UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1956

September Term, 2015

JOHNATHAN DARNELL YOUNG

v.

STATE OF MARYLAND

Berger,
Reed,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: August 30, 2016

A jury in the Circuit Court for Baltimore County convicted Johnathan Darnell Young, appellant, of possession of heroin and distribution of heroin. Because the court concluded that appellant was a repeat offender, it sentenced him to a term of imprisonment of 25 years without the possibility of parole. On appeal, appellant raises three issues for review, of which we have rephrased the first issue:[1]

1. Did the trial court err in allowing the State to present testimony regarding the course of the police investigation.

2. Did the trial court err in allowing the State to present improper rebuttal closing argument.

3. Is the evidence insufficient to sustain the convictions.

For the reasons that follow, we answer the first question in the affirmative and vacate appellant's convictions. Appellant's second issue is moot, but we will address the third question.

BACKGROUND

Sometime in April 2015, Detective Nicholas Hynes relayed information to Detective Timothy Ward provided to him by a confidential informant.[2] This informant advised Detective Hynes that someone known as "Red" was selling narcotics in the White

[1] Appellant's first question, verbatim from his brief, is:

1. Did the trial court err in allowing the State to present hearsay evidence?

[2] All law enforcement officers in this case are members of the Baltimore County Police Department.

Marsh area of Baltimore County. The informant also provided police with a phone number and vehicle -- a Honda Crosstour -- associated with "Red."

On April 9, 2015, Detective Ward called the phone number provided by the informant and a male responded. Posing as a prospective buyer, Detective Ward asked the man if he could get $200 worth of drugs and the man agreed to meet Detective Ward in the White Marsh area. To prepare for this encounter, police photocopied the bills comprising the $200, and Detective Ward wore a wire and carried a camera mounted in a key fob, which recorded audio and video.[3]

Around 7:40 p.m., the male called Detective Ward and directed him to a Burger King on Honeygo Boulevard. Once there, Detective Ward spoke on the phone with the man, who told him to walk toward the nearby Giant. As Detective Ward complied with this order, a black male approached him and gave him a "handful of clear capsules," each containing an "off-white powder." Detective Ward asked the man if he was "Red," and the man responded, "Yeah." Detective Ward then gave the man the $200 and asked if he could call again later in the week. The man agreed and Detective Ward walked away. The encounter lasted approximately five seconds. At trial, Detective Ward identified appellant as the man who had given him the capsules.

As Detective Ward walked away, he gave the arrest signal to the other officers surrounding the scene. Leaving the area, Detective Ward observed a Honda Crosstour with another person in the driver's seat. Detective Ward then left the parking lot of the Giant

[3] The key fob recording was played for the jury at trial.

and returned to the police station, where he stored the ten capsules appellant had given to him in an evidence locker.

Detective Hynes was part of the team that moved in to arrest appellant following the transaction with Detective Ward. Prior to Detective Ward's signal, Detective Hynes observed appellant walk toward Detective Ward from the direction of a parked Honda Crosstour. After the transaction was completed, Detective Hynes observed appellant walk toward the Crosstour, but before he could reach the vehicle, he saw Detective Hynes approaching and ran. Once Detective Ward gave the signal and officers began moving in, the Crosstour pulled out of the parking lot "at a high rate of speed," according to Detective Hynes. Detective Hynes lost sight of appellant for approximately one second, but he ultimately reached him and placed appellant under arrest.

A search of appellant subsequent to his arrest revealed a "small amount of currency," which Detective Hynes believed to be the $200 Detective Ward had just given him. Approximately fifteen minutes later, however, Detective Hynes discovered that this money was not the $200 Detective Ward had used in the sting operation and police were unable to find this money in a search of the parking lot.

Police also caught up to the Crosstour that had left the parking lot. An individual identified as Bruce Jones was driving the vehicle, and he had the cell phone that corresponded with the number Detective Ward had called to set up the drug buy.

Roger Covington, a chemist with the Baltimore County Crime Laboratory, tested the powder from the capsules Detective Ward had received in the transaction.[4] He stated that the capsules contained heroin.

By criminal information, the State charged appellant with possession of heroin, distribution of heroin and conspiracy to distribute heroin. The court granted a motion for a judgment of acquittal as to the conspiracy charge. Thereafter, the jury convicted appellant of the remaining counts.

DISCUSSION

I. Detective Ward's Testimony

During Detective Ward's direct examination, the following occurred:

> [THE STATE]: Now, Detective Ward, I wanna take you back to April of this year, so April of 2015. Can you tell the members of the jury um, what if any information you received regarding a subject that went by the alias, Red?
>
> [APPELLANT'S COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> DET. WARD: My partner, Detective Hynes, advised me that he had, --
>
> [APPELLANT'S COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> DET. WARD: -- my partner, Detective Hynes, advised me that he had information from a confidential informant.

[4] The court accepted Covington as an expert in the chemistry and analysis of narcotics.

[APPELLANT'S COUNSEL]: Objection. Your Honor, may we approach?

THE COURT: Sure. (Bench Conference begins with counsel present):

* * *

[APPELLANT'S COUNSEL]: Testimony of what specifically his partner – any testimony this officer testified about what he was told from his partner is hearsay. It's just double, you know, hearsay because he's giving information of what he was told by his – to his partner, but another person to him. And this witness is not the proper person to testify to what information he had.

THE COURT: Okay.

[THE STATE]: First of all, Detective Hynes is here. She can cross-examine him. This is information regarding an investigation that – a lot – explains and helps the jury understand why they were calling a particular phone number, why they were making an arrangement, because they suspected drug dealing was going on. This isn't for the truth of the matter asserted. This is just where they got –

THE COURT: Is it, is it –

[THE STATE]: -- this information.

THE COURT: -- to show, is it to show the affect [sic] on this, on this witness? Is it to show why he did the – why he did what he did?

[THE STATE]: Right.

[APPELLANT'S COUNSEL]: Your Honor, it's –

[THE STATE]: It's not hearsay. It's –

[APPELLANT'S COUNSEL]: Your Honor, the basis – the fact of the matter – the officer can testify – they – you know, based on the information received, they began an investigation. The specifics and details are totally irrelevant to this particular case because they – this individual is not the person that they were investigating. So, I believe, Your Honor, it's muddying the waters. It's um, confusion of issues. It's – this officer –

THE COURT: So, --

[APPELLANT'S COUNSEL]: -- testifying and speculating –

THE COURT: -- so what are –

[APPELLANT'S COUNSEL]: -- (inaudible) the (inaudible) –

THE COURT: What's the, what's the proffer? What are you – what's –

[THE STATE]: Well, we don't even know who Red is. Why – it, it – the proffer is that this is – this information was used to get the phone number that was called, and when they called this –

* * *

Used to get the phone that the detectives called, and when they called this number, this Defendant made – was there present to conduct a drug transaction.

THE COURT: I'm gonna overrule it. Overruled.

[APPELLANT'S COUNSEL]: Your Honor, may I have a continuing objection –

THE COURT: Yes.

* * *

(Bench conference ends)

[THE STATE]: Detective, if you could please um, tell the members of the jury what information you received early in the month of April 2015 regarding a set up with the alias, Red?

DET. WARD: The information I received was that Red was a ah, narcotics trafficker in the White Marsh area of Baltimore County and a phone number was provided, as well as a vehicle description.

[THE STATE]: And what was that phone number that was provided?

DET. WARD: Ah, 441-391-3516.

[THE STATE]: And what was the vehicle description?

DET. WARD: A Honda Crosstour, SUV-type vehicle.

[THE STATE]: And where did you receive this information?

DET. WARD: My partner, Detective Hynes.

[THE STATE]: And do you know where Detective Hynes received this information?

DET. WARD: I believe he received the information from his –

[APPELLANT'S COUNSEL]: Objection.

THE COURT: I'll sustain it.

On appeal, appellant contends that the court erred in admitting this testimony. Appellant argues that Detective Ward's testimony was inadmissible hearsay evidence. Appellant recognizes that police officers are permitted to testify as to actions they took based on the receipt of information, but he contends that, when officers provide specific

details about the information, the testimony is then regarded as inadmissible hearsay or, alternatively, not hearsay, but unduly prejudicial. He asserts that any error in admitting this testimony was not harmless.

The State contends that Detective Ward's testimony was not hearsay because it was not offered to prove the truth of the matter asserted. Rather, the State offered Detective Ward's testimony to establish a narrative for the jury. Furthermore, the State argues that Detective Ward's testimony was not unduly prejudicial because it was an isolated statement and did not contain specific information sufficient for this Court to reverse appellant's convictions. Alternatively, the State contends that, if there was error in admitting the testimony, it was harmless because appellant's convictions were based on the testimony of two police officers and it was not a closely-contested case. Stated another way, "the sum total of the evidence left no 'reasonable possibility' that the brief mention of the informant tip contributed to the guilty verdict here."

Ordinarily, we review a trial court's rulings as to the admissibility of relevant evidence pursuant to the abuse of discretion standard. *See Wagner v. State*, 213 Md. App. 419, 453-54 (2013). "'Review of the admissibility of evidence which is hearsay is different. 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.'" *Thomas v. State*, 429 Md. 85, 98 (2012) (emphasis omitted) (quoting *Bernadyn v. State*, 390 Md. 1, 7-8 (2005)). Accordingly, a circuit court has no discretion to admit evidence that is hearsay, unless the evidence meets

an exception. *Id.* Whether evidence constitutes hearsay is an issue of law, which we review *de novo*. *Gordon v. State*, 431 Md. 527, 533 (2013) (citing *Bernadyn*, 390 Md. at 8).

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." Rule 5-801(c). If a statement is not being offered to prove the truth of a fact, then it does not constitute hearsay. *See In re Matthew S.*, 199 Md. App. 436, 463 (2011) (citing *Conyers v. State*, 354 Md. 132, 158 (1999)).

The Court of Appeals and this Court have recognized that police officers may testify concerning the receipt of information that caused them to take certain actions in an investigation. *See*, *e.g.*, *Parker v. State*, 408 Md. 428, 438-39 (2009) (noting that this type of testimony is non-hearsay offered to show action in reliance upon a statement); *Frobouck v. State*, 212 Md. App. 262, 283 (2013) (stating that officers' testimony as to why they went to premises leased by the appellant was not hearsay because it was a brief narrative for the jury).

In *Purvis v. State*, 27 Md. App. 713, 715-16 (1975), a police officer testified that a paid informant provided information that a man known as "Slim" (identified by the informant as Purvis) was selling heroin in a particular location. Purvis objected on hearsay grounds, but the trial court admitted this testimony as non-hearsay to show the actions of the police officers. *Id.* at 716. This Court recognized that a police officer may explain particular actions "'by stating that he did so upon information received and this of course will not be objectionable as hearsay, **but if he becomes more specific by repeating definite complaints of a particular crime by the accused, this is so likely to be misused**

by the jury as evidence of the fact asserted that it should be excluded as hearsay.'" *Id.* at 718-19 (quoting C. MCCORMICK, EVIDENCE § 248 at 587 (2d ed. 1972)).[5]

This Court concluded that the trial court should **not** have admitted the officer's statements concerning what the informant told him because it went directly to the question of Purvis's guilt or innocence. *Id.* at 724-25. Indeed, "[t]he fact that Purvis was a seller of heroin was the very object which the prosecution had undertaken to establish[.]" *Id.* at 724. Permitting the officer to testify as to the statements of the informant "tended to influence the trier of facts to believe that before Purvis'[s] contact with the officers he was already a dealer in heroin and thus more likely to have sold the drug to the detectives as charged." *Id.* at 725.

Similarly, in *Zemo v. State*, 101 Md. App. 303, 306, (1994), a police officer testified that information from a confidential informant led him to Zemo in an investigation for armed robbery. The State argued that the officer's testimony was necessary to establish a narrative for the jury. *Id.* at 310. Writing for this Court, Judge Moylan observed, "[t]he jury, of course, has no need to know the course of an investigation unless it has some direct bearing on guilt or innocence. That an event occurs in the course of a criminal investigation does not, *ipso facto*, establish its relevance." *Id.* Judge Moylan further criticized the "Old Wives' Tale" of providing a narrative for the jury: "The State's theory that the course of

[5] Notably, questions as to probable cause to initiate a stop and/or the lawfulness of an arrest may be relevant and admissible as to the legality of the stop and/or arrest, but they constitute hearsay when they concern the guilt of the accused. *See Purvis*, 27 Md. App. at 719-20. This distinction is inapplicable in this case because there is no concern with the legality of appellant's arrest.

an investigation somehow must be shown, pertinent or not, assumes that a criminal trial should unfold upon the stage of the courtroom with the unbroken linear quality of a silent movie." *Id.* at 310-11. We recognized that juries "are capable of 'leaping o'er time and space' as relevance and admissibility dictate." *Id.* at 311.

As to the testimony of the narrative in *Zemo*, "[t]he only possible import of such testimony was to convey the message that the confidential informant 1) knew who committed the crime, 2) was credible, and 3) implicated [Zemo]." *Id.* at 306. This Court concluded that it was error to permit the officer to offer this testimony. *Id.* at 306-07.

Parker, *supra*, provides a final example that addresses the issue before us. In that case, a police officer testified that an informant told him that a black male wearing a blue cap and black sweatshirt was selling heroin at a particular location. 408 Md. at 431. The trial court admitted the testimony over objection, accepting the State's proffer that it was not being offered to prove the truth of the matter asserted. *Id.* at 435. The State attempted to distinguish *Purvis* and *Zemo* from Parker's case by arguing that the informants in the former two cases had specifically named Purvis and Zemo, respectively, as involved in criminal acts, whereas the informant in *Parker* had merely described clothing and a location. *Id.* at 443.

The Court of Appeals concluded that the trial court erred in admitting this testimony and recognized that a name "is not the only way to identify [a defendant], and when the hearsay provides contemporaneous and specific information about the defendant's clothing, location, and activity, it can be highly persuasive as to the defendant's actual guilt of the crime charged, even without a name." *Id.* Indeed, the Court reasoned that the jury

was likely to have misused the information in a determination of Parker's guilt. *Id.* ("[T]he timing and particularity of the description, without evidence that there were other individuals wearing this type of clothing, left the jury with a virtually inescapable inference that the individual observed by the informant selling heroin at the [location] was Parker[.]"). The Court noted that permitting the officer to testify that he went to the area "based on information received," however, would have been permissible. *Id.* at 446.

In this case, we are persuaded that Detective Ward provided more than a brief statement as to a narrative of the investigation. *See Frobouck*, 212 Md. App. at 283. Detective Ward provided a name ("Red"), phone number, and vehicle associated with criminal activity in an area. Indeed, Detective Ward testified that the information he received was that "Red was a ah narcotics' trafficker." This information was provided to him by Detective Hynes, which had been provided to him by a confidential informant, who did not testify at trial subject to cross-examination. Accordingly, similar to the officers' testimony in *Purvis*, *Zemo*, and *Parker*, Detective Ward's testimony provided details that were subject to misuse by the jury in their determination as to whether appellant committed the crimes at issue. Detective Ward's testimony was, therefore, hearsay and should not have been admitted.

We are, furthermore, not convinced that the State offered the testimony merely to show a narrative of the investigation. The State continuously elicited testimony as to the presence of the Honda Crosstour and appellant's relation to it, despite professing to have no clue as to the true identity of "Red." Additionally, the State referred to Detective Ward's reliance upon the information received from the informant in its closing argument. As in

Parker, the State continued using the informant's statement for the truth of what it asserted and continued to corroborate the informant's information. 408 Md. at 444. The continued referrals to the hearsay testimony in *Parker* led the Court of Appeals to observe that the State's proffered purpose in admitting the testimony was "fatally undermine[d]." *Id.* at 446. In this case, we, similarly, observe that the State's continued use of the informant's information undermined the State's stated non-hearsay purpose of introducing the testimony.

The State contends that this case is closer to *Frobouck*, rather than *Purvis*, *Zemo*, and *Parker*, on the "spectrum" of hearsay police testimony. In *Frobouck*, two police officers testified independently that they went to a particular location for a "suspected marijuana grow." 212 Md. App. at 281. The trial court admitted the testimony, over objection, for the limited purpose of showing why the officers took a particular action. *Id.* This Court concluded that the statements were admissible and were not hearsay because they "explained brief[ly] what brought the officers to the scene in the first place." *Id.* at 283 (emphasis omitted). We distinguished that case from *Zemo*, noting that the officers in *Frobouck* provided brief statements and also that the officers were not attempting to offer the testimony of someone who would not testify. *Id.* Furthermore, we noted that the testimony that was subject to an objection was cumulative to other testimony to which Frobouck had not objected. *Id.* We also concluded that any error was harmless. *Id.* at 283-85.

We are not persuaded that this case is similar to *Frobouck*. Unlike the officers' testimony in *Frobouck*, which at most referred to the reason for going to the site two times,

the State continuously referred to the information provided by the informant in this case. Moreover, the officers in *Frobouck* were not offering the testimony of someone who would not later testify, unlike the situation in this case with the hearsay testimony of a confidential informant. *See Frobouck*, 212 Md. App. at 283. We further reject the State's contention that the error in this case was random, rather than sustained. *See Zemo*, 101 Md. App. at 306 (stating that "passing or random interjection of some arguably prejudicial material into a trial[]" is harmless, whereas prejudicial material that is "the central thrust of an entire line of inquiry[]" is problematic).

Of course, error on the part of the trial court does not necessarily lead to reversal. *See Dionas v. State*, 436 Md. 97, 108 (2013) ("'[W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed harmless and a reversal is mandated.'" (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976))). In order to find that an error was harmless, we must be "'satisfied that there is no reasonable possibility that the evidence complained of . . . . may have contributed to the rendition of the guilty verdict.'" *Id.* (quoting *Dorsey*, 276 Md. at 659). Stated another way, in order to satisfy the harmless error analysis, it must be shown that the evidence admitted in error was "'unimportant in relation to everything else the jury considered in reaching its verdict[.]'" *McClurkin v. State*, 222 Md. App. 461, 485 (2015) (quoting *Dionas*, 436 Md. at 118), *cert. denied*, 136 S. Ct. 564 (2015). The State bears the burden to show that the error was harmless beyond a reasonable doubt. *See Dionas*, 436 Md. at 108-09.

The State contends that any error in admitting Detective Ward's testimony was harmless because the jury did not deliberate for a long time, and appellant offered no testimony to contradict the State's version of events. The State, therefore, argues that Detective Ward's testimony did not "tip the scales" and merely provided a narrative of the investigation to the jurors. The State attempts to distinguish this case from the harmless error analysis in *Parker*, and argues that this case is closer to *Frobouck*.

We are not persuaded beyond a reasonable doubt that Detective Ward's testimony was unimportant to the jury's considerations. As noted, the State elicited testimony from the detectives as to the presence of the Honda Crosstour and the phone number and referred to the confidential informant's tip in its closing argument. Additionally, the State -- despite indicating a lack of an idea as to the identity of "Red" -- linked appellant to that alias. The jury, therefore, much like in *Parker*, was left with the "inescapable inference" that appellant was involved in trafficking heroin, even before the arrival of the officers. *See Parker*, 408 Md. at 443. Focusing on whether appellant contradicted the State's version of events is not the proper test in a harmless error analysis. Further, although the jury returned its verdict just over an hour-and-a-half after deliberations began, the appellant (when arrested) had neither the phone used to arrange the buy nor the departmental currency given by Detective Ward to the individual who gave him the capsules. We, therefore, conclude that the admission of Detective Ward's testimony was not harmless and we vacate appellant's convictions. Accordingly, Appellant's second issue is moot.

II. Sufficiency of the Evidence

"In cases where this Court reverses a conviction and a criminal defendant raises the sufficiency of the evidence on appeal, we must address that issue, because a retrial may not occur if the evidence was insufficient to sustain the conviction in the first place." *Benton v. State*, 224 Md. App. 612, 629 (2015) (citing *Ware v. State*, 360 Md. 650, 708-09 (2000)). Because appellant raises the sufficiency of the evidence on appeal, we will address his arguments.

In reviewing the sufficiency of the evidence, "[w]e must determine 'whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Handy v. State*, 175 Md. App. 538, 561 (2007) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We do not retry the case. *Id.* at 562. Furthermore, "[w]e defer to the fact finder's 'opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]'" *Neal v. State*, 191 Md. App. 297, 314 (2010) (quoting *Sparkman v. State*, 184 Md. App. 716, 740 (2009)).

Appellant contends that the evidence was insufficient because the State's case was based entirely on Detective Ward's identification of appellant as the person from whom he had purchased the heroin. He asserts that Detective Ward's identification was questionable, given the brevity of the interaction between Detective Ward and appellant. Appellant also argues that the State was lacking other evidence, such as fingerprints on the capsules and the missing photocopied $200.

Appellant fails to recognize, however, that Detective Hynes also identified appellant as the other person involved in the drug transaction. Even if the State relied solely on Detective Ward's identification, however, that would be sufficient: "We have repeatedly held that the identification by a single eyewitness is sufficient to support a conviction." *Myers v. State*, 48 Md. App. 420, 424 (1981) (citing *Metallo v. State*, 10 Md. App. 76, 77 (1970)). We, therefore, conclude that taking the evidence in the light most favorable to the State, a rational trier of fact had sufficient evidence from which to convict appellant of possession and distribution of heroin.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY VACATED. THE CASE IS REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID 1/2 BY APPELLANT AND 1/2 BY BALTIMORE COUNTY.