Armstead v. State*, 342 Md. 38, 56 (1996). That is especially true with respect to code words used by drug dealers, which has led courts to recognize the value of expert testimony in interpreting such "drug jargon." *United States v. Vera*, 770 F.3d 1232, 1241 (9th Cir. 2014) ("Drug jargon is well established as an appropriate subject for expert testimony and investigating officers may testify as drug jargon experts who interpret the meaning of code words used in recorded calls."); *see also, e.g.*, *United States v. Garrett*, 757 F.3d 560, 568-69 (7th Cir. 2014) (stating that "where the government was attempting to prove that [recorded conversations] concerned the coordination of a drug deal, deciphering code words commonly used in the drug trade would undoubtedly 'help the trier of fact to understand the evidence or to determine a fact in issue.'") (quoting Fed. R. Evid. 702); *Vandegrift v. State*, 82 Md. App. 617, 634 (1990) (upholding trial court's

admission of expert testimony that explained "intercepted communications [that] were vague, fragmented, and interspersed with street slang").

Here, the court accepted Sergeant McCourt as an expert in drug distribution. In that context, while reviewing text message correspondence between Ms. Shaner and Mr. Bellosi, the State asked Sergeant McCourt to explain the significance of language used in particular text messages in light of his experience and training. Sergeant McCourt thus explained that the term "vitamins"—which Mr. Bellosi used in the phrase "I'm talking about my vitamins"—was significant to him because it is a common code word used by "drug users and dealers" to refer to prescription drugs.

The State then had Sergeant McCourt read the following text: "I'm going to a pharmacy in VA dude wants 10 for hooking us up with the place u willing to let 10 go for a hookup let me know ASAP if I don't hear from u then I'm not doing yours." Asked to explain whether this text message was significant based on his training and experience, Sergeant McCourt testified, over objection, that "[t]he significance is that there is someone willing to give information on a pharmacy in Virginia but won't do so unless you are willing to let 10 go."

Mr. Bellosi argues that this was improper expert testimony. We hold that the trial court did not abuse its discretion in determining that the expert's explanation might be helpful to a jury that had just learned that participants in drug deals sometimes use code words to mean something other than their plain English meaning. That is especially true concerning a term like "hookup," which even outside the drug-dealing context has a

number of quite different but still common meanings, including: (1) engaging in sexual relations, usually of a casual nature; (2) meeting with someone; (3) connecting two people; (4) beginning a new relationship with someone; (5) getting married; (6) joining forces or entering into an alliance; or (7) connecting electronic devices or physical objects in various ways. *See generally Merriam-Webster's Collegiate Dictionary*, "hook up," at 598 (11th ed. 2014); *New Oxford American Dictionary*, "hook up," at 836 (3d ed. 2010); *The American Heritage Dictionary of the English Language*, "hook up," at 844 (4th ed. 2006); *Urban Dictionary*, "hookup," available at https://www.urbandictionary.com/define.php?term=hookup (last visited June 5, 2018); *Collins English Dictionary (online)*, "hook up," available at https://www.collinsdictionary.com/us/dictionary/english/hook-up (last visited June 5, 2018).

C. Sergeant McCourt's Stricken Testimony

We decline to address Mr. Bellosi's third claim of error, relating to Sergeant McCourt's expert testimony regarding intent to distribute, because doing so would not provide helpful guidance on remand. Both parties agree that the State's questions to Sergeant McCourt on this issue were proper (i.e., the State did not ask Sergeant McCourt to provide an opinion as to Mr. Bellosi's intent). Both parties similarly agree that Sergeant McCourt's initial response on this issue was improper (i.e., Sergeant McCourt improperly offered an opinion as to Mr. Bellosi's intent), and so was properly stricken by the trial court. With confidence that the State and the court will take care to ensure that this situation

is not repeated on remand, it would serve little purpose for us to delve into whether the particular sequence of questions, answers, objections, rulings, and corrective instructions resulted in error. We therefore decline to do so.

IV. THE TRIAL COURT'S EXCLUSION OF STATEMENTS MADE BY MR. BELLOSI'S DOCTORS WAS ERRONEOUS BUT HARMLESS.

Mr. Bellosi next argues that the trial court erred in excluding as inadmissible hearsay his testimony about instructions from his doctors. Specifically, Mr. Bellosi wanted to testify that his doctor had recommended that he not keep all of his medication with him because if the Oxycodone pills were lost or stolen, the doctor would not be able to give him an early refill. Mr. Bellosi wanted to tell the jury that he responded to that advice by leaving half of his pills at home, thus explaining why his pill bottle contained only 48 Oxycodone pills out of the 112 he had received the day before. Mr. Bellosi thus contends that the doctor's statements were not being proffered for the truth of the matter asserted—i.e., that the doctor really would not have refilled the prescription early if the medication had been lost or stolen—but for the effect those words had on Mr. Bellosi's actions.

"Whether evidence is hearsay is an issue of law reviewed *de novo*." *Gordon v. State*, 431 Md. 527, 536 (2013) (quoting *Bernadyn v. State*, 390 Md. 1, 8 (2005)). "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Hearsay "*must* be excluded . . . unless it falls within an exception to the hearsay rule." *Bernadyn*, 390 Md. at 8. It is a "general rule that 'a relevant extrajudicial statement is admissible as nonhearsay when it is offered for the purpose of showing that a person relied on and acted

upon the statement . . . .'" *Parker v. State*, 408 Md. 428, 438 (2009) (quoting *Graves v. State*, 334 Md. 30, 38 (1994)).

Mr. Bellosi did not offer the doctor's statements for the truth of any matter allegedly asserted by the doctor in those statements. Instead, Mr. Bellosi sought to identify the statements as the reason for his own actions. Whether the content of the doctor's alleged statements was actually true is entirely irrelevant to that issue.[7] *See* Joseph F. Murphy, Jr., *Maryland Evidence Handbook* 312 (4th ed. 2010) (stating that "[w]hen 'why' a particular person took certain action is a material issue in the case, that person may testify to his entire thought process," and this "information is not excluded on hearsay grounds because it is not being offered to prove the truth of content").

If we had not determined to remand this case for a new trial on a separate issue, we would have concluded that the exclusion of this testimony on hearsay grounds was harmless beyond a reasonable doubt. "Error is harmless when 'a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.'" *Potts v. State*, 231 Md. App. 398, 408 (2016) (quoting *State v. Simms*, 420 Md. 705, 738 (2011)). The test is the same "whether [the evidence was] erroneously admitted or excluded . . . ." *Simms*, 420 Md. at 738 (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

[7] This does not, of course, mean that whether or not the doctor actually made the alleged statement is irrelevant. But that is a much different question from whether the statement is being offered for the truth of the matter asserted in it. Whether to believe that the statement was actually made was a question for the jury.

Here, the substance of the information excluded by the trial court entered into the record in three other places. It entered twice through other portions of Mr. Bellosi's testimony about "what he did based on his conversations with the doctor." The court also allowed Mr. Bellosi to introduce, over the State's objection, a warning notice allegedly posted on the wall of a facility where he obtained his Oxycodone. The notice states: "ATTENTION TO ALL PATIENTS: IT IS RECOMMENDED TO ALL PATIENTS THAT YOU LEAVE HALF OF YOUR PAIN MEDICATION(S) AT HOME. BECAUSE IF YOUR MEDICATION(S) IS LOST OR STOLEN NO ONE WILL NOT [sic] BE GIVEN A NEW PRESCRIPTION." The excluded testimony was thus cumulative of other (perhaps much better) evidence in the record. Thus, although the court erred in concluding that the testimony at issue was hearsay, the exclusion of that evidence on that ground was harmless beyond a reasonable doubt. *Cf. Dove v. State*, 415 Md. 727, 743-44 (2010) (indicating that harmless error analysis considers whether evidence admitted erroneously was cumulative).

V. THE TRIAL COURT DID NOT ERR IN DENYING MR. BELLOSI'S MOTION FOR JUDGMENT OF ACQUITTAL.

Mr. Bellosi's final challenge is to the trial court's denial of his motion for judgment of acquittal. Mr. Bellosi argues that the State introduced insufficient evidence to convict him on either count. We address this issue not to provide guidance on remand, but because "[i]n cases where this Court reverses a conviction, and a criminal defendant raises the sufficiency of the evidence on appeal, . . . a retrial may not occur if the evidence was insufficient to sustain the conviction in the first place." *Benton v. State*, 224 Md. App. 612,

629 (2015) (citing *Ware v. State*, 360 Md. 650, 708-09 (2000), *cert. denied*, 531 U.S. 1115 (2001)). We "review[] a question regarding the sufficiency of the evidence in a jury trial by asking whether[,] after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Grimm v. State*, 447 Md. 482, 494-95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)). In so doing, "we view the State's evidence, including all reasonable inferences to be drawn therefrom, in the light most favorable to the State." *Fuentes v. State*, 454 Md. 296, 307 (2017).

Here, the evidence meets that standard. The crime of possession with the intent to distribute is established by § 5-602(2) of the Criminal Law Article (2012 Repl., 2017 Supp.), which prohibits a person from "possess[ing] a controlled dangerous substance in sufficient quantity reasonably to indicate under all circumstances an intent to distribute or dispense a controlled dangerous substance." The Court of Appeals "consistently has defined conspiracy as the agreement between two or more people to achieve some unlawful purpose or to employ unlawful means in achieving a lawful purpose." *State v. Payne*, 440 Md. 680, 712 (2014) (quoting *State v. Johnson*, 367 Md. 418, 424 (2002)).

The facts adduced at trial were sufficient to support Mr. Bellosi's convictions for possession with intent to distribute, and conspiracy to distribute, Oxycodone. A rational trier of fact could have found, beyond a reasonable doubt, that Mr. Bellosi intended to distribute Oxycodone, and engaged in a conspiracy with Ms. Shaner for that purpose, from evidence at least arguably showing that: (1) Mr. Bellosi possessed fewer than half of a

prescription for Oxycodone that was filled the previous day; (2) Mr. Bellosi and Ms. Shaner engaged in a series of text messages regarding arranging for the sale of Mr. Bellosi's pills; (3) the combined amount of cash in the possession of Mr. Bellosi and Ms. Shaner was roughly equal to both the amount being discussed in the text messages and Sergeant McCourt's estimate of the street value of the missing pills; and (4) Mr. Bellosi's explanation for his activities on the night in question was not credible.

JUDGMENT OF THE CIRCUIT COURT FOR CALVERT COUNTY VACATED AND CASE REMANDED FOR A NEW TRIAL CONSISTENT WITH THIS OPINION. COSTS TO BE PAID 50% BY CALVERT COUNTY AND 50% BY APPELLANT.