

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0896

September Term, 2015

ROBERT S. HUGHES

v.

STATE OF MARYLAND

Kehoe
Leahy
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: July 11, 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.

Robert Shawn Hughes, appellant, was convicted following a jury trial in the Circuit Court for Harford County of possession of Oxycodone with the intent to distribute, possession of heroin with the intent to distribute, possession of heroin, and possession of cocaine. The court subsequently sentenced Hughes to forty years, all but ten years suspended, for possession with the intent to distribute Oxycodone; a consecutive twenty years, all but ten years suspended, for possession with the intent to distribute heroin; and a consecutive four years, all suspended, for the possession of cocaine.¹ In his timely filed appeal, Hughes raises one question for our consideration, which we have rephrased as follows:

Did the trial court plainly err by allowing the State to attack Hughes's credibility by questioning an expert witness regarding whether text messages sent by Hughes were consistent with his trial testimony?

Discerning no error sufficient to compel this Court to exercise plain error review, we shall affirm the judgments of the circuit court.

FACTUAL BACKGROUND

Around 10:50 p.m. on September 1, 2011, officers of the Harford County Sheriff's Office effected a stop of a black Chevrolet HHR traveling along Bel Air Road. The driver, Hughes, provided his driver's license and vehicle registration to the officers. Hughes and his passenger were removed from the car so the officers could perform a K-9

¹Hughes's conviction for simple possession of heroin was merged into his conviction for possession with the intent to distribute heroin for the purposes of sentencing.

scan. The K-9 officer alerted at the driver's side door. Based on the K-9's alert, the officers searched the car. In the course of the search, the officers seized three prescription pill bottles containing 258 30-milligram tablets of Oxycodone, one gram of cocaine, 6.9 grams of heroin, various drug paraphernalia, and Hughes's cell phone.

Hughes was arrested for his possession of multiple illegal substances.

Hughes was interviewed by the police and later testified in his own defense at his trial. He consistently averred that, after getting off of work, around 5:30 p.m., that evening, he had stopped at home to pick up his phone and his prescription slip for 300 Oxycodone pills that he took to treat his chronic back pain. He filled the prescription then picked up his passenger, Nicholas, around 7:30 p.m. He told the police that he had taken four of the pills before he was pulled over around 11:00 p.m. Hughes could provide no explanation as to where the other thirty-eight pills had gone.² Hughes denied that he sold or gave away any of his pills to others. He further denied any knowledge of the heroin and cocaine that were found in the driver's-side headliner of his car and suggested that they had been secreted in the car by his passenger. Hughes also denied that he had sent or received any drug-related text messages on his cell phone, which, he explained, he "barely" used because he was not permitted to use the phone while he was at work. He

²The State argued that text messages on Hughes's phone could be interpreted to suggest that, prior to being arrested, he had sold a total of thirty-eight Oxycodone pills to three buyers – Jeff Bel Air, Shorty Black, and Kim Kloman – who respectively purchased thirty pills, four pills, and four pills.

said that, when he was working, he left his cell phone at home, where it was regularly used by his ex-girlfriend.

DISCUSSION

During the State’s case in chief, the prosecutor called Sergeant Robert Royster to testify as an expert “in the fields of packaging, manufacturing, distributing, sale, terminology, and concealment methods” of controlled dangerous substances. In the course of his testimony, Sergeant Royster interpreted some of the text messages that were found in Hughes’s cell phone, indicating that the messages demonstrated that Hughes was actively involved in the illegal sale of narcotics. Hughes testified in his own defense that he “barely” used his cell phone, did not have his phone with him throughout most of the day on September 1, and had not sent or received the text messages, from September 1, that were extracted from the phone.

During its rebuttal, the State re-called Sergeant Royster. The prosecutor again presented the witness with text messages extracted from Hughes’s cell phone and asked him to “read the substance of the message and as you go, what, if any, interpretation based on your expertise you have of the text messages you’re reading to the ladies and gentlemen of the jury.” Throughout Royster’s testimony, the prosecutor asked the witness explicitly, in different ways and on multiple occasions, whether Hughes’s trial

testimony was consistent with the text message evidence, and the witness was permitted to answer (emphasis added):

Q: Now, I understand you weren't here yesterday when the defendant testified, but if the defendant testified that he barely used this phone, would [these messages] indicate ... that the defendant might be the person using the phone?

A: I believe he was using it in this instance, yes.

* * *

Q: And again, I understand you were not here yesterday when the defendant was testifying, but if the defendant had testified that he did not know a Jeff to the extent of having text message conversations with him, would that seem to be consistent or inconsistent with what you're reading?

A: That would be inconsistent.

* * *

Q: And again I understand you were not here when the defendant testified, but if he testified there was no way there would be any text messages with his name related to any controlled dangerous substance related texts, would you say that what you just read was consistent or inconsistent with that statement?

A: It would be very inconsistent with that statement.

* * *

Q: [I]f the defendant had testified that there would be no messages related to his name and drug dealing, would that be consistent or inconsistent with what you're viewing right now?

A: Completely inconsistent.

* * *

Q: So if the defendant had testified yesterday that he didn't have his phone at that time, would that be consistent or inconsistent with what you're reading?

A: Inconsistent.

* * *

Q: If the defendant yesterday had stated he did have his phone at that point, would that be consistent with what you believe from your investigation and experience?

A: That he did have it at five?

Q: Yes.

A: Yes.

The State concedes, and this Court agrees, that the prosecutor's questions were improper. Maryland law is clear that parties are prohibited from soliciting the opinion of a witness regarding the trustworthiness of another witness's trial testimony. *See Hunter v. State*, 397 Md. 580, 588-89 (2007) ("It is the settled law of this State that a *witness, expert or otherwise*, may not give an opinion on whether he believes a witness is telling the truth. Testimony from a witness relating to the credibility of another witness is to be rejected *as a matter of law*." (citation omitted; emphasis in original)); *see also Ware v. State*, 360 Md. 650, 678-679 (2000); *Conyers v. State*, 354 Md. 132, 153 (1999); *Bohnert v. State*, 312 Md. 266, 277 (1988).

What makes this case difficult is that defense counsel raised no objection to the prosecutor's questions at the time they were asked, nor at any other time prior to this appeal.

When evidence is admitted in the absence of a timely objection, this Court reviews the trial court's actions only for plain error. *See* Md. Rule 8-131 (“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”). “Plain error review is a rarely used and tightly circumscribed method by which appellate courts can, at their discretion, address unpreserved errors by a trial court which ‘vitally affect[] a defendant’s right to a fair and impartial trial.’” *Malaska v. State*, 216 Md. App. 492, 524, *cert. denied*, 439 Md. 696 (2014) (quoting *Diggs v. State*, 409 Md. 260, 286 (2009) (quotation marks and citation omitted)). This discretion should be rarely exercised because considerations of fairness and judicial efficiency call for assertions of error to be raised at trial so that “a proper record can be made with respect to the challenge, [and] the other parties and the trial judge are given an opportunity to consider and respond to the challenge.” *Chaney v. State*, 397 Md. 460, 468 (2007). We should engage in plain error review only when we are confronted with an outcome-affecting error of such magnitude that it “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *State v. Rich*, 415 Md. 567, 578 (2010) (quotation marks and citation omitted).

We are persuaded that the prosecutor’s questioning of the State’s expert witness regarding whether Hughes’s testimony was consistent with the other evidence presented at his trial was improper. *See, e.g., Hunter*, 397 Md. at 588-89 (opining that such questions are improper as a matter of law). But the evidence against Hughes was very strong. His claim that he did not have access to his cell phone at the time the critical text messages were sent and received was undercut by the fact that the sender referred to himself as “Shawn,” which is Hughes’s middle name. In light of the otherwise overwhelming evidence of Hughes’s guilt, we do not find the circumstances of this case so unfairly prejudicial that we are compelled to exercise our discretion to undertake plain error review. *See Rich*, 415 Md. at 578 (advising that plain error review is only appropriate in cases where the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings”).

**THE JUDGMENTS OF THE CIRCUIT COURT FOR
HARFORD COUNTY ARE AFFIRMED. COSTS TO BE PAID
BY APPELLANT.**