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# IN THE COURT OF APPEALS OF INDIANA

Dwayne Keith Washington,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

December 9, 2021

Court of Appeals Case No. 21A-CR-997

Appeal from the Vigo Superior Court

The Honorable Sarah K. Mullican, Judge

Trial Court Cause No. 84D03-2008-F2-2814

**Mathias, Judge.**

[1] Dwayne Keith Washington appeals his conviction for Class A misdemeanor possession of a schedule II controlled substance following a jury trial. Washington presents a single issue for our review, namely, whether the trial

court abused its discretion when it admitted evidence identifying pills he had possessed as hydrocodone.

[2] We reverse.

## Facts and Procedural History

[3] On August 21, 2020, Terre Haute police officers were dispatched to an apartment to investigate a disturbance. When they arrived, they saw a man leaving the apartment, and they asked him to stop and talk to them. The man, later identified as Washington, looked like he might flee, so the officers approached him and conducted a pat down search of his person. The officers found a handgun in Washington's pocket and two baggies containing marijuana. The officers arrested Washington and transported him to the Vigo County Jail. There, when Officer Zachary Boone was about to conduct a strip search of Washington, Washington gave Officer Boone some pills and a substance that was later identified as methamphetamine. Officer Brian Hall later identified the pills as hydrocodone.

[4] The State charged Washington with Level 2 felony dealing in methamphetamine; Level 3 felony possession of methamphetamine; Level 4 felony dealing in a schedule II controlled substance; Class A misdemeanor possession of a schedule II controlled substance; Class A misdemeanor carrying a handgun without a license; Class A misdemeanor dealing in marijuana; and Class B misdemeanor possession of marijuana. At trial, the State presented

Officer Hall's testimony that the pills recovered from Washington at the jail were hydrocodone. The State did not conduct chemical tests on the pills to identify them. Rather, Officer Hall explained that he had matched the physical characteristics of the pills to hydrocodone as described on a website called Drugs.com. The trial court admitted that testimony over Washington's hearsay objection. The trial court also admitted State's Exhibit 14, which is a printout from that website showing identifying information for hydrocodone.

[5] At the conclusion of the trial, the jury found Washington guilty of Level 2 felony dealing in methamphetamine, Level 3 felony possession of methamphetamine, Class A misdemeanor possession of a schedule II controlled substance, and Class B misdemeanor possession of marijuana. The trial court entered judgment of conviction on all but the Level 3 felony possession of methamphetamine verdict. And the court sentenced Washington to an aggregate term of sixteen years with six years suspended to probation. This appeal ensued.

## Discussion and Decision

[6] Washington contends that the trial court abused its discretion when it admitted evidence that Washington possessed hydrocodone based on information obtained from Drugs.com. Generally, a trial court's ruling on the admission of evidence is accorded a great deal of deference on appeal. *Hall v. State*, 36 N.E.3d 459, 466 (Ind. 2015). Because the trial court is best able to weigh the evidence and assess witness credibility, we review its rulings on admissibility for

abuse of discretion and only reverse if a ruling is clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights. *Id.*

[7] Washington asserts that Officer Hall's testimony identifying the pills he possessed as hydrocodone was hearsay and did not fall under any hearsay exception. "Hearsay is an out-of-court statement used to prove the truth of the matter asserted." *Hurt v. State*, 151 N.E.3d 809, 813 (Ind. Ct. App. 2020) (citing Ind. Evid. R. 801(c)). "Hearsay is inadmissible unless it falls under a hearsay exception." *Id.* (citing *Teague v. State*, 978 N.E.2d 1183, 1187 (Ind. Ct. App. 2012); Ind. Evid. R. 802).

[8] At trial, the State argued that, while Officer Hall's identification of the pills using Drugs.com was hearsay, it was admissible under Indiana Evidence Rule 803(17), the "market reports exception." *See Reemer v. State*, 835 N.E.2d 1005, 1008 (Ind. 2005). That exception permits admission into evidence of "market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations." Evid. R. 803(17). The trial court concluded that Officer Hall's testimony was admissible under the market reports exception.

[9] On appeal, Washington presents an issue of first impression for our courts, namely, whether information obtained from Drugs.com to identify hydrocodone pills is admissible under the market reports exception to hearsay.

While no Indiana court has yet addressed this specific issue, in *Reemer*, our Supreme Court considered the market reports hearsay exception in the context of the admissibility of "the labels of commercially marketed drugs[.]" 835 N.E.2d at 1008. The Court in *Reemer* focused solely on the reliability of the labels and did not consider whether their use, as opposed to forensic testing of the drugs, was necessary. The Court stated that

> the "market reports" description of admissible items as "market quotations, tabulations, lists, directories, or other published compilations" suggests that the exception exists only for "compilations." It has however been held to support admission of other published materials where they are generally relied upon either by the public or by people in a particular occupation.

*Id.* The Court concluded that the "labeling of the tablets found in Reemer's possession was subject to federal and state law" and "physicians, patients and the general public routinely rely on regulated manufacturing practices and mandatory labeling to assure that pharmaceuticals are as they are represented to be." *Id.* at 1008–09. Thus, the Court held that "labels of commercially marketed drugs are properly admitted into evidence under the exception provided by Evidence Rule 803(17) to prove the composition of the drug." *Id.* at 1009.

[10] The State acknowledges that the use of a website to identify loose pills is not analogous to the reliance on the regulated label of a commercially marketed drug. Still, the State maintains that "the fact that government regulations

require accuracy in a statement is not a litmus test for admissibility under Rule 803(17).” Appellee’s Br. at 10. And the State asserts that,

> [w]hile a parallel with *Reemer* is not exact, because no government regulation appears to govern Drugs.com, the similarity with *Reemer’s* package labels (which were also produced by a non-governmental source) is telling: The information reported by Drugs.com for the imprinted pills exactly matches the information required for pill imprints by federal law and also supports, albeit indirectly, the trial court’s decision to admit Hall’s testimony and Exhibit 14. R. Evid. 803(17).

*Id.* at 14. Thus, the State contends that the trial court did not abuse its discretion when it admitted the identification of the hydrocodone using Drugs.com. We are not persuaded.

[11] In support of his contention on appeal, Washington cites cases from two other jurisdictions that have addressed this issue and held that such evidence is not admissible under this, or any other, hearsay exception. Washington relies, in part, on the Colorado Court of Appeals’ opinion in *People v. Hard*, 342 P.3d 572 (Colo. App. 2014), and we find the court’s analysis in *Hard* instructive here.

[12] In *Hard*, an officer testified at trial that “the numerical markings, shape, and color of the pills” found in the defendant’s possession “matched those of oxycodone and alprazolam, respectively, as shown on” Drugs.com. *Id.* at 576. The trial court admitted that testimony under the market reports exception to hearsay. On appeal, the court observed that,

> [a]t common law, [the market reports] exception was recognized as a narrow exception that was to be applied to a well-defined category of cases. *See* 6 John Henry Wigmore, Evidence in Trials at Common Law § 1702, at 38 (Chadbourn rev. ed. 1976). . . . "As with other hearsay exceptions, the admissibility of market reports and commercial publications under Rule 803(17) is predicated on the two factors of necessity and reliability." 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 803.19[1], at 803–131 (Joseph M. McLaughlin ed., 2d ed. 2014). Admitting such evidence is considered necessary because it would be difficult or impracticable to locate and summon every person who had contributed to the report or list. *Id.*; Mueller & Kirkpatrick § 8:101, at 882. The evidence is considered reliable because the compilers know that if the material they publish is inaccurate, the public or the trade will cease consulting their publication. Weinstein & Berger § 803.19[1], at 803–131; see also Mueller & Kirkpatrick § 8:101, at 882 ("[T]he material is considered trustworthy because many people rely on it in connection with their very livelihoods. . . . [A] pattern of unreliability invites users to turn elsewhere, which would make those who make or compile and publish such material lose stature and perhaps income.").

*Id.* at 576–77. The court then concluded that the State had not shown either that its reliance on Drugs.com to prove that the defendant had illegally possessed two prescription drugs was necessary or that the website was reliable. The court stated that

> [t]he People have not argued that using Drugs.com is a necessary means of identifying drugs. And it seems clear to us that it is not. Visually identifying a drug based on a Drugs.com search is not the only method—or even the most effective or reliable method—available to law enforcement officials. Rather, as

> Trooper Hancey acknowledged, another available method for identifying the pills in this case would have been to submit them to the Colorado Bureau of Investigation for chemical testing. Thus, use of Drugs.com to identify the drugs was by no means necessary.

*Id.* at 577. And the court stated that the State had not shown "that information from Drugs.com is sufficiently reliable for the purpose of identifying a controlled substance" because, among other reasons, it provided "no foundation for Trooper Hancey's assessment that Drugs.com is nationally recognized" and provided no support for its contention that Drugs.com is reliable because it "compiles and publishes material from reliable sources[.]" *Id.* at 578.

[13] In the instant case, the State attempts to distinguish *Hard* and argues that the evidence was admissible under the market reports hearsay exception because its reliance on Drugs.com was necessary and the website is reliable. The State asserts that the record shows that "Drugs.com is a necessary resource for law-enforcement officers to determine the identity of medicines they encounter in their duties." Appellee's Brief at 12. In support, the State cites Officer Hall's testimony that he does not have a field test kit for pills. The State also points out that the trial court acknowledged that "police lab[s]" are "overwhelmed" and "can't test marijuana and hydrocodone[.]" Tr. p. 25. And Brandy Cline, a forensic scientist with the Indiana State Police Laboratory, testified that due to

a "backlog" it takes longer to analyze some items "such as marijuana." *Id.* at 170.

[14] In support of its contention that Drugs.com is reliable, the State cites Officer Hall's testimony that the website is "respected enough that it's built into [the police department's] report system" and that it is the only site officers use to identify drugs. *Id.* at 90. Officer Hall testified that he has participated in "hundreds of drug cases." *Id.* at 100. Finally, the State points out that this court has cited Drugs.com in a published opinion, *Robeson v. State*, 834 N.E.2d 723, 724 n.2 (Ind. Ct. App. 2005) (citing Drugs.com to explain what Xanax is), *trans. denied*.

[15] We are not persuaded that the State's identification of the hydrocodone solely based on Drugs.com was necessary or that the website is reliable. The lack of a field test for pills is obviously not a bar to having them tested by the State Laboratory in preparation of trial. And the State does not explain why the difficulty of obtaining lab tests makes the use of Drugs.com necessary rather than merely convenient. Cline testified that she did not test the pills in this case because she was not asked to do so. As for reliability, just because one police department uses Drugs.com does not prove that the website is "generally relied upon either by the public or by people in a particular occupation[.]" *See Reemer*, 835 N.E.2d at 1008. Notably, the State did not introduce any evidence "that Drugs.com is nationally recognized" or commonly used by law enforcement. *See Hard*, 342 P.3d at 578.

[16] The trial court found, and the parties do not dispute, that the evidence obtained from Drugs.com was hearsay. We agree with Washington that the State's reliance on Drugs.com was not necessary and that the State has not shown that Drugs.com is a reliable source for drug identification. Indeed, the Colorado Court of Appeals noted that Drugs.com includes a "disclaimer of any guarantee as to the accuracy of the information on the site." *Hard*, 342 P.3d at 579. And Cline acknowledged that it is "possible for a pill to look like [h]ydrocodone and not be [h]ydrocodone[.]" Tr. p. 178.

[17] We hold that the market reports exception to hearsay under Evidence Rule 803(17) does not apply to allow the admission of evidence from Drugs.com that was used to convict Washington. Accordingly, the trial court abused its discretion when it admitted the evidence purporting to show that the pills in Washington's possession were hydrocodone based on the description on Drugs.com. Because the State presented no other evidence to show that the pills possessed by Washington were a controlled substance, we reverse Washington's conviction for Class A misdemeanor possession of a schedule II controlled substance.

[18] Reversed.

Tavitas, J., and Weissmann, J., concur.