UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0907

September Term, 2015

BELINDA WINDSOR

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Meredith,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: August 1, 2016

A jury in the Circuit Court for Calvert County convicted Belinda Windsor, appellant, of possession with intent to distribute Oxycodone. Appellant was sentenced to a term of 12 years' imprisonment, with all but five years suspended. In this appeal, appellant presents the following question for our review:

Did the trial court err in admitting hearsay evidence?

Finding no error, we affirm.

BACKGROUND

On April 22, 2014, Deputy Hardesty of the Calvert County Sheriff's Office was on routine patrol when he observed a vehicle make a left-hand turn through a red light. Deputy Hardesty initiated a traffic stop and made contact with the driver, later identified as appellant. After issuing a warning to appellant for the traffic infringement, Deputy Hardesty asked appellant if he could search her vehicle, and appellant consented.[1] The search revealed "three very small plastic clear glassine baggies" and a shopping bag containing "six bottles of medication." One of the bottles, a prescription for Oxycodone, was in appellant's name and had been filled by appellant earlier that day. Deputy Hardesty noted that the bottle "had a significant amount of pills missing." From inside of the bottle, Deputy Hardesty recovered a note that read, "acquired eight tools, amount owed $120," and appeared to be signed either "HRS" or "HRB."[2] Appellant was eventually arrested and charged.

[1] Deputy Hardesty testified that the area in which Appellant was stopped was "a well-known drug area for transactions."

[2] The author of the note was not identified.

At trial, appellant moved to have the note excluded, arguing that it was "an IOU note" from an unidentified individual and thus was inadmissible hearsay that did not fall within one of the hearsay exceptions. The court found as follows:

> The issue is whether [appellant] has a right to [confront] the officer who seized the note and cross-examine the officer about the circumstances under which the note was found. That's the critical issue. That's where her right to confrontation comes into play. And if the Deputy is going to get on the stand and say as part of my investigation I recovered a pill bottle with this note inside of it, and she is charged with this, distribution of various drugs, and I'm telling you or testifying that this is evidence of that kind of activity, it's going to be for the jury to accept that or not. I don't see that there is any prejudice to that because that's part of the State's case, and by its nature that is prejudicial against the defense, prejudicial in the sense that they are building a case against her. You have the opportunity to cross-examine the officer. You have the opportunity to explore what this piece of paper is, what its relevance is. Again, he is going to have to get up there and authenticate it and give us the circumstances. The key question is whether the jury is going to accept his testimony or not.
>
> It's not hearsay, I hate to disagree with you, but it's not hearsay in the sense of co-conspirators' statements being used against each other. There are no co-conspirators in this case, and we don't know who the author of the note is. The key issue is does it fit into the scheme or is it part of the evidence to show that [appellant] was distributing drugs or in possession with intent to distribute drugs. That's the key issue. If the officer is going to proffer or give his testimony about that, you get to cross-examine him about that, it's up to the jury to make that decision.
>
> For these reasons the motion in limine on the note or the ledger is going to be denied.

Later, Detective Sergeant Brian McCourt of the Calvert County Sheriff's Office testified as an expert in drug investigations and drug trafficking. Detective McCourt testified that the "street value" of Oxycodone was approximately $1 per milligram and that the pills contained in the Oxycodone bottle were 15 milligrams each. Detective McCourt also testified that there should have been 85 Oxycodone pills in the bottle and "if

[appellant] had taken them as she was supposed to, maybe at the most two, there should be 83, but we are missing 83." Detective McCourt then determined that the note found inside of the bottle was indicative of possession with intent to distribute because "15 pills, 15 milligram pills, eight of them sold, the street value is $120." Detective McCourt concluded that, in his expert opinion, "these pills were for sale." [3]

STANDARD OF REVIEW

A trial court's ruling on the admissibility of evidence is generally reviewed for abuse of discretion. *Hopkins v. State,* 352 Md. 146, 158 (1998). On the other hand, "[w]hether evidence is hearsay is an issue of law reviewed *de novo*." *Bernadyn v. State,* 390 Md. 1, 8 (2005). Accordingly, "the trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review." *Gordon v. State,* 431 Md. 527, 538 (2013) (internal citations omitted).

DISCUSSION

Appellant argues that the statement, "acquired eight tools, amount owed $120," was inadmissible hearsay and should have been excluded. The State counters that the statement was not hearsay because it was a "verbal act" and was not offered to prove the truth of any assertions. We agree with the State.

[3] In rendering his opinion, Detective McCourt considered additional evidence, including several text messages recovered from Appellant's phone from people allegedly looking for drugs.

Under Maryland Rule 5-801(c), "[h]earsay 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." *Id.* These out-of-court statements are generally inadmissible; however, "[a]n out-of-court statement is admissible if it is not being offered for the truth of the matter asserted[.]" *Conyers v. State,* 354 Md. 132, 158 (1999). One such example is a "verbal act."

"Verbal acts are those 'out-of-court statements [that] are operative legal facts which constitute the basis of a claim, charge or defense[.]'" *Banks v. State,* 92 Md. App. 422, 432 (1992) (internal citations omitted). "Since the law accords the making of such statements a certain legal effect, the sincerity and reliability of the declarant is of no consequence; the simple fact that such statements are made is relevant." *Id.* "Verbal acts include, for example, bequest language in wills, offer and acceptance language in contracts, and language which gives rise to a claim of libel or slander[.]" *Id.* (internal citations omitted).

In *Best v. State,* 71 Md. App. 422 (1987), this Court determined that statements made during a drug transaction could be considered a "verbal act." In that case, a detective answered the telephone while executing a search warrant at the home of an alleged drug dealer. *Id.* at 430. During the call, the caller made statements indicating that she intended to purchase drugs, and these statements were used against the defendant at trial. *Id.* On appeal, the defendant argued that the statements were inadmissible hearsay. *Id.* at 432. We disagreed:

> [The detective's] testimony concerning his conversation with [the caller] was not offered in court for the truth of what [the caller] said; rather, it was offered as evidence of the fact that the call was made. As such, [the detective's]

> testimony was not hearsay at all, but evidence of a verbal act. Testimony concerning telephone calls made to or received at a particular location has been held admissible frequently in prosecutions for bookmaking and other gambling activities, where such testimony is offered not to establish the truth of what was said over the telephone, but as evidence that the calls were made to the location for the purpose of placing bets. . . . Analogously, [the detective's] testimony about the phone call in this case was offered as evidence that the call was made for the purpose of arranging an illegal drug transaction.

Id. (internal citations omitted).

More recently, in *Garner v. State,* 414 Md. 372 (2010), the Court of Appeals discussed the admissibility of an out-of-court statement nearly identical to the one at issue in *Best*. *Id.* In that case, the defendant was arrested for possession of cocaine. *Id.* at 376. While the defendant was in custody, his cell phone rang, and a police officer answered it. *Id.* The caller asked, "Can I get a 40," and then hung up when the officer asked for his name. *Id.* At trial, the State introduced the caller's statement as evidence that the defendant's possession was "commercial in nature."[4] *Id.*

On appeal, the defendant argued that the trial court should have excluded the statement as hearsay. *Id.* at 381. The Court of Appeals disagreed, explaining that "[w]hen a telephone is used to receive illegal wagers or to receive orders called in by persons who wish to purchase a controlled dangerous substance, the telephone becomes an instrumentality of the crime." *Id.* at 382. In other words, "[t]he making of a wager or the purchase of a drug, legally or illegally, is a form of contract. . . . The telephoned words of

[4] A police officer testified that a "40" is slang for $40 worth of cocaine. *Garner,* 414 Md. at 376.

the would-be bettor or would-be purchaser are frequently categorized, therefore, as verbal parts of acts." *Id.* (internal citations and quotations omitted). The Court explained:

> "Whether the caller makes a commitment or just tries to make a bet or buy drugs, placing the call is not simply an assertion but action seeking to achieve these ends, and the performative quality of such behavior justifies non-hearsay treatment when it is proved as a means of showing that bets are taken or drugs are sold where the call is received. Courts admit such evidence in both gambling and drug cases, and this result seems sensible."

Id. at 385 (quoting Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence*, § 8.22 at 773 (4th ed. 2009)).

In addition to finding that the statement was admissible as a "verbal act," the Court of Appeals found that any "assertions" implicit in the caller's question did not affect its admissibility:

> While there may be an "implied assertion" in almost any question, in the case at bar, the only assertion implied in the anonymous caller's question was the assertion that the caller had the funds to purchase the drugs that he wanted to purchase. Because the caller's request did not constitute inadmissible hearsay evidence, the rule against hearsay does not operate to exclude evidence of the "verbal act" that established a consequential fact: Petitioner was in possession of a telephone called by a person who requested to purchase cocaine.

Id. at 388.

This Court has even found that non-contemporaneous, written statements can be considered "verbal acts." In *Fair v. State*, 198 Md. App. 1 (2011), this Court held that the writing on a paycheck was not hearsay, but instead was "a verbal part of the act of issuing the check[.]" *Id.* at 37. In that case, the defendant was arrested for possession of marijuana, and a set of keys was found on his person. *Id.* at 4. The police linked the keys to a nearby car, and a search of the car's center console revealed a bag of marijuana, a handgun, and a

recent paycheck issued to the defendant. *Id.* at 3. Prior to trial, the State indicated that it intended to use the paycheck to show that the defendant had a possessory interest in the car and had recently accessed the center console. *Id.* at 6. The defendant moved to exclude the paycheck, claiming that the information on the check was hearsay. *Id.* The trial court denied the motion, and the defendant was convicted of possession of marijuana and possession of a firearm. *Id.* at 8.

On appeal, the defendant reiterated his argument that the information contained in the check was hearsay. *Id.* at 13. After a lengthy review of Maryland hearsay law, including the Court of Appeals' decision in *Garner, supra,* we held that the paycheck was a "verbal act" and thus not hearsay. *Id.* at 37. In doing so, we noted that the information contained in the check was not admitted for its truth, but rather "was merely circumstantial non-assertive crime scene evidence." *Id.* at 37. In other words, "[i]ts relevance was that its presence supported an inference that [the defendant], who happened to be the payee of the check, had recently accessed the console and was therefore aware of its contents." *Id.* at 37-38.

Like the Court of Appeals in *Garner, supra*, we also recognized that, while the check may have contained certain "implied assertions" that could be considered for their truth, the circumstances did not warrant excluding the evidence based on these assertions. We emphasized that, in general, checks are "legally operative documents with a meaning independent of the words they display . . . [and] their significance lies solely in the fact that [they were] made[.]" *Id.* at 36 (internal citations and quotations omitted). We further noted that "the only assertions implied by the paycheck [were] that the [issuer] owed, or believed

it owed, a named employee wages for a period worked, and that [it] had, or believed it had, the funds in its account to cover the check for those wages." *Id.* at 38. Because the paycheck was not offered to prove the validity of these implied assertions, but rather as circumstantial evidence of the defendant's knowledge of and possessory interest in the contraband found in the center console, we held the check was "properly admitted." *Id.*

In light of the above case law, we hold that the note found in appellant's Oxycodone bottle was a "verbal act" and therefore admissible. As appellant readily concedes, the note "appeared to be an IOU, stating that the declarant had taken a certain number of 'tools' and owed $120." Indeed, the statement was nothing short of a promissory note, evidencing a pledge by "HRS" to reimburse appellant for "tools" taken from the pill bottle. *See* Md. Code, Commercial Law § 3-103(a)(9) (defining a promise, in terms of a negotiable instrument, as "a written undertaking to pay money signed by the person undertaking to pay."). Therefore, the statement contained in the note was less a "statement" and more a "legally operative document" akin to a contract or, as was the case in *Fair*, a check. As previously discussed, such "verbal acts" are admissible as non-hearsay. *See, e.g., Banks,* 92 Md. App. at 432; *Fair,* 198 Md. App. at 38.

Moreover, any "assertions" contained in the note, either expressed or implied, were immaterial in light of the note's evidentiary purpose. Whether "HRS" *actually* "acquired 8 tools" or "owed $120" was inconsequential, as the note was not offered to prove the truth of these statements, nor was it offered to show that appellant had, in fact, sold eight Oxycodone pills to "HRS" for $120. Rather, the note was offered in conjunction with other evidence to show, based on the totality of the circumstances, that appellant's possession of

the Oxycodone was commercial in nature. *See Fair,* 198 Md. App. at 37 ("If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay.") (*quoting* Federal Rules of Evidence 801(c) (advisory committee's note)); *See also Salzman v. State,* 49 Md. App. 25, 55 (1981) ("Intent to distribute controlled dangerous substances is 'seldom proved directly, but is more often found by drawing inferences from facts proved which reasonably indicate under all the circumstances the existence of the required intent.'") (internal citations omitted).

Lastly, although the trial court's ruling on defense counsel's motion to exclude the note came before any evidence was taken, the State did not introduce the contents of the note in its case-in-chief until Detective McCourt testified. We find this significant in light of Maryland Rule 5-703(b), which states that "facts or data reasonably relied upon by an expert … may, in the discretion of the court, be disclosed to the jury even if those facts and data are not admissible in evidence." *Id.* Detective McCourt, in forming his expert opinion, reasonably relied on the note as probative of his overall assessment that appellant possessed the Oxycodone with an intent to distribute. As a result, even if the note was hearsay, its admission would have been permissible as necessary to illuminate Detective McCourt's expert testimony. *See Cooper v. State,* 434 Md. 209, 230-31 (2013) (discussing "inadmissible hearsay" as being otherwise admissible under Md. Rule 703); *See also Green*

v. State, 81 Md. App. 747, 755 (1990) ("A ruling generally will be affirmed even when the ruling is right for the wrong reason.").

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