

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2701

September Term, 2016

RODNEY LEE AGNEW

v.

STATE OF MARYLAND

Wright,
Graeff,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: December 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.

On November 16, 2016, Rodney Lee Agnew, appellant, was convicted in the Circuit Court for Montgomery County of possession of a firearm by a prohibited person, possession with intent to distribute heroin, and possession with intent to distribute cocaine. The circuit court imposed eight-year concurrent sentences on each of the convictions.

On appeal, appellant presents five questions for this Court's review, which we have slightly rephrased, as follows:

1. Did the trial court err in admitting a communication, recorded on a cell phone, between appellant and an unidentified speaker, which was intercepted in violation of the Maryland Wiretap Statute?
2. Did the trial court err in allowing irrelevant and prejudicial testimony that appellant was the subject of a drug-related investigation and under surveillance?
3. Did the trial court abuse its discretion in permitting Detective Street to testify to the meaning of terms used in conversations between Agnew and others?
4. Did the trial court plainly err by permitting Detective Street to testify that appellant possessed drugs with the intent to distribute them in violation of Rule 5-704?
5. Did the trial court plainly err by allowing propensity evidence of Agnew's "drug dealing?"

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2015, officers from the Montgomery County Police Department initiated a drug-related investigation of appellant. On the evening of November 3, 2015, Officer Kevin Morris observed appellant exit an apartment, descend two flights of steps, and return to the apartment "approximately 30 seconds" later. On November 10, 2015, Officer Morris and another officer, Officer Kevin Baxter, observed appellant exit the same

apartment and return approximately “10 to 15 seconds” later. Through the officers’ physical surveillance of appellant, and the use of police databases, the police determined that appellant resided at 13403 Guilford Run Lane, Apartment L, in Silver Spring, Maryland (the “Apartment”).

The police obtained a search warrant, and on November 25, 2015, they executed the search warrant on the Apartment. Appellant and his wife, Natalie Agnew, were in the bedroom. On the nightstand, to the right of the bed, was a cell phone that officers recovered. Within the top drawer of the nightstand was a bag of marijuana and a small pink wallet, which contained another controlled dangerous substance. On the nightstand to the left of the bed was a silver iPhone; U.S. currency was found in a drawer of the nightstand. In the closet of the bedroom, officers found a suitcase, which contained a loaded .32 caliber revolver and a black digital scale. The suitcase contained a luggage tag with the name “Elise M. Weaver” on it.¹

In the hallway, the officers found a black container, inside of a cabinet, that contained six plastic baggies, with “either white powder substance, suspected crack cocaine or suspected heroin.” During a search of the kitchen, the officers found “a bottle of

¹ At trial, the State and appellant entered into the following stipulation: “[T]he defendant is charged with illegal possession of a regulated firearm. The defendant stipulates that he has been convicted of a disqualifying crime under the statute charged and is therefore not permitted to possess a regulated firearm. The defendant does not admit possession of a regulated firearm.”

creatine, some sandwich bags, a digital scale and a baggie with a green leafy substance and another baggie with white substance in it, a white powder in it.”

Leah King, the Technical Leader of the Forensic Chemistry Unit in the Crime Laboratory of the Montgomery County Police Department, identified the type and quantity of each substance found within area of the Apartment, as follows:

Marijuana:

- Three individual knotted sandwich bags of green vegetation totaling 4.53 grams; and
- One separate knotted sandwich bag of green vegetation containing 0.18 grams.

Cocaine:

- One knotted sandwich bag containing 0.77 grams; and
- Three separate sandwich bags totaling 14.96 grams.

Heroin:

- A total of 0.26 grams.

Combination of Heroin and Cocaine, commonly known as a “speedball”:

- One knotted sandwich bag containing 2.88 grams; and
- One knotted plastic bag containing .10 grams.

During the trial, which began on November 14, 2016, Detective Ryan Street testified as an expert in the area of digital forensic examination of data recovery, as well as in narcotics trafficking and street-level drug dealing. He testified that data was extracted from an iPhone recovered in the Apartment, which he was able to determine belonged to the appellant.

The State introduced Exhibit 38, which was a print out of text messages between the iPhone and a contact listed under the name of Oz-Oz. The earliest text messages were sent on November 24, 2015, starting at 11:22 a.m. and ending at 6:31 p.m. Detective Street testified that these messages were of significance to the ongoing drug-investigation.

Detective Street read the text messages into the record, as follows:

So, starting with the earliest one, a received message, it says, I tried with you, never get peeps. The phone then sends, Be over tomorrow to get my money. Received a message, So, I'll call the cops and go crazy too if you get me. It was then sent, I'm just coming to get my money, no trouble. My wife coming. It then read, I got you next week, guarantee. Then sent, I'm not playing games tomorrow. Also sent in a separate message, my wife is coming over today. She told me to tell you. Also sent, she said call the police on her. Then sends, you can't take people's money, I'm sorry, you can't take people money and pay when you want. Then read, I ain't paying shit, step up bitch. Also incoming message, you ain't abusing this soldier. Then a sent message, okay, have it your way. You pick the fight so you don't have to pay. I don't want trouble, I just want to get paid, you did last time. Then an incoming message that says next week. Sent message, we go over to your house, my mother's coming with my girl to talk to your parents. I don't want trouble, you wrong. Then a sent message, we went over to your house today for money, you threatened me. Sent message, I want my 230 today. Then sent, before my people come over, when you going to pay me and how much you can't change updates when you owe people. I have a wife and bills. I'm trying to get right with you. You can't owe me and say police. You put other people in, you can't treat me like this. . . . I'm not going to let you, see you soon. Have a nice day. And an incoming message, It's Uber. I've got you next week, you said not. Sent message, it's Uber. What have you got me, nothing. Who texted who? Also sent, today will be over. I want all my money. A received message, I went to get phones. Sent message, what are you talking about? Sent, I'll meet you at your house. Sent, on my way to your house now.

Detective Street testified regarding his interpretation of the text messages, stating as follows:

A lot of times drug dealers will front drugs or provide on consignment to customers' quantities of drugs that, then they expect to be paid back at a later time. Sometimes that's a user that they may have a relationship with that, you know, they believe they're going to pay them back. Sometimes it is another dealer that they will give a quantity of some drug to with the expectation then that dealer is then going to sell that amount. Acquire whatever profits they may obtain and then kickback the amount that they owe to their supplier. So, money management with your customers as a drug dealer is important because you have to know who owes you and then you have to retrieve that money. Drug dealers can't obviously go to the police and say, hey this guy, I sold this guy drugs and he's not giving me my money. So, he can't go through legal means. So, frequently disputes and spats will occur over a drug customer returning money owed to a drug dealer.

The State also introduced State's Exhibit 39, an audio recording extracted from the iPhone's voice memos program. The recording was played in its entirety and then in segments. The following was played:²

Unidentified Male [Appellant]: (Unintelligible). Hey Mack, what you trying to do? What are you going [I mean, you need to come up with that money down here.] I mean, [I mean] we gotta talk first. I don't know what's going on, this is kind of like, what's going on? (Unintelligible) and I said when I said I couldn't get you nothin' you said come and give it to me.

Unidentified male [Appellant]: [What's the deal], I mean, I said on my own you can't, doesn't matter, you're the one fucking talking about, if you tell them they will. You know what I'm fucking talking about, you tell them they will. So, just listen. You don't know what you're fucking talking about. [You know what I'm fucking talking about.] [Obviously] I'm saying I guess next time I go over there so you call me and said come over here [I ain't giving it to you like that.]

Unidentified Male [Appellant]: So, what's going on? What's going on? You already owe me 20 pills already. You owe me 20 pills already. So, how you going man, you don't worry about me I'm like, (unintelligible) keep worrying about him then so I leave that right there where you stand, you

² We have set forth the transcript from when the audio was played in its entirety, including text in bolded brackets as clarification from when the recording was played again in smaller segments.

worry about him. So, what's going on? [Except for the deal and how you're going to pay me I'm gone.] I can't, you gotta tell me what you're gonna do. [And you all the way over there,] you can't trip, you can't come [around] here, I mean damn. I guess I'm gonna (unintelligible) [with] in my business. You trying to, I mean, damn. You already owe me 20 pills man. You gonna take my pills [and] then you lied, then you gonna say 12 and you could've give me 10's. That's a definite. You owe me 20 now. So what's the deal on this? So, what's the, you can tell me, what's the deal now from this? You already owe me 20 already.

Unidentified Male: I said I'll give you 20 more.

[Appellant]: [Man, are you getting them tomorrow?] See that's the thing about this here. Man, am I supposed to believe that? Why [should I do] that when you already told me you got them the other day. So, oh yeah like, you said like the other day I didn't get them[.] [S]o what's that mean? Mike, I need for all the head, so you can't even blame what you have on me. This is my, I said this is (unintelligible) you asked me why I'm here, brother I do, I got (unintelligible) from here to here. So, you gotta come right with me, man. How do I know you are getting them tomorrow? That's what I'm trying to figure out. I [stay in the] car too. I'm coming [to get] the car[d], but we're going to talk about this first [though]. [I'm tired.] [20 more, count them, why don't you go ahead and [count them, so].

[Unidentified Male: How come I owe you so many.]

[Appellant]: Well, how am I able to use your, [all right] bring your car[d] with you, have it right here man.] Bring [your card] to me. (Unintelligible). Go get the car[d] then.

Unidentified Male: Shouldn't you be going for him?

[Appellant]: No. (Unintelligible). Dude I can't stay here four hours to do something what you got me upset.

Unidentified Male: Where you going?

[Appellant]: [I'm trying to make a quick transaction.] What's the number?

Unidentified Male: I'm going to give it to you.

[Appellant]: How you gonna get to your other phone. You gotta write it down.

Unidentified Male: No, I don't.

[Appellant]: [Huh? Wait a minute.] So, you going to give me 40 tomorrow, man, until tomorrow might not Thursday, I mean not Friday, right, tomorrow.

Unidentified Male: Right.

[Appellant]: All right, man. [Don't] take my stuff. [You know, don't take my stuff and getting paid, man (unintelligible)].

Unidentified Male: Why don't you take me and go.

[Appellant]: No, I'm going to take my stuff, you can't pay me. I'm going to take - -

Unidentified Male: (Unintelligible). One more.

[Appellant]: Man, [are we going to have a problem?] [I'm going to have a problem] with this, man[.] [Taking it and not paying me?]

Unidentified Male: No, one.

[Appellant]: Huh?

Unidentified Male: No. No.

[Appellant]: Come on man, I'm going to tell you right now, man, don't take my shit, [and] you can't pay me [because] I got bills to pay. [I'm behind] [This is] my shit. So, don't take my shit, I can't pay my bills man. So, don't take my shit if you can't pay me tomorrow man. I'm serious. And don't take my shit if you can't pay me man. I'm telling you man. [Go ahead, go ahead and see, go ahead and see, then I get] trouble man. (Unintelligible). You have a problem, the way I see it you in trouble man, mother.

At the conclusion of the recording, defense requested to approach the bench and the following occurred:

[DEFENSE COUNSEL]: Your Honor, there was no evidence that there was consent by both people in this conversation. You hear the other person saying, I mean how that illegal act was taking place.

THE COURT: Well, if it's illegal your client did it, didn't he?

[DEFENSE COUNSEL]: I understand that but it doesn't make it admissible because it's illegal. You can't use illegally obtained material.

[THE STATE]: If it were illegally obtained by the government then it wouldn't be able to be used, that's the Fourth Amendment which doesn't apply to [appellant] and his illegal activities.

[DEFENSE COUNSEL]: No, it comes up in domestic cases rather regularly when someone is surreptitiously recording and then tries to use it and it's not admissible because it's a surreptitious recording. There's no indication, first right off that I'm recording this because I want to know what you're doing and you know it's recorded. Here we don't have that.

THE COURT: Well, if the state would try to use it and if the state intends to use it against the person on the other phone, undermine, whoever that is, then I would agree then that's illegal and you couldn't use it against whoever that other person is. But this is a recording that he made its being used against the defendant so, it should be admissible.

Detective Street confirmed that he previously had heard appellant's voice and that appellant's voice matched the louder of the two voices on the recording. He acknowledged that appellant was the "main voice that does the majority of the talking." He also testified that the recording was significant because it was indicative of a drug deal.

The State replayed segments of the recording during trial. Detective Street gave his opinion regarding what was transpiring between appellant and the unidentified individual in each segment. He testified that appellant was establishing control by his demeanor on the phone, and that the conversation reflected that appellant was aware that he could be arrested for transporting illegal drugs and was concerned about the risk of being stopped

by the police if the unidentified individual was not going to pay. He explained the process in which drug transactions occur. Specifically, he testified that, “if somebody doesn’t have cash to pay then they get a prescription from their doctor, health insurance may pay for it and, you know, it acts as currency in the drug trade.”

Detective Street further testified that, “[a]ny time that a drug dealer is selling to customers that are using it,” that is “considered street-level drug trafficking or street-level drug dealing.” He stated that a large amount of money typically is not involved in street-level drug dealing, noting:

Typically, deals involve small amounts of money, less than, you know, typically less than \$1,000 worth of drugs. Typically, with the majority of the transactions because ultimately [the] end consumer is the addict, money management, addicts aren’t necessarily known for their money management. And so, they buy small amounts at a time. So, typically, that’ll, that’ll involve smaller dollar amounts as well.

Detective Street then testified that the cost for a half-an-ounce of cocaine was approximately \$700 and could go as high as \$900. When asked if it was significant that the appellant had a half ounce of cocaine and \$722 in currency in the Apartment, Detective Street answered in the affirmative, and he explained that, given the value of a half ounce and the amount of currency, this indicated a total of an ounce of cocaine, “a common amount that’s sold by a supplier to a street-level dealer.” He testified that the revolver found in the suitcase was a “defensive weapon or offense tool of intimidation commonly used in the drug trade,” and because it was “present with drug distribution paraphernalia such as digital scale commonly used to weigh drugs,” it was his opinion “that that gun was being used in connection with [appellant’s] drug trafficking activities.” The prosecution

then asked if, based on everything Detective Street reviewed and observed, he was able to form an opinion regarding the intent relating to the heroin and cocaine located in the residence. Detective Street replied in the affirmative and stated that appellant “possessed something with the intent to distribute.” Detective Street explained the basis for his opinion, as follows:

Based on the fact that there is a set distribution station in the kitchen with packaging materials, a scale to weigh everything out, a small amount of, of heroin and cocaine with those items. Then you go to the stash location, and you find larger amounts of those, those same drugs. Then, in the bedroom, you’ve got [appellant’s] phone on one nightstand where he was located.

Inside that phone are items that indicated to me that that was, in fact, his phone. There were text messages that were indicative of him trying to get paid for a drug deal. Then, there was the audio recording where he specifically says I’m not an addict. He specifically says I can get locked up taking this stuff from here to there.

He, the, the entire recording was clearly to me a drug transaction. The payment was pills, and then, you know, he says, don’t, you know, don’t, don’t take my stuff if you’re not going to pay me. That, that shows that control [factor], that intimidation factor, that is common, commonly establishing that relationship between dealer and customer.

As indicated, the jury returned a verdict finding the appellant guilty of possession of a firearm by a prohibited person, possession with intent to distribute heroin and possession with intent to distribute cocaine. This appeal followed.

DISCUSSION

I.

Recorded Conversation

Appellant contends that the circuit court erred in admitting a recorded audio communication between himself and an unidentified party that was stored on his cellular phone. He argues that, pursuant to Md. Code (2013 Repl. Vol.) § 10-402(a) and § 10-405(a) of the Courts and Judicial Proceedings Article (“CJP”) (the “Wiretap Act”), the recording was inadmissible as an unlawfully intercepted communication.³ Appellant further asserts that the admission of this evidence was not harmless error because the State relied upon it multiple times.

The State contends that this issue is not preserved for this Court’s review because appellant did not timely object to the admission of the recording. In any event, it argues that the court “correctly admitted a recording [appellant] made of himself selling drugs.”

We begin with the State’s preservation argument. Maryland Rule 4-323(a) provides: “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 the objection become apparent.” Here, the recording that was played was fairly long, but defense counsel did not object to its

³ “Intercept” is defined as “the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.” Md. Code (2013 Repl. Vol.) § 10-401(10) of the Courts and Judicial Proceedings Article (“CJP”).

admissibility until after it had been played in court. We agree with the State that there is a risk of gamesmanship in proceeding in this manner,⁴ and it is not a model way to practice.⁵ Because counsel did object immediately after the recording was played, and because the court did rule on its admissibility, we will consider the issue on the merits.

CJP § 10-402 provides, in pertinent part, as follows:

(a) *Unlawful acts.* – Except as otherwise specifically provided in this subtitle it is unlawful for any person to:

(1) Willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(2) Willfully disclose, or endeavor to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subtitle; or

(3) Willfully use, or endeavor to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subtitle.

A communication that is intercepted unlawfully may not be admitted into evidence at trial.

CJP § 10-405(a).

⁴ The State asserts that delaying the objection until the recording had been admitted created a risk “of gamesmanship – winning a mistrial rather than pretrial suppression, in a case that did not depend upon the admission of the voice recording to be successful for the State.”

⁵ Indeed, under Md. Rule 4-252(a)(3) and (b), a motion to suppress an unlawful interception of a wire or oral communication is a mandatory motion that is deemed to be waived if not raised prior to trial “unless the court, for good cause shown, orders otherwise.” The State, however, does not argue that the failure to comply with this Rule constituted a waiver of the issue on appeal.

Although the record is not clear whether the interception here was of a wire (telephone) or oral communication, appellant characterizes the “voice memo” recording as a recorded oral communication. Regardless, everyone in this case has treated the recording as an intercepted communication. We shall do so as well.

Not all intercepted communications are unlawful. CJP § 10-402(c) sets forth various situations where it is lawful to intercept communications. For example, CJP § 10-402(c)(3) provides:

It is lawful under this subtitle for a person to intercept a wire, oral, or electronic communication where the person is a party to the communication and where all parties to the communication have given prior consent to the interception unless the communication is intercepted for the purpose of committing criminal or tortious act in violation of the Constitution or laws of the United States or this State.

As appellant notes, that exception is not applicable “because there is no evidence that the unidentified speaker gave prior consent to the interception of the communication.”

This Court, however, has previously held that the proscriptions in the Wiretap Act do not apply in circumstances similar to those involved here. In *State v. Maddox*, 69 Md. App. 296, 300 (1986), *cert. denied*, 309 Md. 48 (1987), this Court explained:

The Maryland Electronic Surveillance and Wiretap Law was designed with a two-fold purpose: 1) to be a useful tool in crime detection and 2) to assure that interception of private communications is limited. To make certain of the fulfillment of those objectives, the Legislature carefully restricted the circumstances in which a wire tap or electronic surveillance may be used.

In that case, we addressed whether an intercepted recording of a conversation between Maddox and a third-party, after Maddox consented to law enforcement recording

it, should be suppressed as an unlawful interception. *Id.* at 298. This Court concluded that CJP § 10-402(c)(3) was inapplicable to the recording insofar as Maddox was concerned, noting:

He consented to the interception and recordation of his conversation with [the third party]. The protective umbrella that the Legislature raised over [the third party] and others who do not consent to the interpretation of their conversations affords Maddox no shelter. His portion of the conversation is admissible to the same extent as if it had been merely overheard, or someone had permissibly listened to it on an extension phone.

In enacting [CJP] § 10-402(c)(3), the General Assembly sought to protect those who do not know their conversation is being electronically intercepted; it did not intend to allow an accused to consent to the surreptitious recording of his or her conversation with another party and later cause that recording to be suppressed on the ground that the other party to the conversation did not consent. The result would be ludicrous.

Id. at 301. We held that, “when one party to a conversation expressly or implicitly consents to the recording of that conversation, the recording is admissible in evidence against the consenting party even though the other person or persons involved in the conversation were unaware of the interception.” *Id.*⁶

II.

Irrelevant and Prejudicial Testimony

Appellant contends that the circuit court “erred in allowing irrelevant and prejudicial testimony that [he] was the subject of a drug-related investigation and under surveillance.”

⁶ The Court of Appeals denied Maddox’s petition for a writ of certiorari. 309 Md. 48 (1987). Subsequently, the Court of Appeals in *Perry v. State*, 357 Md. 37, 61 (1999), in deciding a different issue, stated that it would not address “whether one who unlawfully tapes a conversation can seek the protection of the exclusionary rule embodied within the Maryland statute.”

He argues that this information “was propensity evidence that significantly threatened [his] right to a fair trial.”

The State contends that: (1) the contention relating to the prosecutor’s “single use” of the phrase “drug related investigation” when it asked Officer Amaya about his surveillance is not preserved for this Court’s review because there was no objection below; and (2) both claims are without merit. It argues that the circuit court properly exercised its discretion in admitting this evidence because it was “relevant and not unfairly prejudicial.” In any event, it asserts that, even if there was an error, it was harmless, and “the admission of this testimony did not cause an otherwise undecided juror to convict [appellant].”

A.

Proceedings Below

The State filed a motion in limine to allow police testimony regarding surveillance on the Apartment, which showed appellant leaving the apartment, meeting with another individual, and returning to the Apartment. The State argued that evidence showing that appellant had access to the apartment was relevant, noting that appellant’s defense strategy was that he was not a lease holder to the Apartment and did not live there. The court ruled as follows:

Well, that’s the only thing you’re going to be able to do is place him. You can’t say he met with other people because I think that leaves the impression he was meeting them to sell drugs and you’re not going to put that evidence on there. So the only thing you’re going to be able to do, that you saw him, that the officers saw him there.

Officers Morris and Baxter testified that, while conducting surveillance on the Apartment, they saw the appellant, on two different occasions, leave the Apartment, and shortly thereafter, return to the Apartment. Officer Adam Amaya testified that he began investigating appellant in November 2015, and when the State asked regarding the purpose of the investigation, defense counsel objected. During a bench conference, the following occurred:

[DEFENSE COUNSEL]: Well, if all he's going to say is that we had an, we did an investigation based on that, we got a search warrant and went in there to see, great. That sets the stage. But I don't think they need anything else.

THE COURT: But with respect to the, the motion that was heard earlier about -

[DEFENSE COUNSEL]: That's what - -

THE COURT: you all need to listen to me, with respect to the motion that was heard earlier with respect to what they would testify to - -

[DEFENSE COUNSEL]: Uh-huh

THE COURT: -- is this, was this before the investigation or after the investigation?

[DEFENSE COUNSEL]: During.

[THE STATE]: During?

[DEFENSE COUNSEL]: Yes, before the search warrant.

THE COURT: Before the search warrant?

[DEFENSE COUNSEL]: They used it, the search warrant. They used what they got in the, to get the search warrant.

[THE STATE]: It is, it's relevant that they were investigating this individual as opposed to they get a search warrant on an address and he just happens to be there. But I'm not, I'm not going into any of the - -

THE COURT: All right. Just rephrase your question. Rephrase your question to make sure information doesn't come out that's not supposed to come out.

[THE STATE]: Can [co-counsel] rephrase in a leading form to ensure that nothing else comes out - -

THE COURT: Because --

[THE STATE] --drug related investigation?

THE COURT: Yeah, that gives you --

[THE STATE]: Thank you.

[DEFENSE COUNSEL]: Thank you, Your Honor.

At the conclusion of the bench conference, the State asked Officer Amaya if he was involved in a drug-related investigation involving the appellant, and Officer Amaya answered in the affirmative. There was no objection from defense counsel. After Officer Amaya stated that the police were able to determine where appellant was living, defense counsel objected to the question regarding how the officers were able to determine that, stating that Officer Amaya "didn't investigate where appellant lived, they simply did a surveillance." The court overruled the objection, and Officer Amaya testified, without objection, that he learned "[t]hrough various police databases and also through physical surveillance that appellant lived in the Apartment."

B.

Preservation

We address first the State’s argument that the issue relating to evidence that Officer Amaya was involved in a “drug-related investigation” is not preserved for this Court’s review. The record is clear that there was no objection to whether Officer Amaya was involved in a “drug-related investigation” in November 2015. “It is a well recognized principle that, as a general matter, the admissibility of evidence admitted without objection cannot be reviewed on appeal.” *Hall v. State*, 119 Md. App. 377, 389 (1998). *Accord Wimbish v. State*, 201 Md. App. 239, 261 (2011), *cert. denied*, 424 Md. 293 (2012). Thus, this issue is not preserved for our review.

Moreover, appellant’s complaint regarding the testimony that the officers conducted surveillance of appellant is also not preserved for review. As we have explained:

Whether the motion in limine is made before trial or during trial, a court’s ruling which has the effect of admitting contested evidence does not relieve the party, as to whom the ruling is adverse, of the obligation of objecting when the evidence is actually offered. Failure to object results in the non-preservation of the issue for appellate review.

Wimbish, 201 Md. App. at 261 (quoting *Reed v. State*, 353 Md. 628, 637 (1999)). Here, although defense counsel objected to evidence regarding surveillance prior to trial, counsel failed to object at trial when reference was made to the officers’ surveillance. Accordingly,

this issue also is not preserved for this Court's review and we will not address these contentions.

III.

Detective Street's Expertise

Appellant contends that the circuit court "abused its discretion in permitting Detective Street to testify to the meaning of terms in conversations between the [appellant] and others" because Detective Street was not a qualified expert in coded drug language.

The State disagrees. It contends that the court properly exercised its discretion in allowing Detective Street to "interpret the text messages that he relied upon in reaching his conclusion that [appellant's] behavior was consistent with that of a drug dealer."

Maryland Rule 5-702 addresses the admission of expert testimony. It provides 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.

The Court of Appeals has explained that expert opinion is admissible if the person

"is reasonably familiar with the subject under investigation, regardless of whether this special knowledge is based upon professional training, observation, actual experience or any combination of these factors." Fundamentally, an expert witness's opinion is expected to "give the jury the assistance in solving a problem for which their equipment of average knowledge is inadequate."

Roy v. Dackman, 445 Md. 23, 41 (2015) (quoting *Radman v. Harold*, 279 Md. 167, 169 (1977)).

“[Maryland] Rule 5-702 vests trial judges with wide latitude in deciding whether to qualify a witness as an expert to admit or exclude particular expert testimony.” *Stevenson v. State*, 222 Md. App. 118, 136 (quoting *Massie v. State*, 349 Md. 834, 850-51 (1998)), *cert. denied*, 443 Md. 737 (2015). A reviewing court will not disturb the trial judge’s sound discretion to admit the expert testimony “unless the [court’s] decision to admit the expert testimony was clearly erroneous or an abuse of discretion.” *Id.* at 132 (quoting *Montgomery Mut. Ins. Co. v. Chesson*, 399 Md. 314, 327 (2007)). As this Court has explained:

An abuse of discretion occurs “where no reasonable person would take the view adopted by the [trial] court[] . . . or when the court acts without reference to any guiding principles, and the ruling under consideration is clearly against the logic and effect of facts and inferences before the court [] . . . or when the ruling is violative of logic and fact.”

Sibley v. Doe, 227 Md. App. 645, 658 (quoting *Bacon v. Arey*, 203 Md. 606, 667 (2012)), *cert. denied*, 448 Md. 726 (2016).

Here, the trial court did not abuse its discretion in permitting Detective Street to testify regarding the meaning of the conversations between appellant and other parties. Detective Street had 13 years of experience within various law enforcement agencies, including as a member of the drug investigation unit of the Montgomery County Police Department and as a task force officer with the Drug Enforcement Administration. He completed over 250 hours of specialized narcotics and investigative training, and he

worked as an undercover officer completing drug transactions. Given his training and experience, Detective Street was qualified to interpret portions of the conversations regarding drug-related code words.⁷ Accordingly, the circuit court did not abuse its discretion in admitting Detective Street's testimony in this regard.

IV.

Intent to Distribute

Appellant's next contention involves the following testimony from Detective Street:

[THE STATE]: Based on everything you have reviewed in this case and observed were you able to form an opinion regarding the intent to [distribute] heroin and the cocaine located in the residence?

[DETECTIVE STREET]: Yes.

[THE STATE]: And, what is that opinion?

[DETECTIVE STREET]: "That the [appellant] possessed something with the intent to distribute.

Appellant contends that the circuit court "plainly erred by permitting Detective Street to testify that [appellant] possessed drugs with the intent to distribute them." He asserts that this testimony went "directly and unequivocally" to his mental state, in

⁷ We note that much of the language did not need interpretation. In parts of the conversation, appellant clearly discussed the fact he was owed pills and payment.

violation of Md. Rule 5-704.⁸ The State argues that the issue is not preserved, and this Court should not grant plain error review.

Although this Court has discretion to address an unpreserved issue, we have noted that,

[i]t is a discretion that appellate courts should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.

Kelly v. State, 195 Md. App. 403, 431 (2010) (citations and quotations omitted), *cert. denied*, 417 Md. 502, *cert. denied*, 131 S. Ct. 2119 (2011). Plain error review is “a rare, rare phenomenon.” *Id.* at 432 (quoting *Hammersla v. State*, 184 Md. App. 295, 306 (2009)).

⁸ Md. Rule 5-704, provides as follows:

(a) ***In General.*** Except as provided in section (b) of this Rule, testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact.

(b) **Opinion on Mental State or Condition.** An expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may not state an opinion or inference as to whether the defendant had a mental state or condition constituting an element of the crime charged. That issue is for the trier of fact alone. This exception does not apply to an ultimate issue of criminal responsibility.

The Court of Appeals has set forth the process involved for an appellate court to grant the extraordinary remedy of reversal for plain error. In *State v. Rich*, 415 Md. 567, 578 (2010), the Court explained:

“[P]lain-error review” – involves four steps, or prongs. First, there must be an error or defect – some sort of “[d]eviation from a legal rule” – that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant’s substantial rights, which in the ordinary case means he must demonstrate that it “affected the outcome of the [court’s] proceedings.” Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error--discretion which ought to be exercised only if the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” Meeting all four prongs is difficult, “as it should be.”

(Citations omitted). *Accord Steward v. State*, 218 Md. App. 550, 566-67, *cert. denied*, 441 Md. 63 (2014).

The State implicitly acknowledges that Detective Street’s testimony was problematic. *See Gauvin v. State*, 411 Md. 698, 707-08, 711 (2009) (although expert may testify that evidence is consistent with a particular mental state, experts are not “entitled to express the opinion that the defendant possessed a controlled dangerous substance with the intent to distribute.”). It asserts, however, that “when viewed in its broader context,” the testimony made plain that Detective Street was not claiming “insight into [appellant’s] thoughts, but a general opinion as to the picture painted by the evidence in this case.”

The State additionally asserts, as a stronger argument, that the testimony did not substantially interfere with appellant’s right to a fair trial. In this regard the State asserts:

[U]nder the facts and circumstances of this case, no rational juror would make any fine distinction between “the circumstances here are consistent with an intent to distribute narcotics” and the “defendant possessed something with the intent to distribute.”

To recap: [appellant] was found in his apartment with a gun, heroin, cocaine, marijuana, a heroin cutting agent, digital scales, and a pile of cash. Moreover, on his phone, he had both text messages and a recording of himself engaging in discussions about his drug dealing. [Appellant’s] defense was not that it was for his person use, but that his wife was the actual drug trafficker in the family.

We agree. Accordingly, we decline to exercise plain error review of this contention.

V.

Propensity Evidence of Prior Bad Acts

Appellant again requests that this Court engage in plain error review of his contention that the trial court erred by admitting evidence of prior drug dealings and allowing the prosecutor to refer to him as drug dealer in its opening statement and closing argument. The record reflects that there was no objection below in this regard, and the State contends, therefore, that “appellate review is inappropriate.”

We have set forth, *supra*, the standard for plain error review. Here, although the prosecutor did refer to appellant as a drug dealer multiple times in its opening statement and closing argument, we are not persuaded that this was “plain error.” As the State notes,

the jury would have understood the prosecutor’s references to [appellant] as a “drug dealer” to refer to the facts and circumstances of this case, not his prior criminal history. Indeed, this is the only rational interpretation of the opening statement. [Appellant] is described as a “drug dealer” in the context of the prosecutor summarizing the facts that he would be presenting in the course of the trial, [i.e.,] that [appellant] was found in his apartment with drugs, a gun, packaging, a cutting agent, and scales, and his phone contained text messages and an audio recording of him discussing drug dealing. This

was not an attempt at informing the jurors of [appellant's] prior convictions, and it would not have been interpreted as one. It was a description of [appellant] based on the facts that would be presented in this case.

If defense counsel had objected to these references, any ambiguity, to the extent there was any, could have been clarified. Defense counsel, however, did not determine that there was a need for any objection, and we are not persuaded that appellant's claim regarding the prosecutor's statements or evidence admitted calls for us to engage in plain error review. Accordingly, we decline to do so.

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