UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1914

September Term, 2014

JAMES McDONALD

v.

STATE OF MARYLAND

Meredith.
Berger,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: November 10, 2015

*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 bench trial in the Circuit Court for Baltimore City, James McDonald, appellant, was convicted of obtaining money using a counterfeit instrument, using a false document with intent to defraud, and theft of property valued under $1,000. The court merged appellant's convictions and imposed a sentence of one year imprisonment, which was suspended, with one year of supervised probation, and ordered him to pay restitution in the amount of $603.89. Appellant appealed and presents two questions for our review, which we quote:

> 1. Did the trial court err in permitting a witness to testify that, based on his review of the company's employee database, appellant never worked at U.S. Securities Associates, Inc., when the State never produced an actual business record that would have established as much?
>
> 2. Was the evidence sufficient to convict appellant?

We answer the first question in the negative and the second in the affirmative. Accordingly, we affirm the judgments of the circuit court.

FACTS AND PROCEDURAL HISTORY

On December 13, 2013, appellant entered Southwest Discount Liquors in Baltimore. Appellant approached Steven Brownstein, the general manager of the store, and asked if he could cash a check. Appellant produced a payroll check purporting to be from U.S. Security Associates, Inc. ("U.S. Security"),[1] made payable to appellant, in the amount of $603.89. Mr.

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[1] We note that the name of the company in the record is sometimes spelled as "U.S. Securities Associates, Inc.", but the check offered into evidence purports to be from the actual name of the company, U.S. Security Associates, Inc. The website for U.S. Security notes that it is a provider of a range of security services with operations in 160 cities and 45 (continued...)

Brownstein advised appellant that the store charged a 1% fee for this service. Appellant endorsed the check and gave it to Mr. Brownstein; appellant also provided his home address, telephone number, and ID, which Mr. Brownstein copied, for store records. Mr. Brownstein exchanged the endorsed check for approximately $597 in cash.

When Mr. Brownstein attempted to deposit appellant's check, however, he learned that U.S. Security would not pay it. Mr. Brownstein attempted to contact appellant using the information that he had provided, but he did not respond. Appellant was later charged with obtaining money using a counterfeit instrument and other offenses.

At trial, Joel Titman, the head of payroll and billing for U.S. Security in this region, testified for the State.[2] In examining the purported payroll check appellant had given to Mr. Brownstein, Mr. Titman remarked that it appeared to be forged. Specifically, Mr. Titman testified that the font was different, that the account and routing numbers were in the wrong place, and that the check number sequence was different from the numbers the company was using at the time the check was supposedly drafted. Furthermore, Mr. Titman testified that he had searched the company's employee database and determined that appellant had never worked for U.S. Security.

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[1](...continued)
states. The company has over 49,000 employees. *See* http://www.ussecurityassociates.com (last visited Oct. 21, 2015).

[2] We note that Mr. Titman's name is sometimes spelled "Tilman" in the record.

DISCUSSION

I. Witness Testimony

Appellant contends that the court erred in permitting Mr. Titman to testify as to the absence of appellant's name from the employee database. Appellant asserts that the State should have produced a business record, namely U.S. Security's employee database, as evidence. Appellant concedes that the absence of an entry in a business record is a proper exception to the rule against hearsay. *See* Rule 5-803(b)(7). But, appellant contends that Mr. Titman's testimony as to the absence of his name from the database, which relied on a search of the employee database, does not meet the exception. Essentially, appellant avers that Maryland law requires production of a business record to meet the hearsay exception to show the absence of an entry from a business record.

Ordinarily, we review a circuit court's ruling on the admissibility of evidence for abuse of discretion. *Dulyx v. State*, 425 Md. 273, 285 (2012). This Court has noted, however, that the admissibility of hearsay evidence is different: "'Hearsay, under our rules, must be excluded as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence or is permitted by applicable constitutional provisions or statutes.'" *Choate v. State*, 214 Md. App. 118, 145 (2013) (quoting *Bernadyn v. State*, 390 Md. 1, 8 (2005)). "'Whether evidence is hearsay is an issue of law reviewed *de novo*.'" *Webster v. State*, 221 Md. App. 100, 116 (2015) (quoting *Bernadyn*, *supra*, 390 Md. at 8).

To prove the contents of business records, the Court of Appeals has recognized that the documents, themselves, must ordinarily be admitted into evidence, but

> [t]his rule is not absolute, however, and parties may introduce summaries or compilations of voluminous or complex records . . . to prove the contents of otherwise admissible records. Such summaries of complex or voluminous records may take two forms: summations or compilations of what the records contain . . . **or statements as to what is not recorded in the records**.

Chapman v. State, 331 Md. 448, 461 (1993) (emphasis added) (internal citations omitted) (citing Lynn McLain, *Maryland Evidence* § 1006.1, at 545-46 (1980)). Indeed, "it is well established under Maryland law that a litigant may prove through negative inference, ***without the need of introducing the underlying records***, the non-occurrence of an event or transaction from the absence of an entry in a business's records where such records normally contain like information." *Id*. (emphasis added).[3]

In *Summons v. State*, 156 Md. 382 (1929), Summons convinced a potential investor that he was authorized to sell stock on behalf of a corporation, and he took money that the potential investor gave him. *Id*. at 384. He was later charged with obtaining money by false pretenses. At his trial, Mr. Weaver, a stockholder and director of the corporation, who had also chaired a committee of investigation of corporate records, testified that, in a search of

[3] The text of the business records exception and its companion absence of entry exception supports the proposition that the actual record is required for the former, while testimony or other evidence is sufficient for the latter. *Compare* Rule 5-803(b)(6) ("A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses . . . .") *with* Rule 5-803(b)(7) ("Unless the circumstances indicate a lack of trustworthiness, ***evidence*** that a diligent search disclosed that a matter is not included in the memoranda, reports, records, or data compilations . . . .") (emphasis added).

corporate documents, he found no record of Summons depositing money on behalf of investors. *Id*. at 386-87. Summons was convicted as charged. On appeal, he argued what appellant argues in this case, namely that the business records should have been introduced into evidence. *Id*. at 387. The Court of Appeals disagreed:

> [T]he purpose was, not to establish the terms of the corporate records or accounts, but to establish facts about these documents other than their contents. The witness [Mr. Weaver] was giving primary evidence of facts within his personal knowledge as a result of the exercise of his own powers of observation. On this ground, or on that of the inconvenience of producing before the jury or trial court a large number of documents and accounts to be read and examined before a fact could be ascertained, a competent witness, who has investigated and is familiar with the contents of the entire mass, may testify that certain entries in the corporate records or accounts do not exist.

Id. (citing *Wigmore on Evidence* (2d ed.) §§ 1242, 1244(5); *Underhill on Criminal Evidence* (3d ed.) § 98). *See also United States v. De Georgia*, 420 F.2d 889, 893 (9th Cir. 1969) ("[T]his alternative method of proving the negative would have been singularly burdensome and unrewarding. An enormous volume of [documents] would have had to be brought into court.").

In this case, Mr. Titman, who was familiar with U.S. Security's employee database as the head of payroll and billing for this area and who had worked for two years entering data into the very same database, testified from his personal knowledge that a search of the database indicated that appellant was not currently employed by and had never worked for U.S. Security. Appellant avers that Mr. Titman's job history is irrelevant to his testimony. We disagree. Mr. Titman's job history provided a foundation for his testimony as to the

absence of appellant's name from the employee database. This testimony meets the hearsay exception, as it comports with Rule 5-803(b)(7). The State was not required to produce the entirety of U.S. Security's employee database merely to show that appellant was not included in it. We, therefore, find no error in the court's determination to admit Mr. Titman's testimony.

II. Sufficiency of the Evidence

Appellant contends that there was insufficient evidence for his convictions because he lacked the intent to defraud Mr. Brownstein. He argues that the State failed to demonstrate that he had any knowledge that the check was fraudulent or that he used the check with the intent to defraud. Appellant points out that if he had intended to defraud Mr. Brownstein, he would not have given his actual name, address, and identification for store records. He contends that the State has demonstrated a suspicion that he had the intent to defraud, but not guilt beyond a reasonable doubt.

This Court recently discussed the standard of review for challenges to the sufficiency of the evidence as follows:

> The standard we apply, in reviewing the sufficiency of the evidence, is "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." In applying that standard, we give "due regard to the [fact-finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses."

McClurkin v. State, 222 Md. App. 461, 486 (2015) (internal citations omitted), *cert. denied*, 443 Md. 736 (2015). Furthermore,

> "[t]he Court's concern is not whether the verdict is in accord with what appears to be the weight of the evidence, but rather is only with whether the verdicts were supported with sufficient evidence – that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offense charged beyond a reasonable doubt. We must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference. Further, we do not distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence."

DeGrange v. State, 221 Md. App. 415, 420-21 (2015) (quoting *Donati v. State*, 215 Md. App. 686, 718, *cert. denied*, 438 Md. 143 (2014)).

Maryland Code (2002, 2012 Repl. Vol.) Criminal Law Article ("C.L.") § 8-602(a) prohibits "[a] person, with intent to defraud another, [from] issu[ing] or publish[ing] as true a counterfeit instrument or document . . . ." We have said that the elements of this offense are: (1) that "the counterfeit instrument or document must be issued or published as true; (2) the party issuing or publishing must know that the instrument or document is counterfeit; and (3) the issuing or publishing must be done with the intent to defraud." *Moore v. State*, 198 Md. App. 655, 701 (2011). The intent to defraud may be inferred from the facts and circumstances surrounding the transaction. *See Pearson v. State*, 8 Md. App. 79, 87-88 (1969). Indeed, the mere act of publishing the instrument with knowledge of its falsity is

sufficient to demonstrate an intent to defraud. *See id*. at 84-85 (citing *Levy v. State*, 225 Md. 201 (1961)).[4]

In this case, the State demonstrated that appellant offered what appeared to be a payroll check from U.S. Security in exchange for cash. Although Mr. Brownstein testified that appellant did not say anything regarding the genuineness of the check, appellant endorsed it in front of Mr. Brownstein. Because of this action, appellant represented to Mr. Brownstein that he was an employee of U.S. Security and that the company would honor the check. Mr. Titman's testimony, however, indicated that appellant was not at the time and had never been an employee of U.S. Security. Given that, a rational trier of fact could conclude beyond a reasonable doubt that appellant had both the knowledge of the falsity of the instrument and the intent to defraud. As appellant obtained money as a result of his use of a counterfeit instrument, there was sufficient evidence that he violated both C.L. §§ 8-602 and 8-609. Accordingly, we will affirm the judgments of the circuit court.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[4] C.L. § 8-609(b)(3) prohibits a person from "knowingly and fraudulently obtain[ing] money or goods by means of a counterfeit order for money or goods." Appellant was also convicted of violating C.L. § 7-104 for theft of property valued under $1,000.

In his brief, appellant contends that the State failed to demonstrate his intent as to all three of the statutes he was convicted of violating. Appellant, however, focuses his argument on the intent to defraud, required for convictions pursuant to C.L. §§ 8-602 and 8-609. As such, appellant has abandoned any argument as to his conviction for theft. *See State v. Jones*, 138 Md. App. 178, 230 (2001), *aff'd*, 379 Md. 704 (2004).