

Circuit Court for Worcester County
Case No. C-23-CR-18-000281

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 3222

September Term, 2018

BRANDON M. HILLIARD

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Gould,

JJ.

PER CURIAM

Filed: April 9, 2020

*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.

Following a jury trial in the Circuit Court for Worcester County, Brandon M. Hilliard, appellant, was convicted of possession of cocaine with intent to distribute and possession of cocaine. Mr. Hilliard raises two issues on appeal: (1) whether the evidence was sufficient to sustain his conviction for possession of cocaine with intent to distribute and (2) whether the trial court plainly erred in allowing the prosecutor to make an improper argument during closing. For the reasons that follow, we shall affirm.

Mr. Hilliard first contends that there was insufficient evidence to sustain his conviction for possession of cocaine with intent to distribute because the State failed to prove that he intended to distribute the cocaine found on his person. We disagree. In reviewing the sufficiency of the evidence, we ask “whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Ross v. State*, 232 Md. App. 72, 81 (2017) (citation omitted). Furthermore, we “view[] not just the facts, but ‘all rational inferences that arise from the evidence,’ in the light most favorable to the” State. *Smith v. State*, 232 Md. App. 583, 594 (2017) (quoting *Abbott v. State*, 190 Md. App. 595, 616 (2010)). In this analysis, “[w]e give ‘due regard to the [fact-finder’s] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.’” *Potts v. State*, 231 Md. App. 398, 415 (2016) (citation omitted).

At trial, the State presented evidence that the police searched Mr. Hilliard following his arrest and recovered a clear plastic bag containing 10.862 grams of cocaine, a digital scale, a box of sandwich baggies, and \$194. Maryland State Police Sergeant Brooks

Phillips was qualified as an expert in the identification and valuation of controlled dangerous substances and the common practices of users and dealers of controlled dangerous substances. He testified that the value of the cocaine recovered from Mr. Hilliard was approximately \$800 to \$1,200, depending on how it was packaged, and that cocaine users typically did not possess that amount of cocaine. Sergeant Phillips also testified that Mr. Hilliard's possession of a box of plastic baggies and a digital scale was indicative of a cocaine dealer instead of a user because such items were typically used to break down larger amounts of cocaine for sale. And that evidence, if believed by the jury, was sufficient to establish Mr. Hilliard's intent to distribute the cocaine beyond a reasonable doubt.

Mr. Hilliard nevertheless asserts that it was equally possible he was a cocaine user because Sergeant Phillips acknowledged on cross-examination that a heavy user might possess more than 10 grams of cocaine at once. However, Sergeant Phillips also testified that such a situation would be atypical. And in any event, where “two inferences reasonably could be drawn [from the evidence], one consistent with guilt and the other consistent with innocence, the choice of which of these inferences to draw is exclusively that of the fact-finding jury and not that of the court assessing the legal sufficiency of the evidence.” *Ross v. State*, 232 Md. App. 72, 98 (2017).

Mr. Hilliard also claims that the prosecutor made improper comments during closing. During his closing, defense counsel argued that Mr. Hilliard was not a drug dealer but “a heavy user.” The prosecutor then made the following argument in rebuttal:

[Defense Counsel] wants to tell you that Mr. Hilliard's a heavy user, *but I haven't heard any evidence about that today. That's complete speculation.* And if you remember, Judge Oglesby saying that our closing arguments are not evidence, they're not. The evidence has been presented today. It was presented through the witnesses today. Presented through the exhibits. So [defense counsel] can say, oh, well, Mr. Hilliard's a user, he's a heavy user, but we can't even get to that fact because none of that's in evidence. *We've heard* no testimony of that.

(Emphasis added.)

On appeal, Mr. Hilliard asserts that the highlighted portions of the prosecutor's argument impermissibly shifted the burden of proof from the State to himself by drawing the jury's attention to his failure to present evidence. Mr. Hilliard acknowledges that this claim is not preserved because he did not object at trial. He therefore requests that we engage in plain error review.

Although this Court has discretion to review unpreserved errors pursuant to Maryland Rule 8-131(a), the Court of Appeals has emphasized that appellate courts should “rarely exercise” that discretion because “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[.]” *Ray v. State*, 435 Md. 1, 23 (2013) (citation omitted). Therefore, plain error review “is reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of [a] fair trial.” *Savoy v. State*, 218 Md. App. 130, 145 (2014) (quotation marks and citation omitted). Here, there is no reason for us to exercise plain error review because the trial court's failure to *sua sponte* interject itself into the prosecutor's closing argument was not a “compelling, extraordinary, exceptional, or fundamental” error. In light of

defense counsel’s argument that Hilliard was a “heavy drug user,” there was nothing improper about the prosecutor pointing out to the jury that there was no evidence to support that conclusion.

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