Circuit Court for Baltimore City
Case No. 116069010

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2669

September Term, 2016

DOMINICK COMEGYS

v.

STATE OF MARYLAND

Woodward, C.J.,
Nazarian,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: April 17, 2018

Appellant, Dominick Comegys, was convicted by a Baltimore City jury of possession with intent to distribute and possession of cocaine, possession of a firearm during a drug trafficking crime, and possession of a firearm after a prior drug conviction. Comegys appeals his convictions, arguing that the evidence establishing his possession of the cocaine and handgun was insufficient, and that the trial court erroneously allowed hearsay evidence to be introduced. We conclude the court did not err, and affirm.

I. SUFFICIENCY OF THE EVIDENCE

Acting on an anonymous tip, Baltimore City police officers began surveillance on a drug dealing operation in front of a house at 6221 Fortview Way in the O'Donnell Heights neighborhood of Baltimore City. There, they observed Comegys engage in activities that the officers concluded were consistent with the hand-to-hand sale of drugs. The officers observed Comegys enter and exit the house at least twice. Once they arrested Comegys, the officers entered the house and obtained consent to search from a woman they found inside. The officers searched the house and found scales, zip-loc bags, gel caps, and sifters used in the packaging of drugs for sale in open view in the kitchen. They also found a quantity of cocaine in a kitchen cabinet, as well as a handgun in an adjacent cabinet. Comegys first argues that the evidence was insufficient to prove that he had possession of the cocaine and the handgun recovered in the house. We disagree.

Our review of sufficiency of the evidence is highly deferential to the State:

> In determining whether the evidence is legally sufficient, we examine the record solely to determine whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing the State's

> evidence, including all reasonable inferences to be drawn therefrom, in the light most favorable to the State.

Fuentes v. State, 454 Md. 296, 307 (2017) (cleaned up).[1]

There was no evidence of actual possession, so to find Comegys guilty the jury would have had to infer that Comegys constructively possessed the drugs and handgun. Md. Code Criminal Law § 5-101(v). To prove constructive possession, the evidence must show that the defendant knew of the presence of the items, and "such knowledge may be proven by circumstantial evidence." *Dawkins v. State*, 313 Md. 638, 651 (1988). This can be proven by showing links to the cocaine and gun, as well as by links to the location in which the cocaine and gun were found. *State v. Gutierrez*, 446 Md. 221, 234 (2016). The State introduced a good deal of evidence to show possession of the drugs and gun. First, there was evidence linking Comegys to the house where the drugs and gun were discovered:

- Comegys stipulated at trial that he had reported the house as his residence to a government housing agency.
- Comegys was seen by police entering and exiting the house, and specifically the kitchen area of the house, on several occasions.
- When he was arrested, Comegys had keys to the house in his pocket.

[1] "Cleaned up" is a new parenthetical intended to simplify quotations from legal sources. *See* Jack Metzler, *Cleaning Up Quotations*, J. APP. PRAC. & PROCESS (forthcoming 2018), https://perma.cc/JZR7-P85A. Use of (cleaned up) signals that to improve readability but without altering the substance of the quotation, the current author has removed extraneous, non-substantive clutter such as brackets, quotation marks, ellipses, footnote signals, internal citations or made un-bracketed changes to capitalization.

- When asked by the police, Comegys identified the keys as his house keys.

Then, there was evidence that Comegys was dealing drugs outside of the house, and was using the house as part of his drug dealing operation:

- Comegys was seen by police conducting hand-to-hand drug sales outside of the house while periodically entering the house.

- There was expert testimony that Baltimore drug dealers make use of a house in this manner to store the "ground stash" of drugs.

- The cocaine and gun were discovered in unlocked cabinets in the kitchen, a common area of the house.

- $2,025 in cash was found on Comegys' person after arrest, a large amount suggestive of drug dealing.

- Two scales, zip-loc bags, gel caps, and sifters, all used in drug packaging, were found in the kitchen.

All of this evidence, taken in the light most favorable to the State, is sufficient to convict Comegys of possession of the cocaine and gun. In sum, the jury was free to infer that Comegys knew of the presence and exercised dominion over the cocaine and gun found in the house that he repeatedly entered and exited while he was engaged in the enterprise of dealing drugs—"the very type of inference that juries are charged with making." *State v. Suddith*, 379 Md. 425, 445 (2004). In a light most favorable to the State, the evidence demonstrates that Comegys was selling drugs and using the house as storage for the drugs and handgun that were discovered. The cocaine and gun were discovered in a common storage area in a room in that house he was seen entering. *Gutierrez*, 446 Md.

at 234. Any reasonable trier of fact would have sufficient evidence from which to find possession.[2]

II. HEARSAY

Comegys' second argument is that the State relied on inadmissible hearsay to convict him. Specifically, he objects to testimony at trial regarding the anonymous tip that the police received before beginning their surveillance of the area. At trial, Detective Steven Mahan testified about the tip:

> [The caller] made observations that Mr. Comegys … was engaged in narcotic sales and that he had a *possible* firearm.

[2] In *Moye v. State*, the Court of Appeals identified four factors that are relevant in determining whether evidence is sufficient to show drug possession: 1) the defendant's proximity to the drugs; 2) whether the drugs were in plain view of, or accessible to, the defendant; 3) whether there were indicia of mutual use and enjoyment of the drugs; and 4) whether the defendant has ownership of or possessory interest in the location where the drugs were found. 369 Md. 2, 18-20 (2002); *Gutierrez*, 446 Md. at 234. Comegys argues that the State's case relied solely on one of these factors—his possessory interest in the house—and that it did not produce sufficient evidence to prove his possessory interest in the house.

We do not think that the *Moye* analysis is availing to Comegys. The *Moye* factors are not a checklist and no one of those factors is dispositive of possession or lack of possession of drugs. *Gutierrez*, 446 Md. at 234; *Moye*, 369 Md. 2. The *Moye* line of cases, further, are most relevant when the evidence of possession of the drugs is thin and the sufficiency of the evidence is a close question. *See, e.g.*, *State v. Leach*, 296 Md. 591, 597 (1983) (residing in house where drugs were found is insufficient when "nothing else [showing possession] was admitted into evidence at trial"). In this case, however, to go through a formal analysis of the evidence under each *Moye* factor would be to abandon the forest for the trees: the evidence here, in the light most favorable to the State, showed that Comegys was dealing drugs and using the house for drug storage. There was ample evidence here to demonstrate possession of the drugs beyond his possessory interest in the house.

(emphasis added). At trial, Comegys objected that this testimony was hearsay but was overruled. In this Court, Comegys argues that Detective Mahan's testimony that Comegys had "a possible firearm" was inadmissible hearsay, and that it prejudiced the jury by linking him to possession of firearms, one of the facts the jury was required to decide.

The decision of whether evidence constitutes hearsay is reviewed without deference to the trial court. *Parker v. State*, 408 Md. 428, 436 (2009). We conclude, *first*, that the testimony was not hearsay; and *second*, that even if the statement was hearsay, failing to exclude it was harmless error.

To determine whether testimony constitutes hearsay:

> The threshold questions … are (1) whether the declaration at issue is a "statement," and (2) whether it is offered for the truth of the matter asserted. If the declaration … is not offered for the truth of the matter asserted, it is not hearsay … .

Id.; *see also* Md. Rule 5-801. First, the declaration at issue here did not assert anything, and second, even if it did, it was not offered to prove the truth of that matter.

The reference to a "possible firearm" was not definitive enough to be assertion, and therefore the testimony was not hearsay. A statement must actually assert something to be hearsay, in other words, it must "communicate[] a factual proposition." *Stoddard v. State*, 389 Md. 681, 703 (2005). The context of a statement, such as its grammatical mood, can leave a statement without a definitive factual assertion. *Holland v. State*, 122 Md. App. 532, 543-44 (1998). For instance, we have held that imperative or interrogative statements, such as commands or questions, are often not assertions. *Id.*; *Wallace-Bey v. State*, 234 Md. App. 501, 540 (2017). Similarly, expressing a possibility is not the same thing as an

indicative sentence asserting that something is the case. This reference to a "possible firearm" is too weak a statement to assert anything definitively. Absent further foundation for the "possibility," in this context the term "possible firearm" was not a factual proposition asserting that Comegys was, in fact, armed. *See Stoddard*, 389 Md. at 710 (holding that the determination is whether a statement is hearsay is based on whether the statement "communicated a given factual proposition"). Because the statement contained no assertion, we conclude that it was not hearsay.

Further, even if the statement was an assertion, it was not introduced to prove the truth of that matter. The statement was introduced not to prove that Comegys had a gun (of course it couldn't prove that he had a gun—only a *possible* gun), but solely to prove that the police relied upon the tip. *Graves v. State*, 334 Md. 30, 38 (1994) (holding that a police tip may be "a relevant extrajudicial statement … admissible as nonhearsay"). For this reason too, we hold that the testimony was not hearsay.

That does not end our hearsay analysis, however, because testimony about an anonymous tip, introduced to show police reliance on that tip, may nevertheless be excluded as unfairly prejudicial if the court finds that it will prejudice the jury into evaluating the defendant's ultimate guilt based on the contents of the tip. Md. Rule 5-403; *Graves v. State*, 334 Md. 30, 39 (1994). The question is whether the testimony about the tip was prejudicial; was it "so likely to be misused by the jury as evidence of the fact asserted that it should be excluded as hearsay." *Purvis v. State*, 27 Md. App. 713, 719 (1975). Comegys argues that any testimony about such a tip beyond simply saying that the

police were investigating based on "information received" was too prejudicial to be admitted. We disagree.

As long as the contents of the tip are not relied upon by the State to prove its case, the danger of prejudice is minimal. *Graves*, 334 Md. at 38 (holding that there was prejudice when the testimony including hearsay was a centerpiece of the State's case). The decision by the trial court that the tip was not overly prejudicial was an evidentiary decision, which we review for abuse of discretion. *Brooks v. State*, 439 Md. 698, 708 (2014). The Court of Appeals has identified that the danger that arises from the use of such police tips in court is that the State's use of the tip "becom[ing] more specific by repeating definite complaints of a particular crime by the accused." *Parker*, 408 Md. at 440 (quoting *Graves*, 334 Md. at 39-40). In *Parker*, for instance, the Court of Appeals reversed a conviction when the testimony fully discussed the contents of an anonymous tip, which the State proceeded to rely on in their closing and throughout the State's case, including using the tip to corroborate other evidence. *Id.* at 443; 448.

Here, by contrast, the State did not rely on the tip at all. The tip was referenced once by Detective Mahan, but Detective Mahan's discussion of the tip was not directly elicited by a question by the State. The tip was never mentioned again by the State or anyone else at the trial. The State's use of the tip did not rise of the level of "repeating definite complaints of a particular crime," *id.* at 440, and therefore it was not an abuse of discretion for the trial court to conclude that it did not present the danger of prejudicing the jury. We conclude there was no danger of prejudice, and that the trial court did not err in permitting the testimony.

Finally, we note that if it was indeed error for the trial court to allow the testimony, that its admission was harmless error. If a reviewing court can, on the record, declare beyond a reasonable doubt that an error did not influence the result, the error may be deemed harmless. *Perez v. State*, 420 Md. 57, 66 (2011). Given the weight of the evidence supporting conviction, discussed above in Part I, we do not think that Detective Mahan testifying that the police had received a tip that Comegys had a "possible firearm" was enough to prejudice the jury into equating the anonymous tip with the specific firearm. We are persuaded that this remark, made in passing, and not subsequently referenced by either party, was not prejudicial enough to have influenced the verdict. Thus, even if the testimony was hearsay, the evidence of Comegys' possession of the handgun was strong enough to make its admission harmless error. We conclude there is no error, and therefore, we affirm.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.