UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1247

September Term, 2016

HENRY JEFFERSON GRAY

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: June 26, 2017

*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.

Henry Jefferson Gray, appellant, was convicted by a jury sitting in the Circuit Court for Queen Anne's County of three counts of conspiracy: conspiracy to distribute cocaine, conspiracy to possess cocaine with the intent to distribute, and conspiracy to possess cocaine. The court sentenced appellant to 15 years of imprisonment, 13 years suspended, followed by five years of supervised probation, for each of his first two convictions, to be served concurrently; the court merged his last conviction. Appellant presents the following questions on appeal, which we have slightly rephrased:

I. Did the trial court err when it admitted into evidence recorded telephone calls because: A) the evidence with which the State attempted to authenticate appellant's voice on the calls was insufficient and violated the best evidence rule, and B) the co-conspirator exception to the hearsay rule did not apply?

II. Did the trial court err when it admitted into evidence expert testimony about the coded drug language used in the recorded telephone calls?

III. Did the trial court err when it admitted into evidence testimony about the illicit activities of appellant's alleged co-conspirator?

IV. Did the trial court err by imposing two conspiracy sentences?

For the reasons that follow, we answer the first three questions in the negative but the last in the affirmative. Accordingly, we shall affirm the judgments but vacate appellant's sentence for conspiracy to possess cocaine with the intent to distribute.

FACTS

The State's theory of prosecution was that between January 13 and March 3, 2016, Eric Clark supplied drugs to appellant, who then sold the drugs to individual buyers. The State's evidence came primarily from ten intercepted phone calls between appellant and Clark in which they discussed the processing, packaging, and sale of controlled dangerous

substances. The theory of defense was that the calls were innocuous and that appellant was not the person on the calls. The defense presented no witnesses. The following facts were elicited at trial.

Between January 13 and March 3, 2016, officers with the Queen Anne's County Drug Task Force and the Maryland State Police conducted a court-authorized wiretap investigation of the telephone calls made to and from 443-980-0144, which belonged to Eric Clark. Clark, who the police had been investigating for drug dealing on and off for ten years, was the target of the investigation. Of the approximately 5,100 calls intercepted, about half were drug-related, and of those, over a hundred involved appellant.

Prior to the State introducing into evidence ten of the intercepted calls, the State called witnesses who testified as to the integrity of the process of recording the live calls. Additionally, Trooper First Class Michael Buckius of the Maryland State Police and Deputy First Class Chris Schwink of the Queen Anne's County Sheriff's Office, both of whom were assigned to the wiretap investigation, each identified Clark's voice and appellant's voice on the calls. After each of the calls were played for the jury, Trooper Buckius, who was qualified as an expert in the field of detection and packaging of controlled dangerous substances, testified as to the meaning of the coded words and phrases used. The evidence elicited from the ten calls was as follows:

1- Session number 867, recorded on January 20, was transcribed as follows:

> Clark: what chu want, I mean Is it a good time or you want to meet me at the house what eve, whatever you want
>
> [Appellant]: yeah, I just need the, I didn't go by your house and grab that plastic

Clark: You ain't get it yet.

[Appellant]: No I didnto go by, you know I decide not to do it I don't like being in your yard like that when you not around you know what I mean.

Trooper Buckius testified that "plastic" meant a plastic baggie of cocaine.

2- Session number 1612, recorded on January 27, was transcribed as follows:

Clark: Hey Unk I got to it.

[Appellant]: you got to it.

Clark: yeah that little bit I had.

[Appellant]: oh ok

Clark: So Im good that will save you a run you know what I mean

[Appellant]: ok ok alright alright, Imma still get up with you after I get him straight and see what she want to do, unintelligible.

Trooper Buckius testified that appellant was known as Hank, Uncle Hank, Unk and the phrase "save you a run" meant that Clark managed the drug deal himself so that appellant did not have to.

3- Session number 1837, recorded on January 29, was transcribed as follows:

Clark: Whats up Unc

[Appellant]: Dude say he got two more round the way

Clark: Who

[Appellant]: the big dude

Clark: Yeah but umm tell him tell him he dead till the morning.

[Appellant]: Ok alight alight

Clark: cause I already I already that's why I had to go holler at my man

[Appellant]: Oh ok ok

Clark: Tell him he just want these un uhh uhh doowaps

Trooper Buckius testified that Clark's response about being "dead till the morning" meant he was unable to "re-up" his cocaine supply and distribute the amount of cocaine the customer wanted until the morning. Additionally, the trooper testified that a "doowap" meant $20 or .2 grams of cocaine.

4- Session number 2114, recorded on February 2, was transcribed as follows:

Clark: Try to yeah trying to get that ah that that thing for the ah steak

[Appellant]: Oh ok oh ok

Clark: I mean you around ain't you

[Appellant]: Yeah yeah I was just ready run to Kent Island right quick yeah but I can yeah ok

Clark: I mean you good or or or you just set it in my ah ah blue truck, but you don't really

Trooper Buckius testified that "steak" could mean a couple of things – it could mean a scale to weigh a large amount of drugs or it could refer to money that was owed to Clark from others selling drugs. Additionally, it was elicited that during the investigation appellant was observed entering the cab of a blue truck sitting on a jack in Clark's driveway and exiting a few minutes later.

5- Session number 2921, recorded on February 10, was transcribed as follows:

[Appellant]: Need to go over ah Chester River

Clark: You got to run over there?

[Appellant]: Yeah ah prolly, prolly play hard ball

Clark: Alright well then, we'll, I'll have to show em a trick on it, real quick while I'm over there

Trooper Buckius testified that "play hard ball" meant the processing of powder cocaine into crack cocaine, and that Clark was saying that he would share a tip he knew about processing.

6- Session number 3419, recorded on February 15, was transcribed as follows:

Clark: I'll be right there Unk.

[Appellant]: Aight well I gotta strike for you

Clark: Huh

[Appellant]: I gotta strike for you buck eighty

Trooper Buckius testified that when appellant said "I gotta strike for you" he meant that he had a drug deal for Clark and that "buck eighty" was slang for $180 worth of cocaine.

7- Session number 3462, recorded the same day, was transcribed as follows:

Clark: Hey whats up unc

[Appellant]: We might have another hit when I get back

Trooper Buckius testified that appellant meant that he might have another drug deal when Clark returned to the area.

8- **Session number 4241, recorded on February 23, was transcribed as follows**:

[Appellant]: Yeah waz up man

Clark: I need one thing from ya Unc

[Appellant]: uh huh

Clark: Them uh uh that uh jewelry bag you got

Trooper Buckius explained that "jewelry bag" meant money appellant owed to Clark for supplying appellant with an amount of drugs to sell.

9- **Session number 4622, recorded on February 26, was transcribed as follows**:

> [Appellant]: Go ahead. Go ahead. Go ahead man. You alright. Go ahead. Put it in you. There ain't nothing in that motherfucker. Put it in you Jack. God damn it. Stop acting like that. I got, I got, I got, $500 worth of twenties. I'm selling 20's and killing them.
>
> Clark: What's up bro.
>
> [Appellant]: Man nothing. What's up man!!!! This place is jumping out this motherfucka tonight.
>
> Clark: Oh yea?
>
> [Appellant]: Yea man. I'm over here selling (unintelligible).
>
> Clark: Oh yea.
>
> [Appellant]: Yea man. This is jumping. Someone just called me. I got to holler at them.

Trooper Buckius testified that "twenties" meant $20 worth of drugs. The trooper added that the phrase "[t]his place is jumping" meant that appellant was selling a lot of drugs. The phrase that appellant had "to holler at" someone who had just called him meant that a customer had placed an order for drugs and appellant had to meet them and sell them drugs.

10- **Session 4940, recorded on March 3, was transcribed as follows**:

> Clark: Whats up Unk
>
> [Appellant]: Hey nephew you want to mess with um Charlene
>
> Clark: I mean I can
>
> [Appellant]: Yeah ok you got um I think 60 cent

Clark: alright where she at

Trooper Buckius testified that "60 cent" meant $60 worth or half a gram of cocaine.

Trooper Buckius opined that based on the evidence collected during the wiretap investigation he believed that Clark was supplying appellant with drugs, primarily cocaine, for the purpose of appellant selling the drugs to individual buyers.

The investigation ended on March 3, 2016. On that day, the police executed a search warrant for Clark and his house in Grasonville. From Clark's person, the police seized the cell phone with the target telephone number, 443-980-0144. In the blue truck parked and on a jack in his driveway, the police seized from the front passenger compartment, glassine baggies and a digital scale, and a handgun and ammunition in a tool box in the bed of the truck. A subsequent laboratory analysis revealed a trace amount of cocaine on the scale. On the same day, Detective Schwink executed a search warrant for appellant. From appellant's pant pocket, the detective seized a cell phone with the number 443-458-2599, which was the other cell phone number on each of the ten intercepted calls that were introduced into evidence.

We will provide additional facts as needed to address the questions raised.

DISCUSSION

I.

At trial, the State sought to authenticate appellant's voice on the calls through the testimony of Trooper Buckius and Detective Schwink. Over objection, Trooper Buckius testified that although he had never spoken to appellant in person, he was able to identify appellant's voice on the intercepted calls because of a call on January 21 in which appellant

self-identified. Trooper Buckius explained that the person in that call said that he had recently seen an individual at Walgreen's who had called out to him, "Henry Gray, Henry Gray." Detective Schwink testified without objection that he recognized appellant's voice from the telephone calls and from when he spoke to appellant while executing the search warrant.

Appellant argues on appeal that the trial court erred in allowing the two officers to identify his voice in the telephone calls. According to appellant, the State could not rely on Trooper Buckius's testimony to authenticate his voice because the State violated the best evidence rule when Trooper Buckius, who had not heard the call live and had only reviewed it later, testified as to the content of the January 21 call, and the State did not introduce the call into evidence. Additionally, the State could not rely on Detective Schwink's testimony to authenticate appellant's voice because the detective had only heard appellant speak in person on a single occasion. Lastly, appellant argues that the intercepted calls should not have been admitted because they contained hearsay, Clark's statements, and the State failed to provide evidence of a conspiracy, independent of the calls, to admit the calls under the co-conspirator exception to the hearsay rule. The State responds that the trial court did not err in admitting the phone calls: the State laid a sufficient foundation establishing the authenticity of appellant's voice on the calls through both officers, and the calls did not contain hearsay because the State presented sufficient evidence of a conspiracy to meet the co-conspirator exception to the hearsay rule. We shall address each argument in turn.

A. Authenticity and best evidence rule

Md. Rule 5-901(a), provides that the authentication or identification of evidence, a condition precedent to admissibility, "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The Rule sets forth a non-exhaustive list of how a voice may be identified, including, "whether heard firsthand or through mechanical or electronic transmission or recording, based upon the witness having heard the voice at any time under circumstances connecting it with the alleged speaker." Md. Rule 5-901(b)(5).

"[T]he burden of proof for authentication is slight, and the court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so." *Johnson v. State*, 228 Md. App. 27, 59 (quotation marks, citation, and emphasis omitted), *cert. denied*, 450 Md. 120 (2016). We have quoted 2 McCormick on Evidence § 227 (John W. Strong ed.1999), which explained:

> [T]he authenticity of a[n item] is not a question of the application of a technical rule of evidence. It goes to genuineness and conditional relevance, as the jury can readily understand. Thus, if a prima facie showing is made, the [item] comes in, and the ultimate question of authenticity is left to the jury.

Darling v. State, – Md. App. – (No. 2380, Sept. Term 2015, at 19)(filed April 27, 2017). "Thus, once a *prima facie* showing of authenticity is made, the ultimate question of authenticity is left to the jury." *Id*. We review a trial court's decision regarding the admissibility of a voice identification for an abuse of discretion, which the trial court should assess based on the relevance and reliability of the evidence. *Donati v. State*, 215 Md.

App. 686, 740 (citing *Hopkins v. State*, 352 Md. 146, 158-59 (1998)), *cert. denied*, 438 Md. 143 (2014).

Md. Rule 5-1002, sets forth the best evidence rule and provides: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." "Requiring the production of the original was designed to avoid inaccuracies due to mistake, faulty memory, or fraud." 6 Lynn McLain, *Maryland Evidence*, §1001:1 at 522-23 (1987). The best evidence rule is clearly a preference for original evidence. However, secondary evidence is preferable to no evidence at all, as seen from the exceptions to the best evidence rule found in Md. Rule 5-1004. That Rule provides that the contents of a recording may be proved by secondary evidence, if the original was lost or destroyed, not obtainable, in the possession of the opponent, or not closely related to a controlling issue. Md. Rule 5-1004(a)-(d). *See Gordon v. State*, 204 Md. App. 327, 347 (2012)(although best evidence is preferred, secondary evidence is admissible but only "after a proper foundation has been laid, showing good and sufficient reasons for the failure to produce the primary evidence.")(quotation marks and citations omitted)), *aff'd*, 431 Md. 527 (2013).

We review rulings on the admissibility of evidence, such as best evidence rulings, under the abuse of discretion standard. *Hopkins v. State*, 352 Md. 146, 158 (1998)(citations omitted). This is because trial courts have broad discretion in the conduct of trials, including receiving evidence, and we will reverse only if the trial court clearly abused its discretion. *Id.* (citations omitted).

Trooper Buckius testified that he did not listen to the January 21 recording live but reviewed it after the call had been recorded. Therefore, the January 21 recording was the best evidence of the call, and Trooper Buckius's testimony regarding the content of the call was secondary evidence. Under Md. Rule 5-1004, the trooper could testify about the content on the call, but only if the State established that the original recording was unavailable. Here, the trial transcript shows that the audio recording of the January 21 call was available to play for the jury, but the State declined to admit it into evidence. Contrary to appellant's argument, however, this does not lead to reversal of his convictions, for Detective Schwink's testimony sufficiently identified appellant's voice on the call.

Reliability of a voice identification is assessed using the five-factor test from *Neil v. Biggers*, 409 U.S. 188, 199 (1972). *Donati*, 215 Md. App. at 740. Specifically, in assessing the reliability of a voice identification, a trial court will look to "(1) the ability of the witness to hear the assailant speak, (2) the witness's degree of attention, (3) the accuracy of any prior identifications the witness made, (4) the period of time between the incident and the identification, and (5) how certain the witness was in making the identification." *Id.* (quotation marks and citation omitted).

Here, the detective testified that he listened to the intercepted calls between appellant and Clark over the two-month investigation. We note that this was a drug investigation and the detective's job was to pay close attention to what the voices on the calls were saying. At the end of the two months, during which over 100 calls were intercepted and listened to between appellant and Clark, the detective interacted with appellant face to face while executing a search warrant for his car and his person. The

detective then testified, without objection, that he recognized the voices on the ten intercepted calls as belonging to appellant.[1] The detective expressed no hesitancy in his identification. This was sufficient to meet the State's slight burden of proof of authentication, and therefore, we find no abuse of discretion by the trial court in permitting

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[1] Even though not raised by either party, we note that appellant's authentication argument does not appear to be preserved for our review for two reasons. First, appellant objected after Detective Buckius testified as to the content of the January 21 call. Specifically, after the trooper testified that he had reviewed each of the 10 recorded calls, the following colloquy occurred:

> [THE STATE]: Now, I've asked you about several session numbers. Did you recognize the voice on those session numbers?
>
> [WITNESS]: Yes, I did.
>
> [THE STATE]: And how did you recognize the voice on those session numbers?
>
> [WITNESS]: **I recognized it from 977 [the January 21st recorded call] with a voice identifies the party who was speaking and that was the same voice which was captured on calls prior to and after that.**
>
> [THE STATE]: And do you recognize this voice to belong to anybody in particular?
>
> [THE WITNESS]: Yes, I do.
>
> [THE STATE]: Who do you recognize this voice to belong to?
>
> [THE WITNESS]: **Henry Gray**.

(Emphasis added). Defense counsel then objected, and the trial court overruled the objection. Second, appellant did not object when Detective Schwink identified appellant's voice on the recorded calls. *See* Md. Rule 4-323(a)("An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived.").

Detective Shwink to identify appellant's voice in the recorded calls. *Cf. United States v. Axselle*, 604 F.2d 1330, 1338 (10th Cir. 1979)(no error by the trial court in permitting agent to identify the defendant's voice in a single recorded telephone call after hearing the defendant's voice in court on one occasion); *Vilsaint v. State*, 127 So.3d 647, 650 (Fla. Dist. Ct. App. 2013)(no error by the trial court by permitting a detective to identify the defendant's voice on an audio tape based on a ten-to-fifteen-minute discussion after his arrest, because the ultimate identification was for the jury to determine). Moreover, the detective seized a cell phone from appellant's pants' pocket during execution of the warrant and recognized the cell phone number as the number associated with appellant from the live wiretap. We note that authentication may also be established by circumstantial evidence. *See* Md. Rule 5-901(b)(4). *Cf. United States v. Carrasco*, 887 F.2d 794, 804 (7th Cir. 1989)(recorded conversations properly admitted based, in part, on fact that telephone calls were placed to the home where defendant resided).

B. Co-Conspirator exception to the hearsay rule

Appellant also argues that even if the calls were admissible because his voice was properly identified, the trial court nevertheless erred in admitting Clark's statements in the calls because they constituted inadmissible hearsay. Appellant argues that the co-conspirator exception to the hearsay rule does not apply because the State failed to establish a conspiracy, independent of the calls. The State disagrees, as do we.

"Hearsay" is defined as "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). Subject to certain well-established exceptions, a hearsay

statement offered to prove its truth is inadmissible. *See* Md. Rule 5-802. Statements by a co-conspirator "during the course and in furtherance of the conspiracy" is an established exception to the hearsay rule. Md. Rule 5-803(a)(5).

Conspiracy law is well settled in Maryland.

> A criminal conspiracy consists of the combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. The essence of a criminal conspiracy is an unlawful agreement. The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design. In Maryland, the crime is complete when the unlawful agreement is reached, and no overt act in furtherance of the agreement need be shown.

Shelton v. State, 207 Md. App. 363, 377 (2012)(quotation marks and citations omitted). The "furtherance of the conspiracy" requirement of the co-conspirator exception to the hearsay rule is "interpreted broadly." *Id.* at 378 (quotation marks and citation omitted). Specifically, a statement "may be found to be in furtherance of the conspiracy even though it is susceptible of alternative interpretations and was not exclusively, or even primarily, made to further the conspiracy, so long as there is some reasonable basis for concluding that it was designed to further the conspiracy." *Id*. at 379 (quotation marks and citation omitted). Thus, "[i]f some connection is established between the declaration and the conspiracy[,] then the declaration is taken as in furtherance of the conspiracy." *Id*. (quotation marks and citation omitted). "Whether evidence is hearsay is an issue of law reviewed *de novo*." *Bernadyn v. State*, 390 Md. 1, 8 (2005).

Citing *Ezenwa v. State*, 82 Md. App. 489 (1990), appellant argues that the State was required to prove the existence of a conspiracy between himself and Clark, independent of the calls, before the trial court could admit the calls into evidence. Appellant is wrong. In

Ezenwa, we addressed the co-conspirator exception and distinguished between those situations where the State seeks to admit evidence between a co-conspirator and a third-party, neither of whom is the defendant, from those situations where the evidence does not involve a third-party, like the situation here. We explained:

> Maryland law recognizes a common law hearsay exception pursuant to which the out-of-court statement of a co-conspirator is admissible as substantive evidence against the other co-conspirators so long it was made during the conspiracy and in furtherance of it. McLain, *Maryland Practice*, § 801(5).1, p. 330. The general rule is that such statements are admissible only after a prima facie showing that the conspiracy exists and the declarant and his co-conspirators are participants in it. *Id.*, p. 331. "[W]hen the State seeks to use statements against a co-conspirator made by another co-conspirator to a third party, it must first demonstrate, through evidence *aliunde*, the existence of a conspiracy, <u>but the testimony of one conspirator is admissible against a co-conspirator without the necessity of establishing through an independent source the existence of the conspiracy</u>." *Mason, Taylor & Taylor v. State*, 18 Md. App. 130, 136–37, 305 A.2d 492, *cert. denied*, 269 Md. 763, 767 (1973).

Ezenwa, 82 Md. App. at 512 (emphasis added).

Contrary to appellant's argument, the State was not required to prove the conspiracy through evidence independent of the telephone calls. The recorded telephone calls, as interpreted by the State's expert, Trooper Buckius, showed appellant and Clark conspiring to sell and distribute cocaine. Therefore, the calls were admissible under the co-conspiracy exception to the hearsay rule.

In sum, we find no error by the trial court in admitting the calls into evidence.

II.

Appellant argues that the trial court abused its discretion when it permitted Trooper Buckius to offer his expert opinion about the meaning of the words and phrases used in the

calls because there was no factual basis for many of Trooper Buckius's opinions. Citing *Channer v. State*, 94 Md. App. 356 (1993), appellant also asserts a plain error argument, that the trial court erred when it failed to "take precautions to ensure that the jury would not misuse Trooper Buckius's testimony" by giving undue weight to his factual testimony because he was qualified as an expert. The State responds that there was a sufficient basis for the trooper's opinion and appellant's plain error argument is meritless because it does not reflect current Maryland law, and therefore there was no error, let alone plain error. We agree with the State.

Md. Rule 5-702, governing expert opinion testimony, 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.

The third factor, which is at issue here, includes two sub-issues: factual basis and methodology. *Exxon Mobil Corp. v. Ford*, 433 Md. 426, 478 (2013)(citation omitted). Evidence of a factual basis and methodology ensure that the expert's opinion "constitutes more than mere speculation or conjecture." *Id*. (citation omitted). "A factual basis for expert testimony may arise from a number of sources, such as facts obtained from the expert's first-hand knowledge [and] facts obtained from the testimony of others[.]" *Sippio v. State*, 350 Md. 633, 653 (1998)(citation omitted). Trial courts are vested with "wide latitude in deciding whether . . . to admit or exclude particular expert testimony" and we

will reverse only where there has been an abuse of discretion. *Massie v. State*, 349 Md. 834, 850-51 (1998)(citations omitted).

A. Sufficient factual basis

Trooper Buckius testified that he was an officer with the Talbot County Sheriff's Office from 2007 to 2010, a Maryland State Trooper since 2010, and a trooper assigned to the Queen Anne's County Drug Task Force since 2014. He received specific drug training in 2007 at the Eastern Shore Criminal Justice Academy, in 2010 at the Maryland State Police Academy, in 2015 during a McLaughlin Information Sharing Conference (a conference concentrating on the region's drug problem), and, also in 2015, at a week-long Top Gun course. He also testified about his work experience in making approximately 100 drug-related arrests, surveilling drug operations, and participating in approximately 25 drug-related search and seizure warrants. As to his understanding of coded drug language, he explained that his knowledge came from his training at the Top Gun conference and academies where he was trained specifically on the use of coded words in the distribution of controlled dangerous substances, and his speaking with people actively involved in the use and sale of drugs.

Appellant directs our attention to the following words and phrases interpreted by Trooper Buckius as instances where the trooper opined in a "conclusory fashion, that a certain word or phrase should not be given its literal meaning": 1) in call 1612 that the phrase "will save you a run" by Clark meant that Clark had handled the drug transaction himself; 2) in call 1837 that the phrase "tell him he dead till the morning" meant Clark

would re-up his cocaine supply in the morning and distribute the amount the customer wanted to purchase then; 3) in call 2921 that the words "hard ball" meant crack cocaine; 4) in call 3419 that the phrase "I have a strike for you" meant appellant "has a drug deal lined up"; 5) in call 3462 that the phrase "[I] have another hit when I get back" meant that appellant had another drug deal lined up when Clark returned; and 6) in call 2114 that the word "steak" could mean either a scale on which to weigh drugs or money in a drug sale. Appellant argues that in none of the above instances did Trooper Buckius reveal the "underlying rationale or methodology" he applied in reaching his interpretation of each word/phrase.

Citing the 2000 advisory committee notes to Fed.Rule 702, appellant argues that an expert must base his opinion about the use of coded words in a drug transaction on "reliable methods." The advisory notes, however, recognize that "[t]he method used by the agent [to testify about the use of code words in a drug transaction] is the application of **extensive experience** to analyze the meaning of the conversations." (emphasis added). Additionally, the federal case law that appellant cites also recognizes that an expert's methodology in interpreting slang in drug calls may be based on experience and context. *See United States v. Garcia*, 752 F.3d. 382, 390-91 (4th Cir. 2014)(the expert's methodology was sufficiently explained and reliable where the expert testified that he relied on the context of the call, noticed patterns in the words used in the calls, and conversations the expert had with other persons in other cases who "would talk about the drug shops and the language that was used to communicate" about drugs). *See also United States v. Dukagjini*, 326 F.3d 45, 54

(2d Cir. 2003)(recognizing that methodology may be proven by experience), *cert. denied*, 541 U.S. 1092 (2004).

Given the trooper's background, training, and experience, we find no abuse of discretion by the trial court in permitting the expert to given his opinion regarding the coded language in the recorded calls. The language was rationally connected to his expertise and his opinions were not ambiguous statements about words/phrases that were clearly not drug code. To the extent that appellant suggests that an expert is required, before he interprets a word, to specify exactly how and when he came to learn the meaning of the coded term, appellant made no objection below on this ground and we reject that argument as overly broad and unreasonable.

B. Witness offering both lay and expert opinion testimony

Appellant also argues that the trial court erred in not taking precautionary measures to prevent the jury from giving undue weight to Trooper Buckius's factual testimony because he was admitted as an expert. Although appellant recognizes that he did not ask the court to take any precautionary measures, he asks us to exercise our plenary discretion under the doctrine of plain error and reverse his convictions.

The "plain error" doctrine applies generally in the context of unobjected to jury instructions. *See* Md. Rule 4-325(e). It does not apply to the error alleged here – admission of improper expert testimony. For unobjected to errors like that claimed here, we look to Md. Rule 8-131(a). That Rule provides: "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" but that we "may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." We have said:

> The purpose of Maryland Rule 8-131 is to allow the court to correct trial errors, obviating the necessity to retry cases had a potential error been brought to the attention of the trial judge. The Rule is also designed to prevent lawyers from "sandbagging" the judge and, in essence, obtaining a second "bite of the apple" after appellate review.

Sydnor v. State, 133 Md. App. 173, 183 (2000), *aff'd*, 365 Md. 205 (2001), *cert. denied*, 534 U.S. 1090 (2002). Nonetheless, an appellate court should recognize unobjected to error when "compelling, extraordinary, exceptional or fundamental to assure the defendant of [a] fair trial." *Rubin v. State*, 325 Md. 552, 588 (1992)(quotation marks and citations omitted). The standard is high: "Every error that, if preserved, might have led to a reversal does not thereby become extraordinary." *Perry v. State*, 150 Md. App. 403, 436 (2002), *cert. denied*, 376 Md. 545 (2003). We have said: "[T]he notion of 'plain error' requires, as a rock-bottom minimum, a legal error by the judge, not a tactical miscalculation by defense counsel; the judge does not sit as co-counsel for the defense. Neither does the appellate court." *Nelson v. State*, 137 Md. App. 402, 424 n.5 (2001).

To support his argument, appellant relies heavily on federal case law that recognizes some danger in a jury possibly giving undue weight to an expert witness who moves back and forth between expert and fact testimony. *See United States v. Moralez*, 808 F.3d 362, 365-66 (8th Cir. 2015)(collecting cases). He also relies on *Channer v. State*, 94 Md. App. 356 (1993).

In *Channer*, we were asked to decide whether the trial court erred in granting the State's request to present the lead detective's testimony in two parts – as a fact witness and

as an expert witness – so as to make the case "move[] a lot smoother." *Channer*, 94 Md. App. at 367. Recognizing that police officers who investigate drug crimes "are frequently called upon" to testify regarding the evidence they gathered and then explain, based on their expertise, the significance of the evidence, we found nothing unusual with a witness acting as both a fact witness and expert witness in the same case, and we ultimately found no error by the trial court in granting the State's request. *Id*. Contrary to appellant's suggestion, we did not hold that an officer, who is both a fact and expert witness, must testify separately. Even appellant acknowledges that "Maryland courts have not established a preferred procedure for calling witnesses who will testify in both an expert and a lay capacity."

In sum, we shall not address appellant's argument on appeal because, as he recognizes, he has failed to preserve his argument for our review when he did not ask the court to take any precautionary measures, and any error he alleges does not reflect current Maryland law.

III.

Appellant argues that the trial court erred in admitting Trooper Buckius's testimony where he twice testified about drug activities Clark, appellant's co-conspirator, had engaged in during the investigation. Appellant seems to argue that regardless of whether the testimony was admissible as non-hearsay, the testimony was still inadmissible because it was too prejudicial. Appellant has not preserved the first instance for our review, and we find no error by the trial court in the second instance. We explain.

A.

Trooper Buckius testified that the word "plastic" in the first intercepted call played for the jury meant a plastic baggie of cocaine, explaining that drugs are commonly packaged in plastic bags. On cross-examination, defense counsel elicited that the word plastic could have been used literally, and it could refer to a roll of plastic or window insulation. On re-direct, the following colloquy took place:

> [THE STATE]: Why did you believe plastic not to mean actual plastic?
>
> [THE WITNESS]: During the investigation, it was learned that –
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [THE STATE]: What did you learn specifically?
>
> [THE WITNESS]: I learned specifically that Eric Clark was traveling to various areas to obtain cocaine at which time he would distribute to other persons, basically, that worked underneath him and, in turn, would go sell that cocaine. Once they received their profits, they would keep their share, move the money back to Eric – Mr. Clark, at which time he would travel again to go obtain more cocaine and come back down and do it all over again.

Here, the State initially asked the witness why he believed "plastic" meant "plastic baggies" and not plastic literally, as suggested by the cross-examination by defense counsel. We believe that the trial court properly overruled the objection when the witness began "During the investigation . . . ." This was because the State was permitted to have the officer explain on re-direct why he believed "plastic" meant "plastic baggies." However, the answer given by the officer was unresponsive and did not explain why the officer thought plastic meant plastic baggies. In fact, the officer never mentioned the word

plastic in his response. Therefore, it was incumbent on defense counsel to object to the testimony elicited as unresponsive, irrelevant, and unduly prejudicial. Because he did not, appellant has not preserved any objection to that testimony. *See* Md. Rule 4-323(a)("An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived.").

B.

Appellant also directs our attention to the direct examination of Trooper Buckius when the trooper testified that the term "doowop," as used in the third recorded call, meant, based on "[i]nsight gained in this investigation[,]" $20 worth or .2 grams of "primarily powder cocaine." On cross-examination, defense counsel questioned the trooper doggedly about his interpretation of the words used in the calls, eliciting from the trooper that different kinds of CDS could be packaged in a plastic baggie, that "a run" could mean a "beer run," and that "hard ball" could mean to "negotiate something." Additionally, defense counsel questioned the trooper whether doowop referred to crack cocaine or powder cocaine. The following colloquy occurred:

> [DEFENSE COUNSEL]: You don't necessarily know which it was, right?
>
> [THE WITNESS]: Primarily it was powder cocaine and we have – in the investigation we realized that someone placed an order for doowops, for $60 worth of doowops and there was three baggies of powder cocaine recovered and –
>
> [DEFENSE COUNSEL]: I'm going to object to that, Your Honor, that's not in evidence.
>
> [THE STATE]: It's her question, she opened the door.

> [DEFENSE COUNSEL]: That doesn't mean I have to sit there and let all kinds of hearsay in. I have a right to object –
>
> THE COURT: Next question.
>
> [DEFENSE COUNSEL]: Thank you.

On redirect examination, the following colloquy occurred:

> [THE STATE]: You were asked several times about how you determined or that you came to the conclusion that the drug at issue here was cocaine. How did you determine that the drug that they were discussing was cocaine?
>
> [THE WITNESS]: There was an instance where an incoming call was taken in on Mr. Clark's line, the target line, which a female –
>
> [DEFENSE COUNSEL]: I'm going to object now. I don't even know who that is. That wasn't in evidence.
>
> [THE STATE]: Your Honor, there were several questions from [defense counsel] about how this particular individual came to the conclusion that it was cocaine and there was an attempt to make it some sort of, you know, out there sort of determination. I'm bringing it back to the reality of the situation and grounding it in facts. What led this particular witness to a specific conclusion, based on the language that was used.
>
> THE COURT: I believe the door was opened on cross-exam. I'll permit it.
>
> [THE STATE]: Thank you.
>
> [THE WITNESS]: There was an instance where we intercepted a call, a female was speaking with Mr. Clark, she ordered $60 worth of a drug –
>
> [DEFENSE COUNSEL]: Your Honor, may we approach?
>
> THE COURT: No. Overruled.
>
> [THE WITNESS]: She ordered $60 worth of a drug, surveillance was maintained during the hand-to-hand transaction. The female then left the area. Surveillance never lost sight of her at which time a traffic stop was conducted on the vehicle. A search of the vehicle initially didn't reveal anything. The female was taken and searched in a secured area at the state police barracks. Investigators never left the area of where the traffic stop

> occurred. They went back to the traffic stop. There was snow on the ground, it was freshly snowing. They were able to go back to exactly where the vehicle was. They were able to find three baggies of a white powdery substance, suspected to be cocaine and that goes back to the doowops being primarily powder cocaine. Three times two is – three times twenty is 60, $60, so there's three $20 bags of cocaine. The cocaine was field tested, which resulted –
>
> [DEFENSE COUNSEL]: Your honor, I'm going to object. I don't even know –
>
> THE COURT: I'll sustain at this point. I think the question has been answered.
>
> [DEFENSE COUNSEL]: Thank you.

After directing us to the above testimony, appellant's argument is confusing at best. Clearly, the trooper's testimony that a woman asked for $60 worth of drugs from Clark was hearsay. The rest of the trooper's testimony was not hearsay because there was no assertion. However, appellant never argues that the testimony was inadmissible because it was hearsay. Rather, he seems to concede that the testimony was non-hearsay, stating in his appellate brief: "Even where a statement is ostensibly offered for a non-hearsay purpose, this does not settle the question of its admissibility." Nonetheless, he argues that the testimony was "objectionable" but he does not state why, and he argues that the "State went too far when it sought to introduce specific information directly supporting its theory that Mr. Clark was a drug dealer who also supplied drugs to other dealers." Thus, the thrust of appellant's argument seems to be only a general argument that the testimony was unduly prejudicial.

Md. Rule 5-401 provides for the admission of relevant evidence. Md. Rule 5-403 provides that relevant evidence may be excluded, among other reasons, "if its probative

value is substantially outweighed by the danger of unfair prejudice[.]" Whether evidence is "unfairly" prejudicial is not judged by whether the evidence hurts one's case but whether it "might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged." *Burris v. State*, 435 Md. 370, 392 (2013)(quotation marks and citation omitted)). The question is one of balance, and often the more probative the evidence, the greater the unfair prejudice that must be shown to justify exclusion. *Id*. We give significant deference to a trial court's determination that probative evidentiary value outweighs any danger of prejudice. *CSX Transp., Inc. v. Pitts*, 203 Md. App. 343, 373 (2012)(citation omitted), *aff'd*, 430 Md. 431 (2013).

The Court of Appeals has recognized one of the more helpful definitions of the abuse of discretion standard comes from Judge Wilner's opinion in *North v. North*, 102 Md. App. 1 (1994), where he explained:

> Abuse of discretion ... has been said to occur "where no reasonable person would take the view adopted by the [trial] court," or when the court acts "without reference to any guiding rules or principles." It has also been said to exist when the ruling under consideration "appears to have been made on untenable grounds," when the ruling is "clearly against the logic and effect of facts and inferences before the court," when the ruling is "clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result," when the ruling is "violative of fact and logic," or when it constitutes an "untenable judicial act that defies reason and works an injustice.

Alexis v. State, 437 Md. 457, 478 (2014)(quoting *North*, 102 Md. App. at 13–14) (quotation marks and citations omitted). In *North*, Judge Wilner also observed that a "certain commonality" exists in all the definitions of an abuse of discretion, namely that all these

definitions include "the notion that a ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling." *North*, 102 Md. App. at 14.

Here, the trooper's testimony was prejudicial to appellant's case, however, we are not persuaded that the testimony was unduly prejudicial so that the trial court abused its discretion. The trooper's testimony that Clark engaged in a drug sale that the police ultimately learned involved powder cocaine was in direct response to the cross-examination by defense counsel eliciting from the trooper that he could not be sure that the recorded conversations were innocuous, or if the conversations involved drugs he was unsure what kind of drugs. Therefore, the trooper's testimony clearly had high probative value. Moreover, the trooper's testimony did not relate to any activity by appellant – only the actions of Clark and an unnamed woman. Therefore, the testimony while prejudicial was not unduly prejudicial. We think this is a situation where, as stated above, "the more probative the evidence, the greater the unfair prejudice that must be shown to justify exclusion." Under the circumstances presented, we do not believe that the trial court abused its discretion in admitting the testimony.

IV.

Appellant was sentenced to 15 years of imprisonment, 13 years suspended, followed by five years of supervised probation for conspiracy to distribute cocaine, and a concurrent identical sentence of 15 years of imprisonment, 13 years suspended, followed by five years of supervised probation for conspiracy to possess cocaine with the intent to distribute.

Appellant argues that the sentencing court erred by sentencing him to two separate conspiracy sentences instead of one. The State agrees, as do we.

"It is well settled in Maryland that only one sentence can be imposed for a single common law conspiracy no matter how many criminal acts the conspirators have agreed to commit." *McClurkin v. State*, 222 Md. App. 461, 490(quotation marks and citations omitted), *cert. denied*, 443 Md. 736, *cert. denied*, 136 S. Ct. 564 (2015). "The unit of prosecution [] is the agreement or combination rather than each of its criminal objectives." *Id.* (quotation marks and citation omitted). It is the State's burden to prove more than one conspiracy. *Savage v. State*, 212 Md. App. 1, 14-15 (2013)(citations omitted). Because the State did not meet its burden and prove more than one conspiracy, it follows that there was only one continuous conspiracy that was evidenced by the multiple acts or agreements done in furtherance of it. Accordingly, we shall vacate appellant's sentence for conspiracy to possess cocaine with the intent to distribute and, for sentencing purposes, merge that conviction into his conviction for conspiracy to distribute cocaine.

JUDGMENTS AFFIRMED;

SENTENCE FOR CONSPIRACY TO POSSESS COCAINE WITH THE INTENT TO DISTRIBUTE VACATED.

COSTS TO BE PAID ¼ BY QUEEN ANNE'S COUNTY AND ¾ BY APPELLANT.