UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1957

September Term, 2014

ANDREA SHERON HARPS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Hotten,
Nazarian,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 17, 2015

Andrea Sheron Harps, the appellant, was convicted by a jury in the Circuit Court for Harford County of manufacture of marijuana, possession with intent to distribute marijuana, and possession of marijuana. She was sentenced to five years' incarceration, with all but nine months suspended, for the manufacturing count, with five years of supervised probation. A concurrent suspended sentence was imposed for possession with intent to distribute, and the remaining conviction was merged for sentencing. The appellant presents two questions for review, which we have reworded:

I. Did the trial court err in excluding evidence of Jerry Harps's guilty plea?

II. Did the trial court err in excluding Jerry Harps's confession to manufacturing and selling marijuana?

For the following reasons, we shall affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

On July 17, 2013, Officer Aaron Sandruck of the Havre de Grace Police Department responded to a call for a domestic disturbance at the house where the appellant and her husband, Jerry Harps, were living with their three young children. While speaking with the Harpses outside their house, Officer Sandruck smelled "an overwhelming odor of raw marijuana emanat[ing] from within the residence." He asked for their consent to enter, but they would not give it. After clearing the domestic dispute call, Officer Sandruck obtained a search and seizure warrant for the Harpses' house, which was executed early the next morning. Detective Thomas Deluca and Sergeant Robert Royster of the Harford County

Narcotics Task Force assisted in executing the warrant.

Upon entering the Harpses' house, the police saw two large black tents that took up most of the living and dining room space. The tents were so large that it was difficult to walk through that area of the house. The tents were being used to cultivate marijuana plants. The windows of the living room were covered in black plastic that prevented anyone from seeing inside. A third "grow tent" was located in the master bedroom. There were grow lights, an irrigation system, fans, and a ventilation system.

The police recovered various containers full of marijuana; packaging material; a bag of labeled marijuana seeds; a scale; and a book entitled "Marijuana Growers Handbook." They also recovered a cardboard box containing Tupperware bins of marijuana; plastic baggies; a "plant cam" used for watching plants as they grow; a glass pipe used for smoking; and cash. In the master bedroom, inside a drawer that contained women's underwear and a silk scarf, the police found a Tupperware container full of marijuana, and several similar containers that were empty.

The appellant was charged with manufacturing marijuana, possessing marijuana with the intent to distribute, and simple possession. Her husband was charged with manufacturing marijuana, possessing marijuana with the intent to distribute, and possession of a firearm in relation to a drug trafficking crime. Before trial, he pled guilty to the manufacturing charge, and the State *nolle prossed* the remaining charges against him.

At trial, Sergeant Royster, an expert in the field of controlled dangerous substances ("CDS"), including methods of manufacture, packaging, and distribution of CDS, testified that the marijuana growing operation in the Harpses' house was "very impressive" and "high-tech." In Sergeant Royster's opinion, the marijuana was not being grown for personal use, but to be sold. He based his opinion on the cost of the growing equipment, the number of plants (which included plants at different stages of growth, which he explained assured a constant harvest), and the weighing and packaging equipment found in the house.

The appellant testified in her own defense. She denied any involvement in the manufacturing or distribution of the marijuana, stating that her husband assembled the grow tents and tended to the plants. She admitted to possessing marijuana, explaining that marijuana is "[v]ery much" a part of her religion, and that it is her religious belief that marijuana is a "holy healing plant that god has given his people as their birth right and their inheritance."

We will include additional facts as relevant to our discussion.

DISCUSSION

I.

At trial, defense counsel attempted to move into evidence a copy of the disposition of the charges against Jerry Harps, which showed that he had pled guilty to manufacturing marijuana. The prosecutor objected, arguing that the crimes of manufacturing marijuana and

possession with intent to distribute marijuana can be committed by two people acting jointly, and therefore Jerry Harps's guilty plea was not relevant to show that the appellant had not committed the crimes of manufacturing marijuana and possession with intent to distribute. The court agreed and sustained the objection.

The appellant contends the court's relevancy ruling was in error because evidence that her husband had pled guilty to manufacturing the marijuana involved in this case would have a tendency to prove that he was solely responsible for the manufacture of the marijuana, and therefore that she lacked criminal agency. The State counters that evidence of the guilty plea was not relevant because the nature of the charges against the appellant did not demand exclusivity of guilt by a single criminal agent. The State maintains that it would have been unfairly prejudiced had the evidence been admitted because it would not have had an opportunity to cross-examine Mr. Harps.

"[T]he admission of evidence is committed to the considerable discretion of the trial court. *Sifrit v. State*, 383 Md. 116, 128 (2004). Accordingly, we will not disturb a trial court's evidentiary ruling unless there has been a clear abuse of discretion. *See Robinson v. State*, 348 Md. 104, 121 (1997) ("The determination of whether specific evidence is relevant in a given case rests with the trial court, and that determination will not be disturbed on appeal absent a clear abuse of discretion."). A circuit court abuses its discretion "only when it acts without reference to any guiding rules or principles, and . . . we find an abuse of

discretion only when the court's act is so untenable as to place it beyond the fringe of what the court deems minimally acceptable." *State v. Hardy*, 415 Md. 612, 621-22 (2010) (footnote omitted) (citations and internal quotation marks omitted).

The fact that Mr. Harps pleaded guilty to manufacturing marijuana had no tendency to show that the appellant was *not* manufacturing marijuana as well or that she was *not* in possession of the marijuana in the Harpses' house with the intent to distribute it. It is obvious that more than one person can participate together in acts that constitute the manufacture of marijuana.[1] Here, large portions of the Harpses' house were being used to grow marijuana. The evidence readily could support a reasonable finding that the appellant was engaged in the large marijuana manufacturing operation in her own house. Mr. Harps's guilty plea to manufacturing marijuana did not detract from that evidence.

Possession, in the context of possession of CDS, is the "exercise [of] actual or constructive dominion or control over a thing by one or more persons." Md. Code (2002, 2012 Repl. Vol., 2014 Supp.), § 5-101(v) of the Criminal Law Article; *see also Belote v. State*, 199 Md.App. 46, 54-55 (2011) (noting that the CDS statutes recognize that possession

[1]"'Manufacture,' with respect to a controlled dangerous substance, means to produce, prepare, propagate, compound, convert, or possess a controlled dangerous substance: (i) directly or indirectly by extraction from substances of natural origin . . . ." Md. Code (2002, 2012 Repl. Vol., 2014 Supp.), § 5-101(q) of the Criminal Law Article. "Manufacture includes packaging and repackaging a controlled dangerous substance and relabeling its containers." *Id.*

may be joint). The State is not required to prove "sole possession and sole control; there may be joint possession and joint control in several persons." *Jason, Johnson and Moore v. State*, 9 Md.App. 102, 111 (1970); *see also Folk v. State*, 11 Md.App. 508, 512 (1971) ("Nor is it necessary, in order to be found in joint possession of a contraband drug, that the appellant have a 'full partnership' in the contraband. It is enough that she controlled so much of it as would be necessary to permit her to take a puff upon a marihuana cigarette.").

Mr. Harps's guilty plea to manufacturing marijuana did not have a tendency to show that the appellant was not in possession, with the intent to distribute, of the marijuana being grown in the Harpses' house. *State v. Moore*, 522 S.E.2d 354 (S.C. Ct. App. 1999), is helpful. There, the defendant was charged with possession with intent to distribute drugs and unlawful possession of weapons. The drugs and weapons were found during a police stop of a vehicle the defendant was driving and in which there were passengers. At trial, the defendant attempted to introduce the guilty pleas of the passengers. He argued that the guilty pleas tended to show that the drugs and weapons did not belong to him. The trial court ruled that the guilty pleas were not admissible. The South Carolina Court of Appeals affirmed, holding that "[g]uilty pleas of co-defendants are not relevant to or admissible as substantive evidence of a defendant's guilt or innocence." *Id*. at 357. *Accord Hunter v. Indiana*, 578 N.E.2d 353, 356 (Ind. 1991) ("[E]vidence of a conviction or guilty plea of others charged with the same offense as the defendant is not substantive evidence of the

defendant's guilt or innocence.").

The fact that Jerry Harps pled guilty to manufacturing marijuana inside the Harpses' residence did not have a tendency to show that the appellant was not *also* engaged in the manufacture and distribution of that marijuana. Therefore, evidence of the guilty plea was not relevant to the appellant's criminal agency and properly was excluded from evidence.[2]

II.

During cross-examination of Detective Deluca, defense counsel posed a question that alluded to a statement Jerry Harps had made to a police officer when the search warrant for the Harpses' house was being executed. Detective Deluca had not heard what Mr. Harps had said, but had summarized the remark in his investigation report. The prosecutor objected, and a bench conference was held. Defense counsel explained that Mr. Harps had told the officer that he was the person manufacturing and distributing the marijuana. The court ruled that any such statement by Mr. Harps was hearsay and was not admissible through Detective Deluca.

At a break in the proceedings, the court took up the issue again, ruling that, unless

[2]The appellant's reliance on *Sessoms v. State*, 357 Md. 274 (2000), is misplaced. *Sessoms* did not involve the admission of another person's plea of guilty to the same offense that the defendant had been charged with, in support of a theory that someone other than the defendant committed that crime. Instead, the defendant sought to introduce evidence of an unrelated crime committed by his accuser's brother, that provided a theory of the case that tended to show that he was innocent. *Id.* at 291-92.

it could be established that Mr. Harps was unavailable to testify, his statement to the officer would be inadmissable. Defense counsel conceded that Mr. Harps, who was incarcerated, was *not* unavailable as a witness, within the meaning of Rule 5-804.[3]

The appellant contends the trial court erred in excluding this evidence because, even if it was hearsay, it should have been admitted as a matter of fundamental fairness. The State counters that this issue is not preserved for review and lacks merit in any event.

"'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(c).

[3]Md. Rule 5-804 provides, in part:

"Unavailability as a witness" includes situations in which the declarant:

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
> (2) refuses to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
> (3) testifies to a lack of memory of the subject matter of the declarant's statement;
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
> (5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b) (2), (3), or (4) of this Rule, the declarant's attendance or testimony) by process or other reasonable means.

> Hearsay, under our rules, *must* be excluded as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence or is "permitted by applicable constitutional provisions or statutes." Md. Rule 5-802. Thus, a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility.

Bernadyn v. State, 390 Md. 1, 8 (2005).

Through Detective Deluca, the appellant sought to introduce an out-of-court statement made by Mr. Harps to another police officer, that he (Mr. Harps) was the person manufacturing and distributing the marijuana in the Harpses' house. This was an out-of-court statement offered to prove its truth – that Mr. Harps was the only person engaged in the manufacture and distribution of marijuana in the Harpses home. The appellant makes no argument that the statement was not hearsay – which it obviously was – and does not argue that the statement was admissible under any of the exceptions to the rule against hearsay. Instead, she argues that the statement should have been admitted as a matter of "fundamental fairness."

This argument was not raised before the trial court and therefore is not properly before us. *See* Maryland Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court. . . .").

Even if the issue had been properly preserved, we would not find any abuse of discretion. There is no constitutional provision or statute providing for hearsay to be

admitted as a matter of fundamental fairness. As the State points out, even if the appellant's argument could be taken to mean that the "[o]ther exceptions" provision in Rule 5-803(b)(24) applies, the requirements of that exception were not met.[4] We see nothing in the record establishing the existence of "exceptional circumstances."

JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[4]Md. Rule 5-803(b)(24) provides:

> Under exceptional circumstances, the following are not excluded by the hearsay rule: A statement not specifically covered by any of the hearsay exceptions listed in this Rule or in Rule 5-804, but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.