Circuit Court for Garrett County
Case No. C-11-CR-24-000004

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 368

September Term, 2024

DUANE ANTHONY GARLITZ

v.

STATE OF MARYLAND

Friedman,
Tang,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: April 24, 2026

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Following a jury trial, the appellant, Duane Anthony Garlitz, was convicted of distributing fentanyl based on a controlled buy involving a confidential informant who did not testify at trial. The court sentenced the appellant to twenty years, with all but twelve years suspended. The appellant timely appealed and presents the following questions, which we quote:

1. Did the trial court err in allowing Detective T.J. Sisler to testify that an unavailable confidential informant told [the detective] that he, the informant, could purchase drugs from [the appellant]?

2. Did the trial court err in admitting a surveillance video taken by the unavailable confidential informant at the direction of law enforcement?

3. Did the trial court abuse its discretion by admitting drug evidence where the State failed to satisfy Maryland Rule 5-901's "condition precedent to admissibility"?

For the following reasons, we shall affirm.

BACKGROUND

During the relevant period, the Garrett County Narcotics Task Force utilized confidential informants to investigate individuals for narcotics-related offenses. Michael Keener ("Keener"), one such informant, was "under contract" with law enforcement to perform undercover work in exchange for the potential reduction or dismissal of criminal charges he was facing at the time.

The police developed the appellant as a target and used Keener to participate in a controlled buy with him. Keener did not testify at trial; he was wanted by law enforcement, and his whereabouts were unknown.

We summarize the relevant facts adduced at trial.

The Controlled Buy

On September 28, 2023, Detective T.J. Sisler met with Keener to prepare for a controlled purchase of fentanyl from the appellant. As was standard procedure with confidential informants conducting controlled buys, Detective Sisler searched Keener to make sure he did not have any controlled dangerous substances or currency. He equipped Keener with audiovisual surveillance equipment that transmitted a live feed to a cellular phone or tablet application where the detective and other members of law enforcement could surveil him. Detective Sisler also provided Keener with money to complete the transaction.

Keener was taken to a gas station, where he was picked up by two individuals known to the detective. The vehicle left the gas station, and Detective Sisler followed it to a residence. While following the car, Detective Sisler and other members of law enforcement monitored the live video feed from the recording device on Keener's person. Detective Sisler observed Keener meet the appellant in the front yard of the residence. Detective Sisler testified that he witnessed a hand-to-hand exchange between Keener and the appellant via the live video transmission.

Video of the Controlled Buy

At trial, Detective Sisler confirmed he was the custodian of the video recording, which accurately depicted the relevant events. Prior to playing the recording for the jury, the appellant moved to suppress the entire recording. Defense counsel argued that everything Keener did in the video was "testimonial" because he was acting under contract with the police. Because Keener was not present at trial, the defense could not cross-

examine him. Therefore, defense counsel contended that admitting the video would be a violation of the Confrontation Clause.

The court overruled the objection, explaining that absent the audio, "no statements [were] being made against the [appellant]." The court "allow[ed] the video into evidence less the audio." The video was played for the jury without audio. In relevant part, it depicts the appellant holding a small, clear packet containing a white substance, while Keener produced cash.

Chain of Custody

After the transaction, Keener returned to the vehicle that had taken him to the residence, and Detective Sisler followed Keener back to a prearranged location. Detective Sisler then took possession of the 1.4 grams of suspected fentanyl purchased from the appellant and turned off the recording device.

Detective Sisler placed the suspected fentanyl into a larger bag, sealed the package, and signed and dated the top of the seal. He completed a chain-of-custody form, which listed Keener as the first person in the chain.

Detective Sisler testified that he took the package to an evidence locker in the Sheriff's Office. Then the evidence was transported to the lab for analysis. The State's chemist identified the evidence at trial, testifying that he received the exhibit in this case from secure storage. He confirmed it was generally in the same condition as when he received it. He stated that the substance that he tested was repackaged and sealed and then sent back to the police.

Detective Sisler retrieved the package from the evidence lab at the Sheriff's Office to bring to trial. He identified his initials on the sealed package and testified that the bag was substantially in the "same form" as when he submitted it to the lab for analysis. Forensic testing by the State's chemist confirmed the substance contained fentanyl.

Defense counsel objected to the admission of the drug evidence because Keener, the first person on the chain of custody form, did not testify regarding the chain of custody. The court overruled the objection and admitted the drug evidence.

We shall provide additional detail in the following discussion.

DISCUSSION

I.

Detective Sisler's Testimony

The appellant contends that the trial court erred in allowing Detective Sisler to testify to hearsay, specifically that Keener indicated the appellant was a seller of narcotics and Keener could purchase drugs from him.

A.

Additional Background

After establishing Detective Sisler's experience in narcotics investigations, the prosecutor asked him about his use of a confidential informant in connection with this case as follows, which the appellant does not contest on appeal:

> Q: [W]ere there times that you used a confidential informant during the investigation of narcotics crimes?
>
> A: There is.
>
> Q: Why is it that you do that?

> A: [C]onfidential informants are, obviously, *tied into the drug dealers, local drug dealers* and are able to better make purchases from them than, say, an undercover officer would be.
>
> Q: In the summer or fall of 2023, *did you use a confidential informant in the investigation of [the appellant] here*?
>
> A: *We did.*
>
> Q: Who was that confidential informant?
>
> A: Michael Keener.

(emphases added).

Then, Detective Sisler testified that Keener was "under contract to, potentially, work off criminal charges that he was facing at the time." The detective indicated that Keener did not complete all his obligations under that contract. He further testified that he did not know where Keener was at the time of trial and that he was wanted by law enforcement.

Thereafter, the prosecutor questioned the detective about the process of identifying targets for drug crime investigations and whether the appellant had been developed as a target—responses that the appellant challenges on appeal:

> Q: I'm going to ask you, when you are working with these confidential informants and you are identifying what targets, who is going to be investigated, how -- what is your process for that?
>
> A: [T]he confidential informants are asked to provide us with who it is they can purchase drugs from. It's not necessarily us telling them we need you to go purchase drugs from this person or that person, *it's them saying I can do a controlled purchase from this person, and then we develop that person as a target.*
>
> Q: Okay. In the fall, uh, summer or fall of 2023, *did you develop [the appellant] as a target*?
>
> A: *We did.*

(emphases added).

At this point, defense counsel objected on the basis that the prosecutor was "obviously eliciting hearsay from the unavailable confidential informant" and "the only way [the detective] knows it is from the testimony of the unavailable confidential informant. It's obviously hearsay." The court overruled the objection.

B.

Analysis

The appellant argues that Detective Sisler's responses to the last two questions above, combined with the detective's earlier testimony that the Narcotics Task Force employs confidential informants because they are "tied into the . . . local drug dealers and are able to better make purchases," and that he used one such informant, Keener, "in the investigation of [the appellant]," amounted to hearsay that the appellant was a narcotics seller. The State argues, in part, that the issue is not preserved. We agree with the State.

Maryland Rule 4-323(a) provides, in part, that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." Therefore, "[i]f opposing counsel's question is formed improperly or calls for an inadmissible answer, counsel must object immediately. Counsel cannot wait to see whether the answer is favorable before deciding whether to object." *Bruce v. State*, 328 Md. 594, 627 (1992). "[T]o preserve an objection, a party must either 'object each time a question concerning the [matter is] posed or . . . request a continuing objection to the entire line of questioning.'" *Wimbish v. State*, 201 Md. App. 239, 261 (2011) (citation omitted) *abrogated on other grounds by State v. Davis*, 249 Md. App. 217 (2021).

Williams v. State, 99 Md. App. 711 (1994), *aff'd*, 344 Md. 358 (1996), illustrates these principles. There, the defendant contended that the trial court erred in admitting evidence of his post-arrest, pre-*Miranda* silence. *Id.* at 716. This Court concluded the issue was not preserved based on the following exchange:

> [Prosecutor]: Did you tell the police officers that Miss Jones could vouch for your whereabouts?
>
> [Defendant]: No, I haven't. I told my lawyer.
>
> [Prosecutor]: Did you tell the State's Attorney's Office?
>
> [Defendant]: No.
>
> [Defense Counsel]: Objection, Your Honor; the defendant has no necessity of talking to the police or the State.
>
> The Court: I realize that. The objection is overruled.

Id. at 716–17.

We held that the issue was not preserved because the defense failed to object after the first question on the subject was asked and failed to timely object after the second question was asked. *Id.* at 717. In addition, we noted that the appellant never moved to have the answer stricken from the record. *Id.* We explained that "the preservation requirements for this sort of objection are very strict," and that "if the objectionable nature of the question is clear, the objection must be immediately forthcoming before the answer is given." *Id.* (citing *Bruce*, 328 Md. at 627–28).

"It is only when an objectionable answer is given unexpectedly in response to an unobjectionable question that the offended party has slightly more leeway. Even in such a circumstance, however, it is required that the offended party move immediately to strike the objectionable answer." *Id*. In other words, "[t]he strict rule that an objection made at

an inappropriate time will waive the objection . . . will give way when the question is unobjectionable, but the answer includes inadmissible testimony which was unforeseeable from the question." *Bruce*, 328 Md. at 627–28 (citation modified). "In these circumstances, objecting counsel may move to strike the witness's response immediately after the grounds for objection have become apparent, as Rule 4–323(a) provides." *Id.* at 628. The Court held in *Bruce* that:

> The question in the instant case, then, is whether or not Bruce's counsel could or should have known from the question that the answer would be objectionable. We believe that *Bruce's counsel should have been able to anticipate the type of answer called for by the question and thus should have been able to perceive grounds for an objection as soon as the question was asked—before the answer.*

Id. (emphasis added).

In the instant case, the defense did not object after the first challenged question was asked and failed to raise a timely objection following the second question. As in *Williams*, the defense's "objection was not immediately made and there is, therefore, nothing preserved for appellate review." *Id.* at 718.

In his reply brief, the appellant contends that the issue was preserved, arguing that the final two exchanges between Detective Sisler and the prosecutor cannot be viewed separately but rather considered together. He suggests that the way the first challenged question and answer unfolded did not immediately alert the defense that the second challenged response was objectionable on hearsay grounds until it was given. Therefore, he asserts that defense counsel's objection was timely made when the grounds for objection became apparent. We are not persuaded.

The detective's testimony that police develop targets based on a confidential informant "*saying* I can do a controlled purchase from this person" was immediately followed by the prosecutor's question, "Did you develop [the appellant] as a target?" Defense counsel "should have been able to anticipate the type of answer called for by the question and thus should have been able to perceive grounds for an objection as soon as the question was asked—before the answer." *Bruce*, 328 Md. at 628.

Moreover, the prosecutor initiated the inquiry into Detective Sisler's use of Keener in the investigation of the appellant's drug dealing well before the challenged questions and answers. As recounted above, the prosecutor first asked the detective why confidential informants are used. The detective explained that confidential informants are "tied into the drug dealers, local drug dealers" and are better positioned to make purchases from these dealers than an undercover officer. The prosecutor then asked, "Did you use a confidential informant in the investigation of [the appellant] here?" to which the detective responded, "We did." By the time the detective testified that targets were developed based on what an informant was "saying," defense counsel should have recognized grounds for a hearsay objection to the subsequent question, "Did you develop [the appellant] as a target?" as soon as it was asked. Therefore, we conclude that the appellant waived this issue by failing to object in a timely manner.

II.

Admissibility of the Video

Next, the appellant asserts the trial court erred in admitting the video, presumed to have no audio, depicting the controlled buy of suspected drugs from the appellant.[1] Since Keener was not available to testify at trial, the appellant argues that the admission of the video violated the Confrontation Clause.

A.

Confrontation Clause

The Sixth Amendment to the United States Constitution provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "Identical language is currently embodied in Article 21 of the Maryland Declaration of Rights. Maryland's confrontation right is interpreted to 'generally provid[e] the same protection to defendants' as its federal counterpart." *Taylor v. State*, 226 Md. App. 317, 333 (2016) (citation omitted). We review questions of Confrontation Clause violations independently from the circuit court, thereby providing no deference to the issuing court and applying a *de novo* standard of review. *Id.* at 332.

The Confrontation Clause guarantees a criminal defendant the right to confront the witnesses against them. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Under *Crawford*

[1] As noted, the trial court admitted the video recording without the audio. Therefore, our review is limited to the admissibility of the nonverbal conduct shown in the video and does not extend to any audible utterances contained therein.

and its progeny, "the Confrontation Clause only applies when an out-of-court statement constitutes testimonial hearsay. In other words, there are two limitations on the reach of the right to confront witnesses. First, the right only applies if a statement is testimonial." *Derr v. State*, 434 Md. 88, 106 (2013) (explaining that nontestimonial statements are governed by the applicable rules of evidence). "Second, the Confrontation Clause only applies to hearsay, or out-of-court statements offered and received to establish the truth of the matter asserted." *Id.* at 106–07; *Crawford*, 541 U.S. at 59 n.9 ("The Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.").

"Once the Confrontation Clause is implicated, however, *Crawford* established that the State can only introduce a statement against the defendant from an absent witness if two conditions are satisfied. The declarant must be unavailable and the defendant must have had a prior opportunity to cross-examine the declarant." *Derr*, 434 Md. at 107.

B.

Analysis

The appellant contends that Keener's nonverbal actions depicted on video were an "assertion" that he could purchase drugs from the appellant and that the video was "testimonial" because police worked with Keener to conduct the buy for the purposes of eventual prosecution. The State responds that the court did not err in admitting the video because the conduct depicted in the video was neither an assertion nor testimonial.

We conclude that Keener's nonverbal conduct depicted in the video does not constitute hearsay under the second limitation on the reach of the right to confront witnesses, because the conduct was not intended as an assertion. We explain.

1.

Nonverbal Conduct Under Rule 5-801(a)(2)

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(b) (emphasis added). Maryland Rule 5-801(a) defines a "statement" as "(1) an oral or written assertion or (2) *nonverbal conduct of a person, if it is intended by the person as an assertion*." (emphasis added). Professor Lynn McLain explains that, under Rule 5-801(a)(2), "only such conduct engaged in as a substitute for words can be a 'statement.'" 6A Maryland Evidence, State & Federal § 801:5(b), Westlaw (updated Oct. 2025) ("McLain").

Examples of assertive nonverbal conduct include "nodding one's head up and down to communicate 'yes,' or indicating to a driver by hand signals that she can keep backing up without colliding into anything." *Id.* "Other illustrations are the act of pointing to a particular person in a lineup as the equivalent of saying 'That's the person,' or the sign language used by persons with impaired speech or hearing. These are clear instances of non-verbal conduct that the person intended as an assertion . . . ." 2 McCormick on Evidence § 250, Westlaw (9th ed.) ("McCormick") (citation modified); *see, e.g.*, *Meno v. State*, 117 Md. 435, 437–38 (1912) (dying declaration of victim who gave her statement by affirmative or negative nods to questions posed to her); *Myers v. State*, 58 Md. App.

211, 238–39 (1984) (nodding in agreement constituted a statement); *Lawson v. State*, 25 Md. App. 537, 548–49 (1975) (evidence that undercover officer held up three fingers, indicating how much heroin he wanted, and defendant nodded affirmatively in response was not hearsay; nod was an assertion by a party-opponent); *Nance v. State*, 331 Md. 549, 559 n.4 (1993) (a "statement" under Rule 5-801(a) may consist of "nonverbal conduct intended as an assertion, such as the selection of a photograph to identify the perpetrator of a crime"). "[I]f evidence of the conduct is offered to prove the assertion the actor evidently intended, the hearsay rule applies." McLain § 801:4(b)(i).

In contrast, nonverbal, *non*assertive conduct is not a statement under the Rule. As Professor McLain explains, "Rule 5-801(a)'s definition of 'statement' precludes a finding that nonverbal, nonassertive conduct (i.e., conduct not intended as communication as a substitute for particular words) could be considered hearsay, even if relevant only as an implied assertion of the truth of facts apparently believed by the actor." McLain § 801:5(b). For example, the raising of an umbrella that is not obviously intended by the actor to convey a message (i.e., that it was raining), is not a "statement" for purposes of the hearsay rule. *Id.* This is because the conduct offered to prove it was raining "involves no intent to communicate the fact sought to be proved, and purposeful deception is much less likely in the absence of intent to communicate." 2 McCormick § 250; *see also id.* (explaining that "an uncontrollable action or reaction by its very nature precludes any intent to make an assertion").

2.

Preliminary Determination

Under Maryland Rule 5-104(a), "*[p]reliminary questions concerning* the qualification of a person to be a witness, the existence of a privilege, or *the admissibility of evidence shall be determined by the court*." (Emphasis added). In assessing nonverbal conduct, the determination of whether the conduct was intended as an assertion is a preliminary question for the judge to decide, pursuant to Md. Rule 5-104(a). McLain § 801:4(b)(i); *see* McCormick § 250 ("[I]n the case of the non-verbal conduct an intent to assert must be found by the judge as a precondition to classification as hearsay.").

The burden of persuading the trial court that the conduct was intended as an assertion is on the party claiming such intention existed. McLain § 801:4(b)(i) (explaining that the "burden is on the opponent of the evidence to persuade the court that the action . . . was intended to convey a particular message"); *accord* Fed. R. Evid. 801(a) (like Md. Rule 5-801(a), defining "statement" as "a person's oral assertion, written assertion, *or nonverbal conduct, if the person intended it as an assertion*" (emphasis added)); Advisory Comm. note to Fed. R. Evid. 801(a) (explaining that the definition of "statement" "is so worded as to place the burden upon the party claiming that the intention [to make an assertion through conduct] existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility"); *United States v. Butler*, 763 F.2d 11, 14 (1st Cir. 1985) (agreeing with Committee note); *United States v. Hensel*, 699 F.2d 18, 31 (1st Cir. 1983)

(same); *United States v. Kool*, 552 F. App'x 832, 834 (10th Cir. 2014) (same);[2] *State v. Bran*, 492 P.3d 147, 151 (Utah Ct. App. 2021) (same, under comparable Utah Rule's definition of "statement").

In this case, the defense, at the time the trial court ruled on the objection, did not establish that Keener's nonverbal actions depicted on video were intended to convey a particular message. Instead, defense counsel's argument was that Keener's conduct was "testimonial" because he was acting in furtherance of his contract and that Keener was not present and could not be cross-examined. When the court remarked that it was "struggling" to understand how Keener's actions amounted to a "statement," defense counsel did not explain any message Keener intended to convey through his conduct. Instead, defense counsel responded that "everything" Keener was "doing" was "testimonial," such as the act of "hiding the camera, hiding the video," and selecting the people in the car with him, all of which the defense was entitled to cross-examine Keener about. The defense claimed that Keener "intend[ed] for this to be used as testimony" and that the State intended "to use this video as testimony because they're trying to use it as evidence today." The court was

[2] *Kool* is an unpublished opinion. Maryland Rule 1-104(b) provides that an unpublished opinion issued by a court in a jurisdiction other than Maryland "may be cited as persuasive authority if the jurisdiction in which the opinion was issued would permit it to be cited as persuasive authority or as precedent." Federal Rule of Appellate Procedure 32.1(a) provides that "[a] court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like; and issued on or after January 1, 2007." Pursuant to the United States Court of Appeals for the Tenth Circuit's Rule 32.1, unreported opinions "may be cited for their persuasive value." Accordingly, this Court may consider unpublished federal opinions issued on or after January 1, 2007 for their persuasive value. *Critzos v. Marquis*, 256 Md. App. 684, 695 n.4 (2023).

not persuaded that the defense met its burden of showing that Keener's actions were intended to convey a statement and thus overruled the objection. Since the appellant failed to demonstrate that the conduct in question was intended as an assertion, the court did not err in overruling the objection. *See, e.g.*, *Hensel*, 699 F.2d at 31 (holding that the defendant did not preliminarily show the trial judge that conduct at issue was intended as an "assertion").

3.

Keener's Nonverbal Conduct Did Not Constitute a Statement

On appeal, the appellant now asserts that Keener's nonverbal actions shown on video were meant to convey a particular message. Specifically, he contends that Keener intended to assert through his nonverbal conduct something along the lines of: "Like I said, the person I told you—Narcotics Task Force, with whom I have a working contract to incriminate others in exchange for having my own charges dropped—is a drug dealer, in fact, a drug dealer." According to the appellant, to work off the criminal charges he was facing at the time, Keener was required to perform the duties of a confidential informant and "prove the truth of his assertion" that he could "do a controlled purchase" from the appellant. Although this argument was not raised below, we will nonetheless exercise our discretion and address it.

Our appellate courts have not addressed the question of when nonverbal conduct during a controlled buy by a confidential informant amounts to an assertion under Rule 5-801(a)(2) for Confrontation Clause purposes. However, courts in other jurisdictions have addressed the issue, and we find their decisions instructive.

In *United States v. Wallace*, 753 F.3d 671 (7th Cir. 2014), the Seventh Circuit held that a mute video showing a drug dealer handing cocaine to a confidential informant did not depict a nonverbal statement. There, a confidential informant went to the defendant's home to purchase crack cocaine. *Id.* at 672. The informant was provided money and a tiny audio/video recorder and subsequently purchased the drugs as planned. *Id.* at 672–73. At trial, the informant was unavailable to testify. *Id.* at 673. The defendant argued that showing the video recording of the buy without the informant's testimony violated his right to confrontation. *Id.* at 674.

The Seventh Circuit disagreed, explaining that the video of the defendant handing drugs to the informant did not "fit" the definition of a "statement." *Id.* at 675. It explained that "[p]ictures can convey incriminating information," but "one can't cross-examine a picture." *Id.* It noted that the agent narrated the video at trial, and his narration was a series of statements, so he was subject to being cross-examined and was, and thus was "confronted." *Id.*

The United States Court of Appeals for the Eleventh Circuit in *United States v. Taylor*, 688 F. App'x 638 (11th Cir. 2017),[3] held that a muted video clip recording of an alleged illegal drug transaction between the defendant and the confidential informant, who did not testify, did not constitute a statement. *Id.* at 642–43. The defendant argued that the admitted video, although muted, was nonetheless "an effective substitute for the

[3] *Taylor* is an unpublished opinion. Pursuant to the United States Court of Appeals for the Eleventh Circuit's Rule 36-2, unreported opinions "may be cited as persuasive authority." *See supra* n.2.

[confidential informant's] testimony" that was improperly made "immune from cross examination" in violation of the Confrontation Clause. *Id.* at 642.

The Eleventh Circuit disagreed, explaining that the footage did not appear to depict the informant or the defendant making any "assertions." *Id.* Rather, the clip merely showed, from the informant's perspective, the defendant in the carport where police arrested him moments after the clip ended. *Id.* During the clip, the informant was seen getting out of the car and walking towards the defendant; afterwards, the arrest signal was given and police arrived on scene. *Id.*

In *State v. Gilmore*, 862 S.E.2d 499 (Ga. 2021), the Supreme Court of Georgia held that video without audio depicting a controlled buy with a confidential informant did not constitute a "statement." The video recording of the transaction showed the defendant handing the informant a small bag of suspected methamphetamine and then holding a $20 bill. *Id.* at 502. The informant did not testify at trial. *Id.*

The defendant opposed the admission of the video on the basis that it violated his confrontation rights. *Id.* at 504. He claimed that the informant's nonverbal conduct was a testimonial statement (i.e., that the informant intended to prove that the defendant sold drugs). *Id.* at 504. Because the informant was not available to testify, the defendant was unable to cross-examine him. *Id.* at 502.

The Supreme Court of Georgia held that the informant's nonverbal conduct did not constitute a statement. *Id.* at 507. It noted that "the key to the definition of 'statement' is that nothing is an assertion unless intended to be one." *Id.* at 504 (citations omitted). The court explained:

> Unlike a witness pointing to a specific person in a police lineup (nonverbal conduct intended to assert something along the lines of "that is the person") or a person nodding her head in response to a specific question (nonverbal conduct that is intended to assert "yes"), we cannot say that a person handing money to another person and taking possession of a physical object in return is "intended [to be] an assertion." We simply cannot conclude on this record—as [the defendant] implicitly asks us to—that the [informant] intended to assert through his conduct something along the lines of "You are a drug dealer" or "We are entering into a sale of illegal drugs" when he handed a $20 bill to [the defendant] and received drugs in exchange.

Id. at 504–05 (citation omitted). Accordingly, the court held that the informant's nonverbal conduct was not a "statement" for Confrontation Clause purposes. *Id.* at 505.

Likewise, in the instant case, there was no evidence demonstrating that Keener's nonverbal conduct depicted on video was intended, as a substitute for identifiable words, to convey the message, "Like I said, the person I told you—Narcotics Task Force, with whom I have a working contract to incriminate others in exchange for having my own charges dropped—is a drug dealer, in fact, a drug dealer." The relevant portion of the video, played without audio, merely shows Keener approaching the appellant near a car at a residence, the appellant holding a small, clear, packet containing a white substance against a vehicle, and Keener producing cash. The video did not depict actions intended to be an assertion and therefore did not constitute a statement. The video was thus not hearsay for Confrontation Clause purposes. *Cf. United States v. Ibarra-Diaz*, 805 F.3d 908, 922–23 (10th Cir. 2015) (testimony recounting informant's nonverbal conduct of providing defendant a phone number, without indication that conduct was intended to be an assertion, did not implicate the Confrontation Clause); *Butler*, 763 F.2d at 14 (holding that there was "not a shred of evidence" that the defendant's girlfriend's act of driving a car to the

defendant's house with cocaine packaged for distribution was intended as an assertion, and therefore, it did not constitute hearsay); *see also Bennett v. Commonwealth*, 820 S.E.2d 390, 396 (Va. Ct. App. 2018) ("A video is admissible as an independent silent witness because, unless the video contains conduct that 'is intended [by the actor] as an assertion,' the contents of the video simply are not hearsay." (citation omitted)); *State v. Guttormson*, 869 N.W.2d 737, 742–43 (N.D. 2015) (holding that "silent squad car video" was not hearsay because it did not depict actions intended as "assertive statements"); *People v. Tharpe-Williams*, 676 N.E.2d 717, 719–20 (Ill. App. Ct. 1997) (holding that video captured by Wal-Mart security monitoring system of employee putting unscanned items into a bag was not hearsay); *Davis v. Civ. Serv. Comm'n of the City of Phila.*, 820 A.2d 874, 879 n.3 (Pa. Commw. Ct. 2003) (clarifying that a retail store security tape was not hearsay "because nonverbal conduct of a person is only hearsay if it is intended by the person as an assertion"); *Pritchard v. State*, 810 N.E.2d 758, 760–61 (Ind. Ct. App. 2004) (holding that jail surveillance recording did not constitute hearsay, as the conduct it depicted "was not intended to be an 'assertion'"); *but see United States v. Martinez*, 588 F.3d 301, 310–11 (6th Cir. 2009) (holding that a video made in response to an FBI request for purposes of demonstrating proper performance of nerve block injections constituted assertion of proper medical performance and was therefore a statement).

The appellant argues that Keener was "under contract" with police to perform the duties of a confidential informant and make good on his word that he could indeed buy drugs from the appellant. Therefore, he contends that Keener's conduct, which was at the behest of the police, suggests assertive conduct. However, as the *Gilmore* court noted, "the

fact that a [confidential informant] cooperated with law enforcement officials does not by itself convert nonverbal conduct that was not intended to be an assertion into a statement." *Gilmore*, 862 S.E.2d at 506 n.9. For the reasons stated, the video depicting the drug transaction did not constitute a statement under Rule 5-801(a)(2) and therefore was not hearsay.[4] Accordingly, the court's admission of the video of the drug transaction did not violate the appellant's confrontation right.

III.

Admissibility of the Drug Evidence

Finally, the appellant argues the trial court abused its discretion by admitting the fentanyl as an exhibit during trial. The appellant does not challenge the chain of custody at the time Detective Sisler packaged and sealed the drug evidence or when the package was in the chemist's custody. Instead, he contends that the drug evidence was not properly authenticated under Maryland Rule 5-901's "condition precedent to admissibility" because Keener, who was the first person on the chain of custody form, did not testify at trial. He explains that there was a period when police did not have eyes on Keener after the controlled buy when he had the drugs in a vehicle with two unknown individuals, and, therefore, the evidence was unaccounted for during a time span of at least five minutes.

The standard of review of a trial court's ruling on whether evidence satisfies the chain of custody requirement is abuse of discretion. *Easter v. State*, 223 Md. App. 65, 74–75 (2015). Maryland Rule 5-901 states that "[t]he requirement of authentication . . . as a

[4] Given our holding, we need not address the appellant's argument that the video was "testimonial."

condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Md. Rule 5-901(a). In the case of physical evidence, "the law requires the offering party to establish the 'chain of custody,' *i.e.*, account for its handling from the time it was seized until it is offered in evidence." *Johnson v. State*, 240 Md. App. 200, 211 (2019) (citation omitted). Most often, this is established through witness testimony from those responsible for safekeeping the evidence, negating the possibility of tampering or of a changed condition. *Easter*, 223 Md. App. at 75; *see* Md. Rule 5-901(b) (providing by way of illustration that authentication can be established through "[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be").

The State's burden is not to establish the chain of custody beyond a reasonable doubt, but to prove that there is a "reasonable probability that no tampering occurred." *Johnson*, 240 Md. App. at 211 (citation omitted). "What is necessary to negate the likelihood of tampering or of change of condition will vary from case to case." *Easter*, 223 Md. App. at 75. Any gaps in the chain of custody typically do not require the circuit court to exclude evidence; rather, they go to the weight of the evidence. *Id.*; *see also Wheeler v. State*, 459 Md. 555, 568–69 (2018); *Boston v. State*, 235 Md. App. 134, 161 (2017) ("Missing links from the chain of custody do not, as a matter of law, mandate exclusion of the evidence . . . .").

The Supreme Court of Maryland explained that the chain of custody as to controlled dangerous substances in a criminal case

> *[S]tarts with the seizing officer, not with the individuals who made or manufactured the drugs or anyone who may have handled the evidence before it came into the possession of the officer who collected it*. Although the proof negating the probability of changed conditions between the crime and the trial is described as proof of the chain of custody, the State is required to establish a chain of custody from the point at which evidence is collected or seized, not from the precise moment of the crime. In neither *Wheeler* [*v. State*, 459 Md. 555 (2018),] nor *Cooper* [*v. State*, 434 Md. 209 (2013),] was the State required to prove, as a condition precedent to authentication, what occurred with the evidence before an officer took possession of it. Any alleged variance in the condition of the evidence between the time of the crime and the State having collected it would go to the weight to be accorded the evidence by the trier of fact, not admissibility.

Irwin Indus. Tool Co. v. Pifer, 478 Md. 645, 677–78 (2022) (emphasis added); *accord* CJP § 10-1002(a)(1) (defining a "chain of custody" for controlled dangerous substances as the "seizing officer," the "packaging officer," if different than the seizing officer, and "the chemist or other person who actually touched the substance").

The appellant posits that, because Keener was involved in the controlled buy and his name was listed first on the chain of custody form, he should be considered a "seizing officer" for chain of custody purposes. However, even if this argument is accepted, Keener's absence at trial does not undermine the integrity of the drug evidence. *See Thompson v. State*, 80 Md. App. 676, 683 (1989) (explaining that the legislative purpose of CJP §§ 10-1001 to 10-1003 "was to assure the reliability of evidence offered in a criminal case" and that they were "not . . . technical rule[s] etched in stone requiring either the production of three live witnesses or forfeiture of the evidence upon which the prosecution is founded").

We conclude that the trial court did not abuse its discretion in admitting into evidence the bag of fentanyl in the absence of Keener's testimony. Prior to the controlled

buy, the police searched Keener for any drugs. Keener carried a video recording device which sent a live audio and video transmission to the police of his actions. Detective Sisler watched portions of the video live and heard the audio the entire time.

Police followed the vehicle in which Keener rode to the site of the controlled purchase. Detective Sisler saw via video that the appellant and Keener engaged in what appeared to be a hand-to-hand drug transaction. The video, which was played for the jury, depicts the appellant holding a small, clear packet containing a white substance against the top of a car, while Keener produced cash.

Members of the Task Force conducted constant surveillance of Keener. When Keener returned to the vehicle, Detective Sisler followed and instructed Keener to get dropped off at a specific area where the detective "kept constant eyes on Mr. Keener during that time." Although there were two other people in Keener's vehicle, Detective Sisler testified that he did not have any concerns that they would jeopardize the investigation. When he reconnected with Keener, Detective Sisler took the fentanyl from Keener, packaged it, and sealed the bag for analysis.

At trial, Detective Sisler was shown an exhibit that he identified as a "picture of the Fentanyl that was purchased" by Keener. Detective Sisler testified that this photograph fairly and accurately depicted the fentanyl "from that day." Accordingly, we discern no abuse of discretion in the trial court's decision to admit the drug evidence.

The appellant cites an out-of-state case, *State v. Sweet*, 647 S.E.2d 202 (S.C. 2007), to support the purported proposition that a reasonable probability of tampering cannot be negated where a controlled purchase involves a confidential informant seizing the drugs

who is subsequently unavailable to testify and whose transaction cannot be corroborated by police. *See id.* at 206. In *Sweet*, the police arranged for a confidential informant to purchase drugs from the defendant at a local motel. *Id.* at 204. Officers searched the informant and his car beforehand, then followed him to the motel, where they maintained video surveillance of the parking lot. *Id.* The officers also wired the informant so that the transaction could be monitored. *Id.* Officers observed the informant meet the defendant outside and accompany him into a motel room. *Id.* Although they did not see inside the room, they heard only two voices through the wire and saw no one enter or leave on video. *Id.*

After the informant left, officers followed him to the station, where he turned over 0.21 grams of crack cocaine from the purchase. *Id.* At trial, the defendant objected to the introduction of the drugs that the informant allegedly purchased from the defendant because the informant was unavailable to testify. *Id.* The trial court overruled the objection, and the defendant was ultimately convicted. *Id.*

On appeal, the Supreme Court of South Carolina reversed, holding that without the testimony of the confidential informant, the State's proof failed to establish a complete chain of custody. *Id.* at 206. The court explained:

> None of the chain of custody witnesses testified to seeing inside the motel room in order to establish who was in the room making the alleged transaction. Additionally, none of the witnesses who heard only "one other voice" over the informant's body wire could affirmatively identify this voice as being that of [the defendant]. Although Greenville police officers testified to a brief search of the informant both before and after the incident, and that they observed no other individuals enter or exit the room during their surveillance, this circumstantial evidence does not show how the informant

> came into possession of the drug evidence and in what condition he received it.

Id. at 206.

The circumstances in *Sweet* are distinguishable from those in this case. Unlike in *Sweet*, Detective Sisler testified that the informant was both audio and visually recorded and that he observed on video what appeared to be a hand-to-hand transaction with a person he identified as the appellant. Detective Sisler's testimony was corroborated by the video showing the appellant holding a small, clear packet of white substance and Keener giving the appellant cash. The fact that Detective Sisler could not see every detail while Keener rode back in the car after the controlled buy does not undermine the integrity of the drug evidence. Keener was still under video and audio surveillance during that time, and, more significantly, Detective Sisler identified a photograph of the fentanyl at trial as fairly and accurately depicting the drugs that Keener purchased from the appellant during the controlled buy. *Cf. State v. Valentine*, 689 S.E.2d 608, 609 (S.C. 2010) (distinguishing *Sweet*, holding that the trial court did not abuse discretion by admitting cocaine where, *inter alia*, the confidential informant was under direct police observation except during the approximately ten minutes he was in the apartment and only under audio surveillance). For the reasons stated, the State presented enough evidence to "negate[] a reasonable probability of alteration or tampering." *Wheeler*, 459 Md. at 569. Consequently, the court did not abuse its discretion by admitting into evidence the bag of fentanyl.

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