Circuit Court for Worcester County
Case No. C-23-CR-19000234

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 523

September Term, 2020

DAVID I. RUSSELL

v.

STATE OF MARYLAND

Berger,
Arthur,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: March 2, 2021

*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.

Following a jury trial in the Circuit Court for Worcester County, David I. Russell, appellant, was convicted of possession of heroin and possession of heroin with intent to distribute. Russell presents three issues for our consideration on appeal, which we have rephrased and reordered as follows:

> I. Whether the circuit court erred and/or abused its discretion by admitting into evidence a text message recovered from a mobile telephone found in Russell's vehicle.
>
> II. Whether Russell's conviction is supported by sufficient evidence.
>
> III. Whether the circuit court abused its discretion by denying Russell's motion for a new trial.

For the reasons explained herein, we shall affirm.

FACTS AND PROCEEDINGS

On August 28, 2019 at approximately 4:51 p.m., Detective Shane Musgrave and Detective Zachary Converse of the Worcester County Sheriff's Office initiated a traffic stop of a vehicle Russell was driving on Route 113 north of Berlin, Maryland. The basis of the traffic stop was Russell's use of his mobile telephone while driving. Detective Musgrave observed Russell "sweating profusely" and saw that Russell's "hands were shaking." He issued Russell a written warning for using his mobile telephone and asked Russell if he could search his vehicle. Detective Musgrave "believed that there was criminal activity afoot based upon Mr. Russell's demeanor and the sweating profusely and . . . other indicators that [he] had noted."

Detective Musgrave asked Russell if he could search Russell's vehicle, and Russell provided his consent. During the search, Detective Musgrave and Detective Converse recovered a digital scale, a small screwdriver, a dollar bill, a torn dollar bill, a small wrench, an LG mobile phone, and a white iPhone. The detectives also searched a portion of the dashboard console near the radio that appeared to have been altered. The detectives searched behind a panel and Detective Converse removed a white cloth drawstring bag that contained coffee grounds and two small rectangular items wrapped in newspaper and secured with scotch tape.[1] Inside the newspaper, the detectives discovered ninety-nine small bags of heroin. The small bags recovered from Russell's vehicle each had a "green-in-color alien head type of image on the side" and the words "alien rock" written in black ink. Russell was subsequently arrested and charged with possession of heroin and possession of heroin with intent to distribute.

Detective Rodney Wells of the Worcester County Sheriff's Office testified as a forensic cellular telephone expert regarding evidence that was recovered from the mobile phones found in Russell's vehicle. Multiple text messages were extracted from the LG phone found in Russell's vehicle, including an outgoing message on August 26, 2019 at 1:55 p.m. saying, "Bro Mike, you not gonna believe that I just found them alien rocks that I thought old." Another message at 3:38 p.m. said, "Had took out my car." On August 28, 2019, the following message was sent from Russell to "Lisa": "Is Our son around you? If not have him call me. [I]t's really important. It[']s about alien rock[.]"

[1] Detective Musgrave opined that the cloth bag appeared to be a sunglass case.

Three of the recovered text messages were between Russell and an individual identified in the phone as "Travis." On August 22, 2019, Russell texted Travis, "Fam, I have to go," and "We gonna have to get up another time[.]" On August 28, 2019 at 6:31 p.m., Travis sent a message to Russell, stating, "I Neeb [sic] a B." This message was delivered to Russell's phone after the phone had been recovered by the detectives and was unread. It is this final text message that forms the basis for one of the issues raised by Russell in this appeal.

While Russell was being held pre-trial, he made a telephone call that was recorded through the Securus jail call monitoring system. During the call, Russell said, "Remember what I was saying about the dude that fixed my car? It wasn't true . . . I didn't retrieve everything that I thought I -- I thought I retrieved everything, but I didn't."

Prior to trial, Russell moved to exclude the final text message from Travis on the grounds that it was inadmissible hearsay, irrelevant, and unfairly prejudicial. The trial court denied Russell's motion, and the text message was introduced into evidence at trial. On March 2, 2020, Russell was convicted of possession of heroin and possession of heroin with intent to distribute, for which he received a sentence of eight years' incarceration.

On March 12, 2020, Russell, through counsel, filed a motion for new trial arguing that a new trial was in the interest of justice because the conviction resulted from an "erroneously admitted hearsay statement," namely, the text message at issue in Part I of this opinion. Russell asserted that the conviction could not be sustained without this text message. The circuit court denied the motion on April 2, 2020. On May 13, 2020, Russell

filed a *pro se* handwritten letter that was construed as a motion for new trial by the circuit court. Russell argued that his trial attorneys, who had been assigned to his case three days before trial after the withdrawal of his previous attorney, had been unable to uncover certain exculpatory evidence. The circuit court denied both motions. This appeal followed.

Additional facts shall be discussed as necessitated by our consideration of the issues on appeal.

DISCUSSION

I.

The first issue before us on appeal centers on the admission into evidence of the unread text message from Travis to Russell stating, "I Neeb a B." Russell asserts that this text message should not have been admitted because (1) the text message was not relevant; (2) any probative value of the text message was outweighed by unfair prejudice; and (3) the text message was inadmissible hearsay. As we shall explain, we perceive no error by the trial court in the admission of the text message.

A. Standard of Review

The admission or exclusion of evidence "is generally committed to the sound discretion of the trial court." *CR–RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387, 406 (2012) (citing *Ruffin Hotel Corp. of Md., Inc. v. Gasper*, 418 Md. 594, 619-20 (2011)). Appellate courts reviewing whether a trial judge erred in its relevancy determination engage in a two-step analysis. *Washington Metro. Area Transit Auth. v. Washington*, 210 Md. App. 439, 451 (2013) (citing *State v. Simms*, 420 Md. 705, 724 (2011)). "First, we

consider whether the evidence is legally relevant, a conclusion of law which we review *de novo*." *Id.* (citing *Simms*, *supra*, 420 Md. at 725). If we conclude that the challenged evidence meets this definition, we then determine whether the trial court abused its discretion in determining "whether the evidence is inadmissible because its probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns as outlined in Maryland Rule 5-403." *Simms*, *supra*, 420 Md. at 725. "We will only find an abuse of such discretion where no reasonable person would share the view taken by the trial judge." *CR–RSC Tower I, LLC*, *supra*, 429 Md. at 406 (internal quotation and citation omitted).

Pursuant to Maryland Rule 5-401, relevant evidence is defined 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." Maryland Rule 5-402, which governs the admissibility of relevant evidence, provides that "[e]xcept as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible. Evidence that is not relevant is not admissible." Pursuant to Maryland Rule 5-403, a trial court may exclude relevant evidence "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."

B. Relevance, Probative Value, and the Danger of Unfair Prejudice

Russell asserts that the text message, "I Neeb a B" is not relevant because it does not increase the likelihood that Russell distributed heroin or any other controlled dangerous substance. Russell posits that "B" could have referred to any number of things and that testimony presented regarding the likely meaning of "B" was mere speculation.[2]

We disagree. The State presented expert testimony regarding the meaning of the text message from Sergeant Todd Widdowson, a sergeant with the Maryland State Police who testified as an expert in "valuation and identification of narcotics, narcotics street investigations," and "common practices of users and dealers of narcotics." Sergeant Widdowson testified that "bun" is slang for ten to thirteen small bags of heroin "bundled together with a rubber band, a piece of tape, something like that." A "bag" of heroin is a wax fold or a "jeweler's bag, [a] very small zip-type bag." Sergeant Widdowson explained that users typically purchase heroin "by the bag" or by the "bun." Sergeant Widdowson testified that the text message from Travis to Russell could have referred to either an individual "bag" or a "bundle" of heroin and that "[t]hat B can go either way in drug slang."

We agree with the State that the challenged text message is relevant because it makes it more probable that Russell possessed the heroin recovered from his vehicle with the intent to distribute it. As we shall discuss further *infra* in Part II of this opinion, the

[2] Russell asserts that the explanation that "the letter [']B['] means that [Travis] want[ed] [Russell] to bring him [to] a bar" is the "most reliable explanation available." This potential explanation for the meaning of the text message was articulated in Russell's *pro se* second motion for new trial and was not presented at trial.

text message was one piece of evidence among many that supported such a conclusion. When considered within the context of the other evidence presented in this case, we are more than satisfied that the text message satisfies the "low bar" for a relevance determination. *See Williams v. State*, 457 Md. 551, 564 (2018) ("Having 'any tendency' to make 'any fact' more or less probable is a very low bar to meet.").

As we discussed *supra*, 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. We review a trial court's Rule 5-403 determination for an abuse of discretion.

Russell asserts that the text message was unfairly prejudicial because it invited the jury to speculate about whether Russell was involved in drug distribution. Russell reiterates that, in his view, the text message had virtually no probative value and there was no evidence in the record establishing any connection between the text message and Russell's possession of heroin with intent to distribute. We disagree. As we discussed *supra*, the State presented expert witness testimony about the meaning of the text message and its connection to narcotics sales. We reject Russell's contention that a more direct link between the text message and Russell's unlawful conduct was required. We conclude that the probative value of the text message was not outweighed by the danger of unfair prejudice. We hold, therefore, that the trial court's 5-403 determination was not an abuse of discretion.

C. Hearsay

Russell further contends that the trial court erred by admitting the text message into evidence because it constituted inadmissible hearsay. We are not persuaded.

"'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). "Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5-802. We apply the *de novo* standard of review when evaluating whether hearsay was properly admitted pursuant to an exception to the rule against hearsay. *Bernadyn v. State*, 390 Md. 1, 7-8 (2005). Any factual findings made by the trial court when evaluating whether a hearsay exception applies are reviewed for clear error. *Gordon v. State*, 431 Md. 527, 538 (2013) ("[T]he trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review.").

On appeal, Russell asserts that this Court previously acknowledged that text messages are hearsay in *Baker v. State*, 223 Md. App. 750 (2015). The question before this Court in this case is *not* whether text messages generally constitute inadmissible hearsay, but, rather, whether *the specific content of this particular text message* constitutes inadmissible hearsay. It is beyond dispute that the text messages at issue in this case contain statements generated by a human rather than by a machine. *See Baker v. State*, 223

Md. App. 750, 763 (2015) (differentiating between data that "is generated by the internal operations of the computer itself," which does not constitute hearsay, and "computer-stored" content that "reflects human input").

In our view, the Court of Appeals' decision in *Garner v. State*, 414 Md. 372 (2010), is dispositive of this issue. In *Garner*, the Court of Appeals discussed the admissibility of a similar out-of-court statement by a person seeking to purchase an illegal substance, albeit in the form of a verbal statement over a telephone rather than in the form of a text message. 414 Md. at 381-88. In *Garner*, a defendant was stopped and subsequently arrested for possession of cocaine that was found in his vehicle. *Id.* at 376. While the defendant was in custody, his mobile phone rang, and a police officer answered it. *Id.* The caller asked, "[C]an I get a 40." *Id.* After the officer asked for the caller's name, the caller hung up. At trial, the State was permitted to introduce the caller's statement over the defendant's hearsay objection.

This Court and the Court of Appeals affirmed, determining that the out-of-court statement was non-hearsay. The Court of Appeals observed that "[w]hen 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." *Id.* at 382. The Court explained further:

> 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**.

Id. (quoting *Garner v. State*, 183 Md. App. 122, 140 (2008)) (emphasis added). The Court observed that "[w]hether a 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 performative quality of such behavior justifies non-hearsay 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**. *Id.* at 385 (quoting Christopher B. Mueller & Laird C. Kirkpatrick, Evidence, § 8.22 at 773 (4th ed. 2009) (emphasis supplied by the *Garner* Court).

In addition to finding that the statement was admissible as a "verbal act," the *Garner* Court further found that any "assertions" implicit in the anonymous caller's question did not affect its admissibility, explaining:

> 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.

Id. at 388.

The reasoning of *Garner* applies to the text message at issue in this case and compels the same conclusion. The critical holding of *Garner* is that out-of-court statements soliciting a drug purchase are not "assertions" within the contemplation of the hearsay rule.

As in *Garner*, the statement "I Neeb [sic] a B" in Travis's text message to Russell was not an "assertion but [an] action seeking to achieve the[] ends" of purchasing illegal drugs. *Id.* at 385. We hold, therefore, that the text message at issue was a non-hearsay verbal act under *Garner*. Because the out-of-court statement contained within the text message was admissible as a non-hearsay verbal act, the circuit court did not err in overruling Russell's objection to the admissibility of the text message.

II.

We next consider Russell's contention that the evidence presented at trial was insufficient to support his conviction for possession of heroin with intent to distribute. When considering a challenge to a conviction on the basis that the evidence was sufficient to support a conviction, "we determine 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." *Nicholson v. State*, 239 Md. App. 228, 252 (2018) (internal quotation and citation omitted). We have explained:

> Our role is not to retry the case: "[b]ecause the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. 174, 185, 999 A.2d 986 (2010) (citations omitted).

Id. (quoting *Cagle v. State*, 235 Md. 593, 603-04 (2018), *aff'd* 462 Md. 67 (2018)).

Russell asserts that his conviction was based solely on the speculation and conjecture of Sergeant Widdowson. We disagree. Our review of the record leads us to

conclude that there was more than sufficient evidence presented to support Russell's conviction for possession of heroin with intent to distribute. Sergeant Widdowson, an expert in the "valuation and identification of narcotics, narcotics street investigations," and "common practices of users and dealers of narcotics," testified that it was his professional opinion that Russell possessed heroin with the intent to distribute for several reasons. Specifically, Sergeant Widdowson concluded that Russell's possession of ninety-nine separate small bags of heroin, with a total value of approximately $400.00, showed an intent to sell rather than possession for personal use. Sergeant Widdowson further testified that heroin users generally keep their heroin close to them, but the heroin recovered from Russell's vehicle "wasn't readily available."

Sergeant Widdowson further explained that the "average user of heroin" would typically keep their "works," or supplies for using heroin, with them, including a tourniquet, needle, and possibly a spoon for intravenous users and a small piece of paper or rolled up dollar bill for "individuals who snort it." The presence of a digital scale in Russell's vehicle was another factor Sergeant Widdowson considered. The "digital scale, in the way this is packaged, would serve no purpose to a buyer" who would "hold [a bag] to the light [to] see that there was a quantity of substance in there." Heroin purchased in this way was sold "per the bag," not "by the ounce, the gram, any weight." A seller, however, would use a scale to weigh heroin while packaging it.

The recorded jail call and text messages provided further support for Russell's conviction. In the recorded jail call, Russell stated that he "thought [he] retrieved

everything, but [he] didn't." In the context of the other evidence presented, a jury could have interpreted this statement to mean that Russell had previously had more heroin in his vehicle, retrieved some, and left the ninety-nine small bags that were ultimately recovered during the search of the vehicle. The text exchanges in which Russell discussed "alien rock" with Bro Mike and Lisa, as well as the next message from Travis stating, "I Nee[d] a B" provide further support for Russell's conviction.

Based upon our review of the record as a whole, we conclude that there was ample evidence presented in support of Russell's conviction for possession of heroin with intent to distribute. Russell raises arguments in this appeal regarding the weaknesses of Sergeant Widdowson's testimony. The jury was entitled to determine which portions of Sergeant Widdowson's testimony it found credible and persuasive. This was an appropriate task for the jury which we will not disturb on appeal. Accordingly, we hold that Russell's conviction for possession of heroin with the intent to distribute was supported by sufficient evidence.

III.

Russell's final appellate issue is that the circuit court erred by denying his motion for a new trial. Russell asserts that the circuit court should have determined that granting the motion for a new trial was in the interest of justice because Russell's attorneys were "grossly unprepared to defend him at trial," having taken over Russell's representation days before trial. Russell asserts that his trial attorneys failed to obtain certain exculpatory evidence that Russell had been working with his prior attorney to obtain. Russell further

complains that the trial court did not sufficiently explain why a new trial was not in the interest of justice. Russell further suggests that one of his trial attorneys rendered ineffective assistance of counsel by drafting what he asserts was a "bare, two-page motion" to exclude the text message from Travis discussed *supra* in Part I of this opinion. Russell further takes issue with the fact that one of his trial attorneys joined the Worcester County State's Attorney's Office between the verdict and sentencing in Russell's case.

A trial court's decision to grant or deny a motion for a new trial is generally reviewed under the abuse of discretion standard. *Williams v. State*, 462 Md. 335, 344 (2019). "Generally, abuse of discretion is the appropriate standard because the decision to grant or deny a motion for new trial under Md. Rule 4-331(a) depends so heavily upon the unique opportunity the trial judge has to closely observe the entire trial, complete with nuances, inflections, and impressions never to be gained from a cold record[.]"[3] *Id.* at 344-45 (internal quotation and citation omitted). "To reverse the denial of a new trial on appeal, when utilizing the abuse of discretion standard, the reviewing court must find that the 'degree of probable prejudice [was] so great that it was an abuse of discretion to deny a new trial.'" *Id.* at 345 (citing *Merritt v. State*, 367 Md. 17, 29 (2001)).

First, we emphasize that the argument regarding trial counsel's inability to adequately prepare for trial was raised only in Russell's handwritten letter which was

[3] The denial of a motion for a new trial may be reviewed under a harmless error standard when an alleged error is committed during the trial that, through no fault of the moving party, is not discovered until the trial has concluded. *Williams*, *supra*, 462 Md. at 345.

treated as a *pro se* motion for new trial by the trial court. This motion was filed on May 13, 2020, while the jury had issued its verdict in this case on March 2, 2020. Because the *pro se* motion was filed more than ten days after the verdict, it was untimely. Md. Rule 4-331(a) ("On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial."). Furthermore, issues regarding trial counsel's representation of Russell also goes beyond the appropriate scope for a revisory motion pursuant to Md. Rule 4-331(b). Subsection (b) authorizes a court "to set aside an unjust or improper verdict" on a motion filed within 90 days of sentencing. This subsection is generally limited to errors that occur "on the face of the record (the pleadings, the form of the verdict) and not with the evidence or the trial proceedings[.]" *Ramirez v. State*, 178 Md. App. 257, 280 (2008) (quotation marks and citation omitted).

Even if these arguments had been raised in a timely motion for new trial, they would be without merit. Although not expressly articulated as such, Russell's arguments regarding his trial counsel's deficiencies are, in substance, an ineffective assistance of counsel argument that we would not consider on direct appeal. "Generally, in Maryland, a defendant's attack of a criminal conviction due to ineffective assistance of counsel occurs at post-conviction review. This is because a post-conviction hearing presents the opportunity for further fact-finding." *Crippen v. State*, 207 Md. App. 236, 250 (2012) (quotation marks and citation omitted). Ineffective assistance of counsel claims are evaluated on direct appeal only in "extremely rare situations" when "the facts in the trial record sufficiently illuminate the basis for the claim of ineffectiveness of counsel." *Id.*

(quotation marks and citation omitted). This case does not present one of the extremely rare situations in which consideration of ineffective assistance of counsel on direct appeal is appropriate. Furthermore, the trial court expressly acknowledged that Russell's trial attorneys had "picked that case up late in the game," but, in the trial court's view, both attorneys "provided [Russell] with an excellent defense" and "did an excellent job." For all of these reasons, we reject Russell's contention that the trial court erred by denying his *pro se* motion for a new trial.

To the extent Russell raises any arguments regarding the trial court's denial of the first motion for new trial, we are entirely unpersuaded that the trial court's denial of this motion constituted an abuse of discretion. The first motion for a new trial, which was filed through counsel on March 12, 2020, argued that a new trial was in the interest of justice because the conviction resulted from an "erroneously admitted hearsay statement," namely, the text message at issue in Part I of this opinion. As we explained *supra*, the challenged text message was properly admitted into evidence at trial. Accordingly, we hold that the denial of Russell's motion for a new trial on this ground was not an abuse of discretion.

JUDGMENT OF THE CIRCUIT COURT FOR WORCESTER COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.