UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2022

September Term, 2013

---

MARTIN McCLAIN A/K/A MARTIN McLAIN

v.

STATE OF MARYLAND

---

Woodward,
Nazarian,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

---

Opinion by Salmon, J.

---

Filed: January 9, 2015

Martin McClain a/k/a Martin McLain, (hereinafter "McClain") was charged in the Circuit Court for Baltimore City with possession of heroin and possession of heroin with intent to distribute. On November 6-7, 2013, McClain was tried by a Baltimore City jury, which convicted him of both charges. The court merged the convictions and sentenced McClain to 15 years' incarceration for possession with intent to distribute heroin. In this appeal, McClain presents the following questions:

1. Did the court abuse its discretion by qualifying a police officer as an expert in CDS identification, packaging, and sales when the officer had undergone no special training in that field and had never testified before as an expert?

2. Did the court plainly err by instructing the jury on "believable doubt" rather than reasonable doubt?

For reasons discussed below, we answer both questions in the negative and affirm appellant's conviction.

## I.
## TRIAL TESTIMONY OF JAMAL JOHNSON

Baltimore City Police Officer Jamal Johnson testified that at approximately 8:00 a.m. on the morning of December 17, 2012, he and his partner, Officer Davis, were on uniform patrol in the Eastern District of Baltimore City when he noticed a group of about eight people gathered around appellant. Some of the individuals in the group were "standing there with their hands out[.]" After a few seconds, the group disbanded. Officer Johnson drove his patrol car around the block and saw appellant "walking through the rear alley of the 2300 block of Aiken Street at a fast pace." As appellant walked away, Officer Johnson saw appellant take a black plastic grocery bag from his right hand and throw it into a yard.

Officer Davis got out of the vehicle to stop appellant, while Officer Johnson recovered the plastic bag that appellant had discarded. Inside the black bag were three clear plastic sandwich bags, each containing a separate quantity of clear gel capsules. All of the gel capsules contained a white powdery substance. Officer Johnson suspected that the powdery substance was a controlled dangerous substance (CDS) based upon his training and experience.[1] Appellant was then arrested.

After being qualified as an expert witness, Officer Johnson testified that a single heroin user generally buys a quantity of "ten or less" gel capsules, and that each gel cap costs "about $10." The total value of the heroin recovered in the black bag discarded by appellant was approximately $560.

Further facts regarding Officer Jackson's credentials as an expert will be set forth below.

## II.
## ANALYSIS

### A. Whether the trial judge erred when he allowed Officer Johnson to testify as an expert witness.

Appellant argues that "the [trial] court abused its discretion by qualifying [Officer Johnson] as an expert in CDS identification, packaging, and sales when the officer had undergone no special training in that field and had never testified before as an expert." Not

[1]It turned out that Officer Johnson was correct in his suspicions. A chemist for the State testified that subsequent laboratory tests of the powdery substance proved that the powdery substance that appellant had discarded was heroin.

surprisingly, the State maintains that the court properly exercised its discretion in allowing Officer Johnson to testify as an expert.

"Generally, a trial court has 'wide latitude in deciding whether to qualify a witness as an expert or to admit or exclude particular expert testimony.'" *Donati v. State*, 215 Md. App. 686, 742 (2014) (quoting *Massie v. State*, 349 Md. 834, 850-51 (1998)). It is well settled that the admissibility of expert testimony is within the sound discretion of the trial judge and will not be disturbed on appeal unless clearly erroneous. *Miller v. State*, 421 Md. 609, 622 (2011). Reversal of a trial court's ruling on the admissibility, *vel non*, of expert testimony "is warranted only if founded on an error of law or some serious mistake, or if the trial court has seriously abused its discretion." *Hartless v. State*, 327 Md. 558, 576 (1992).

Maryland Rule 5-702[2] provides, in pertinent part, that in determining whether a witness may give expert testimony, the court shall first determine "whether the witness is qualified as an expert by knowledge, skill, experience, training, or education[.]" It is well settled that "[t]o qualify as an expert, one need only possess such skill, knowledge, or experience in that field or calling as to make it appear that [the] opinion or inference will

---

[2]Maryland Rule 5-702, reads in full as follows:

> 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.

probably aid the trier [of fact] in his search for truth." *Thanos v. State*, 330 Md. 77, 95 (1993) (internal quotation marks and citations omitted.) A trial judge "is free to consider any aspect of a witness's background in determining whether the witness is sufficiently familiar with the subject to render an expert opinion, including the witness's formal education, professional training, personal observations, and actual experience." *Massie*, 349 Md. at 851.

The fact that a witness has not previously testified as an expert witness is not, standing alone, reason to find the witness unqualified to testify as an expert. *See Oken v. State*, 327 Md. 628, 660-61 (1992) (affirming admission of expert testimony by FBI special agent regarding a "torn edge comparison" involving shoe rubber, despite the fact that the agent had made no such comparison with rubber previously, in light of his FBI training performing torn edge comparisons of other substances). *Oaks v. State*, 83 Md. App. 1, 9 (1990) (even though the witness lacked expertise in more specific "area of campaign financing," the court nevertheless did not err in admitting testimony of an accountant, because he had expertise in accounting which sufficed to "be of assistance to the jury in tracking the 'paper trail' of campaign contributions[.]").

In the subject case, when Officer Johnson was first offered as an expert, the court ruled that his qualifications were insufficient. The trial judge changed his mind, however, based on Officer Johnson's testimony that he had:

- Completed a week-long course conducted at the police academy in which he learned "how to distinguish . . . heroin, cocaine and the different main street level narcotics, what it feels like, what it looks like, and the different ways that it's packaged and distributed;"

- Participated in annual in-service police training;
- Made over 100 arrests for the distribution of CDS;
- Patrolled the streets of Baltimore City for seven years as a police officer, during which time he often saw individuals selling CDS;
- Engaged in conversations with nearly every individual he arrested for suspected CDS distribution, and, in about one-half of those conversations, acquired information about the distribution of CDS.
- Recovered CDS that tested positive as heroin.

When explaining why he changed his mind, the trial judge first noted that the issue presented was whether Officer Johnson's "level of knowledge [was] such that it [could] assist the jury in its fact finding function if he were to be deemed an expert by the court." The court then observed that although Officer Johnson had never before testified in any court as an expert in CDS identification, packaging, and sales, nevertheless, "there's a first for everything[.]"

As already mentioned, the expert testimony Officer Johnson gave was that the single gel capsules of heroin cost $10, that a single heroin user generally buys "10 or less" gel caps, and that the total value of the 56 gel caps recovered from appellant was $560. Based on Officer Johnson's experience in working as a police officer on the streets of Baltimore for seven years, making over 100 arrests for drug dealing, gathering information during his discussions with drug dealers and others on the street, his knowledge was sufficient to be of at least some assistance to the jury in making a decision as to whether appellant intended to

distribute heroin. We therefore hold that the trial judge did not abuse his discretion when he ruled that Officer Johnson was qualified to testify as an expert witness regarding the identification, packaging, and sale of heroin.

**B. Whether the trial judge committed "plain error" when he instructed the jury.**

Appellant's second argument is that the court committed plain error when it used the term "believable doubt" instead of "reasonable doubt" on three occasions when he orally instructed the jury. Appellant asserts that, because "the court vacillated between the two concepts," it communicated "to the jury a mixed and unclear conception of the State's burden in this case." The State maintains that the issue as to whether an error in the instructions occurred is unpreserved. The State further contends that even if we were to review the issue pursuant to the plain error doctrine, no error occurred because the "trial court's reasonable doubt instruction was proper as it 'closely adhered' to the pattern instruction."

At the beginning of the jury instructions, the trial judge said:

> I will tell you in advance that the instructions seem a bit lengthy. It is anticipated as part of your discharge of your duty as jurors that you will actually remember these instructions. Of course because the instructions are so lengthy, it's this Court's practice that I will actually give to the 12 of you who retire in a moment to deliberate two copies of these written instructions to share one amongst each of the six of you. That way you'll have a couple of copies that you can refer to should you have any questions regarding the instructions based upon, you know, your memory.
>
> Now I am going to read these instructions to you because I haven't memorized them even though I've given them many, many times and I understand that pretty much the only individuals who like to be read to are individuals who are generally between the ages of about one-and-a-half and six. But I'm going to ask that you please now give the Court your undivided

> attention as I read these instructions to you, remembering that I will give you a couple of copies to take with you along with the evidence back to the jury deliberation room.

The trial judge, as promised, proceeded to read the complete set of instructions to the jury. When he finished, neither counsel objected to any part of the instructions. After counsel gave their closing argument(s), the court provided the jury with two written copies of the instructions and told the jurors that they should consult the written instructions if anyone's memory needed clarification regarding the contents of the instructions. The judge emphasized that jurors should "feel free to refer to these to assist you, and I'm sure that that will greatly reduce, if not indeed wholly prevent any questions" that may arise during deliberations.

The written jury instructions submitted to the jury by the trial court contained no errors of any kind, and the instruction regarding the concept of "reasonable doubt" was completely in accordance with Md. State Bar Ass'n's, *Maryland Criminal Pattern Jury Instructions* (MPJI-CR) 2:02, at 210-11 (2nd ed. 2012).

In his oral instructions, the court said:

> The Defendant, Martin McLain, is presumed to be innocent of the charges. This presumption remains throughout every stage of the trial and does not overcome unless you are convinced beyond a <u>believable doubt</u> that he is guilty.
>
> The State has the burden of proving the guilt of the Defendant, Martin McLain, beyond a <u>believable doubt</u>. This burden remains on the State throughout the trial.

> The Defendant, Martin McLain, is not required to prove his innocence. However, the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty; nor is the State required to negate every conceivable circumstance of innocence.
>
> A reasonable doubt is a doubt founded upon reason. Proof beyond a believable doubt requires such proof as would convince you of the truth of the fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs.
>
> If you are not satisfied of the Defendant, Martin McLain's, guilt to that extent, then reasonable doubt exists and he must be found not guilty.
>
> * * *
>
> You may not convict the Defendant unless you find that the evidence, when considered as a whole, establishes his guilt beyond a reasonable doubt.

(Emphasis added).

According to appellant, when the trial court substituted the word "believable" for "reasonable" three times in the portion of the oral instructions just quoted, the court committed plain error. As a result, despite the fact that his counsel did not object, appellant urges us to exercise our discretion under Maryland Rule 4-325(e) to recognize and correct "plain error." According to appellant, the error vitally affected his right to a fair and impartial trial.

Ordinarily, in order to secure appellate review of a jury instruction, a defendant must "object[ ] on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." Md. Rule 4-325(e). Appellant

did not object at the time of the instruction, nor did appellant's trial counsel offer any additions or suggest any changes when asked by the court if there were any exceptions.

There is an exception to the ordinary rule, however. Rule 4-325(e) provides that an appellate court may "take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object."

While we have discretion to exercise plain error review, "we exercise that discretion only when the unobjected to error is compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Turner v. State*, 181 Md. App. 477, 483 (2008) (citations omitted). Plain error review always has been, still is, and "will continue to be a rare, rare phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003). This "plain error hurdle, high in all events, nowhere looms larger than in the context of alleged instructional errors." *Martin v. State*, 165 Md. App. 189, 198 (2005) (quotations and citations omitted), *cert. denied*, 391 Md. 115 (2006).

In *Morris*, while in the course of delivering "a lengthy exposition of pertinent law," the trial judge "made an inadvertent, subconscious slip of the tongue," 153 Md. App. at 509, when, instead of saying that the State did not have to prove guilt beyond "all possible doubt," the judge said "all reasonable doubt." *Id*. at 506. As in the case before us, the judge was "completely unaware of having misspoken," as were both the prosecutor and defense counsel. *Id*. Nevertheless, in *Morris*, "appellants, with hindsight, would now have us believe that the jurors, with the ears of a gazelle, pounced upon the slip that everyone else had missed

and gave it possibly dispositive significance." *Id*. We declined to forgive the appellant's lack of preservation. Instead, we said that the case presents "a classic illustration of one of the key virtues of the preservation requirement," because, had the error been brought to the judge's attention as required, "he would immediately have corrected himself." *Id*. at 509. *See also*, *Bowman v. State*, 337 Md. 65, 69 (1994) ("The purpose of Rule 4-325(e) is to give the trial court an opportunity to correct an inadequate instruction."). The same is true in this case.

Appellant relies upon *Ruffin v. State*, 394 Md. 355, 357 (2006), in support of his contention that we should apply the plain error doctrine in this case. In *Ruffin*, the Court of Appeals reversed appellant's conviction after stating that a trial court's instructions regarding reasonable doubt must "closely adhere to" MPJI-CR 2:02. Appellant contends that the trial judge did not "closely adhere" to the pattern instructions in this case because the court said "believable doubt" instead of "reasonable doubt" three times.

*Ruffin* does not support appellant's position that we should reverse his conviction based on the plain error doctrine. In *Ruffin* there was no preservation issue, because defense counsel made a contemporaneous objection immediately after the trial judge failed to instruct in accordance with the pattern jury instructions. *Id*. at 358-59. Therefore, Ruffin did not have to invoke the plain error doctrine in order to prevail on appeal. Also, unlike the situation in *Ruffin*, during the oral instructions, the trial judge told the jurors twice that they should acquit the defendant if they did not find him guilty beyond a reasonable doubt.

Moreover, the instructions as to the definition of "believable" doubt was the same as the approved definition of reasonable doubt. Additionally, in this case, on two occasions the trial judge emphasized the significance of the written instructions and urged the jurors to freely consult those instructions for guidance if they had any questions. Lastly, we note that defense counsel, during closing argument, stressed – as almost all defense counsel do – that the State had the burden of proving guilt beyond a reasonable doubt. Under all of these circumstances, it is unlikely, in the extreme, that any juror was misled by the court's inadvertent use of the phrase "believable doubt."

For all of the above reasons, we decline to exercise our broad discretion to apply the plain error doctrine.

**JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.**