Circuit Court for Prince George's County
Case No.: CJ 15-1707

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 292

September Term, 2016

GLALELDIN ABDALA MUBARAK

v.

STATE OF MARYLAND

Meredith,
Leahy,
Beachley,

JJ.

Opinion by Meredith, J.

Filed: July 6, 2018

Glaleldin Abdala Mubarak, appellant, was convicted, by a jury sitting in the Circuit Court for Prince George's County, of theft of property valued at more than $10,000 but less than $100,000; theft of property valued at more than $1,000 but less than $10,000; and identity theft. Appellant presents the following questions on appeal:

I. Did the trial court err in excluding evidence?

II. Did the trial court err in ordering restitution without inquiring into appellant's ability to pay?

For the reasons that follow, we shall affirm.

FACTS

The State's theory of prosecution was that, between February 8, 2014, and late April 2014, appellant used a credit/debit/ATM card from a Wells Fargo account in Muteb Alsulami's name to make unauthorized cash withdrawals and charges totaling nearly $28,000.[1] Muteb and several others testified for the State. The theory of defense was that appellant had permission to use the card and to withdraw money from the account. Appellant testified in his defense. Viewing the evidence in the light most favorable to the prevailing party (the State), the following was elicited at trial.

Muteb testified through an interpreter that he met appellant in the United States in 2012. At that time, appellant worked as an interpreter for Muteb's older brother, Sultan Alsulami. Muteb, who is not proficient in English, hired appellant to provide translating and interpreting services while Muteb was in the United States. In this capacity,

[1] Because the testimony in this case made reference to two brothers whose last names were Alsulami, we will refer to each of them by the brother's first name in an effort to minimize confusion.

appellant booked hotels for Muteb, made flight arrangements, bought groceries, and helped Muteb with his banking. Muteb testified that, during his 2012 visit, he opened a Wells Fargo account in his name only, and, although Sultan wired money to the account, the money was Muteb's. Muteb also testified that appellant assisted him in withdrawing cash from ATMs with his Wells Fargo card when appellant was with him, but he never gave permission to appellant to use his card when he was not present.

At some point, Muteb left for Saudi Arabia, but in January 2014, Muteb returned to the United States. Sultan had bought a house in Oxon Hill and had placed Muteb in charge of readying it for their families to live there. Muteb's visit was cut short, however, when he received word that his son was ill, and on February 8, 2014, Muteb left for Saudi Arabia. When Muteb left, he took both the keys to the house, and also took his Wells Fargo card that provided access to the bank account, which then had a balance of nearly $30,000. At that time, no one lived at the Oxon Hill house.

The vice-president for external fraud investigations at Wells Fargo testified that on February 8, 2014 -- which was the date on which Muteb had departed for Saudi Arabia -- the ATM card linked to Muteb's account was reported lost, a replacement card was requested, and a new card was issued and sent to the Oxon Hill address. A week later, the e-mail address and telephone number on Muteb's account were changed to appellant's e-mail address and telephone number. Bank records for Muteb's account were introduced, as was surveillance footage that showed appellant repeatedly using the card to withdraw cash between February and April of 2014. On February 7, 2014, the account balance was $29,338.87, but by April 23, the account was overdrawn by

$275.68, and closed. Muteb testified that appellant did not have permission to use his Wells Fargo card while he was away or to change the phone number or e-mail associated with the account. Muteb also testified that the charges after February 8, 2014, were not authorized by him.

In June 2014, Muteb returned to the United States, and when he tried to use his Wells Fargo card, it did not work. When he went to the house, he found that the locks on the doors had been changed, and that appellant and several other persons unknown to Muteb were living there. Muteb testified that neither appellant nor any of the other people had permission to change the locks or occupy the house.

Appellant testified in his defense. He testified that, in 2011, he began working for Sultan as a "business manager." Appellant explained that he had an "investment relationship" with Sultan whereby Sultan was to fund the purchase of residential property in Oxon Hill, appellant was to assist with the purchase of the property and then furnish it, after which appellant would rent it out and share in the profits. Appellant testified that he met Muteb in 2012, but they did not have "any business relationship[.]" He explained that he and Muteb were "just [] employee[s]" of Sultan, although he admitted that he did help Muteb with banking and interpreting for him.

Appellant testified that, on February 8, 2014, he had accompanied Muteb to the airport, and while waiting at the airport for Muteb's flight to depart, they realized that Muteb's Wells Fargo card was lost. According to appellant, appellant called Wells Fargo while in Muteb's presence and reported the card lost. Although appellant admitted that he knew that the card and the account had Muteb's name on it, he testified that he

believed that he was authorized to use the account. Appellant also testified that he had been given the keys to the Oxon Hill residence, that he was allowed to use the house, and that since 2012, he had lived in one of the bedrooms.

At some point in 2014, appellant sent Sultan a video that was played for the jury. In the video, appellant is inside the Oxon Hill residence and introducing people whom he says will be at the house party he is throwing. He adds that he is sending the video so Sultan can have "fun" watching "all the people" coming to his house for the party. Appellant ends the video by saying: "This is America, the government has assigned me an attorney."

Additionally, after his arrest on theft charges, appellant sent Sultan a photograph of himself changing the locks on the residence. An accompanying text message was translated as saying:

> [G]ot out after two hours because I am a U.S. citizen, but . . . this brother of yours has stolen my furniture. Later on I will put him in jail and you can come and get him out of jail, by law. I'm at work so I don't have time for you right now. You are weak, you can do nothing about it, and you cannot come here.

Although the prosecutor would argue that the text message was intended to taunt Sultan, appellant explained at trial that his message was not meant to be insulting; rather, he claimed, he was trying to explain that "the house still look good [sic], everything is fine."

DISCUSSION

I.

Appellant's brief summarizes his theory of the case in the following passages (citations to record and footnotes omitted):

> It was undisputed that between February 8, 2014 and late April of the same year, Appellant used a debit card to make cash withdrawals and charge purchases totaling close to $29,000. The card was linked to a Wells Fargo bank account in the name of Muteb Alsulami. The question at trial was whether or not Appellant had permission from Muteb and/or Sultan to withdraw money from the account. Appellant contended that they had given him permission. Particularly, he contended that although Muteb's name was on the account, the money was Sultan's. Sultan, who was based in Saudi Arabia, had hired Appellant to manage his financial interests in America. He had given Appellant permission to use the money in the account. The State contended that the money was Muteb's and that Appellant did not have permission to access it.
>
> * * *
>
> It was undisputed that Appellant used the debit card linked to Muteb's Wells Fargo account to withdraw cash and to make purchases. The issue in dispute was whether he did so with Muteb and/or Sultan's permission. The State alleged that the money in the account belonged to Muteb, and that Muteb had not given Appellant permission to use it. Appellant's theory of the case was that 1) the money in the account was Sultan's, 2) Sultan entrusted Appellant with money as part of their business relationship, and 3) Sultan had granted him access to the money in the account. Appellant also argued that the Alsulami brothers only claimed that he lacked permission to use the funds in the account because his relationship with Sultan had deteriorated. And that deteriorating relationship, rather than any crime committed by Appellant led to disputes between the parties starting in June, 2014.

Appellant argues that the trial court erred in excluding certain testimonial evidence relating to the "sour[ing]" of the relationship between himself and the Alsulami brothers. He directs us to two specific portions of his trial testimony. The State responds that the trial court did not err; the testimony was properly excluded hearsay, and, in any event, not relevant to the question of whether appellant committed the crimes alleged. Further, any relevance was outweighed by the danger of unfair prejudice, confusion, and misleading the jury.

"Relevant evidence" is "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 5-401. "Evidence that is not relevant is not admissible." Maryland Rule 5-402. In addition, evidence, even if relevant, "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." Maryland Rule 5-403.

Generally, "the admission of evidence is committed to the considerable discretion of the trial court." *Sifrit v. State*, 383 Md. 116, 128 (2004) (citing *Merzbacher v. State*, 346 Md. 391, 404 (1997)). But, although we generally review rulings on the admissibility of evidence by applying the abuse of discretion standard, the admissibility of hearsay evidence is different. *Bernadyn v. State*, 390 Md. 1, 7-8 (2005). Because hearsay evidence "*must* be excluded at trial, unless it falls within an exception to the hearsay rule," . . . "a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility." *Id*. at 8. "Whether evidence is hearsay is an issue of law reviewed *de novo*." *Id*.

"Hearsay" is defined in the Maryland Rules of Evidence as "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." Maryland Rule 5-801(c). As a general rule, hearsay is not admissible at trial "because of its inherent untrustworthiness." *Parker v. State*, 365 Md. 299, 312-13 (2001); *see* Maryland Rule 5-802. Whether a statement is

hearsay, depends, in part, on the purpose for which it was offered. *Ashford v. State*, 147 Md. App. 1, 75-77 (cases cited therein), *cert. denied*, 372 Md. 430 (2002). As we explained in *Wallace-Bey v. State*, 234 Md. App. 501, 536 (2017), "testimony is not hearsay merely because the witness testified about words spoken by another person outside of court." "Accordingly, a trial court should never exclude evidence as hearsay solely because a witness attempts to testify about something that someone allegedly said outside of the courtroom." *Id*. at 538. When a statement is offered to show the effect on the hearer, and is not offered for the truth of the matter asserted, it is not hearsay. *Ashford*, 147 Md. App. at 76-77. *See also Watson v. State*, 92 Md. App. 494, 500, *cert. denied*, 328 Md. 447 (1992).

A. Testimony by appellant regarding statements made by Sultan

In support of his argument that the trial court committed reversible error in excluding material evidence, appellant points to the following portion of his direct examination:

> [DEFENSE COUNSEL]:
>
> Q As business manager for Sultan Alsulami, please describe how you were paid. . . .
>
> [APPELLANT]: He paid all my expenses while I'm working with him. The agreement between me and him it goes to my share in the investment.
>
> Q How much is that?
>
> A $7000 a month as salary, and that is not including all my expenses.
>
> Q You said that would go towards investments like the furniture?

A Yes.

Q Please describe – very brief indulgence, Your Honor?

Can you please describe your business deals near the end of January, 2014? Who were you working for?

[PROSECUTOR]: Objection, relevance.

THE COURT: Sustained.

[DEFENSE COUNSEL]:

Q Can you please describe when you returned to the United States after leaving Sudan?

A January, 2014 I was in Dubai. I went to American – Canadian Embassy –

[PROSECUTOR]: Objection, move to strike.

THE COURT: Sustained.

(Pause.)

[DEFENSE COUNSEL]: Thank you for the indulgence.

Based on your conversations, without telling us what anybody said, **what did you do in January of 2014 in preparation to return to the United States**?

[PROSECUTOR]: **Objection**.

THE COURT: Approach the bench.

(At the bench.)

THE COURT: What is the relevancy?

[DEFENSE COUNSEL]: As part of our defense that the reason that they are now claiming that he did not have the ability, the permission to use the account is because he refused to do something for Sultan Alsulami.

As Madam State has indicated, Sultan Alsulami is not permitted back into the United States. We would suffer if we were not able to present this defense. I can proffer that Mr. Abdalla refused to claim Mr. Alsulami's second wife as –

THE COURT: How will you get it in?

[DEFENSE COUNSEL]: He is not testifying for the truth of the matter asserted. He is testifying for the effect on the hearer, Mr. Alsulami said nobody says no to me.

THE COURT: You said the motivation. You are using it for the truth of the matter asserted. You just said the reason they are making the false allegation is he withdrew the authorization is [sic] because your client refused to accede to the request. Yes, you did make a request.

[DEFENSE COUNSEL]: It goes to the effect of [sic] the hearer as to whether or not they asked him to do something that he was not allowed to do. It is –

THE COURT: In order for them to believe he said, no, you would have to believe the truth of the matter asserted that the request was made.

[DEFENSE COUNSEL]: Whether or not the request was made is not an issue today before the court.

THE COURT: Why is it relevant then?

[DEFENSE COUNSEL]: It goes to his defense. The defense is we have a right to put on a defense as to whether or [not] they gave permission and why they would rescind the permission. Also shows a bias.

THE COURT: Didn't you oppose to have [Sultan] testify [via Skype]?

[DEFENSE COUNSEL]: Of course I did. That is separate.

* * *

THE COURT: It is hearsay.

[DEFENSE COUNSEL]: It is not.

THE COURT: It is exactly hearsay. The objection is sustained.

(Emphasis added.)

Appellant challenges the trial court's ruling, arguing that the proffered conversation between Sultan and appellant was not hearsay because "it was not offered for the truth of the matter asserted. Rather, it was offered to show its effect on the listener," and therefore, the trial court erred in not permitting the testimony. Appellant cites, *inter alia*, LYNN MCLAIN, MARYLAND EVIDENCE, § 801:9 (2001). (*See* 6A LYNN MCLAIN, MARYLAND EVIDENCE, § 801:10a (3d ed. 2013) ("Out-of court statements that are relevant because a particular person heard or saw them and therefore are offered for the limited purpose of proving their effect on the hearer or reader are nonhearsay." (footnotes omitted)). Although we agree with appellant that statements offered to show the statement's effect on the listener are not hearsay, defense counsel did not ask a question that might have properly elicited such evidence.

At the outset, we note that the question to which the court sustained the prosecutor's objection was an overly broad question that, on its face, had no apparent relevance to the charges of improper use of Muteb's Wells Fargo card and account. The trial court did not commit an abuse of discretion in sustaining the prosecutor's objection to that question. Because defense counsel asked appellant no further questions that might

have elicited additional evidence of a deteriorating relationship with Sultan, we are unable to conclude that no other questions might have been posed to pursue this theory.

Appellant's counsel did proffer to the trial judge that she was attempting to prove that appellant had refused to do something for Sultan, who became angry at appellant for not acquiescing in the request. But no further attempt was made to formulate questions that could have elicited that information. In the absence of additional questions, we would be speculating to assume there was nothing further counsel could have introduced on this topic.

And, as Professor McLain points out in the third edition of her treatise, even when the proponent of the evidence purports to offer the statement for the limited purpose of showing the effect upon the hearer, the trial court must decide "whether to exercise its discretion to exclude the out-of-court statement under Md. Rule 5-403." MCLAIN at § 801:10b (footnote omitted). The questions posed by the trial judge to defense counsel reflected that the court was not persuaded that an incident involving Sultan was relevant to the question of whether appellant made unauthorized use of Muteb's account, and indicate to us that the court's ruling was based, in part, upon the court's concern that the jury would be confused or misled by the testimony. *See Park v. State*, 408 Md. 428, 441-42 (2009).

We also note that appellant *did* testify that he was authorized to use the Wells Fargo account. He explained that he called Wells Fargo on February 8, 2014, in Muteb's presence to report the bank card missing, and the bank representative said a new card would be sent to him within one week. When asked if he had used Muteb's credit card in

February of 2014, appellant answered: "I authorized [sic] to use Muteb's credit card." When asked if it was his testimony that he had permission to be in the Oxon Hill house, he said "[y]es," he had been given permission by Sultan. When asked about the fact that the Wells Fargo card had Muteb's name on it, appellant explained: "The money is not his."

As the transcript excerpt quoted above reflects, the trial judge sustained objections to only three questions. (The questions were: 1. "Can you please describe your business deals near the end of January, 2014? Who were you working for?" 2. "Can you please describe when you returned to the United States after leaving Sudan?" 3. "Based on your conversations, without telling us what anybody said, what did you do in January of 2014 in preparation to return to the United States?") None of those questions specifically sought to elicit the effect of any statement upon appellant. Under the circumstances, we conclude that the trial judge did not commit reversible error by sustaining the objections to the questions that were actually asked by defense counsel.

B. Testimony by appellant that Muteb said the Wells Fargo account belonged to Sultan

Defense counsel also attempted to elicit testimony from appellant regarding a statement Muteb allegedly made during a 2014 visit to Wells Fargo. During the direct examination of appellant, the following colloquy occurred:

> [DEFENSE COUNSEL]: What if anything did you and Muteb do together?
>
> [APPELLANT]: We went, me, and Muteb, to Wells Fargo Bank. There is $200,000 at the bank, it is money that belongs to Sultan Alsulami and it is in his account.

[THE STATE]: Objection. Move to strike.

THE COURT: Stricken.

[DEFENSE COUNSEL]: Without telling us anything about working for someone who is not here. I'm asking you what did you do at Wells Fargo Bank?

[APPELLANT]: I went to Wells Fargo Bank to transfer 2,000 over -- $200,000 from the savings account to Muteb's account.

* * *

[DEFENSE COUNSEL]: What happened at the bank?

[APPELLANT]: The bank is because of the bank's secrecy act –

[THE STATE]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Tell us what happened at the bank?

[APPELLANT]: We transferred $100,000 to Saudi Arabia.

[THE STATE]: Objection.

THE COURT: Sustained.

* * *

[DEFENSE COUNSEL]: Whose account did you transfer money from?

[THE STATE]: Objection.

A bench conference ensued at which defense counsel advised the court that she was attempting to elicit from appellant that Muteb told him the account belonged to Sultan. When the trial court asked defense counsel why the testimony about the statement of a non-party was not hearsay, counsel responded that it was not hearsay

because appellant "witnessed" the statement. The trial court disagreed and ruled that appellant could testify about what appellant said but not what the victim, Muteb, said.

Appellant argues on appeal that the trial court erred when it failed to allow him to elicit that "the [Alsulami] brothers told [a]ppellant that the money in the account was Sultan's, and that it was transferred into the account at [Sultan's] behest." Appellant contends that this evidence would have "corroborated that [a]ppellant believed he had permission to use it." Appellant asserts that, given his testimony "that he worked for Sultan, rather than Muteb, and given that Sultan paid him and granted him access to funds, the effect o[n a]ppellant hearing those statements may have been to make him believe that he had a right to use the money in the account."

Appellant's testimony that the Alsulamis told him the money was Sultan's was hearsay that asserted who was the true owner of the funds in the Wells Fargo account. It does not appear that defense counsel urged the trial court to admit the testimony with a limiting instruction. But, when appellant revisited this issue in his motion for new trial, the trial judge explained that he could envision no way limiting instructions would enable the jury to understand the statements were not to be considered as substantive evidence of the matter asserted. The court explained:

> [THE COURT:] With regard to the statements that were attempted to be offered by the complainant's brother, I think the Court properly sustained those objections as hearsay and I don't think there would have been any way, even with instructions to the jury to get the jury to separate those statements – those alleged statements – to have them admitted only as to the defendant's state of mind versus the truth of the matter asserted.
>
> And again, the defendant testified as to his state of mind as to why he believed that he had this authority and the jury weighed that.

See Maryland Rule 5-403. Accordingly, we are persuaded that, regardless of whether the trial court erred in labelling the statements as "hearsay," the trial court properly exercised its discretion to exclude the testimony due to the danger of confusing or misleading the jury.

II.

Appellant argues that the trial court erred in not allowing him to question Sami Alomari, a defense witness, about threats Muteb made to Alomari prior to Alomari's trial testimony. Appellant argues that the threats were relevant to the "jury's assessment of Muteb's credibility[.]" The State responds that the trial court did not err.

Before calling Alomari to testify in the defendant's case, defense counsel moved for a mistrial, and advised the trial court that Alomari had been threatened by Muteb while the two were in the hallway outside the courtroom. The State responded that the threats were a reaction to the fact that Muteb had been threatened by "individuals in the hallway." Alomari was then questioned outside the presence of the jury, and he related that, while in the hallway, Muteb said to him: "You motherfuckers, fuck you, and I'll not leave you alone, I will kill you and your nice shoes." Alomari nonetheless told the court that he did not believe he was in danger, nor would the threats cause him to change his testimony.

At that point, defense counsel dropped her request for a mistrial, but asked the court to allow her to question Alomari about the threats in front of the jury, arguing that the threats went to Muteb's credibility. Counsel argued that the conduct demonstrated

poor character on the part of Muteb, "showing he is willing to threaten them very openly," and "it goes to . . . whether or not he should be trusted by the jury." The trial court denied the request, stating:

> I will not do that. I don't find it relevant. It is a collateral issue. Then the State calls the victim in rebuttal. Then he says, no, in fact your witness threatened him. Then we have a trial within a trial on not relevant material. I don't think it is relevant at all as to whether between February and June, 2014 whether your client broke the law or not.

Alomari then testified. The substance of his testimony spanned about three pages of transcript and consisted of: he was a bus/limousine driver; he had known appellant for about 10 years; he had met Sultan about three times; he had chauffeured Muteb about four times; and that he drove Muteb and appellant to the airport in 2014; it was his understanding that appellant did "business" with the Alsulami brothers.

We are persuaded that the trial court did not abuse its discretion in not permitting Alomari to testify regarding the threats. Because Muteb was not a defendant, this incident is unlike those situations in which a trial court properly admits evidence of threats to show consciousness of guilt. *Cf. Copeland v. State*, 196 Md. App. 309, 315 (2010) (police officer could testify regarding defendant's threats against a witness because it showed "consciousness of guilt"). Additionally, the rule governing impeachment at trials, Maryland Rule 5-616(a), is inapplicable. Rule 5-616(a) provides: "The credibility of a witness may be attacked through questions asked of *the witness*[.]" (Emphasis added.) Here, appellant sought to impeach Muteb by offering evidence of a collateral incident through Alomari, not by asking questions of Muteb. Under the circumstances presented, we conclude there was no abuse of discretion by the trial court

in not permitting questioning regarding the threats because, as the trial court determined, there had been no prejudice and the matter was collateral.

III.

Appellant was sentenced to ten years of imprisonment, all but 12 months suspended, on the first theft conviction, and a consecutive ten years, all suspended, on the identity theft conviction. His remaining conviction was merged for sentencing purposes. Appellant was ordered to serve five years of probation upon his release from prison, and to pay restitution in the amount of $27,892.70.

Appellant contends that the trial court erred in ordering restitution without inquiring into his ability to pay. Appellant cites Maryland Code, Criminal Procedure Article ("Crim. Proc."), § 11-603(a), which states that "[a] court *may* enter a judgment of restitution that orders a defendant . . . to make restitution in addition to any other penalty for the commission of a crime," and § 11-605(a)(1), which states that "[a] court *need not issue a judgment of restitution . . . if* the court finds [] that the restitution obligor does not have the ability to pay the judgment of restitution[.]" (Emphasis added.) The State observes that inquiry into the ability to pay is discretionary, not mandatory, and in any event, because defense counsel essentially conceded appellant's ability to pay in arguing that appellant should not receive jail time, there was no error.

Appellant's arguments are based upon the general restitution provision in Crim. Proc. § 11-601 *et seq*., but appellant was convicted of two counts of theft under Maryland Code, Criminal Law Article ("Crim. Law"), § 7-104. The penalty sections for theft expressly provide that, following a conviction, the defendant "*shall restore the property*

taken to the owner *or pay the owner the value of the property* or services[.]" Crim. Law § 7-104(g)(1)(i) and (ii) (emphasis added). We have held that use of the word "shall" in the theft statute means that restitution is "required as a matter of law." *Carlini v. State*, 215 Md. App. 415, 455 (2013). *See also Wallace v. State*, 63 Md. App. 399, 411 ("[U]nder the penalty portion of the theft statute the court *must* sentence the offender to restore the property taken . . . or pay [the owner] the value of the property.") (emphasis and some brackets added) (quotation marks and citation omitted), *cert. denied*, 304 Md. 301 (1985). Due to the mandatory language of Crim. Proc. § 7-104(g), "[t]he [theft] statute does not require a preliminary financial inquiry." *Id*. (addressing a predecessor codification of the theft statute).

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.