Circuit Court for Worcester County
Case No. C-23-CR-18-000398

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 423

September Term, 2019

JAMES BRANDON TANKARD

v.

STATE OF MARYLAND

Fader, C.J.,
Graeff,
Moylan, Charles, E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: June 4, 2020

Following a jury trial in the Circuit Court for Worcester County, James Brandon Tankard, appellant, was convicted of possession of heroin with intent to distribute, possession of heroin, and possession of Alprazolam. On appeal he contends that the trial court erred in admitting evidence of his refusal to consent to a search of his cell phone. Because we are persuaded that any error in admitting the evidence was harmless beyond a reasonable doubt, we shall affirm.

Ocean City Police Department officers recovered 58.54 grams of heroin, one Alprazolam pill, a cell phone, and $700 from Mr. Tankard's person during a search incident to arrest. The heroin was packaged in 20 "bundles," each of which contained approximately 13 wax bags of heroin. During the cross-examination of Detective Rick Gutowski, one of the officers who was involved in the search, defense counsel asked whether he or any other officer had made "any effort to run Cellebrite on [Mr. Tankard's] phone."[1] Detective Gutowski testified that they had not. The next witness called by the State was Detective James Schwartz, who interviewed Mr. Tankard following his arrest. During direct, the prosecutor asked Detective Schwartz if he had "asked [Mr. Tankard] anything specifically about [his] cell phone." Detective Schwartz testified that he had asked him for consent to search the phone. When the prosecutor asked him what Mr. Tankard's response was, defense counsel objected, arguing that the question was analogous to asking about "the exercise of [Mr. Tankard's] constitutional right to remain silent." The court overruled the objection, stating that "this isn't in a vacuum, you asked him a question

[1] Cellebrite is a tool used by law enforcement to extract data from a person's cell phone.

about the Cellebrite[.]" Detective Schwartz then testified that Mr. Tankard had not given consent to search his phone.

On appeal, Mr. Tankard contends that the court erred in admitting Detective Schwartz's testimony regarding his refusal to consent to the search. *See Longshore v. State*, 399 Md. 486, 537 (2007). The State asserts that defense counsel opened the door to that line of questioning by raising the issue of whether the police had searched Mr. Tankard's phone to show that the "State lacked possibly important evidence about what was on Tankard's cell phone." Alternatively, the State claims that any error in admitting was harmless beyond a reasonable doubt.

We need not resolve whether the court erred in admitting Detective Schwartz's testimony, because, even if we assume that the trial court erred, the error was harmless beyond a reasonable doubt. "The harmless error rule embod[ies] the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." *Frobouck v. State*, 212 Md. App. 262, 284 (2013) (internal quotation marks and citation omitted)). To prevail in a harmless error analysis, "we must be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict." *State v. Heath*, 464 Md. 445, 471 (2019) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Porter v. State*, 455 Md. 220, 234 (2017) (internal quotation marks and citation omitted).

Here, the evidence of Mr. Tankard's guilt was overwhelming. The police found $700, an Alprazolam pill, and approximately 58 grams of heroin, which had been packaged in 261 wax bags, on his person. During an interview with police, Mr. Tankard admitted that he had purchased the contraband and that he "[sold] heroin to support his habit to get more money to purchase more heroin." Moreover, Detective Rodney Wells, who was qualified as an expert in the common practices of users and dealers of controlled substances, opined that the large amount of heroin and cash recovered, combined with Mr. Tankard's admission that he sold heroin, indicated that Mr. Tankard had possessed the heroin with an intent to distribute. Consequently, we are persuaded beyond a reasonable doubt that the admission of Detective Schwartz's testimony, if error, did not influence the jury's verdict and was therefore harmless.

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