Circuit Court for Harford County
Case No. C-12-CR-19-000492

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 454

September Term, 2021

JOSEPH DANIEL PARRISH

v.

STATE OF MARYLAND

Shaw,
Tang,
Albright,
JJ.

Opinion by Tang, J.

Filed: February 23, 2023

*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.

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

After a multi-day trial, a jury, sitting in the Circuit Court for Harford County, convicted Joseph Daniel Parrish, appellant, of murder in the first degree of Jeffrey Coudon, retaliation against Mr. Coudon for reporting a crime of violence, and use of a firearm in a crime of violence. The circuit court sentenced appellant to life in prison, plus forty years. Appellant raises the following issues which we have rephrased:[1]

1. Did the court abuse its discretion in admitting the jail calls made by appellant?

2. Did the court abuse its discretion in permitting the State's witness to rebut the testimony of appellant's alibi witness?

For the following reasons, we shall affirm the judgments of the circuit court.

FACTUAL BACKGROUND[2]

The murder of Jeffrey Coudon occurred on or about November 11, 2018. To place the facts and investigation of the murder and attendant offenses into context, we begin with the antecedent robbery of Mr. Coudon at the Super 8 motel.

[1] The questions presented by appellant in his brief are:

1. Did admitting irrelevant and unduly prejudicial jail calls violate Maryland Rules 5-401 through 5-404 and Mr. Parrish's constitutional right to a fair trial?

2. Was Mr. Parrish unduly prejudiced by the court changing its ruling that the State's rebuttal witness could not testify?

[2] The facts, as summarized in the body of this section, are derived from the evidence adduced at trial, viewed in the light most favorable to the State. *Molina v. State*, 244 Md. App. 67, 87 (2019).

Robbery of Jeffrey Coudon[3]

In March 2018, Mr. Coudon, a veteran and wheelchair user, was staying temporarily in a Super 8 motel in Harford County, where he encountered appellant and someone presenting as appellant's half-brother. Appellant and his half-brother smoked a cigarette with Mr. Coudon outside the front of the motel and then assisted Mr. Coudon with an upgrade into a more wheelchair-accessible room.

That afternoon, appellant knocked on Mr. Coudon's door and proceeded to "choke" him, knocking him out of his wheelchair. Appellant kicked and "pummel[led]" Mr. Coudon for a couple of minutes before demanding money. When Mr. Coudon directed appellant to the cash, appellant "stopped beating" him. Before appellant left the room, he "got right over [Mr. Coudon's] face" and threatened to "come after" him if he reported the incident.

Mr. Coudon nevertheless called police and reported that "he was robbed of about $300 in cash and a smart phone." An officer, responding to the call, found Mr. Coudon at the motel bloodied around the face. The officer located appellant, based on information Mr. Coudon provided, and brought him down to the motel lobby, where Mr. Coudon "identified him immediately as the individual who robbed him and assaulted him." The officer arrested appellant, and a search of his person yielded $761. The officer also seized

[3] Mr. Coudon's account of the robbery was presented at trial through a transcript of his testimony at a motions hearing before his murder. Defense counsel offered, and the court admitted, into evidence the excerpt of the transcript.

appellant's shoes, which were bloody both on the tops and on the soles.[4] For the sake of convenience and clarity, we shall refer to this incident as the "Coudon robbery."

About a week after the robbery, Mr. Coudon contacted his daughter, who testified that Mr. Coudon was "scared" because "someone had threatened to kill him after assaulting him." Mr. Coudon "wanted the taser he [had given his daughter] for Christmas a year prior[,]" and she gave it to him.

On September 18, 2018, appellant, who had been held without bail, was released from pretrial detention.[5]

Murder of Jeffrey Coudon

On the evening of November 10, 2018, Mr. Coudon ordered a pizza delivery to his apartment, located in Havre de Grace, Harford County. Although the apartment was "usually a secured building," "everything was wide open" when the deliveryman entered the building. The deliveryman spoke with Mr. Coudon, who said he was not worried about security lapses in the apartment building because he had a "shock stick[,]" referring to the taser obtained from his daughter.

The following morning, Mr. Coudon's friend went to his apartment because the two had scheduled to get a service dog for Mr. Coudon. They had communicated the night

[4] The DNA profile of blood on one shoe was consistent with Mr. Coudon's DNA.

[5] The State had charged appellant with the Coudon robbery, among other related offenses. In March 2019, however, the State entered a *nolle prosequi* to these charges due to insufficient evidence; by that time, Mr. Coudon, the State's key witness and victim, had been murdered.

before, at around 6:00 p.m., to confirm plans to pick up the dog in the morning. When the friend arrived at Mr. Coudon's apartment, he found Mr. Coudon bloody and slumped over a nightstand. The friend called police.

When police responded, they found Mr. Coudon with gunshot wounds. He was transported to the hospital, where he later succumbed to his injuries. The State's medical examiner recovered two bullet fragments from Mr. Coudon's autopsy. In processing Mr. Coudon's apartment, police discovered and collected two spent "R&P .380" shell casings.[6] They also discovered a cigarette butt on the floor, which was later determined to have appellant's DNA on it.

Jail Calls

On December 13, 2018, appellant was "taken into custody on another case."[7] Police pulled the recordings of appellant's jail calls made from the detention center, focusing on four calls made to appellant's brother, Robert Zeman. Three calls were made on December 14, 2018, and the last call was made on December 16, 2018. At the start of each call, the detention center advised, by pre-recorded message, that calls made from the detention center would be recorded.

On the morning of December 14, 2018, appellant told Mr. Zeman that he "got locked up last night" for allegedly "robbing somebody and [holding] somebody up." Appellant

[6] "R&P" or "R-P" refers to Remington Peters, a brand of ammunition.

[7] As explained *infra*, the other case implicated appellant in an unrelated robbery of an individual by the name of Jonathan Craig ("Craig robbery").

directed Mr. Zeman to go to Christopher Gray's house for a "bike."[8] Then appellant paused and tried to expound ("All right and fucking – shit"), but Mr. Zeman cut in and said he "underst[ood]." Appellant attempted to say more, but he "d[id]n't know how to explain it."

Appellant advised Mr. Zeman that police were looking for a "bookbag" and "all kinds of other shit[.]" Appellant denied having any of these items. He said "[i]t makes no sense at all," and but for a "pending charge in March," he would have been released. He instructed Mr. Zeman, "[w]hen you get [to the house] ask Chris where his bike is." Mr. Zeman indicated he would do so shortly, but appellant insisted that he proceed as soon as possible.

A few minutes later, while Mr. Zeman was en route to Mr. Gray's house, the two spoke again. Appellant explained that the "bike" was located "[r]ight there in the driveway" "where the staircase is" with the other "bikes." Appellant described the "bike" as the "blue one with the pegs on it." Appellant continued to deny any involvement in the alleged robbery. He told Mr. Zeman to hasten. Mr. Zeman said he was almost at the house.

Appellant, evidently reading from a document, indicated that "Jon Craig" had supposedly recognized appellant from the alleged robbery, but appellant denied seeing Mr. Craig in recent months.[9] When Mr. Zeman arrived at the house, he confirmed that he

[8] Mr. Gray's testimony is the subject of the discussion in Section II, *infra*.

[9] *See* n.7.

located the "bike." Appellant said he had "a couple of dollars in [his] wallet and whatever." He continued to deny any involvement in the alleged robbery. Mr. Zeman assured appellant that he was "good now."

A couple of days later, on December 16, 2018, appellant asked Mr. Zeman if he had gone through the "bag" and gotten the "grass" and the "money." Mr. Zeman said he had.

Search Warrants

Based on the information gathered from the jail calls, police applied for and obtained a search warrant premised on probable cause to believe that evidence relating "to the crime of Armed Robbery" could be found at Mr. Zeman's home. The search warrant authorized a search for, *inter alia*, "car keys of Jonathan Craig, semiautomatic handgun, ammunition or any evidence of a semiautomatic handgun, back pack and dark clothing."

On February 8, 2019, when police executed the search warrant at Mr. Zeman's home, they found a blue backpack with black straps, a "Vipertek stun device," and a cell phone. Inside the backpack, police found, *inter alia*, a wallet containing appellant's photograph and two sweatshirts. Inside one sweatshirt, police discovered a "live R-P .380 round," which matched the two shell casings found at the murder scene.

In "late February or early March" 2019, Mr. Zeman sold a handgun to Brian Humphreys. Police executed a second search warrant at Mr. Humphreys' home. Inside, they found a partly disassembled, black Bersa .380 pistol, which was, according to the State's firearms expert, the weapon that had fired the bullets that struck Mr. Coudon.

Additional background information will be supplied, as necessary, in the discussion below.

DISCUSSION

I.

Appellant argues that the trial court erred in admitting the jail calls because they were irrelevant and unduly prejudicial. The State maintains that the court acted within its discretion in admitting them.[10]

A. Background

In its case-in-chief, the State sought to introduce the jail calls through a testifying detective. Defense counsel initially objected to their admission on relevance and hearsay grounds. Outside of the presence of the jurors, the court listened to the calls, during which the detective identified the voices of appellant and Mr. Zeman. After the calls were played, defense counsel reframed the objection, focusing on "other crimes" evidence:

[10] Preliminarily, the State argues that this issue is not preserved because appellant did not provide us with a transcript of the jail calls. *See* Maryland Rule 8-411(a)(3) (requiring a transcription of any audio recording or portion thereof offered or used at a trial); *Whack v. State*, 94 Md. App. 107, 126 (1992) (failure by defense "to produce the relevant tapes or transcripts is similarly totally dispositive of his contention which relies on same"). Although the entirety of the jail calls was not transcribed, excerpts are contained in the transcript of the State's closing argument. We obtained, from the circuit court, the disc containing the jail calls admitted into evidence at trial. We do not condone appellant's failure to comply with the Rules; he should have arranged to have the jail calls transcribed in their entirety. *See White v. State*, 8 Md. App. 51, 54 (1969) (it is an appellant's responsibility to include in the record a transcript of all matters and issues which he desires us to review on appeal). But given this record and our preference to resolve the issue raised, we exercise our discretion and consider the argument on the merits.

> [DEFENSE COUNSEL]: . . . First of all, there's the other crime issue. I'm not arguing – it's statements by the party proponent. I'm not really arguing hearsay on behalf of what he has to say, but just because he said it doesn't mean it's admissible. So, we have him talking about this other robbery in, I believe, every one of the calls at length about yet another crime. And so the State is offering this up to show that he's been charged with another crime, and, in fact, offering statements of [appellant] about those other crimes. Other crimes evidence is not admissible, and yet, again – and you have ruled on other crime for Mr. Coudon's robbery.[11] I understand. But now we're dealing with – and it goes through all of these tapes with another crime, and specifics of it. You know, I wore a mask, this kid said that. Mr. Zeman, the brother is talking about the other crimes too, so I believe in all four tapes there's issues of that.

Defense counsel argued that the State was trying to introduce "other crimes" evidence that was highly prejudicial and lacked probative value. He maintained that the admission of "other crimes" evidence required the State to "go through the steps" of identifying an exception to the general prohibition against the admission of such evidence; the court then would have to find that the "other crime" occurred by clear and convincing evidence and its probative value outweighed the prejudice. As to relevance, defense counsel argued that appellant's mention of the "bike" and "bag" could not be tied to the murder and, therefore, the jail calls were not relevant.

The State countered that it was not seeking admission of the jail calls to prove that appellant had committed the Craig robbery and, therefore, the "other crimes" analysis was not implicated. It further argued that appellant had directed Mr. Zeman to hide evidence

[11] The trial court had ruled that evidence of the Coudon robbery was admissible. The ruling is not the subject of this appeal.

tying appellant to the Craig robbery, which also happened to include evidence of the Coudon robbery and murder. The State explained that redacting the calls to parse out references to the Craig robbery would have rendered them incomprehensible. The following colloquy between the court and counsel ensued:

> THE COURT: And you are offering it for what purpose?
>
> [THE PROSECUTOR]: Your Honor, we are not offering this evidence to prove he committed another robbery.
>
> THE COURT: That's what I'm asking.
>
> [THE PROSECUTOR]: We are not bringing that in. We are offering this evidence to prove pursuant that this isn't really what 5-404(b) talks about. It says evidence of other crimes in or wrongs, acts, including delinquent acts defined by the code is not admissible to prove the character of the defendant in order to show actions in conformity therewith. That's obviously not what we are trying to do.
>
> We are trying to put in [appellant]'s statement in which he talks about more bad things than just the ones that are relevant here. They can't be pared out. You can't chop it out and understand it. [Appellant] talked about it. But understand these four calls talk about encouraging his brother to go to the place where he hid the evidence of the robbery of Mr. Craig which also contained the evidence of the robbery and murder of Mr. Coudon. He asked -- he is recorded asking his brother to get that evidence and dispose of it. And he is told by his brother, I did it.
>
> There is no way we're trying to prove he committed another robbery. There is no way we'll ever make any argument about that. And, in fact, the [c]ourt can instruct the jury that any evidence relating to the fact that he committed other crimes than which he's charged is totally irrelevant to their decision making.
>
> [DEFENSE COUNSEL]: That would make it worse, but I'll submit on my argument as to the tapes.

Over the defense's objection, the court admitted the jail calls and permitted them to be played for the jury.

B. Analysis

"We review a circuit court's decisions to admit or exclude evidence applying an abuse of discretion standard." *Norwood v. State*, 222 Md. App. 620, 642 (2015). First, we must consider "whether the evidence is legally relevant, and, if relevant, then whether the evidence is inadmissible because its probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns as outlined in Maryland Rule 5-403." *State v. Simms*, 420 Md. 705, 725 (2011). Issues of relevance are reviewed *de novo*. *State v. Robertson*, 463 Md. 342, 353 (2019) ("Although trial judges have wide discretion 'in weighing relevancy in light of unfairness or efficiency considerations, trial judges do not have discretion to admit irrelevant evidence.'") (citation omitted). Before we turn to the issues of relevance, we first analyze appellant's contention that the jail calls implicated the "other crimes" analysis.

i. "Other Crimes" Analysis is Not Implicated

Appellant argues that the trial court improperly allowed the State to introduce the jail calls without engaging in the following three-step process for admitting "other crimes" evidence: (1) determine whether the evidence has special relevance; (2) determine whether there is clear and convincing evidence of the alleged criminal act; and (3) determine whether the probative value of evidence outweighs its prejudicial effect. The State, on the

other hand, continues to maintain that the calls do not implicate the "other crimes" analysis. We agree with the State.

Evidence of other crimes generally is inadmissible in a criminal trial "to prove the character of a person in order to show action in the conformity therewith." Md. Rule 5-404(b). Evidence of other crimes is admissible, however, in some circumstances where the evidence is "'specially relevant' to a contested issue" other than propensity, "such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident." *Burris v. State*, 435 Md. 370, 386 (2013) (quoting Md. Rule 5-404(b)).

> The purpose of Maryland Rule 5-404(b) is to prevent the State from:
>
> > bring[ing] in "out of left field" the fact that on some other occasion the defendant committed a crime. The danger being guarded against is that such past behavior will be offered to show and will be used by a jury to conclude that the defendant has a propensity to commit crime.
>
> * * *
>
> > Although the direct evidence of what happens at a crime scene may sometimes show some possible crime in addition to the one literally charged, that coincidental possibility does not necessarily engage the gears of "other crimes" evidence law.

Odum v. State, 412 Md. 593, 611 (2010) (quoting *Dixon v. State*, 133 Md. App. 325, 329-30 (2000), *rev'd on other grounds*, 364 Md. 209 (2001)); *Silver v. State*, 420 Md. 415, 435 (2011) ("[T]hese concerns do not necessarily apply to all 'evidence of what happens at a crime scene[,]' and that such evidence may be admitted even though it might show 'some

possible crime in addition to the one literally charged[.]'") (quoting *Odum*, 412 Md. at 611).

In *Dixon*, which was reversed on other grounds, the defendant was convicted of first-degree assault and use of a handgun in the commission of a crime of violence. 133 Md. App. at 328. At trial, the victim testified that he had approached the defendant to purchase crack cocaine. *Id*. at 330. The defendant then displayed a gun and shot the victim. *Id*. The State elicited from the victim testimony that he had purchased drugs from the defendant on a prior occasion. *Id*. at 331. The defendant maintained that evidence of his drug-selling was inadmissible "other crimes" evidence. *See id*. at 328-29. We disagreed, explaining that such evidence did not engage the "gears" of "other crimes" evidence law:

> Although we could validate that testimony on the theory that it undergirds [the victim]'s ability to make a reliable identification of the appellant as the criminal agent, . . . that would be to dignify the contention more than it deserves to be dignified. Fundamentally, this was simply not extrinsic evidence showing the appellant's criminal propensity. It was direct evidence as to why [the victim] stopped the car and approached the appellant in the first instance. In view of the fact, moreover, that the entire confrontation was one between a would-be purchaser of drugs and an ostensible seller of drugs, the coincidental fact that the two had been involved on an earlier occasion or occasions was inconsequential in terms of prejudicial impact. But for [the victim]'s knowledge that the appellant was someone from whom he could purchase "more crack," his entire narration of the incident that morning would have been unintelligibly bizarre. We see no error.

Id. at 330-31 (citations and footnotes omitted). We further reasoned that the disputed evidence was "essentially integral to, even if not literally inextricable from, the criminal incident on trial." *Id*. at 330; *see also Odum*, 412 Md. at 614 (holding that evidence of the

entire criminal "transaction," including robbery, carjacking, and murder, was admissible even though only kidnapping was being tried); *Wagner v. State*, 213 Md. App. 419, 457-58 (2013) (holding that evidence of a defendant's drug use after robbing and fatally stabbing victim was intrinsic to the crimes charged, and, thus, were admissible); *Silver*, 420 Md. at 435-36 (holding, in a case of animal cruelty resulting in horse's death, that evidence regarding neglect of two surviving horses was admissible as being intertwined with and part of the same criminal episode as the horse's death).

Federal courts have similarly recognized that Rule 404(b)[12] does not bar the admission of "other crimes" evidence where it is necessary to "show the context of the crime" and complete "the story" of the offense. *See Merzbacher v. State*, 346 Md. 391, 409-10 (1997) (citing *United States v. Powers*, 59 F.3d 1460, 1466 (4th Cir. 1995) ("we have made clear that prior bad acts evidence is considered necessary and admissible either where it is an essential part of the crimes on trial, or where it furnishes part of the context of the crime.") (cleaned up)); *United States v. Brizuela*, 962 F.3d 784, 793-95 (4th Cir. 2020) ("[T]he evidence must be probative of an integral component of the crime on trial or provide information without which the factfinder would have an incomplete or inaccurate view of other evidence or of the story of the crime itself.").

Here, Maryland Rule 5-404(b) does not bar the admission of the jail calls in which appellant remarked, and the jury heard, that he had been "locked up" for allegedly "robbing

[12] Maryland Rule 5-404(b) derives from Federal Rule of Evidence 404(b).

somebody and [holding] somebody up." Appellant repeatedly denied, on the calls, any involvement in the robbery, any recent encounter with Mr. Craig, and possessing items sought by police. And there was no evidence offered by the State that appellant had, in fact, committed the Craig robbery. We fail to see how the calls activate the "other crimes" analysis under these circumstances. *See Sessoms v. State*, 357 Md. 274, 283 (2000) ("This Court has had many opportunities to interpret the other crimes evidence rule and has consistently held that, in a criminal proceeding, it is a standard limited to acts *committed* by a defendant.") (emphasis added); *Smith v. State*, 232 Md. App. 583, 599 (2017) ("Maryland Rule 404(b) prohibits other bad acts evidence to protect against the risk that a jury will assume that because a defendant *committed* other crimes, he is more likely to have committed the crime for which he is on trial.") (emphasis added); *Khan v. State*, 213 Md. App. 554, 572-73 n.5 (2013) ("other crimes" analysis was not implicated where testimony relating to complaint made by unknown customer about a prior, unspecified touching by appellant was not verified; "[e]vidence was never presented regarding the details of the complaint, *or to show that the incident in fact occurred*.") (emphasis added).

In any event, the jail calls were not brought "out of left field" to demonstrate that appellant had committed the Craig robbery, nor was it used to show appellant's propensity to commit a crime. The calls were probative of appellant's participation in the murder by virtue of the subsequent discovery of the blue backpack, the live round contained therein, and the murder weapon. Mr. Zeman's immediate recovery of the "bike"/"bag," his assurance that appellant "was good now," and his subsequent gun sale to Mr. Humphreys,

placed into greater context why appellant had made the calls to Mr. Zeman and what he meant by urgently directing Mr. Zeman to get the "bike" from Mr. Gray's house.

The calls also explained for the jury why police obtained the recordings of the jail calls in the first instance as well as the investigatory chain of events that ultimately led police to the instrumentalities of the murder. *See e.g.*, *United States v Goosby*, 523 F.3d 632, 638 (6th Cir. 2008) (Rule 404(b) was not implicated where witness's testimony about defendant was to provide background information about the investigation, not to discuss his character or prior bad acts); *United States v. Weeks*, 716 F.2d 830, 832 (11th Cir. 1983) (in prosecution for assaulting a federal agent, evidence that the agent had been investigating stolen motor vehicles at the time of assault was reasonably necessary to complete the story of the crime and, therefore, did not implicate "other crimes" evidence). But for the jail calls, the jury would have had an incomplete picture of the murder (and its instrumentalities), the attendant offenses tried, and the investigation.[13]

ii. Jail Calls Were Relevant and Not Unduly Prejudicial

[13] In his reply brief, appellant relies on *United States v. Shelton*, 628 F.2d 54 (D.C. Cir. 1980) to claim that an innuendo of appellant's involvement in another crime is improper. In *Shelton*, the prosecutor cross-examined the defendant and a defense witness to portray the defendant, by innuendo, as "an undesirable, a member of the drug underworld, and, thus, a person who was likely to be guilty of assault—or of something." *Id.* at 58. The facts in the instant matter, however, are distinguishable. Aside from the obvious difference that appellant was not cross-examined, the State introduced the jail calls to demonstrate that appellant tried to hide evidence of the murder, not that he had a disposition to commit crime.

Appellant argues that the jail calls were not relevant because the conversations contained therein only related to the Craig robbery and, therefore, had "no logical connection" to the murder. He contends that the State merely assumed that the "bookbag" mentioned in the jail calls was the same as the blue "backpack" found at Mr. Zeman's house.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. "Having any tendency to make any fact more or less probable is a very low bar to meet." *William v. State*, 457 Md. 551, 564 (2018) (internal quotes and citation omitted). "[P]hysical evidence need not be positively connected with the accused or the crime to be admissible; it is admissible where there is a reasonable probability of its connection with the accused or the crime[.]" *Aiken v. State*, 101 Md. App. 557, 573 (1994).

Here, the evidence was sufficient to create a reasonable probability that appellant's comments, on the jail calls, about the "bike" and "bookbag" were connected to his participation in the murder; they, in fact, led police to search Mr. Zeman's and Mr. Humphrey's homes where police found evidence tying appellant to the murder and the attendant charges. We have no difficulty concluding that the calls were relevant.[14]

[14] Appellant cites to three cases which held that certain physical evidence was inadmissible because they were not linked to the crimes charged: *Williams v. State*, 342 Md. 724, 737 (1996) (crowbar and can of mace found in defendant's possession at time of arrest was inadmissible where there was no evidence establishing connection between these

Regarding the jail calls' "logical connection" to the murder, "[i]t was for the jury to weigh the evidence and make the ultimate determination on this point." *Grymes v. State*, 202 Md. App. 70, 104 (2011).

As to prejudice, appellant argues that the jail calls enabled the jury to focus on appellant's habitual incarceration (for the Coudon robbery, the Craig robbery, and the murder) and develop a false inference of guilt from it. We are not persuaded. By the time the jury heard the jail calls, competent evidence established that appellant had been incarcerated more than once. For instance, the detective had already testified, without objection, that appellant had been in jail (for the Coudon robbery), was released on September 18, 2018, and then arrested on December 13, 2018 (for the Craig robbery).

> [THE PROSECUTOR]: All right. Then what did you next do?
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> [THE DETECTIVE]: Checked . . . to see . . . if [appellant] was still in jail or incarcerated.
>
> [THE PROSECUTOR]: What did you learn about that?
>
> [THE DETECTIVE]: I think he had been released September 18th 2018.
>
> * * *
>
> [THE PROSECUTOR]: . . . in the course of the investigation, you then found out about [appellant]'s circumstances. What were they?

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items and crime charged); *Gupta v. State*, 227 Md. App. 718, 742-73 (2016) *aff'd*, 452 Md. 103 (2017) (camping knife used for protection was inadmissible where it was not implicated in the charged crime); and *Smith v. State*, 218 Md. App. 689, 704-06 (2014) (firearms and ammunition were inadmissible where they were unrelated to charged murder). The instant case is distinguishable because the jail calls referenced the blue "bike"/"bookbag" which, in fact, led police to find a blue "backpack" and the murder weapon.

[THE DETECTIVE]: He was out, out of jail. . . He had been released from custody 9/18/18. . .

* * *

[THE PROSECUTOR]: What did you learn on or about December 13th about [appellant]'s circumstances?

[THE DETECTIVE]: [Appellant] had been arrested on December 13th.

[THE PROSECUTOR]: All right. Without telling us anything about that case, did you learn where [appellant] was as a result of being arrested on December 13th?

* * *

[THE DETECTIVE]: When he was arrested?

[THE PROSECUTOR]: Yes.

[THE DETECTIVE]: Actually close to the police station.

[THE PROSECUTOR]: And then where after that, where did he go?

[THE DETECTIVE]: He was actually in a cell block at the Havre de Grace Police Station.

In addition to this unobjected to testimony, appellant later stipulated, and the court advised the jury, that appellant "ha[d] been in custody since December 13 of 2018 to the present [the date of trial.]" The jail calls did not add more to what had already been admitted, without objection, regarding instances of appellant's incarceration. *See Robeson v. State*, 285 Md. 498, 507 (1979); *Yates v. State*, 429 Md. 112, 120-21 (2012) ("Where competent evidence of a matter is received, no prejudice is sustained where other objected to evidence of the same matter is also received") (citing *Robeson*, 285 Md. at 507);

Grandison v. State, 305 Md. 685, 739 (1986) (challenged testimony was not sufficiently prejudicial to warrant reversal where the facts were independently established through prior unobjected to testimony). As noted, appellant's comments about being "locked up" for an alleged robbery was mitigated by his repeated denial of his involvement. The prejudicial effect of the calls, both in substance and circumstance, did not outweigh the probative value of explaining why the calls were made and how they led to the discovery of evidence tying appellant to the offenses tried. Accordingly, the court did not err in admitting the jail calls.

II.

Appellant argues that he was unduly prejudiced by the trial court's change in ruling allowing Mr. Gray to testify as the State's rebuttal witness. The State responds that the court acted within its discretion in permitting Mr. Gray's rebuttal testimony.

A. Background

On October 3, 2019, less than a week prior to the start of trial, the defense filed on MDEC[15] a Notice of Discovery identifying Linda Gischel as a defense witness. It did not definitively identify Ms. Gischel as an alibi witness; rather, the defense indicated that "[t]his witness has the *potential* to be an alibi witness *but is not being named as an alibi witness* as the actual time of the crime has not been alleged."[16] (Emphasis added).

[15] "MDEC" is the Maryland judiciary's "system of electronic filing and case management[.]" Md. Rule 20-101(l).

[16] Maryland Rule 4-263(e)(4) provides, "[w]ithout the necessity of a request, the defense shall provide to the State's Attorney:"

On October 9, 2019, in its opening statement to the jury, the defense made clear, for the first time, that it would call Ms. Gischel as an alibi witness. Defense counsel advised the jury that Ms. Gischel would "testify that when Mr. Coudon was shot sometime that night, really probably that morning, [appellant] was at her house."

Days later, before resting its case, the State informed the trial court that it intended to call Mr. Gray in its case-in-chief. Mr. Gray was the resident of the home where appellant had directed Mr. Zeman, on the jail calls, to get the "bike" and/or "bookbag." He also had been in appellant's company on November 10, 2018, the night before Mr. Coudon was found shot.

Although the State had previously provided the defense with Mr. Gray's information and statements, the defense sought to preclude Mr. Gray from testifying because he had not been listed on the *voir dire* list as a witness the State intended to call. The State conceded its oversight – it did not disclose its intent to call Mr. Gray, nor had it subpoenaed him to attend court.[17] The trial court granted appellant's motion:

> (4) *Alibi Witnesses.* If the State's Attorney has designated the time, place, and date of the alleged offense, the name and, except when the witness declines permission, the address of each person other than the defendant whom the defense intends to call as a witness to show that the defendant was not present at the time, place, or date designated by the State's Attorney[.]

The defense is required to make its disclosure, subject to an exception not applicable here, "no later than 30 days before the first scheduled trial date[.]" Md. Rule 4-263(h)(2).

[17] Maryland Rule 4-263(d)(3) provides that "[w]ithout the necessity of a request, the State's Attorney shall provide to the defense:"

> THE COURT: Well, I denied the request of the defense with respect to Mr. Humphreys, but I think I have to grant the defense request as to this particular witness.
>
> [THE PROSECUTOR]: Very well, Your Honor. *We'll save him for possible use for later on in the trial*.
>
> THE COURT: Very good. Thank you, sir.

(Emphasis added).

After the State rested its case, without Mr. Gray's testimony, the defense called Ms. Gischel as an alibi witness. Ms. Gischel testified that appellant had lived in her home in Aberdeen; appellant was home by 11:00 p.m. on November 10, 2018; and he was home all day the next day.

Thereafter, the State apparently informed the defense that it planned to call Mr. Gray as a rebuttal witness. The defense took this up with the court, arguing that the State did not identify Mr. Gray as a witness to rebut alibi testimony as required by the discovery rule. The State responded that it "didn't know of any alibi . . . until the [defense] made his opening statement." Conceding that other evidence Mr. Gray had to offer might not be admissible, the State maintained that "the alibi of him being in a different town at a specific

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> (3) *State's Witnesses.* As to each State's witness the State's Attorney intends to call to prove the State's case in chief or to *rebut alibi testimony*: (A) the name of the witness; (B) except as provided under Code, Criminal Procedure Article, § 11-205 or Rule 16-912 (b), the address and, if known to the State's Attorney, the telephone number of the witness; and (C) all written statements of the witness that relate to the offense charged[.]

(Emphasis added). The State is required to make such disclosure "within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court[.]" Md. Rule 4-263(h)(1).

time I think is quite relevant and quite appropriate." The defense disagreed, concluding its argument as follows:

> [DEFENSE COUNSEL]: We made a motion. The [c]ourt ruled that he couldn't testify. I mean, that's what the [c]ourt said. You made that ruling for the very reason I stated. You have to look at their discovery. They say this is a list of people to rebut alibi testimony. So, that is given to me to show if there are people that are going to rebut alibi testimony. By not putting a name there – and they knew that I was going to produce alibi testimony because I filed it. So, that is the sort of being a little – I mean, you should tell me what it is. The [c]ourt already ruled on this issue that he couldn't testify in this trial. I'll submit.

The court permitted Mr. Gray to testify, but it limited the testimony to rebutting the alibi testimony. It expressly prohibited the State from inquiring into "the bag and the bikes and all of that."

Mr. Gray testified that, on November 10, 2018, shortly after 11:50 p.m., appellant met Mr. Gray around "the northern edges of Havre de Grace" and "smoked a little bit of pot" for about half an hour and then "parted ways." The State offered, and the court admitted, text messages Mr. Gray sent and received from appellant that evening, which corroborated Mr. Gray's account of appellant's whereabouts the evening before Mr. Coudon was found mortally wounded.

After the close of all the evidence, the defense renewed the objection to Mr. Gray's rebuttal testimony and requested that it be stricken. The defense continued to maintain that the State violated the discovery rule by failing to identify Mr. Gray as a witness to rebut alibi testimony. The State reiterated that the defense never clearly disclosed Ms. Gischel as an alibi witness, and in any event, the disclosure of the potential alibi witness was not

timely under the discovery rule. The court stood by its ruling and explained, "I guess it is a potential alibi witness is the way that the [c]ourt viewed it and this was rebuttal. I only allowed rebuttal evidence in."

B. Analysis

"In reviewing the trial court's evidentiary rulings, we recognize that the court has broad discretion in the conduct of trials, and we will not disturb that exercise of discretion unless the court has clearly abused it." *Churchfield v. State,* 137 Md. App. 668, 682 (2001). Although the exercise of its discretion is not unlimited, a trial court may reconsider a prior evidentiary ruling based on evidence developed during trial. *See, e.g*., *Little v. Schneider*, 434 Md. 150, 163 (2013) (after initially granting defendant's motion to exclude "lack of board certification" evidence, the trial judge reconsidered its ruling after defense counsel "attempted to paint a picture of [the defendant] as a model of excellence in the field of vascular surgery").[18]

[18] Other courts take the same view. *See, e.g*., *United States v. Todd*, 920 F.2d 399, 403 (6th Cir. 1990) ("It is within the sole discretion of a court to determine if a prior ruling should be reconsidered."); *United States v. Akers*, 702 F.2d 1145, 1148 (D.C. Cir. 1983) ("[T]he judge's exercise of his broad discretion on an evidentiary ruling (which ultimately pertains to relevancy) must turn upon the evidence as developed in the particular trial.") (footnote omitted); *Gonzalez-Chavarria v. State*, 449 P.3d 1094, 1098 (Wyo. 2019) ("[A] trial judge has broad discretion on evidentiary rulings because this type of decision turns upon the evidence as developed during the course of a trial."); *State v. Langley*, 424 P.3d 688, 713 (Or. 2018), *adh'd to as modified on recons.*, 446 P.3d 542 (Or. 2019) ("Generally, a trial court has broad discretion in determining whether to reconsider its earlier rulings, and may revisit a pretrial ruling when events at trial unfold that call for adjustments to that ruling.") (internal citation omitted); *State v. Thorngren*, 240 P.3d 575, 582 (Idaho 2010) ("[A] party must be mindful of a court's discretion to change its own pretrial ruling, especially evidentiary rulings."); *Ritter v. State*, 532 S.E.2d 692, 695 (Ga. 2000) ("[A]

Appellant does not appear to challenge the general proposition that a trial court has the discretion to change its rulings; his attention, rather, is on the limits of exercising that discretion, particularly where a party has relied on the previous ruling. *See United States v. Carrasco*, 540 F.3d 43, 52-53 (1st Cir. 2008) (acknowledging that a trial court can reconsider its own ruling, but "[f]ailure to abide by previous rulings about admissibility of evidence may be error, especially where there has been reliance.").

Appellant cites to a Second Circuit decision in *Colvin v. Keen*, 900 F.3d. 63 (2d Cir. 2018) to illustrate the dilemma presented by reconsidering an earlier evidentiary ruling where reliance interests are implicated:

> Suppose that at the start of a trial, the plaintiff's counsel put a question to the plaintiff, opening a line of inquiry, and the trial judge initially sustained the defendant's objection to the question on the grounds of the irrelevance of that line of inquiry. Moments later, the court reconsidered and proposed to allow the question to be answered. The defendant objected based on LOTC [law of the case],[19] but the court allowed the plaintiff to answer. Following a verdict

court retains broad discretion over interlocutory evidentiary rulings which may be modified at any time until entry of final judgment."); *Byers v. State*, 709 N.E.2d 1024, 1028 n.3 (Ind. 1999) ("Although certainly not required to do so, trial courts have the authority to reconsider rulings on the admissibility of evidence prior to an exhibit being passed to the jury."); *State v. Streich,* 658 A.2d 38, 50 (Vt. 1995) ("[P]retrial rulings are provisional, and are subject to later modification. Thus, a ruling on a pretrial motion to exclude evidence is tentative and subject to revision at trial.") (citation omitted); *State v. Haycock,* 660 A.2d 1115, 1115 (N.H. 1995) ("[T]he trial court's discretionary powers are continuous. They may be exercised, and prior exercise may be corrected, as sound discretion may require, at any time prior to final judgment.") (quotation omitted).

[19] As to the law of the case, the Second Circuit explained,

> LOTC does not say to judges, "Once a ruling has been made, you should not change it." It says rather, "When deciding whether to change a ruling, you

> for the plaintiff, the defendant argued on appeal that the judgment should be set aside solely because, under LOTC, the court should not have changed its initial ruling. Absent a showing that the ultimate ruling was error, or that the change caused prejudice to the defendant or resulted in some other harm, we see no reason why the trial judge should have adhered to the erroneous previous ruling merely because of the undesirability of changing rulings. We see even less reason why the appellate court would require a new trial, especially because, at the new trial, the judge would once again allow the inquiry into the subject matter.
>
> On the other hand, suppose that at the start of trial, just as in the previous example, the court sustained the defendant's objection to the plaintiff's counsel's question on the grounds of the irrelevance of the inquiry. However, just before the close of trial, the court reconsidered, decided that the line of inquiry was relevant, and proposed to now allow the plaintiff to answer the question. The defendant objected based on LOTC and *argued that he was prejudiced because, in reliance on the court's initial ruling that the line of inquiry was irrelevant, the defendant had released its subpoenaed witnesses, whom he would have called to rebut the plaintiff's answer to the question. In that circumstance, the trial judge would have strong reasons either to adhere to the prior ruling, or to explore whether grant of a continuance could cure the prejudice suffered by the defendant. If the trial court simply changed its ruling in spite of the prejudice to the defendant, and without taking curative measures, an appellate court might have good reason to vacate a judgment in the plaintiff's favor*.

Id. at 69 (emphasis added); *see also* Wright & Miller, 18B Fed. Prac. & Proc. Juris. § 4478.1 (3d ed.) ("As with rulings by a single judge, . . . reliance interests become more important as the opportunities to adjust to change diminish. Common illustrations of the

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> should consider whether making the change will cause problems that would make it preferable to adhere to the earlier ruling (even though you now consider it erroneous) or would at least make it advisable to take precautious measures to mitigate the bad effects of those problems."

Colvin, 900 F.3d at 68-69.

dilemma are provided by reconsideration at trial of earlier evidence rulings, often made before trial and thus more likely to affect the course of trial preparation.").

Appellant primarily relies on the First Circuit decision in *United States v. Gonzalez-Maldonado*, 115 F.3d 9 (1st Cir. 1997). There, the defendants were tried on money laundering and other charges. *Id*. at 13. The defense sought and obtained a pretrial ruling allowing a psychiatrist to testify about the government witness's mental illness and tendency to exaggerate. *Id*. at 13-14. Relying on the ruling, defense counsel promised the jury, in opening statement, that he would call a psychiatrist who would testify that a person in the witness's condition "exaggerates, and that everything that he talks about is greater." *Id*. at 14. During the defendants' case, however, the district court reconsidered its earlier ruling and decided not to allow the psychiatrist to testify. *Id*. On appeal, the defendants argued that the district court committed reversible error by first ruling that it would permit the psychiatrist to testify and then, after the close of the government's case, ruling that the testimony would be excluded. *Id*.

The First Circuit agreed, explaining that the change in the ruling "prevented the defense from fulfilling its promise to the jury" and left the jury to likely infer that the psychiatrist was unwilling to testify for the defense. *Id*. at 14-15. Moreover, the district court did not take curative measures; the jury was not informed of the fact that it was the court's ruling, rather than the defendants' decision, that kept the psychiatrist off the stand. *Id*. at 15. In reversing, the appellate court concluded "that promising to admit this

important evidence and then failing to produce it is prejudicial as a matter of law in the circumstances of this case." *Id*.

i. Admitting Testimony to Rebut Alibi Was Not an Abuse of Discretion

Appellant interpreted the trial court's earlier ruling as one that precluded Mr. Gray from testifying *in toto*, including as the State's rebuttal witness. Relying on that belief, he called the alibi witness to testify, presuming that her testimony would be unchallenged. On that premise, appellant argues that he was prejudiced by the court's change in ruling when it allowed Mr. Gray to testify as a rebuttal witness. Appellant's argument, however, rests on two faulty assumptions. First, the court's earlier ruling did not preclude Mr. Gray from testifying as a rebuttal witness. It was apparent, from the procedural posture and colloquy *supra*, that the court precluded the State from calling Mr. Gray *in its case-in-chief*; it was not a preclusion *in toto*. The State indicated, and the court acknowledged, as much when the State said it would "save [Mr. Gray] for possible use for later on in the trial."

Second, the court's subsequent decision to allow Mr. Gray to testify as a rebuttal witness was not a change in its prior ruling. The court adhered to its earlier ruling — it did not permit Mr. Gray to testify in the State's case-in-chief, it did not re-open the State's case to permit a line of inquiry into what Mr. Gray knew about the "bike"/"bookbag," and it did not allow the State to elicit such testimony in rebuttal.

Even if the court's ruling was a reconsideration of its earlier one, the court recognized the shift in the evidentiary posture of the case, it evaluated the discovery dispute

regarding the State's alleged failure to disclose the rebuttal witness,[20] and it appropriately exercised its discretion in limiting Mr. Gray's testimony to rebut the alibi testimony.

Finally, the claimed prejudice, resulting from appellant's purported reliance on the court's earlier ruling, is not akin to the sort of reliance and prejudice examined in *Gonzalez-Maldonado* and the contrasting hypothetical in *Colvin*. Appellant does not contend that he would have altered his trial strategy, *i.e*. refrained from calling the alibi witness, had he known the court would permit Mr. Gray to testify in rebuttal. And his assertion that he "reasonably relied on the court's [earlier] ruling in deciding to call" the alibi witness to testify is not supported by the trial record; the earlier ruling was made days *after* the defense had already promised the jury, in its opening statement, that it would call Ms. Gischel as appellant's alibi witness. For the reasons stated, the court did not abuse its discretion in permitting Mr. Gray to rebut the testimony of the alibi witness.

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

[20] In his brief, appellant mentions the alleged discovery violation in so far as it relates to the background context for his "change in ruling" contention. He does not ask us to evaluate the alleged violation, nor could he because the issue was neither raised in the questions presented nor adequately briefed. Accordingly, we need not express an opinion about the court's resolution of the discovery dispute. We note, however, that the "[e]xclusion of evidence for a discovery violation is not a favored sanction and is one of the most drastic measures that can be imposed." *Thomas v. State*, 397 Md. 557, 572 (2007). The discovery rule, "on its face, does not require the court to take any action; it merely authorizes the court to act. Therefore, the presiding judge has the discretion to select an appropriate sanction, but also has the discretion to decide whether any sanction is at all necessary." *Id*. at 570.