UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2811

September Term, 2015

SYTIRA TIARA BARHAM

v.

STATE OF MARYLAND

Meredith,
Beachley,
Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: December 23, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

Sytira Tiara Barham, appellant, was tried and convicted, by a jury in the Circuit Court for Dorchester County (Wilson, J.) of distribution of CDS (Oxycodone), possession of CDS (Oxycodone) and possession of paraphernalia, *i.e.*, a plastic bag. After merging Counts 3 and 4, appellant was sentenced to 20 years imprisonment, all but four years suspended on Count 1, to be followed by five years' probation with specific conditions. The trial judge also ordered appellant to pay a fine of $255.00 and court costs of $145.00. Appellant filed the instant appeal in which she raises the following question for our review, which we quote:

Did the trial court abuse its discretion by admitting improper lay opinion testimony?

FACTS AND LEGAL PROCEEDINGS

At trial, the State elicited testimony from four witnesses. Deputy James McDaniel, a member of the Dorchester County Sheriff's Office Narcotics Enforcement Team, testified that, on February 6, 2015, at approximately 3:00 p.m., he and Detective Jacob Garvey were conducting surveillance at the Springdale Market on Route 16 in an unmarked car. According to Deputy McDaniel, "We were just kind of hanging out in the parking lot, just kind of watching some things."

Deputy McDaniel testified that he observed appellant driving a black Hyundai vehicle without any passengers. A silver Nissan Altima, with two occupants, entered the parking lot of the convenience store. The driver of the Nissan drove down Springdale Road, followed by appellant to a dead end. The driver of the Nissan turned his vehicle around to face Route 16 where the two vehicles parked, with the drivers' side of each facing each

other. Deputy McDaniel moved his car and parked it on Springdale Road, where he watched the occupants of the cars through binoculars. He recounted what then transpired:

> As the vehicles pulled up beside each other and kind of sat there for a minute, I wasn't sure what they were doing. I had stopped on the right side of the road, was watching the vehicles.
>
> I observed the driver of the black vehicle reach out of the driver's side window with a clear plastic baggie in her hand that appeared to be knotted and had bunny ears at the top of it. Like if something was tied into it, the top of the plastic bag is, you know, loose and there's an object inside. Hold it in her hand and hold it out.
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> I observed the driver of the silver Ultima [sic] reach out, grab the (inaudible word) plastic baggie and bring the plastic baggie into the silver Ultima. And I observed the driver of the silver Ultima reach back out of the car to the female, Ms. Barham, and hand her what appeared to be a wad of U.S. currency cash.
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> Q. [ASSISTANT STATE'S ATTORNEY]: Why do you say it appeared to be?
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> A. While I was watching it, when it first came out, it was almost like it was straight and then he used his hands to fold it up in half. I could see - - I was using 10 by 40 Steiner binoculars, some of the best there are, and I could see that it was U.S. currency. I couldn't tell the denominations or anything. I could just tell it was U.S. currency the way that it looked, the way it was folded, the size and the color.
>
> Handed it to Ms. Barham. She retrieved the U.S. currency from him and brought it in her car. They sat there for a brief minute and then I observed a clear plastic baggie come out of the silver Ultima, be thrown on the ground. There was nothing in it. There didn't appear to be any bulges or objects. It looked like it had just been ripped.

Over objection, Deputy McDaniel further testified regarding his assessment of the activity between appellant and the other individual as a "hand-to-hand" drug transaction. *See, infra Analysis.*

Deputy McDaniel and Detective Garvey stopped appellant and discovered her "holding a wad of U.S. currency in her hand," which she attempted to withhold from the police officers, but Detective Garvey recovered the money from appellant, totaling

$690.00. A search of her vehicle yielded a prescription bag from a local pharmacy, five cell phones and an additional $71.00 in cash.

The driver of the Nissan was identified as William Hepperle. He was in possession of a prescription bottle with his name on it and 31 tablets of Oxycodone. Detective Garvey testified that he seized the pills and submitted them for testing. Catherine Savage, Forensic Scientist for the Maryland State Police, tested the pills and found them to be Oxycodone, a controlled dangerous substance listed on Schedule II of the Maryland Department of Health and Mental Hygiene's classification of "controlled dangerous substances, prescriptions and other substances."[1] A search after arrest revealed that Hepperle had $621.00 in his pants pocket. After he was charged with two drug offenses, Hepperle agreed to cooperate with the police officers and his $621.00 was returned to him at the police station. He entered into an agreement to testify as a witness for the prosecution in exchange for the dismissal of the criminal charges lodged against him. He testified that he purchased 30 Oxycodone pills from appellant for $690.00. He testified that he

> [m]et up with her and gave her the money. Got the bag of pills. Got in my car. Took the pills out of the bag, put them in my bottle. Threw the bag out the window and started driving down the lane.

Hepperle explained that he had received an insurance settlement and was carrying $700.00 or $800.00 on his person. He had his own prescription for the medication filled "days before," but someone he knew stole the pills from him. In his statement submitted to

[1] *See* MD. CODE ANN., CRIM. LAW § 5–403. Schedule II.

the police, he stated that he purchased 20 pills, but he testified that he actually purchased 30 of them for $23.00 each.

At the conclusion of the prosecution's case, appellant, through counsel, moved for judgment of acquittal, which was denied. Testifying in her own defense, appellant explained that she went to the Springdale Market to purchase Oxycodone pills from Hepperle. She agreed to pay $23.00 each for 30 pills, but the agreement was not consummated when he demanded $25.00 for each pill. The pills were in a bag and she was ready to buy them, but she never took possession of the pills. After the agreement was not consummated, they went their separate ways. Appellant, who worked as a "personal caregiver, earning $400.00 per week," asserted that she was holding money that belonged to her. Appellant acknowledged that she had been convicted of theft in January 2015.

The prosecutor re-called Deputy McDaniel to the stand to testify, as follows, as a rebuttal witness:

> I observed the driver of the black car reach out with a clear plastic baggie, hand it over, which was received by the operator of the silver car, Mr. Hepperle. Moments later, the operator of the silver car, Mr. Hepperle, reached out and handed a wad of U.S. currency to the driver, Ms. Barham, of the black two-door Hyundai.

At the conclusion of all of the testimony, appellant's counsel again moved for judgment of acquittal and the motion was denied.

DISCUSSION

Standard of Review

> A trial court has wide discretion to rule on the relevance of evidence. Similarly, the decision to admit lay opinion testimony lies within the sound discretion of the trial

> court. In either case, the trial court's decision to admit such evidence will not be overturned unless it is shown that the trial court abused its discretion.

Thomas v. State, 183 Md. App. 152, 174 (2008) (citations omitted).

Analysis

Appellant contends that Deputy McDaniel's testimony pertaining to what he believed was a "hand-to-hand drug transaction" constituted expert opinion testimony and Deputy McDaniel was not qualified as an expert witness. Accordingly, appellant argues that the trial court's ruling, *i.e.*, allowing this testimony, was erroneous. Appellant also contends that Deputy McDaniel's testimony was not admissible as lay opinion testimony "in light of the ruling by the Court of Appeals in *Ragland v. State*, 385 Md. 706 (2005)." Finally, appellant argues that the error in admitting this testimony was not harmless and, therefore, reversal of appellant's convictions is required.

The State concedes that the trial court erred in admitting Deputy McDaniel's testimony "that he believe drugs were involved based on his training and experience, when he was not offered as an expert witness."

"Expert opinion testimony is testimony that is based on specialized knowledge, skill, experience, training, or education. Expert opinions need not be confined to matters actually perceived by the witness." *Ragland*, 385 Md. at 717. Md. Rule 5–702 governs expert opinion testimony and provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony

> on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

"Lay opinion testimony is testimony that is rationally based on the perception of the witness." *Ragland*, 385 Md. at 717. Md. Rule 5–701 governs opinion testimony made by a lay witness and provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Furthermore, this Court, in *Moreland v. State*, 207 Md. App. 563, 571 (2012), noted that there are generally two categories of permissible lay opinion testimony.

> The first category is 'where it is impossible, difficult, or inefficient to verbalize or communicate the underlying data observed by the witness.' The second category is when 'the lay trier of fact lacks the knowledge or skill to draw the proper inferences from the underlying data.'

(Citations omitted). Accordingly, "[t]he two requirements in Rule 5–701 for the admissibility of lay opinions are conjunctive. Thus, a lay opinion must be based on the perception of the witness *and* must be helpful to the trier of fact." *Goren v. U.S. Fire Insurance*, 113 Md. App. 674, 686 (1997) (second emphasis supplied).

As we discussed in *Goren, supra*,

> [a] classic example of the type of lay opinion that is properly admissible is found in *Brown v. Rogers*, 19 Md. App. 562 (1974), in which a mother testified that, after her child was struck by a car, the child was in great pain during her hospital stay.
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> We said that
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> > [s]uch testimony has generally been admitted where all the transient physical conditions which the witness observed—tone of voice, expression of the face, the movement of the limbs—which indicated the injured person was in pain

> could not be reproduced for the jury in such precision and fullness as to impress the jury in the same manner as the observer was impressed and as to permit the jury to draw its own inference.

Goren, 113 Md. App. at 686.

The Maryland Rules, however, prohibit the admission of "lay opinion testimony based upon specialized knowledge, skill, experience, training or education." *Ragland*, 385 Md. at 725. Permitting lay opinion testimony based on such circumstances allows "parties to avoid the notice and discovery requirements of our rules and blur[s] the distinction between the two [evidentiary] rules." *Id.*

This presents a unique issue when police officers, who undoubtedly have "specialized knowledge, skill, experience, training, or education" in law enforcement and provide lay opinion testimony at trial. A police officer's testimony is not automatically relegated as "expert testimony," *Prince v. State*, 216 Md. App. 178, 201, *cert. denied*, 438 Md. 741 (2014), but it is clear that it cannot be based on his specialized training or experience as a police officer. In *Moreland, supra*, we held that a police officer's lay opinion testimony was properly admitted into evidence, based on his intimate knowledge of the appellant. We reasoned that the police officer's

> long-term relationship made [him] better able to identify the appellant in the video recording and still photographs than the jurors would be. His years of familiarity with the appellant also provided a basis for his testimony that the appellant's appearance had changed between the time of the robbery and the trial, including that he had lost weight and was exhibiting the physical symptoms of a paralysis that he had not exhibited before. [The police officer's] testimony was rationally based on his own perception of the appellant over a 40 to 45–year period and was helpful to the jury for a clear understanding of the change in the appellant's appearance.

Moreland, 207 Md. App. at 573. Significantly, the police officer did not testify as to the conclusion of what the appellant was doing in the video recording or the still photographs; rather, he testified to the identification of the appellant based on his own personal knowledge. As we explained, his testimony was helpful to the jury because they were not as intimately acquainted with the appellant as was the police officer.

In *Prince*, *supra*, we held that

> [a] police officer who does nothing more than observe the path of the bullet and place trajectory rods (in the same manner as any layman could) need not qualify as an expert to describe that process. Officer Costello relied on his own observations and placed the rods into the holes made by the bullet fired by Mr. Prince. He *conducted no experiments, made no attempts at reconstruction, and 'was not conveying information that required a specialized or scientific knowledge to understand.'*

Prince, 216 Md. App. at 202 (Emphasis supplied) (citation omitted).

In *In re Ondrel M.*, 173 Md. App. 223 (2007), we held that a police officer who testified that his opinion that the appellant was smoking marijuana was based on his training and experience as a police officer, did not constitute expert testimony. Citing *Ragland, supra*, we explained that

> [n]o specialized knowledge or experience is required in order to be familiar with the smell of marijuana. A witness need only to have encountered the smoking of marijuana in daily life to be able to recognize the odor. The testimony of such witness thus would be 'rationally based on the perception of the witness.'

Ondrel M., 173 Md. App. at 243.

In *Ragland, supra*, however, the Court of Appeals held that the police officers' testimony did not constitute lay opinion testimony and was improperly admitted. The Court explained that,

> . . . it is clear that the State sought and received opinions from Officer Bledsoe and Detective Halter that were based on those witnesses' specialized knowledge, experience, and training. At the beginning of Officer Bledsoe's testimony, the prosecutor asked him to describe his training in the investigation of drug crimes. Bledsoe reported having attended 'several drug recognition courses and training at the police academy, and several seminars,' as well as a 'drug school.' The prosecutor asked Officer Bledsoe whether 'based on [his] training and experience' the activity on Northwest Drive was 'of significance' to him, and then asked 'what did you believe had occurred?' Although he denied that he was seeking an expert opinion, the prosecutor explained that Officer Bledsoe 'brings to this like a mechanic who works on Mercedes, brings special knowledge about Mercedes. He brings special knowledge about drug deals and what these things bring.'
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> Officer Bledsoe testified that '[i]n my opinion what occurred was the drug transaction.' Asked what that opinion was based on, Bledsoe replied, '[b]ased on two temporary assignments in a narcotics unit; two and a half years with this unit; involved in well over 200 drug arrests.' Detective Halter similarly testified to an extensive history of training and experience in the investigation of drug cases, and gave his opinion that the events on Northwest Drive constituted a drug transaction.
>
> This testimony cannot be described as lay opinion. These witnesses had devoted considerable time to the study of the drug trade. They offered their opinions that, among the numerous possible explanations for the events on Northwest Drive, the correct one was that a drug transaction had taken place. *The connection between the officers' training and experience on the one hand, and their opinions on the other, was made explicit by the prosecutor's questioning*. Such testimony should have been admitted only upon a finding that the requirements of Md. Rule 5-702 were satisfied. In admitting the testimony under Md. Rule 5-701, the trial court abused its discretion.

Ragland, 385 Md. at 725–26 (Emphasis supplied).

In the case *sub judice*, it is clear that Deputy McDaniel's testimony, as a lay witness, was based on his "specialized knowledge, skill, experience, training or education" and was, therefore, inadmissible. As in *Ragland, supra*, this connection between the Deputy's training and experience and his opinion was made explicit by the prosecutor's questioning. The relevant colloquy follows:

[PROSECUTOR]: You just—backtrack a little bit again. You said you worked for the Narcotics Task Force or the Narcotics Enforcement Division—

[DEPUTY MCDANIEL]: Uh-huh.

[PROSECUTOR]: —with the Sheriff's Office for approximately two years?

[DEPUTY MCDANIEL]: Uh-huh.

[PROSECUTOR]: Did you have any narcotics experience prior to that?

[DEPUTY MCDANIEL]: That's correct. Well, it will be three years this April I've been assigned to the drug unit in the Sheriff's Office. Before that I worked for the Cambridge Police Department. I was assigned to their narcotics enforcement team. I'm (inaudible words) the anti-crime unit. I'm in the special operations unit for the Cambridge Police Department. I worked for that unit for about two years. Prior to that, I worked road patrol for the Cambridge Police Department for approximately six years.

[PROSECUTOR]: In all that experience have you ever witnessed what you—

[DEFENSE COUNSEL]: Object.

THE COURT: Grounds?

[DEFENSE COUNSEL]: May we approach?

THE COURT: Uh-huh. (Whereupon, counsel approached the bench and a conference was held.)

[DEFENSE COUNSEL]: It's to relevance. He's not going to be qualified as an expert. There's no expert testimony coming. So I think he can get into his background, but if we're now going to start getting into the elements of a drug deal based on his training, knowledge and experience . . .

THE COURT: Well, I think he—yeah, I mean, I think he, I think he can get into his experience, but he's not going to be an expert. So you can't, you can't ask him an ultimate question.

[PROSECUTOR]: No. What I wanted, what I wished to do is ask him his experience with hand-to-hand transactions and why he believed this to be a hand-to-hand transaction, because that ultimately leads to the stop.

THE COURT: I gotcha. I mean, he can get into why his suspicions were aroused.

[DEFENSE COUNSEL]: Thank you, Your Honor. (Whereupon, counsel returned to their trial tables and the proceedings continued.)

[PROSECUTOR]: In all your experience as a CPD, Dorchester County Sheriff's Office and the Narcotics Enforcement Division . . . have you ever worked with any confidential informants?

[DEPUTY MCDANIEL] That's correct.

[DEFENSE COUNSEL]: Object.

THE COURT: Overruled.

[DEPUTY MCDANIEL]: I attended and completed numerous advance trainings in street narcotics, street sales, street distribution. I've attended advanced training in the same. I've attended the Maryland Top Gun Undercover Narcotics Investigator's course through the Northeast Counter Drug Training Center at Fort Indiantown Gap, Pennsylvania. I've attended periods of instruction from the FBI, DEA, Maryland State Police, as well as other allied agencies. Through my training, knowledge and experience and my job duties I've had the opportunity to work with confidential informants, undercover police officers and interview known and admitted drug users, dealers, distributors, facilitators of controlled dangerous substances.

[PROSECUTOR]: Now, just specifically I'm going to talk to you about hand-to-hand transactions. Have you ever witnessed hand-to-hand transactions—

[DEPUTY MCDANIEL]: That's correct.

[PROSECUTOR]: —with a confidential informant that you knew to be conducting one?

[DEPUTY MCDANIEL]: Yes, sir, I have.

[PROSECUTOR]: Okay. Have you had any specific training in what hand-to-hand transactions are?

[DEPUTY MCDANIEL]: Yes, sir, I have.

[PROSECUTOR]: Okay. Based on that training, knowledge and experience what do you—back to February 6th of last year. What did you believe had occurred between Ms. Barham and the other individual at that point?

[DEFENSE COUNSEL]: Object.

THE COURT: Sustained.

[PROSECUTOR]: Why did you stop the vehicle that day?

[DEPUTY MCDANIEL]: Through my training, knowledge and experience—

[DEFENSE COUNSEL]: Object.

THE COURT: I'll let him answer that.

[DEPUTY MCDANIEL]: Through my training, knowledge and experience, activity and observations by me that day I believed what I—

[DEFENSE COUNSEL]: Object.

THE COURT: He's telling what he believes. What he believes. Not what happened, but what—

THE WITNESS: What I believe I saw was a hand-to-hand drug transaction within Dorchester County, Maryland.

It is clear from the foregoing that Deputy McDaniel's testimony was not based on just his rational perception; rather, it was based upon his specialized experience and training as a police officer. The prosecutor expressly questioned the Deputy about his specialized training, specifically in "hand-to-hand" drug transactions. The testimony did not constitute "underlying data observed by the witness" that is "impossible, difficult, or inefficient to verbalize or communicate," nor did it constitute information, from which "the lay trier of fact lacks the knowledge or skill to draw the proper inferences[.]" *Moreland, supra.* Significantly, Deputy McDaniel testified, conclusively, that he specifically *believed*,

i.e., it was his opinion, that the activity in which appellant and Hepperle were engaged was a "hand-to-hand" drug transaction. The Deputy was not testifying as to information about the physical actions or positions of appellant and Hepperle, which would have been both based on his rational perceptions and helpful to the jury, as they were not present to observe the incident. As a rational fact-finder, the jury was capable of drawing its own conclusions regarding the activity, without Deputy McDaniel's own belief of what it was. As in *Ragland, supra*, the prosecutor's line of questioning made the impermissible connection between Deputy McDaniel's opinion and his specialized knowledge even more explicit. Accordingly, we hold that that the trial court erred in admitting the Deputy's testimony as lay opinion.

Harmless Error

Appellant alleges that, "[a]s a consequence of the trial court's ruling, the jury was essentially told that there was a drug transaction, so the error was not harmless."

The State proffers that it is uncontested that a drug transaction occurred; appellant alleges that she was attempting to purchase drugs from Hepperle and the State alleges that Hepperle purchased drugs from appellant. Therefore, "the 'fact in issue' for the jury to decide was not whether drugs were involved, but whether the deal flowed from Barham to Hepperle, or from Hepperle to Barham." According to the State, "Deputy McDaniel's testimony on that score was not expert testimony, but lay witness testimony for which he relied, not on training or experience, but what he saw through binoculars that day." The testimony of Deputy McDaniel improperly admitted as expert testimony concerning the

drug transaction was "merely cumulative" and, therefore, the error was harmless. We agree.

"In order for the error to be harmless, we must be convinced, beyond a reasonable doubt, that the error in no way influenced the verdict." *Weitzel v. State*, 384 Md. 451, 461 (2004) (citing *Dorsey v. State*, 276 Md. 638, 659 (1976)). Furthermore, "the State bears the burden of proving that an error is harmless. The State must prove beyond a reasonable doubt that the contested error did not contribute to the verdict." *Simpson v. State*, 442 Md. 446, 458 (2015) (quoting *Smith v. State*, 367 Md. 348, 360 (2001)).

> Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Owens v. State, 161 Md. App. 91, 111 (2005) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). *See also Dorsey*, 276 Md. at 655–56 (noting that, "if the State can show beyond a reasonable doubt that . . . the erroneously admitted evidence was merely cumulative, and that there was other overwhelming and largely uncontroverted evidence properly before the trier of fact, then the error would be harmless").

Three other witnesses testified on behalf of the State, including Detective Garvey, who was with Deputy McDaniel in an unmarked police car at the time of the incident, and Hepperle, who was an eye-witness and participant in the transaction for the purchase of the narcotics. Furthermore, appellant does not allege that Deputy McDaniel's testimony, in its entirety**,** was improperly admitted. Moreover, there was physical evidence recovered from

appellant, Hepperle, and the surrounding scene, including $690.00 on appellant's person, $621.00, 31 tablets of Oxycodone and a plastic baggie on Hepperle's person. Deputy McDaniel testified that appellant passed the baggie, with contents inside, to Hepperle, who took it inside his vehicle and then threw the empty baggie outside of the car.

In *Ragland, supra*, the Court of Appeals held that the error was not harmless because

> [t]he primary witness against Ragland was Paul Herring, an impeached witness, a participant in the alleged crime, and a witness testifying pursuant to a plea agreement with a promised benefit from the State. The remaining evidence was circumstantial, and depended upon an inference that Herring had obtained his piece of crack cocaine from Ragland. To support this inference, the State relied in large part on the police officers' opinion testimony that the events on Northwest Drive had constituted a drug transaction. Under these circumstances, we cannot say beyond a reasonable doubt that this testimony did not contribute to the verdict.

385 Md. at 726–27. Furthermore, as the State notes in its brief, in *Ragland*, the police officers could not identify one of the parties to the drug transaction, there were no drugs or drug paraphernalia recovered from the accused or his vehicle and neither officer could identify what was alleged to have been exchanged. *See Ragland*, 385 Md. at 709–10.

Unlike *Ragland*, in the instant case, the conviction did not hinge on the improperly admitted expert testimony. There was direct evidence, *i.e.*, drugs, drug paraphernalia and large amounts of cash recovered, and testimony from Detective Garvey, Hepperle and appellant concerning the transaction as a hand-to-hand drug purchase. Also, unlike *Ragland*, Hepperle was not impeached as a witness, nor was Detective Garvey's testimony alleged to be improper lay opinion testimony.

Accordingly, we hold that, because the jury already knew that the exchange between Hepperle and appellant was a drug transaction, Deputy McDaniel's improper expert

testimony concerning the hand-to-hand drug transaction was harmless because it was probative of whether there had been a drug transaction, a fact established by other evidence in the case.

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