UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 903

September Term, 2016

JEREMY ZUNIGA QUEBRAL

v.

STATE OF MARYLAND

Wright,
Berger,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: May 8, 2017

*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.

Tried by a jury in the Circuit Court for Montgomery County, appellant, Jeremy Zuniga Quebral, was convicted of distribution of marijuana and possession with intent to distribute marijuana. The trial court sentenced appellant to a total of three years in prison. Appellant timely noted this appeal, presenting the following questions for our consideration:

> 1) Did the trial court err in admitting into evidence text messages taken from a phone purported to belong to Appellant?
>
> 2) Did the trial court err in denying Appellant's motion for judgment of acquittal, specifically, was the evidence adduced by the state insufficient to allow any rational trier of fact to find beyond a reasonable doubt that the marijuana found in Appellant's residence was possessed by him with the intent of distributing it?

For the reasons that follow, we shall affirm the judgments of the trial court.

FACTS AND LEGAL PROCEEDINGS

In December 2014, the Montgomery County Police Department received information that someone was selling controlled dangerous substances ("CDS") from the residence located at 7 Schindler Court, Silver Spring, Montgomery County. As a result, several officers undertook surveillance of that house.

At approximately 6:30 p.m. on December 30, 2014, Officer Robert Johnson, from the back of an unmarked minivan, observed a silver Chevy Malibu pull up to and park in front of 7 Schindler Court. For approximately ten minutes, the car remained stationary, and all four occupants remained inside. Then, the car pulled forward around the court and parked in another location for an additional five minutes.

Shortly thereafter, a red Honda Civic pulled up and parked directly behind the Malibu. A man, later identified as appellant, exited the Civic, at which point the driver of the Malibu, later identified as Anderson Rosa, exited his vehicle. Appellant and Mr. Rosa walked together to the front porch of 7 Schindler Court. Appellant entered the house while Mr. Rosa waited outside.

Several minutes later, appellant returned to the porch and engaged in "cordial conversation" with Mr. Rosa for approximately two minutes before reaching into his front jacket pocket and handing "something small" from his cupped hand to Mr. Rosa; Officer Johnson could not identify the item from his vantage point. After another minute or so of conversation, Mr. Rosa returned to his car and drove off.

Officer Johnson remained on Schindler Court, where he observed appellant exit his house with a dog and walk past the van three times, looking into the windows each time. After appellant re-entered the house, Officer Johnson surreptitiously left the scene.

Corporal Charles Haak and other officers followed Mr. Rosa as he drove away from appellant's neighborhood. Officer Chris Murray pulled Mr. Rosa's car over a short distance away from the Schindler Court house.

Corporal Haak searched Mr. Rosa, with his consent, and found what Mr. Rosa described as a "partially smoked marijuana blunt from earlier in the day."[1] Mr. Rosa explained to Corporal Haak that he had gone to appellant's house to pay a previous $50

[1] The parties stipulated that later testing confirmed that the "blunt" contained .81 gram of marijuana, a Schedule I CDS.

debt for the purchase of marijuana but had not purchased any marijuana that day. When Mr. Rosa's wife stepped out of the car, however, Corporal Haak immediately smelled fresh marijuana and observed Mrs. Rosa reach into the back of her pants. A later search of her person by Officer Nicole Min yielded a bag of suspected marijuana.[2] Mrs. Rosa told Officer Min that her husband had put the marijuana in her seat and she then "shoved it down her pants."

Corporal Haak read Mr. Rosa his *Miranda* rights.[3] Mr. Rosa provided a written statement, which was vastly different from the story he had initially told Corporal Haak. In his written statement, Mr. Rosa explained that he had just come from appellant's house, where he had picked up approximately ten grams of marijuana from appellant. He said he had not paid for the marijuana because appellant owed him $150 for a football gambling debt. He agreed that the marijuana he obtained from appellant was that recovered from his wife's person.

Due to Maryland's recent decriminalization of possession of marijuana in an amount less than ten grams, Corporal Haak did not arrest Mr. Rosa. Instead, Corporal Haak issued a civil citation and released him.

Mr. Rosa, who knew appellant from school, testified reluctantly at appellant's trial, changing his story yet again. He admitted that he had gone to appellant's house with his

[2] The parties stipulated that later testing confirmed that the substance recovered from Mrs. Rosa's person comprised 9.53 grams of marijuana.

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

wife and mother on December 30, 2014. He stated that the purpose of the visit was to pay appellant for the loss Mr. Rosa had suffered on a football "gambling pot."

Mr. Rosa believed he may have phoned appellant to advise he was on his way that evening. He denied, however, that he had exchanged text messages with appellant from a cell phone with the number 301-XXX-XX76.[4] According to Mr. Rosa, when he arrived at appellant's house, appellant came outside and Mr. Rosa gave him the money he owed, but appellant did not give him anything in return.

As he left appellant's neighborhood, Mr. Rosa saw several "random cars just popping out of nowhere." Believing he was being followed by undercover police officers, Mr. Rosa was not surprised when he was pulled over and given a "bogus story" about speeding out of the neighborhood.

Conceding that the officers who searched him may have found a "little butt" of marijuana he had smoked while doing yard work earlier that day, Mr. Rosa denied having bought marijuana from appellant or having a large amount of marijuana on his person. He further denied having told the officers that he went to appellant's house to "pick up some weed." He said that he had never bought marijuana from appellant and that the marijuana the police found on his wife's person on December 30, 2014 had been purchased from a seller in Prince George's County.

[4] Evidence admitted later during trial belied this statement. The issue of text messages between appellant, Mr. Rosa, and other individuals will be discussed in more detail, *infra*.

Following the December 30, 2014 transaction between appellant and Mr. Rosa, the police received more community complaints of suspicious behavior at appellant's home. The police obtained a search warrant for 7 Schindler Court, which was executed at approximately 6:00 p.m. on January 22, 2015. Appellant was present in a first floor bedroom when the police entered the house, and Detective Ryan Street recovered a Samsung Galaxy S3 cell phone from his back left pants pocket.

Detective Street also found $656 in cash in the pocket of a pair of pants on the floor and what he believed to be drug paraphernalia—a piece of tin foil on top of a Ziploc bag—in a dresser drawer in appellant's bedroom. Officer Daniel Fitzpatrick discovered two other cell phones and an additional $13 in cash in a nightstand. No CDS was found on appellant's person or in his bedroom.

In the common area of the basement of the house, Officer Steven Hutchinson found cigar wrappers and an implement that appeared to be a marijuana grinder. In the basement laundry room/kitchenette, Officer Hutchinson found a jar containing marijuana buds in the very back of a cabinet drawer and several open plastic bags of marijuana and marijuana residue in another drawer in the same cabinet.[5] It appeared to Officer Hutchinson that someone lived in the basement.

[5] The parties stipulated that testing confirmed that the jar contained 90.86 grams of marijuana and the bags contained a total of 19.41 grams of marijuana. An additional .31 grams of marijuana residue was recovered from the grinder.

In February 2015, Officer Benjamin Geller of the Montgomery County Police Department electronic crimes unit, accepted by the trial court as an expert in the field of digital forensics, analyzed four electronic devices recovered from appellant's home.[6] Of the four, one would not power on, and one had "catastrophic damage preventing an extraction" of data. The third phone contained no data from later than December 18, 2014 and was deemed irrelevant to the investigation, but the fourth device, the Samsung Galaxy S3 cell phone recovered from appellant's pocket, yielded several hundred text messages to and from someone identifying himself as Jeremy Quebral between December 16, 2014 and January 22, 2015, including many messages to and from Anderson Rosa. Officer Geller created printouts of all the text messages, which were admitted into evidence at appellant's trial and published to the jury.

Sergeant Jason Cokinos, accepted by the trial court as an expert in the field of drug trafficking and distribution of CDS, testified that drug dealers use multiple communication methods to arrange deals, but text messaging via cell phone (or multiple cell phones) is very common. After reviewing the text messages between the phone seized from appellant (that by virtue of being on appellant's person and containing accounts referencing his name, Cokinos believed belonged to appellant) and Mr. Rosa's phone, Sergeant Cokinos asserted that many of those messages related to the setting up of drug transactions. He

[6] By the time of trial, Mr. Geller was employed as a computer forensic examiner contractor with the Department of State.

further opined that messages between appellant and other people also indicated attempts at arranging drug deals.

Messages between appellant and someone named Carlos—in which Carlos admitted to having taken a small amount of appellant's product and appellant responded he was glad to be told, as he otherwise would have accused "Jovan" of "plucking from his stash"—indicated to Sergeant Cokinos that appellant kept his drugs in an area to which other people had access. He explained that dealers generally keep their product away from their bedrooms to make it less accessible to children or robbers and because the odor is very strong.

Based on all the evidence he reviewed, Sergeant Cokinos concluded that the transaction that occurred on appellant's porch on December 30, 2014 was a drug buy by Mr. Rosa. In addition, the amount of marijuana recovered from appellant's house, the numerous text messages between appellant and apparent buyers that used slang terms common in the drug industry, and the large amount of cash found on appellant's person, which was mostly in $20 bills, indicated that appellant was undertaking ongoing drug transactions; in other words, appellant possessed the marijuana found in his basement on January 22, 2015 with the intent to distribute.

Appellant did not put on any evidence. His motion for judgment of acquittal at the close of all the evidence was denied.

DISCUSSION

I.

Appellant contends that the trial court erred in admitting into evidence printouts of the numerous text messages obtained from a cell phone purported to belong to him.[7] The messages between him and anyone other than Anderson Rosa, appellant claims, were irrelevant, misleading, prejudicial, and comprised inadmissible hearsay and/or other bad acts evidence, such that their admission was improper.[8]

When Officer Geller extracted the data from the Samsung cell phone, he observed numerous text messages, which he printed and organized into several charts. Aside from the obvious relevance of the messages between appellant and Mr. Rosa regarding Mr. Rosa's marijuana purchase on December 30, 2014, Sergeant Cokinos deemed many of the other text messages significant in terms of the investigation into the charge of possession

[7] The cell phone from which the text messages were extracted was seized from appellant's person pursuant to a valid search warrant. Although no evidence was presented by the State to prove the phone was indeed owned or used by appellant, the jury heard the circumstantial evidence that, aside from being taken from his person, the accounts on the phone were in the names "Jeremy" or "JQuebral." The jury reasonably may have inferred that the phone belonged to appellant, and appellant does not specifically argue otherwise. *See* Maryland Rule 5-901 (permitting circumstantial evidence in authenticating evidence); *Dickens v. State*, 175 Md. App. 231, 239 (2007) (quoting *U.S. v. Safavian*, 435 F.Supp.2d 36, 38 (D.D.C. 2006)) (burden of authentication is slight and the trial court "'need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so.'").

[8] In his brief, appellant acknowledges that he did not object to the admissibility of the text messages between him and Mr. Rosa at trial. Therefore, he waived any claim of error regarding the admission of those messages.

And, because appellant did not object to the authenticity of any of the text messages or argue below that the printouts did not accurately reflect text messages made by the Samsung cell phone, the State was not required "'to produce a witness to explain how the information came to be stored in the phone,'" or any other "'expert information technology evidence,'" in order to authenticate the messages. *Carpenter v. State*, 196 Md. App. 212, 230 (2010) (quoting *Griffin v. State*, 192 Md. App. 518, 544 (2010)).

with intent to distribute marijuana stemming from the seizure of the CDS on January 22, 2015.

Prior to Sergeant Cokinos's trial testimony, defense counsel agreed to stipulate to the authenticity of the text messages between appellant and Mr. Rosa, but he objected to "the introduction of any other text messages that involve people who are not here who are unknown." The court acknowledged the potential issue but decided to wait to hear from counsel on the subject until another State's witness had completed his testimony.

After the court dismissed the jury for the day, the court heard further argument on the admissibility of the text messages. Defense counsel again specifically stated he did not object to messages between appellant and Mr. Rosa but did object to "other conversations." The court anticipated the State's response: "I'm just guessing it is to show a flurry of activity?. . .To show the jury that he is not a one day salesman?" The prosecutor agreed, adding that the messages, in total, showed appellant's knowledge of, and dominion and control over, the marijuana found in his basement.

Defense counsel raised an issue with regard to appellant's Sixth Amendment right to confront the witnesses against him, adding that the messages, which made use of a great deal of street slang, were also misleading and prejudicial because their meanings were unclear, and the messages could refer to innocent activities. The State responded that the messages served the purpose of proving that appellant received the messages and responded to them, which in turn demonstrated their effect on him and what he was going to do as a result of the inquiries, *i.e.,* distribute marijuana.

The court determined that conversations between appellant and people other than Mr. Rosa were admissible as appellant's adoption of the incriminating conversations in which he participated, which did not fall under the protection of the Sixth Amendment but did fall under an exception to the general rule excluding hearsay. The court ruled it was "inclined to let them in" but decided to "sleep on all of this."[9]

The following morning, before the jury entered the courtroom, defense counsel again raised the issue of the admissibility of the text messages between appellant and anyone other than Mr. Rosa, arguing that they had nothing to do with the sale on December 30, 2014 and were therefore irrelevant. The prosecutor reiterated her position that the messages from appellant were certainly relevant, and the messages from other people to which appellant responded had been adopted by him as true and showed a continuing course of conduct, intent, and motive. Defense counsel again disagreed, stating that the only distribution that was relevant was the one that occurred on December 30, 2014 and that other messages about possible transactions referred to prior bad acts that the State had not charged.

The court ruled that the statements contained in the text messages were not testimonial and therefore did not implicate appellant's Sixth Amendment right to confront his accusers. It further determined that the messages did not fall under the exclusionary rule against hearsay because the messages were not offered for the truth of the statements

[9] The court did agree to limit the timeframe of admissible text messages to within several days of December 30, 2014, the date the police observed the drug buy by Mr. Rosa, so they related to the drugs then in appellant's house.

contained therein; instead, they were offered to "show context and response and reaction from the defendant to these statements" that he was selling marijuana.

The court agreed that the messages referred to prior bad acts and would have to be offered to show intent, absence of mistake, motive, or course of action. Finding the State's argument the more persuasive, the court overruled appellant's objection to the admission of the text messages between appellant and individuals other than Mr. Rosa.

Sergeant Cokinos was then permitted to testify about a small sampling of the hundreds of text messages between appellant and presumed customers other than Mr. Rosa:[10]

> 1. From "Leonard" on December 31, 2014: "Yo, you around?" Response from appellant: "Not at the moment and don't have anything left right now."
>
> 2. From "Bash" on December 31, 2014: "Need a cop. A halftime."[11]
>
> 3. From "Stephen" on December 31, 2014: "I need two dubs in different bags, please."[12] Response from appellant: "Got u." From Stephen: "Outside." Response from appellant: "Okay, gimme a min." From Stephen: "Okay."
>
> 4. From Stephen on December 31, 2014: "You back yet?" Response from appellant: "Yeah, but there's mad undercovers in the neighborhood right now. My boy just got pulled over leaving here. Need to give it a min."

[10] He also testified about the text messages between appellant and Mr. Rosa.

[11] Sergeant Cokinos explained that a "halftime" is a specific quantity of marijuana but that the quantity differs among individual sellers.

[12] Sergeant Cokinos stated that a "dub" is a small amount of marijuana and that the request for two bags likely indicated some of the marijuana was for another person.

5. From "O" on December 30, 2014: "Half 175?"[13] Response from appellant: "Yeah."

6. From "Carlos Ice Cuozo" on December 30, 2014: "Yo, I took a little nug from u j I'll pay u tonight cool?" Response from appellant: "Thats cool. Dont worry bout it." From Carlos: "You sure man? Plus I still owe you 20 for the seafood pot." From appellant: "Yeah man no sweat. U didn't even eat. I'll take a dub next time." From Carlos: "Thank you man good lookin." From appellant: "All good. Thanks for letting me kno. Because I do check it and I would have thought Jovan was plucking from the stash."

7. From appellant to "240-XXX-XX56" on January 9, 2015: "Yo did u take anything out of the stash today?" Response from 240-XXX-XX56: "Nah I always tell you. I only took a nugget that night my boy copied that 8th." Response from appellant: "Ok. Nah. I was asking jus because the bag looked like it was opened. Prolly my dad though. He been going through my shit lately."

8. From "Yerik" on December 24, 2014: "1/8 for 45 cool?" Response from appellant: "Okay yeah." From Yerik: "outside." From appellant: "Come in and come down to the basement."

9. From Stephen on January 22, 2015: "Yoo I got someone that needs a hp." Appellant to "Snow" on January 22, 2015: "My homie needs a hp."[14]

10. From "Christine" on January 22, 2015: "Nothinggg, going dry here." Response from appellant: "I figured. Its been a lil while. Got some green crack."[15] Response from Christine: "Oh yeah cool I'm coming to see you!!" Response from appellant: "Halftime right."

11. From appellant to "Sivoni" on January 20, 2015: "U needed another jont [sic] or something?" Response from Sivoni: "Nah I'm good brah. I might also end up grabbin a halftime on Thursday when I come thru."

[13] Sergeant Cokinos opined that O was asking if he could purchase a half-ounce of marijuana for $175.

[14] Sergeant Cokinos clarified that an "hp" is a half-pound of marijuana and that it appeared that appellant was acting as a "broker" between Stephen and Snow.

[15] Sergeant Cokinos explained that "green crack" is a brand of marijuana.

Appellant argues that the printouts of the text messages comprised hearsay and evidence of other crimes or bad acts, either of which would render them inadmissible. We disagree.

First, we agree with the State that the text messages authored by individuals other than appellant do not comprise hearsay, as they were not offered by the State to prove the truth of the statements contained therein. Rather, they were used to show the effect of the declarants' statements on appellant, that is, that he generally assented to the declarants' requests to purchase specific amounts of marijuana at specific times. *See Watson v. State*, 92 Md. App. 494, 500 (1992) ("The general rule is that such evidence is admissible if introduced for the purpose of showing that a party relied on or acted upon the statement and not for the purpose of showing that the facts stated in the declaration are true.").

And even assuming, *arguendo*, that the statements contained in all the text messages comprised hearsay, Md. Rule 5-803(a) provides one of the "most important exceptions" to the rule against the admission of hearsay, *Bellamy v. State*, 403 Md. 308, 319 (2008), a statement by a party opponent. The rule states, in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> (a) Statement by party–opponent. A statement that is offered against a party and is:
> (1) The party's own statement, in either an individual or representative capacity;
> (2) A statement of which the party has manifested an adoption or belief in its truth;
> (3) A statement by a person authorized by the party to make a statement concerning the subject;
> (4) A statement by the party's agent or employee made during the agency or employment relationship concerning a matter within the scope of the agency or employment; or

> (5) A statement by a coconspirator of the party during the course and in furtherance of the conspiracy.

Clearly, appellant's own statements in the text messages he authored to other people would fall under the exception outlined in Rule 5-803(a)(1) and would not be excluded as hearsay when offered by the State against him. Regarding the text messages from other people to which appellant responded, the trial court found that they comprised statements in which appellant manifested an adoption of their truth, pursuant to Rule 5-803(a)(2). We agree.

When deciding whether to admit an adopted admission of a statement, the trial court "'must make a preliminary determination as a matter of fact whether a jury could reasonably conclude that the defendant unambiguously adopted another person's incriminating statement. If the judge answers that question in the affirmative and admits the evidence, then the jury's function is to decide whether it *should* reach the conclusion which the judge has held that it *may* reach, namely that there was unambiguous assent.'" *Gordon v. State*, 431 Md. 527, 547 (2013) (quoting *Blackson v. United States,* 979 A.2d 1, 7 (D.C.2009)) (Emphasis in original).

As such, on appeal of an allegedly erroneous admission of evidence as an adoptive admission, "the question is not whether the evidence before the judge clearly proved that the person against whom the statement was admitted unambiguously adopted the statement. Rather, the question is whether there is sufficient evidence from which a jury *could* reasonably conclude that the defendant unambiguously adopted another person's incriminating statement." *Id.* (Emphasis in original; internal quotation marks omitted).

The record demonstrates that there was sufficient evidence from which the jury reasonably could have concluded that appellant adopted the truth of the text messagers' statements. When those individuals solicited what, in Sergeant Cokinos's expert opinion, were drug buys of particular amounts at particular prices and appellant responded affirmatively, that is, that he agreed to the price in exchange for marijuana or to a meeting for an exchange, he adopted the truth of other people's assertions that he could provide them with marijuana. Therefore, the trial court's factual determination that appellant made an adoptive admission of the truth of their statements was not clearly erroneous. *See id.* at 550 (Because the trial court's decision about whether a person made an adoptive admission is generally a factual one, we will not disturb that decision absent clear error.).

Once the court made that factual determination, the legal conclusion that the statements contained in the text messages were admissible as exceptions to the hearsay rule called for a straightforward application of Rule 5–803(a)(2). *Id*. at 549. The text messages were admissible as an exception to the hearsay rule, and the trial court was legally correct in admitting them into evidence. The jury, of course, was then free to disbelieve the assertions contained therein and reach a different conclusion than the one regarding appellant's culpability.

Because we conclude that the trial court was correct in admitting the text messages as appellant's adoptive admissions, we further agree with the trial court's finding that appellant's constitutional right to confront witnesses against him in their admission was not violated. As we explained in *Cox v. State*, 194 Md. App. 629, 652–53 (2010), *aff'd*, 421 Md. 630 (2011),

> [a] statement admitted as a tacit admission is a statement that the defendant has adopted as his or her own. When such a statement is admitted into evidence, the 'witness' against the defendant, therefore, is the defendant. Thus, there is no violation of the right to confront 'the witnesses against him.' U.S. Const. amend. VI. As the Court of Appeals has noted, a party 'cannot be prejudiced by an inability to cross-examine him or herself.' *Briggeman v. Albert,* 322 Md. 133, 135, 586 A.2d 15 (1991).

Appellant's claim that the admission of the text messages was improper because they referenced his other crimes or bad acts fares no better. Although the trial court agreed with appellant's assertion that the messages arguably referenced other drug deals between him and his customers and comprised other bad acts that are generally inadmissible, the court nonetheless properly admitted the evidence.

Pursuant to Md. Rule 5-404(b), a court may not admit evidence of other crimes, wrongs, or acts that is offered "to prove the character of a person in order to show action in conformity therewith."[16] Notwithstanding this rule of exclusion, a trial court may admit other crimes or prior bad acts evidence if it has "special relevance" and satisfies three requirements: First, the evidence must be relevant to the offense charged on some basis other than mere propensity to commit crime, such as "motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or

[16] Rule 5-404(b) states:

> "Evidence of other crimes, wrongs, or acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as . . . motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident."

accident;"[17] Second, the evidence must be clear and convincing that the defendant was involved in the alleged acts; Third, the probative value of the evidence must substantially outweigh its potential for unfair prejudice to the defendant. *Gutierrez v. State*, 423 Md. 476, 489–90 (2011) (citing State v. *Faulkner*, 314 Md. 630, 634-35 (1989)).

The admission of prior bad acts or crimes evidence under Rule 5-404(b) is a matter for the trial court's discretion. *Snyder v. State,* 210 Md. App 370, 393, *cert. denied*, 432 Md. 470 (2013). If, as here, the trial court does not specifically explain its ruling, the appellate court will itself do the balancing of the three steps *de novo. Id*.

In our view, all three requirements were met. First, the text messages involving appellant and alleged marijuana purchasers provided evidence of his intent to distribute the marijuana found in his laundry room to people other than Mr. Rosa, to whom he was charged with distributing on December 30, 2014. The messages tended to prove that his distribution was part of ongoing scheme and not a once-in-awhile minor sale to a friend. Therefore, they had special relevance to the charged offenses.

Second, in reviewing whether the other bad acts have been established by clear and convincing evidence, we look only to the legal question of whether there was "'some competent evidence, which, if believed, could persuade the fact finder as to the existence of the fact in issue.'" *Wagner v. State*, 213 Md. App. 419, 459 (2013) (quoting *Henry v. State,* 184 Md. App. 146, 168–69 (2009)). The texts between appellant and Mr. Rosa, which appellant does not challenge as authentic and admissible, coupled with Mr. Rosa's

[17] The list of "other purposes" in the Rule is not intended to be exhaustive. *Jackson v. State*, 132 Md. App. 467, 484-85 (2000).

statement to the police on December 30, 2014, provide clear and convincing evidence that appellant distributed marijuana to Mr. Rosa. Based on the similar language contained in the text messages between appellant and other individuals, and the fact that they were made from the same phone as the admittedly authentic messages to Mr. Rosa, they likewise provide clear and convincing evidence of a drug enterprise.

Finally, the evidence regarding appellant's other drug deals was, of course, highly probative in proving that he possessed the marijuana found in his basement on January 22, 2015 and that he possessed it with the intent to distribute it, rather than for personal use. Of course, such evidence was prejudicial, as most evidence against a criminal defendant is prejudicial. It was the trial court, however, that was in the best position to determine if the text messages were *unfairly* prejudicial, and we find no abuse of discretion in the trial court's implicit finding that the messages were not unfairly prejudicial to appellant.

II.

Appellant also avers that the trial court erred in denying his motion for judgment of acquittal on the charge of possession with intent to distribute marijuana.[18] Conceding that his motion was not made with the requisite specificity to preserve this issue for appellate review, appellant complains that he was not afforded the opportunity to expound on his motion before the court denied it and that trial counsel's failure to state the grounds for the motion should be addressed as ineffective assistance of counsel.

[18] He does not make a specific argument that the evidence was insufficient to sustain the conviction for distribution of marijuana to Mr. Rosa.

If he surmounts the waiver hurdle, he claims that the State failed to prove he possessed the marijuana found in the common area of the basement of his house, as the evidence did not show he knew of the existence of the marijuana in a house with other occupants. Even if he did possess it, he continues, the evidence was insufficient to show that he did so with the intent to distribute it, as evidenced by the small amount of marijuana found and the absence of scales or packaging materials indicative of distribution.

Appellant has indeed failed to preserve this issue for appellate review. When, as here, a jury is the trier of fact, appellate review of the sufficiency of the evidence is available "'only when the defendant moves for judgment of acquittal at the close of all the evidence and argues precisely the ways in which the evidence is lacking.'" *Walker v. State*, 144 Md. App. 505, 545 (2002) (quoting *Anthony v. State*, 117 Md. App. 119, 126 (1997)), *rev'd on other grounds*, 373 Md. 360 (2003). "'[A] motion which merely asserts that the evidence is insufficient to support a conviction, without specifying the deficiency, does not comply with [Maryland] Rule [4–324(a),] and thus does not preserve the issue of sufficiency for appellate review.'" *Montgomery v. State*, 206 Md. App. 357, 385-86 (quoting *Brooks v. State*, 68 Md. App. 604, 611 (1986)), *cert. denied*, 429 Md. 83 (2012). The language of Rule 4-324(a) is mandatory. *Whiting v. State*, 160 Md. App. 285, 308 (2004), *aff'd*, 389 Md. 334 (2005).

At the close of the State's case-in-chief, the following colloquy occurred at the bench:

(Bench conference follows):

> THE COURT: All right, do you want to make a motion for judgment of acquittal?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: All right, and I'll deny it. I think the State has made a prima facie case.
>
> [DEFENSE COUNSEL]: Sure.
>
> THE COURT: And then you are going to rest in front of the jury, right?
>
> [DEFENSE COUNSEL]: I am.
>
> THE COURT: Okay.
> (Bench conference concluded).

Immediately thereafter, the defense rested, without putting on any evidence or re-addressing the motion for judgment of acquittal.

Clearly, in stating nothing other than he was making a motion for judgment of acquittal, appellant never stated with specificity any grounds in support of his motion, as required by Rule 4-324(a). Although he contends, in a footnote to his brief, that he was not afforded an opportunity by the court to elaborate on his motion and that further insistence on doing so would have been futile, there is nothing in the transcript to support that bald assertion. Instead, it appears that defense counsel readily acceded to the court's denial of his motion, without making any attempt at articulating his reasons that the State's evidence was insufficient. As such, he has failed to preserve the issue of sufficiency of the evidence for appellate review.[19]

[19] With regard to appellant's alternate claim that we should address trial counsel's failure to elaborate on the motion as ineffective assistance, the Court of Appeals has made

Even had appellant preserved the issue of the sufficiency of the evidence to support his conviction of possession with intent to distribute marijuana, he would not prevail.

We will conclude that the evidence is sufficient if, "viewing the evidence in the light most favorable to the State, '***any*** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Riggins v. State*, 223 Md. App. 40, 60 (2015) (quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)) (Emphasis in original). 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.'" *Harrison v. State,* 382 Md. 477, 487-88 (2004) (quoting *Moye v. State*, 369 Md. 2, 12-13 (2002)).

On December 30, 2014, appellant was observed by police officers conducting what they believed to be a hand-to-hand drug deal with Anderson Rosa. Shortly thereafter, Mr. Rosa was pulled over and almost ten grams of marijuana was found on his wife's person. Mr. Rosa admitted to Corporal Haak that he had just purchased the marijuana from appellant.

After several more complaints of suspicious activity at appellant's house, the police executed a search warrant on January 22, 2015, which yielded marijuana, cigar wrappers,

clear that "[p]ost-conviction proceedings are preferred with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel acted or omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel's ineffectiveness. *Mosley v. State*, 378 Md. 548, 560 (2003). Therefore, we decline to consider the issue on that ground.

and what appeared to be a marijuana grinder in the laundry room/kitchenette in the basement of appellant's home. It is on the basis of the recovery of that marijuana, coupled with the completed drug deal with Mr. Rosa, that the State charged appellant with possession with intent to distribute marijuana.

Although appellant asserts that the evidence was insufficient to prove that he possessed the marijuana because it was not in his bedroom and other people lived in the house, our courts have made clear that possession may be constructive and joint. *Moye v. State*, 369 Md. 2, 14 (2002) (Sole possession of CDS is not required to support a conviction; a person may have actual or constructive possession, and the possession may be exclusive or joint in nature).

To be found guilty of possession with intent to distribute marijuana, the State's evidence was required to prove that appellant knew "'of both the presence and the general character or illicit nature of the substance . . . such knowledge may be proven by circumstantial evidence and by inferences drawn therefrom.'" *Id*. (quoting *Dawkins v. State*, 313 Md. 638, 651 (1988)). Therefore, we must determine whether the State established beyond a reasonable doubt that appellant exercised a "knowing dominion or control" over the marijuana he was convicted of possessing with the intent to distribute. *Id*. In our view, the evidence was sufficient to prove that he did.

The marijuana was found in the basement laundry room/kitchenette of appellant's house. Although there was some evidence that other people lived in the house with appellant, the common laundry room was accessible to all the home's inhabitants. Appellant's accessibility to the room, by itself, probably would not suffice to prove his

knowledge of, and dominion over, the drugs therein, but the numerous text messages to and from his buyers between December 24, 2014 and January 22, 2015 served to prove that he knew about and controlled the drugs in his basement. A sampling of the messages indicated that appellant: 1.) had a drug "stash;" 2.) checked the stash from time to time and was aware when the bags were opened and drugs were missing; and 3.) invited some of his buyers to "come down to the basement" to complete their sales.

In addition, the evidence was sufficient to prove that appellant possessed the marijuana with the intent of distributing it. The 110.58 grams, or almost a quarter-pound, of marijuana found in the laundry room (along with a grinder likely used to process the marijuana for use) was of sufficient quantity to imply distribution. *See Purnell v. State*, 171 Md. App. 572, 612 (2006) (In Maryland, no specific quantity of drugs has been delineated that distinguishes between a quantity from which one can infer distribution over personal use and a quantity from which one cannot make such an inference, but the quantity of drugs possessed is circumstantial evidence of intent.).

Moreover, the text messages between appellant and his customers provide further support of his intent to sell the marijuana recovered from his basement on January 22, 2015. For example, the text messages from Christine on that date, which indicated she was "going dry," were answered by appellant's offer of the "green crack" brand of marijuana, an offer that she accepted. And, a text from Sivoni on Tuesday, January 20, 2015 indicated he might buy an amount of marijuana when he came through the area "on Thursday," which presumably would have January 22, 2015, leading to a reasonable inference that it was the marijuana recovered on January 22, 2015 that appellant offered to sell to Sivoni.

For these reasons, had appellant preserved his right to appeal the issue of the sufficiency of the evidence on the charge of possession with intent to distribute marijuana, all the circumstances amply supported a reasonable inference by the jury that he possessed the marijuana recovered from his basement and that he did so with the intent to distribute it.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS ASSESSED TO APPELLANT.