Circuit Court for Montgomery County
Case No. 132407

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 125

September Term, 2018

ALFRED ORLANDO REED

v.

STATE OF MARYLAND

Meredith,
Friedman,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: December 20, 2018

A jury in the Circuit Court for Montgomery County convicted Alfred Orlando Reed, the appellant, of one count of possession of cocaine with intent to distribute and one count of resisting arrest. It acquitted him of second-degree assault. The court sentenced Reed to a term of forty years for the narcotics conviction,[1] and to a consecutive three-year sentence for resisting arrest.

Reed presents four questions for review,[2] which we have combined and rephrased as three:

[1]Reed was sentenced to the statutory maximum for a fourth-time offender. *See* Md. Code (2002, 2012 Repl. Vol.), section 5-608(d) of the Criminal Law Article.

[2] The questions as posed by Reed are:

> I. Whether the trial court, by failing to control the proceedings related to a central defense witness, committed error by one or a combination of the following omissions or acts:
>
> a. Not conducting any independent inquiry of the witness's assertions of the Fifth Amendment privilege in the jury's presence and instructing defense counsel, after the witness invoked three times, to persist in questioning, thereby, among other wrongs, depriving Appellant of his rights to a fair trial, including to compulsory process and confrontation of an effectively hostile witness.
>
> b. Permitting the then-unsworn witness, who was expected to assert the Fifth Amendment privilege, to listen from the witness stand to the trial court's deliberations with attorneys about the witness's anticipated Fifth Amendment invocation; and,
>
> c. Permitting the attorney of the witness who was expected to invoke the Fifth Amendment to interrupt direct examination of that witness to consult with his client.
>
> II. Whether the trial court erred by twice ruling against the proposed admission of a writing as a statement against penal interest without having carefully reviewed the statement.
>
> III. Whether the trial court erred by admitting as a prior inconsistent statement a statement of a witness in part because the witness's Fifth

(continued…)

I. Did the trial court err in its handling of defense witness Keith Wright's invocation of his Fifth Amendment privilege against self-incrimination?

II. Did the trial court err or abuse its discretion by admitting into evidence a letter written by Wright as a prior inconsistent statement instead of as a statement against penal interest?

III. Did the trial court err by declining to instruct the jury on self-defense?

For the following reasons, we answer all three questions in the negative and shall affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

At trial, the State presented evidence that on the night of August 14, 2017, Officers Mark McGinnis, Larbi Dakkouni, and Chad Eastman, and Corporal Shane Eastman, all with the Gaithersburg Police Department ("GPD"), were patrolling near the Walkers Choice Apartments. Officer McGinnis, who was dressed in plainclothes but had his badge on a lanyard around his neck, observed a man, later identified as Reed, drive his car into the parking lot for the apartment complex and park near the boiler room. A man, later identified as Keith Wright,[3] approached the car on foot. Reed got out of his car and met Wright at the rear of the car, on the driver's side. Officer McGinnis saw

(…continued)

Amendment invocation was "inconsistent" with the prior statement and instructing the jury to consider the prior inconsistent statement as both substantive and impeachment evidence.

IV. Whether the trial court erred by refusing over objection to issue a self-defense instruction as to Resisting Arrest (Warrantless) because, *inter alia*, the subjective intent of the defendant because he did not testify, was not in evidence.

[3] Wright was known to Officer McGinnis as a drug user.

Reed "present a bag" to Wright and Wright remove something from the bag. Wright then sat down in the back seat of Reed's car.

Corporal Eastman, who also was dressed in plainclothes, was surveilling Reed and Wright from a different location. From his vantage point, Corporal Eastman observed Wright light a cigarette lighter inside Reed's car. From his policing experience, Corporal Eastman believed that Wright was smoking crack cocaine. He radioed this information to Officer McGinnis.

Corporal Eastman and Officer McGinnis both approached Reed and Wright, but from different directions. Corporal Eastman announced loudly that he was a police officer. Reed began backing away from the officers and then took off running. Officer McGinnis chased him, ultimately using his Taser on him after he refused to stop. Officer Dakkouni and another officer assisted Officer McGinnis in placing Reed under arrest. Reed resisted being searched and had to be restrained by multiple officers. During the search, he kicked Officer Eastman several times. From Reed's person the police recovered a plastic bag containing several rocks of crack cocaine, a plastic bag containing 43 individually packaged baggies of crack cocaine, and over $1,500 in cash.

The next day, Wright called Officer McGinnis. He told the officer that Reed was his "closest friend" and that he would do anything to "help [Reed] get a reduced sentence [in] this case." He did not claim that the cocaine found on Reed belonged to him (Wright), however.

Detective Patrick Skiba, with the Special Investigations Division, Drug Interdiction Team for the Montgomery County Police Department, was accepted by the court as an expert in drug interdiction. He opined that the quantity of crack cocaine found on Reed's person, coupled with the packaging of the cocaine and the cash, was "consistent with [Reed's possessing the cocaine] with the intent to distribute."

Reed elected not to testify. The defense called two witnesses: Corporal Eastman and Wright.[4] Wright answered some questions posed to him on direct examination and invoked his Fifth Amendment privilege in response to other questions. The court admitted as a defense exhibit a notarized letter by Wright, dated August 23, 2017 ("the Letter"). In the Letter, Wright claimed that the bag of drugs the police found on Reed did "not belong to [Reed]." Rather, Wright wrote, when he was "cutting across the lawn" to meet Reed in the parking lot, for Reed to give him a ride to a drug rehabilitation facility, he happened upon the bag of drugs. Wright further wrote that when he got in the back seat of Reed's car, he began smoking crack cocaine. Reed saw him, became angry, took the drugs away from him, and told him to get out of the car. Just at that moment, the police arrived on the scene. (We shall discuss the Letter and Wright's testimony in greater detail, *infra*.)

[4]Corporal Eastman testified that there was a female passenger in Reed's car and that he had interviewed her. The court sustained the prosecutor's objections to questions seeking to elicit the substance of the passenger's statement to Corporal Eastman.

In its rebuttal case, the State recalled Corporal Eastman. He testified that on the night in question, Wright told him that Reed had "given him a piece of cocaine to try, to test."

We shall include additional facts in our discussion of the issues.

DISCUSSION

I.

The defense theory at trial was that the crack cocaine (and cash) the police found on Reed's person belonged to Wright. Defense counsel previewed this theory in opening statement, telling the jurors that the evidence would "support a story that [Reed] was simply helping out a friend [Wright,] and found himself in the wrong place at the wrong time." He predicted that the "evidence w[ould] show that this bag of cocaine was not [Reed's]."

Wright was the second witness in the defense case. He was awaiting trial in another case, in which he was represented by counsel, and was in the lock-up at the courthouse. While the court and counsel were waiting for him to be brought to the courtroom by the sheriff's deputies, the following colloquy took place at the bench:

> THE COURT: I mean there's no secret he's in lock up, in fact, you want to make sure that the jury sees that, right.
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: So, we can tell them that. And then when they come back, we'll have him. Okay.
>
> [PROSECUTOR]: **But we'll need, we need to address the issue, the Fifth Amendment privilege first before. I'd ask that that be done outside.**

THE COURT: I don't get into that. I don't ask him that.

[DEFENSE COUNSEL]: He's aware of it. Trust me.

[PROSECUTOR]: And Mr. Gottlieb [Wright's attorney] is.

[DEFENSE COUNSEL]: I'll call [Mr. Gottlieb] on his cellphone right now.

THE COURT: I just call balls and strikes with respect to (unintelligible) appears to be a competent witness, whatever privileges he has, he's got an attorney, Mr. Gottlieb, I saw him earlier. So, I assume they've gone over that.

[DEFENSE COUNSEL]: I'm going to call [Mr. Gottlieb] right now and have him come up here.

THE COURT: Yes, that'd be a good idea.

[PROSECUTOR]: **If he does intend to invoke his privilege, I would object to that being done that being the only thing in front of the jury.**

[DEFENSE COUNSEL]: **There's a case directly on point. It's [*Gray v. State*, 368 Md. 529 (2002)]. I'm happy to give you a copy. There's another witness the defense puts on and this exculpatory information relative to the crime that's charged. [*Gray*] would allow him to ask the questions even if he invokes the [F]ifth in front of the jury.**

THE COURT: **Well, you didn't let me rule. I would have denied that. No, I think it's fine. You can call him up and let the jury get a feel for it. It's a two-edged sword anyway and all that stuff.**

[DEFENSE COUNSEL]: **Sure, thank you.**

(Emphasis added.)

After a brief recess, but before the jury was returned to the courtroom, Wright got on the witness stand but was not sworn. The trial judge spoke to the parties, Wright, and Mr. Gottlieb, who participated via telephone:

> THE COURT: Mr. Gottlieb, we are in open session without the jury. Your client, . . ., Mr. Wright, is on the witness stand. He hasn't been sworn in. He hasn't been asked any questions. [Defense counsel] was giving me a proffer as to what your knowledge was of the situation. . . . . Is this something that you wanted to be present for?
>
> MR. GOTTLIEB: I don't believe I need to be. I've consulted with Mr. Wright. He's going to exercise his Fifth Amendment privilege and not testify.
>
> [DEFENSE COUNSEL]: He's going to answer certain questions, right?
>
> MR. GOTTLIEB: Well, anything about your case, yes. Well, I don't want to open any doors. If you need me to come over, if it's a particular question, but regarding the case that you're involved in, he's not going to give any testimony. Anything surrounding, I think, the arrest and circumstances involving your particular case.
>
> [DEFENSE COUNSEL]: There are certain questions we can ask that won't put him in any reasonable apprehension of [inculpatory] or criminal activity. I think we should be able to ask those.
>
> MR. GOTTLIEB: Okay, if you need me to come over. I just got back [to the office from the courthouse], but if you need me to come over, I would be happy to. I just walked in. I'll be happy to walk back.

After Mr. Gottlieb arrived at the courthouse, defense counsel reiterated his plan to "ask questions" and have Wright invoke his Fifth Amendment privilege, as necessary, on a "question by question basis." The prosecutor objected, arguing that, under *Gray*, "there at least has to be a threshold showing of relevance as to inculpation before Mr. Wright can be questioned in front of the jury. Defense counsel responded:

> I'm happy to have argument on this. We got two letters, handwritten letters from Mr. Wright, taking responsibility for these drugs. We've also questioned Officer McGinnis about it. He's been mentioned. [*Gray*] is directly on all fours. It allows us to ask questions and if it [so] happens that he invokes his Fifth Amendment privilege in front of the jury, so be it.

The court rejected the prosecutor's argument, ruling that Wright could testify and that defense counsel could proceed as he had outlined, in other words with Wright invoking his privilege (or not) on a question by question basis.

The jury was brought in and Wright was sworn. He testified that he first met Reed "out in the streets" and had known him for a year. On August 14, 2017, he called Reed and asked him for a ride to a drug treatment center. Reed agreed and met Wright near Montgomery Village Avenue in Gaithersburg. Defense counsel asked Wright what had happened "in relation to [Reed]" before Reed picked him up. Mr. Gottlieb interjected, asking the court if he could consult with his client. The court permitted Mr. Gottlieb to have a brief private conversation with Wright. Neither the defense nor the State objected.

When direct examination of Wright resumed, defense counsel asked, "[D]id anything occur earlier on in that evening? What occurred earlier in that evening relative to [Reed]?" Wright responded by invoking his Fifth Amendment privilege. Defense counsel continued:

> [DEFENSE COUNSEL]: Did you find a bag with money and cocaine that evening?
>
> [WRIGHT]: I went out to my best friend.
>
> [DEFENSE COUNSEL]: When [Reed] picked you up, what did you do?
>
> [WRIGHT]: I smoked crack cocaine.
>
> [DEFENSE COUNSEL]: Where?
>
> [WRIGHT]: In his vehicle.

[DEFENSE COUNSEL]: And at that time did you have that bag of money and cocaine?

[WRIGHT]: I have to invoke my Fifth, sir.

[DEFENSE COUNSEL]: What happened after you smoked the crack cocaine in his vehicle?

[WRIGHT]: The police ran up on the car.

[DEFENSE COUNSEL]: Were they in uniform?

[WRIGHT]: No.

***

[DEFENSE COUNSEL]: Did you hand [Reed], let me ask you this. What happened to the bag of money and cocaine?

[WRIGHT]: I don't know.

[DEFENSE COUNSEL]: Did [Reed] take that money and bag of cocaine with him?

[WRIGHT]: I have to invoke my Fifth, sir.

[DEFENSE COUNSEL]: Was [Reed] upset at you?

[WRIGHT]: Yes.

[DEFENSE COUNSEL]: Why?

[WRIGHT]: Guess I had smoked the stuff in the back of his car.

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[DEFENSE COUNSEL]: Did you give any cash to [Reed] that night?

[WRIGHT]: Absolutely not, absolutely not.

[DEFENSE COUNSEL]: Did [Reed] provide you with the crack that [you] smoked that night?

[WRIGHT]: I had a piece of cocaine on me, sir. No.

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[DEFENSE COUNSEL]: The bag of cocaine and money. What happened to the bag of money and cocaine?

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[WRIGHT]: I don't know.

***

[DEFENSE COUNSEL]: And, at some point you wrote a letter about that incident, correct?

[WRIGHT]: I wrote a letter.

***

[Defense counsel showed the Letter to Wright.]

[DEFENSE COUNSEL]: Is this one of the letters that you wrote regarding that incident?

[WRIGHT]: Yes, I wrote it.

At this point, defense counsel sought to admit the Letter in evidence as a statement against penal interest, under Rule 5-804(b)(3).[5] The court questioned whether Wright

[5] Rule 5-804(b)(3) creates an exception to the rule against hearsay for a statement "which . . . at the time of its making . . . so tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true." The court may not admit a statement "tending to expose the declarant to criminal liability" in a criminal case, however, "unless corroborating circumstances clearly indicate the trustworthiness of the statement." *Id*. The exception applies only when the declarant is unavailable. As pertinent here, a declarant is unavailable if he or she "is exempted by ruling of the court (continued…)

was "unavailable" under the Rule, as he was "on the stand." Defense counsel argued that Wright was unavailable because he was "exempted . . . on the ground of privilege from testifying concerning the subject matter of [his] statement." Md. Rule 5-804(a)(1). Rejecting that argument, the court noted that Wright's invocation of the privilege had been "half-hearted" and incomplete. Additionally, the court ruled that Rule 5-804(b)(3) was not satisfied because there was an absence of corroborating circumstances indicating the trustworthiness of the Letter. Defense counsel then offered an alternative argument, that the Letter was admissible as a "prior statement that is inconsistent with the declarant's testimony," under Rule 5-802.1(a).[6] The court ruled that defense counsel had not yet laid an adequate foundation for admission of the Letter under that rule.

Direct examination of Wright resumed, with defense counsel asking him whether he had written in the Letter that Reed had taken the bag of crack cocaine from him. Wright responded by invoking the Fifth Amendment. Upon further questioning, Wright stated:

> Bottom line is [Reed] didn't sell me nothing that day. I don't know why you keep going over it. I told you he didn't sell me nothing. The man didn't sell me nothing that day. He didn't.

(…continued)
on the ground of privilege from testifying concerning the subject matter of the declarant's statement." *Id.* at (a)(1).

[6] Rule 5-802.1 excepts from the hearsay rule certain "statements previously made by a witness who testifies at the trial . . . and who is subject to cross-examination concerning the statement[.]" As pertinent, at subsection (a), it excepts "[a] statement that is inconsistent with the declarant's testimony, if the statement was . . . reduced to writing and was signed by the declarant[.]"

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> I had the crack. I smoked the crack. I had a piece of crack, I smoked it. That's it and I don't know all that other stuff. Look, Your Honor, I want to invoke my Fifth Amendment right. I don't want to discuss none of this no more. I'm done. There's no sense in your asking me no more questions. I'm not going to answer no more.

Defense counsel continued to question Wright, asking him whether he had written in the Letter that had he "kept that bag and smoked all that stuff [he] would either end up dead from overdose or killed by whatever drug dealer." Wright replied: "It's true, yes." Defense counsel asked Wright to confirm that he had written in the Letter that the drugs did not belong to Reed and that Reed didn't know about the drugs or money that Wright had found. Wright invoked his Fifth Amendment privilege in response.

At the end of Wright's direct examination, defense counsel again sought to admit the Letter. The prosecutor objected, and the court reserved.

On cross-examination, the prosecutor asked Wright whether he recalled telling a police officer at the scene that Reed had "broke[n] . . . off a piece [of the crack cocaine for Wright] to try?" Wright replied that he did not remember saying that. He also was asked if it was true that Reed had the cash and the crack cocaine in his possession the whole time. In response, Wright invoked his Fifth Amendment privilege.

After the defense rested its case, the court turned to the admissibility of the Letter. Defense counsel argued that the "foundation ha[d] been laid" for admission under Rule 5-802.1(a) because there were inconsistencies between Wright's statements in the Letter

and his trial testimony. The court agreed and admitted the Letter over the State's objection.

In closing argument, defense counsel focused on Wright's testimony and the Letter. He emphasized that Wright had written in the Letter that the cocaine found on Reed belonged to him (Wright), and that when asked about the Letter, Wright had "selectively invoked his Fifth Amendment privilege to avoid possible prosecution."

A trial court "has the discretion to determine whether to allow a defendant to call a witness to testify, who the defendant alleges committed the crime, for the purpose of having the witness invoke his Fifth Amendment right in the presence of the jury." *Gray*, 368 Md. at 537-38. Before exercising its discretion,

> the trial court, on the record, should make a determination of whether sufficient other evidence has been proffered that, if believed by any trier of fact, might link the accused witness to the commission of the crime. If the trial court finds that such sufficient evidence, linking the accused witness to the crime and believable by any trier of fact, exists that could possibly cause any trier of fact to infer that the witness might have committed the crime for which the defendant is being tried, then the trial court has the discretion to permit, and limit as normally may be appropriate, the defendant to question the witness, generally, about his involvement in the offense and have him invoke his Fifth Amendment right in the jury's presence.

Id. at 564.

On appeal, Reed contends the trial court committed numerous errors in handling Wright's invocation of his Fifth Amendment privilege. He argues that the court erred by not questioning Wright to determine whether there was a basis for him to invoke the Fifth Amendment and to do so in front of the jury; by conducting the colloquy among counsel

and the court about whether Wright would invoke the Fifth Amendment in Wright's presence; by not intervening, when Wright invoked the privilege on the witness stand seven times, to assess the propriety of the invocation of the privilege; and by directing defense counsel to continue questioning Wright in the face of those invocations. Recognizing that defense counsel did not object to any of these alleged errors by the trial court, Reed seeks plain error review.

The State responds that any review on our part is barred by the invited error doctrine, and that Reed's arguments lack merit in any event.

> The "invited error" doctrine is a "shorthand term for the concept that a defendant who himself invites or creates error cannot obtain a benefit – mistrial or reversal – from that error." *Klauenberg v. State*, 355 Md. 528, 544, 735 A.2d 1061, 1069 (1999), quoting *Allen v. State*, 89 Md. App. 25, 43, 597 A.2d 489, 498 (1991), *cert. denied*, 325 Md. 396, 601 A.2d 129 (1992). "The doctrine stems from the common sense view that where a party invites the trial court to commit error, he cannot later cry foul on appeal." *United States v. Brannan*, 562 F.3d 1300, 1306 (11th Cir. 2009).

State v. Rich, 415 Md. 567, 575 (2010). To the extent that an invited error amounts to an intentional relinquishment of a known right, it is a waiver. *Id.* at 580. While "a forfeited objection [may] be the subject of plain error review, . . . an issue that had been waived results in procedural default in every instance." *Joyner v. State*, 208 Md. App. 500, 512 (2012).

We agree with the State that the issues Reed raises on appeal respecting the court's handling of Wright's invocation of his Fifth Amendment right are barred by the invited error doctrine. As our recitation of the pertinent facts makes plain, defense counsel's trial strategy was to shift the blame for possessing the crack cocaine and money away from

Reed and onto Wright. One means to carry out this strategy was for the defense to call Wright to the witness stand and have him invoke his Fifth Amendment privilege, if at all, in front of the jury, question by question, thereby allowing the jurors to infer, from the invocation, that the answers to the questions would implicate Wright in the narcotics crime. The prosecutor, understanding this strategy, sought to prevent the defense from carrying it out. The prosecutor, not defense counsel, asked the court to conduct an inquiry outside the presence of the jury to assess whether Wright was invoking the privilege in good faith.

Citing *Gray*, defense counsel opposed the prosecutor's request, arguing that the defense should be permitted to question Wright in front of the jury and that Wright could invoke the privilege on a question by question basis. The court ruled in favor of the defense, allowing defense counsel to proceed as he wished, asking questions of Wright, with Wright invoking his privilege selectively.

Reed is in no position to advance any of the appellate complaints he is raising about Wright's testimony. He argues that the court did not make adequate inquiry prior to allowing Wright to invoke the privilege at all or before the jury, but it was defense counsel who asked the court for Wright to be able to invoke the privilege and to do so selectively and before the jury. Indeed, defense counsel opposed the State's request for such an inquiry. The court's ruling gave Reed exactly what his counsel asked for. Defense counsel could question Wright about the version of events that was helpful to Reed – that the drugs and money found on Reed actually belonged to Wright – and, if

Wright invoked in response to those questions, the jurors could infer that Wright would incriminate himself if he answered truthfully. This obviously was helpful to the defense and was precisely what defense counsel was seeking to accomplish by proceeding to question Wright as he had asked the court to allow him to do. If there was any error at all in the court's ruling, and we do not suggest there was, this is a textbook example of invited error amounting to a waiver, making plain error review unavailable. So too with Reed's complaints about Wright's being present when counsel were arguing about the expected invocation, and about the court not intervening in some fashion after Wright invoked several times, and to preclude defense counsel from questioning Wright further after he invoked several times. Defense counsel did not object to any of this because he wanted to continue to examine Wright and to have Wright invoke in response to questions that would raise an inference of complicity.

Even if plain error review were available, which it is not, we would decline to exercise it because we perceive no error by the court in permitting Wright to testify as he did, much less error that is "obvious," had an impact on the outcome of the trial, and affected the "fairness, integrity, or public reputation of judicial proceedings." *Savoy v. State*, 218 Md. App. 130, 145 (2014). The procedure Reed argues should have been followed applies when *the State* seeks to call a witness who may invoke the Fifth Amendment privilege. *See Gray*, 368 Md. at 550-551 (citing *Richardson v. State*, 285 Md. 261, 265-66 (1979)). The *Gray* Court expressly declined to determine the precise procedure to be followed when, like here, the defendant, not the State, seeks to call a

witness who may invoke the privilege. *Id*. at 558. It held only that the court must make a threshold determination that there is sufficient evidence of the witness's connection to the crime to permit a reasonable juror to infer that the witness committed the crime. In the case at bar, the trial court did not abuse its broad discretion by concluding that Wright's presence at the crime scene, coupled with the information he included in the Letter, satisfied that threshold, and by permitting Wright to invoke his Fifth Amendment privilege, selectively, in the presence of the jury. Nor did the court abuse its discretion by having counsel address the issue of expected invocation in front of Wright, whose counsel was part of the conversation, and, having exercised its discretion appropriately under *Gray*, in advising defense counsel to continue his examination of Wright after Wright invoked the privilege in response to several questions. [7]

II.

In two contentions that are related to each other and to his assertions in Question I., Reed maintains that the trial court erred by admitting the Letter as a prior inconsistent statement, under Rule 5-802.1(a), instead of as a statement against penal interest, under Rule 5-804(b)(3), and then giving a confusing jury instruction that permitted the Letter to

[7] Reed also argues that the court erred by allowing Wright's counsel to briefly confer with him during his direct examination by defense counsel. Defense counsel did not object and there is no conceivable error in the court's ruling. Wright was being questioned about facts that could lead him to incriminate himself and it was important that he receive advice of counsel, even if during his testimony. In addition, the court had already ruled that any invocation could take place before the jury. Finally, the fact that the jury saw Wright confer with counsel before he invoked in response to certain questions could only strengthen the negative inference defense counsel was seeking to take advantage of.

be considered as substantive evidence and impeachment evidence. Because no defense objection was made to the jury instruction as given, Reed again seeks plain error review.

The State responds that because Reed moved for admission of the Letter as a prior inconsistent statement and agreed to the court's correcting its jury instruction as it did, his appellate claims are waived under the invited error doctrine. Furthermore, any claimed error in not admitting the Letter as a statement against penal interest would have to be harmless because the court admitted it for substantive use as a prior inconsistent statement, which is what Reed had wanted.

"A ruling on the admissibility of evidence ordinarily is within the trial court's discretion.'" *Hajireen v. State*, 203 Md. App. 537, 552 (2012). A trial court's decision to admit or exclude evidence only will be reversed for an abuse of discretion. *State v. Simms*, 420 Md. 705, 724 (2011). A trial court abuses its discretion "when it acts without reference to any guiding principles or rules of law or where no reasonable person would take the view adopted by the trial court." *Matoumba v. State*, 390 Md. 544, 552 (2006).

As explained above, defense counsel moved for admission of the Letter under two exceptions to the rule against hearsay – Rule 5-804(b)(3) for statements against penal interest and Rule 5-802.1(a) for prior inconsistent statements by a witness – both of which permitted admission of the Letter as substantive evidence. The court declined to admit the Letter under the former exception, ruling primarily that it lacked sufficient indicia of trustworthiness, but admitted it under the latter exception. Plainly, because Reed received the relief he sought – admission of the Letter substantively – he may not

complain on appeal that the court granted that relief for the wrong reason. *See State v. Funkhouser*, 140 Md. App. 696, 719 (2001) (a court may be "right for the wrong reason and will therefore be affirmed"); *see also, e.g., Klauenberg*, 355 Md. at 545 ("Because the defendant received the remedy for which he asked, [he] has no grounds for appeal.").

The jury instruction Reed now complains about was discussed during the charge conference, which was held after the defense had rested but before the State called Corporal Eastman in rebuttal. Defense counsel asked the court to give Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") 3:19(A), titled "PRIOR STATEMENT OF WITNESS: AS SUBSTANTIVE EVIDENCE."[8] The court agreed that that instruction was appropriate with respect to the Letter. The prosecutor pointed out that he would be calling Corporal Eastman on rebuttal to testify about Wright's having told him that Reed had given him a piece of crack cocaine to try, and that testimony was admissible as a prior inconsistent statement for impeachment purposes. For that reason, he suggested that the court also give MPJI-Cr 3:19(B), titled "PRIOR STATEMENT OF WITNESS: TO IMPEACH."[9] The court agreed that that instruction might also be appropriate and

[8] MPJI-Cr. 3:19(A) provides:

> You will recall that (name) testified in the [State's case] [defense case] during the trial. You will also recall that it was brought out that before this trial [he] [she] made statements concerning the subject matter of this trial. Even though these statements were not made in this courtroom, you may consider these statements as if they were made at this trial and rely on them as much, or as little, as you think proper.

[9] MPJI-Cr. 3:19(B) provides:

(continued…)

indicated that it would include it in the proposed instructions and counsel could determine later if it should be removed. Defense counsel did not object to that proposed course of action.

After Corporal Eastman had finished testifying on rebuttal, the court instructed the jurors, giving a modified and combined version of MPJI-Cr. 3:19(A) and (B):

> Prior statements: You'll recall that Keith Wright testified in the defense's case during the trial. You'll also recall it was brought out that before this trial he made statements concerning the subject matter of this trial. Even though these statements were not made in this courtroom, you may consider these statements as if they were made at this trial and rely on them as much or as little as you think proper. You heard testimony that Keith Wright made a statement before trial. Testimony concerning that statement was permitted. It's permitted for you to evaluate. It can be used by you as substantive evidence, whatever you believe or not believe, whatever weight you want to give it. It can also be used to impeach the testimony of the witness, and it's being offered to help you decide whether you believe the testimony of the witness, Mr. Wright, when he testified. It is for you to decide whether to believe the trial testimony of Keith Wright, and it's also for you to decide whether you believe the statement of . . . Defense Exhibit 1 [the Letter]. So, that's, you make that decision. *And whether you believe it in whole or in part and you may not use, okay.*
>
> *I think we should strike that last sentence because I think it's inconsistent with the other part. But we can approach before [the written instructions go to the jury] just to make sure we agree on that.*

(…continued)

> You have heard testimony that (name) made a statement [before trial] [at another hearing] [out of your presence]. Testimony concerning that statement was permitted only to help you decide whether to believe the testimony that the witness gave during this trial.
>
> It is for you to decide whether to believe the trial testimony of (name) in whole or in part, and you may not use the earlier statement for any purpose other than to assist you in making that decision.

(Emphasis added.)

As the italicized portion of the instruction makes clear, the court began to include the final phrase from MPJI-Cr. 3:19(B), which instructs the jurors that they only may use the prior statements to assess the witness's credibility, but stopped, recognizing that that would be inconsistent with the MPJI-Cr. 3:19(A) instruction. After the court finished instructing the jury, the court asked counsel during a bench conference if they would agree to the court's striking from the written instructions the last phrase from MPJI-Cr. 3:19(B). Both counsel agreed. The court noted that it had given "B and A" because it "want[ed] to accommodate both [defense counsel and the prosecutor]." Defense counsel replied, "And I'm fine with that Your Honor." The written instructions were modified to eliminate the final phrase from MPJI-Cr. 3:19(B).

We agree with the State that by "expressing his satisfaction with the instructions actually given, . . . [Reed] waived any objection and failed to preserve this issue for appellate review." *Choate v. State*, 214 Md. App. 118, 130 (2013). For the reasons already explained, because Reed waived this contention, we decline to exercise plain error review.

III.

Finally, Reed contends the trial court erred by declining to instruct the jury on self-defense with respect to the charge of resisting arrest. He asserts that the instruction was generated by Wright's testimony that he (Reed) did not know that Officer McGinnis and Corporal Eastman were police officers when they approached his car.

The State responds that the trial court correctly ruled that the instruction was not generated because there was no evidence that Reed "actually believed that he . . . was in immediate or imminent danger of bodily harm." (Quoting *Jones v. State*, 357 Md. 408, 422 (2000)). We agree.

To generate the issue of self-defense, "[t]he defendant must show 'some evidence' and then the burden shifts to the State to show, beyond a reasonable doubt, that the defense does not apply." *McMillan v. State*, 428 Md. 333, 355 (2012). The evidence adduced must be viewed in a light most favorable to the defendant, and the existence of contrary evidence, even overwhelming contrary evidence, is not dispositive. *Dykes v. State*, 319 Md. 206, 217 (1990). "There must be 'some evidence' to support each element of the defense's legal theory before the requested instruction is warranted[,]" however. *Marquardt v. State*, 164 Md. App. 95, 131 (2005); *see also Bynes v. State*, 237 Md. App. 439, 449 (2018) ("The evidence . . . must be generated not simply with respect to self-defense generally, but with respect to each of its constituent components specifically.").

Self-defense requires evidence that the defendant:

> 1) had reasonable grounds to believe him or herself in apparent imminent or immediate danger of death or serious bodily harm from an assailant;
> (2) ***in fact believed him or herself to be in such danger***;
> (3) was not the aggressor [and did not] provoke[] the conflict;
> (4) used no more force than the exigency required.

State v. Martin, 329 Md. 351, 357 (1993) (emphasis added). The first element is an objective inquiry. By contrast, the second element requires proof of the defendant's

subjective belief and "only evidence bearing directly on that issue will suffice." *Id*. at 368; *see Bynes*, 237 Md. App. at 450-51 (self-defense instruction not generated because the record was silent on the "necessary mental component").

In the case at bar, defense counsel argued below that the evidence that Reed "got the crap kicked out of him" by the police officers arresting him, coupled with Wright's testimony that he (and Reed) did not realize that the two men who approached Reed's car were police officers, satisfied the "some evidence" threshold on the second element. The court rejected that argument, noting that it is "close to impossible" for a defendant who does not testify to generate a self-defense instruction, and concluding that Reed did not adduce any evidence about his "subjective belief."

The court did not err in so ruling. There was no evidence bearing upon *Reed's* subjective belief that he was in danger when he was being chased and placed under arrest by the police. Evidence that *Wright* did not realize that Officer McGinnis and Corporal Eastman were police officers was not probative of *Reed's* subjective belief in that regard. Having failed to adduce "some evidence" on that element of self-defense, Reed was not entitled to a self-defense jury instruction.

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