UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2126

September Term, 2015

MICHAEL LAMONT PRICE

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: August 1, 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.

Michael Lamont Price, appellant, was convicted by a jury in the Circuit Court for Washington County of possessing a telecommunications device while confined in a correctional facility. The court sentenced appellant to eighteen months imprisonment, to be served consecutively to the sentence he was then serving.

On appeal, appellant contends that the trial court abused its discretion in (1) allowing the prosecutor to elicit information through the use of a leading question and (2) allowing the prosecutor to make an improper closing argument. Perceiving no reversible error, we affirm.

Background

On June 22, 2014, appellant and a fellow inmate, Michael Thomas, shared a cell at Roxbury Correctional Institution in Hagerstown. On that day, Department of Public Safety and Correctional Services Officers Brandon Renner and Ryan Crosco searched the cell and removed a word processor. A subsequent x-ray of the word processor revealed a cell phone and cell phone battery inside of the processor. Mr. Thomas's inmate number was on the outside of the word processor.

Detective Kandace Mills, also with the Department of Public Safety and Correctional Services, conducted an investigation. As part of the investigation, Detective Mills interviewed appellant. She testified that appellant told her the phone was his cellmate's but that, at one time, he had it in his possession. He told her that (1) he attempted to use it, but it would not work; (2) he attempted to fix it, he was unsuccessful; and (3) he gave it back to his cellmate.

Mr. Thomas testified that he bought the word processor from another inmate, approximately four months before June 22, 2014. He stated that he had no knowledge of the phone.

Appellant testified on his own behalf. He denied telling Detective Mills that (1) Mr. Thomas gave him the phone; (2) he attempted to use it; and (3) he attempted to fix it. He testified that prior to his interview with Detective Mills, he had been administratively charged with possession of the cell phone and he had spoken to a Lieutenant Apple. He explained that he was telling Detective Mills what Lt. Apple had asserted to him. He acknowledged, however, that he pleaded "guilty" at his administrative hearing. Appellant also testified that Detective Mills told him one of the phone numbers found on the cell phone was the phone number of his wife. Nevertheless, appellant testified at his criminal trial that he never saw the phone and had no knowledge of its existence prior to June 22, 2014.

In rebuttal, Detective Mills testified that appellant told her that the phone belonged to his cellmate; that he attempted to call his wife or girlfriend[1] but it did not work; and he gave it back to his cellmate.

Discussion

Leading Question

The cross examination of Detective Mills concluded with the following two questions and answers.

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[1] It is not clear whether the person referred to was appellant's wife or girlfriend/significant other.

> Q. [Y]ou said on direct examination that …Mr. Price said that – you say that he, you say that he told you that he had possession of the phone at some point. Did he say what that point in time was?
>
> A. When?
>
> Q. Yes.
>
> A. No.

On redirect, the following occurred:

> Q. *Court's indulgence. When you spoke with uh Mr. Price, didn't he tell you that his cellmate had only just gotten that phone a couple days before they found it?*
>
> [Defense Counsel]: Objection. Objection.
>
> The Court: Overruled.
>
> A. Yes.
>
> Q. So if he had just gotten the phone a couple days before you found it and his cellmate let him borrow it, he would have had to have used it within a couple days—
>
> [Defense Counsel]: Objection
>
> The Court: Sustained.
>
> [The Prosecutor]: Nothing further.

(Emphasis added).

Appellant argues that the italicized question was leading and the answer impermissibly prejudiced the defense. Appellant explains that Detective Mills's answer to the question was the only evidence that appellant possessed the phone on or about June 22, 2014, the crime with which he was charged. Appellant concludes that, although

there was evidence that appellant possessed the phone, without the question and answer, there was no evidence that appellant possessed the phone on or about June 22, 2014.

The State observes that one of the exceptions to the general prohibition against leading questions on direct examination is to refresh a witness's recollection. The State argues that the leading question was used to refresh the witness's recollection after the witness testified that appellant did not tell her when he had possession of the phone.

Ordinarily, leading questions should not be allowed on direct examination except as necessary to develop a witness's testimony. The allowance of leading questions is reviewed on an abuse of discretion standard. Maryland Rule 5-611(c).

We agree with appellant that the challenged question was leading. It suggested the answer. We disagree with the State that the prosecutor asked the question to refresh the witness's recollection. First, the witness never testified that she lacked recall. Second, the two questions were not the same. One question asked whether appellant told the witness when he had possession of the phone. The other question asked whether appellant told the witness that his cellmate had gotten the phone a couple days before it was found. The similarity of the questions might give rise to an inference of date(s) of possession, but a witness would not necessarily regard them as the same question.

Nevertheless, there was no reversible error. A trial court has considerable leeway in permitting leading questions. *Hubbard v. State,* 2 Md. App. 364, 368 (1967). Moreover, even if the trial court erred, we conclude that any error was harmless beyond a reasonable doubt. Appellant admitted that he had physical possession of the cell phone at some point in time. There was evidence that the cell phone was still in his cell on

June 22, 2014. Physical possession of the phone plus actual knowledge of the existence of the phone in close proximity on June 22, 2014 was sufficient to support the conviction.

Closing Argument

In closing argument, defense counsel argued that if the State wanted to do a thorough analysis, it would have looked for fingerprints on the phone. Because there was no fingerprint evidence, defense counsel argued that the jury could infer that the results of a test might have been favorable to the defense.

In rebuttal, the prosecutor argued:

> Now the last thing that the defense came up with is some quick, saying this was a quick rush to judgment, that there wasn't a full investigation done. Well they found the phone. They found a phone number on the phone that belongs to the defendant's wife. They asked him, "Did you ever have the phone?" And he said, "Yes I had it. I tried to fix it, I tried to call my wife." And they have him admitting in an administrative hearing that he had possession of the phone. Yes we could have swabbed it for DNA and fingerprints and spent thousands and thousands and thousands of dollars—
>
> [Defense Counsel]: Objection.
>
> The Court: Overruled.
>
> [Prosecutor]: But it's not necessary when you've got an admission, corroboratory evidence and the fact that it was found in a cell where only two people had access.

Appellant acknowledges that the prosecutor properly argued that fingerprint evidence was not necessary "because even without fingerprint evidence, the State's evidence established beyond a reasonable doubt that Price possessed the cell phone." Appellant asserts, however, that the italicized sentence constituted improper argument.

Although there was no evidence of cost of fingerprint analysis, the remark in context clearly was intended to convey and did convey that analysis was unnecessary. It is unlikely that the remark misled the jury or unduly prejudiced appellant. *See Degren v. State*, 352 Md. 400, 431 (1999) (reversal is required only when the remarks actually misled the jury or were likely to have misled or unduly prejudiced the jury). Even if permitting the remark constituted an abuse of discretion, for reasons stated above, the single comment in context was harmless beyond a reasonable doubt.

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