UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0686

September Term, 2013

RONALD RAGLAND

v.

STATE OF MARYLAND

Meredith,
Woodward,
Friedman,

JJ.

Opinion by Meredith, J.

Filed: September 24, 2015

This case arose as a result of a feud between neighbors in Brandywine, Maryland. One of the neighbors — Ronald Ragland, appellant — shot the father and son who lived in the house across the street from Ragland's house, killing the father and wounding the son. At the conclusion of a jury trial in the Circuit Court for Prince George's County, Ragland was convicted of second-degree murder, attempted second-degree murder, first-degree assault, and two counts of use of a handgun in the commission of a felony. For the second-degree murder conviction, he was sentenced to incarceration for a term of thirty years, with all but twenty years suspended. For the attempted second-degree murder conviction, he was sentenced to a consecutive term of thirty years, with all but fifteen years suspended. And, for each of the use of a handgun convictions, he was sentenced to consecutive terms of twenty years, with all but five years suspended. The conviction for first-degree assault merged into the conviction for second-degree murder. This timely appeal followed.

QUESTIONS PRESENTED

Ragland presents seven questions for our consideration, which we have altered slightly, as follows:

I. Did the trial court err in its instructions to the jury?

II. Did the trial court abuse its discretion when it refused to allow defense counsel to ask Ragland if he wanted to shoot and kill Robert Mitchell, Sr.?

III. Did the trial court abuse its discretion when it improperly curtailed defense counsel's closing argument?

IV. Did the trial court abuse its discretion when it permitted the State to call Detectives Rodriguez and Brooks as rebuttal witnesses?

V. Did the trial court abuse its discretion when it refused to allow defense counsel to refresh Lekeysha Garner's recollection about a statement she made to the police?

VI. Did the trial court err or abuse its discretion when it permitted the State to introduce a statement the surviving witness made to police when the statement was hearsay and did not qualify as an excited utterance?

VII. Did the trial court abuse its discretion when it refused defense counsel's request to redact a portion of the 911 call made by Lekeysha Garner?

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

In May 2010, Robert Mitchell, Sr., and his son, Robert Mitchell, II, lived at 8800 Charm Court in Prince George's County.[1] Ragland lived across the street from the Mitchells at 8801 Charm Court. There is no dispute that, on May 2, 2010, Ragland shot and killed Mitchell-Senior, and shot and wounded Mitchell-Junior. The issue at trial was whether the shootings were legally justified.

Mitchell-Junior, who was twenty-one years old at the time of trial (and would have been eighteen at the time of the incident in May 2010), testified that his family, which included his parents, his sister, and his twin brother, moved to 8800 Charm Court when he was nine-years-old. Bad blood developed between the Mitchells and Ragland three or four years after the Mitchells moved to Charm Court. It began with "petty issues," such as a ball going into Ragland's yard, or one of the Mitchell children running across a strip of grass near the curb of Ragland's property. Ragland — who was 57 at the time of trial, and would have been 54 at the time of the incident in May 2010 — would "cuss" at the children or speak to

[1] Throughout trial, Robert Mitchell, II was frequently referred to as "Junior." Because the father and son shared the same name, we shall refer to the father as Mitchell-Senior, and the son as Mitchell-Junior.

them "in a disrespectful manner." On one occasion, when Mitchell-Junior's twin brother was using the driveway of an unoccupied home in the neighborhood as a skateboard ramp, Ragland confronted him, and Mitchell-Junior ran to get his father. Mitchell-Junior denied ever vandalizing Ragland's property, destroying his bushes, or throwing bricks through his windows, although Ragland suspected him of such misconduct.

Mitchell-Junior acknowledged that, around April 2010, he was arrested for selling marijuana at his family's house. Although he did not know, he speculated that Ragland had called the police on him. He was upset by his belief that Ragland reported him to the police, but he claimed he never approached Ragland or said anything to him about it. Mitchell-Senior told Mitchell-Junior not to say anything to Ragland about it and to "leave it alone." Mitchell-Junior was not convicted of selling drugs.

Mitchell-Junior described the events that occurred on May 2, 2010, as follows. On the afternoon of May 2, Mitchell-Junior drove his father's white Ford Taurus to pick up a close family friend, a young woman named Lekeysha Garner. Mitchell-Junior was gone for about five minutes, and then returned home with Garner. Upon returning home, Mitchell-Junior parked the car at the top of the driveway. As Mitchell-Junior pulled up the driveway, Ragland gave Mitchell-Junior "the finger" and he did the same in response. Mitchell-Junior then walked down the driveway to the mailbox. He saw Ragland "pacing back and forth" on his own driveway, holding a "Corona" in his hand, and staring at him. Mitchell-Junior asked, "What are you looking at? What's your problem?" Ragland responded, "I'm looking at you." Ragland told Mitchell-Junior that "they should have locked your ass up." He also

said: "I told your bitch-ass father earlier." Mitchell-Junior walked into his house and told his father what Ragland had said. Mitchell-Senior told him not to say anything else to Ragland and not to "worry about the situation, leave it alone."

Shortly thereafter, Mitchell-Senior decided to go to the store. He exited the house with Mitchell-Junior and Garner, and the three spoke about what to have for dinner. Mitchell-Senior got into the white Ford Taurus and started to back down the driveway. As he was doing so, Ragland was yelling across the yard at Mitchell-Junior, trying to get his attention and get him to talk back to him. Ragland was staring at Mitchell-Senior, and Mitchell-Junior asked why he was doing that. Mitchell-Junior walked down the Mitchell property until he was "near the mailbox." According to Mitchell-Junior, he never went into the street and never went on Ragland's property. Ragland walked from his property, and crossed the street until he was about five feet from the Mitchells' mailbox. Mitchell-Junior testified that Ragland was close enough that he could have hit him, but that he kept his hands at his sides. Mitchell-Junior prepared to fight Ragland; Mitchell-Junior clenched his fists and was ready to "throw back" when Ragland "pulled out [a] gun." Mitchell-Junior described the gun as a silver and black .38 caliber five speed snub nose revolver.

Ragland fired twice and Mitchell-Junior started to backpedal. Ragland moved from his spot in front of the curb onto the Mitchells' property and fired a third shot that hit Mitchell-Junior in his right hip. As Mitchell-Junior was moving away from Ragland, Mitchell-Junior fell onto the ground. Ragland then ran over to the white Ford Taurus and

fired two shots into the open driver's side window as Mitchell-Senior was attempting to take off his seat belt.

Ragland returned to Mitchell-Junior, who had tried to move toward the side of the house. Mitchell-Junior yelled: "Please don't shoot me anymore. Please don't shoot me anymore." Mitchell-Junior tried to get up, but Ragland kicked him down. Ragland stood over him and pulled the trigger of the gun twice more, but no bullets came out. Mitchell-Junior managed to get into his garage and close the door. Garner, who had already run into the house, helped him inside, and the two looked out the windows until the police arrived.

Garner gave a similar account of what transpired. According to her, as she and Mitchell-Junior were standing in front of the Ford Taurus speaking with Mitchell-Senior, Ragland backed his car into his own driveway. Mitchell-Junior asked out loud, "Why does he keep looking at me?" Ragland responded in a confrontational manner, saying: "Well, it's a lot of street out here; come on, come out here in the street." Mitchell-Junior walked to his mailbox with "his guards up, like he wanted to fight." Ragland was at the end of his own driveway. Ragland pulled a gun from behind his back and, from the middle of the street, started shooting at Mitchell-Junior. Garner heard two or three shots.

Mitchell-Junior took off running, and Ragland chased him. Mitchell-Junior told Garner to go inside the house, and she did. Once inside, Garner locked the door, called 911, and ran upstairs to a bedroom window. Garner heard Mitchell-Junior screaming, "Help, help." When she saw him limp toward the garage, she ran downstairs and unlocked the garage door so that he could get in the house. After a few minutes, Garner helped Mitchell-

Junior upstairs. She looked out a bedroom window and saw Ragland by the driver's side door of Mitchell-Senior's white Ford Taurus. Garner testified that Ragland made a motion "like he just tossed something into the car." She stated: "It's like he's wiping something off, and all I see is black, ... And then it's like he's looking around — he turns around and he's looking around, like to see if anyone is outside, and he's walking back to his driveway." After Ragland threw something black into Mitchell-Senior's car, he walked into his garage and put his gun on a white towel. Mitchell-Junior yelled for help from a bedroom window and Ragland yelled back: "Come back outside. Are you still there? Come back outside. Ain't nobody out here. Come back outside."

After the police arrived and paramedics removed Mitchell-Senior's body, Garner went outside and saw a gun on top of the white Ford Taurus. She told the police that it was not Mitchell-Senior's and that she had seen Ragland "drop that gun there." She did not, however, see Ragland shoot Mitchell-Senior.

Chante Rose, who lived at 8811 Charm Court, testified that, on May 2, she heard Ragland and the Mitchells yelling. She heard Mitchell-Senior say: "Do what you got to do." Later, she saw the Mitchells' white car leave for a short time and then return. She also saw a black car leave and then return. She heard two or three gunshots, ran to her first floor bedroom, and looked out a window. She saw Mitchell-Senior's car parked halfway in his driveway, and she saw Mitchell-Junior "running around, duck down, running around the side of [his] house." She then went to a different window, looked out, and saw Ragland in the Mitchells' driveway standing at the driver's side of the white Ford Taurus while a heavy

man, whom she assumed was Mitchell-Senior, sat in the car. She observed Ragland leave the white car and then walk to his own driveway to a vehicle with the trunk open.

Prince George's County Police Officer Christian Wutka responded to the call reporting a shooting. When the officer arrived at the scene of the shooting, Ragland raised his arms and said to the police: "Are you cops? You came for me." Ragland was placed in custody. Officer Wutka secured a gun that was located on a white towel on top of a trash can in Ragland's garage.

Prince George's County Police Officer Adam Wyatt also responded to the shooting. He found Mitchell-Senior slumped in the driver's seat of the white Taurus with his head resting on the door and his hands at his side. He had a gun shot wound to the back of his left temple. Officer Wyatt observed blood and brain matter. He also saw a gun on the floor of the car between Mitchell-Senior's legs. The barrel was pointed toward the steering wheel and the handle was pointed toward Mitchell-Senior's body.

Corporal Jeremy Webb, a crime scene investigator for the Prince George's County Police Department, recovered a black glove from the Mitchells' driveway, near the rear driver's side door of the Taurus. The inside of the glove was swabbed for DNA. Mitchell-Senior had two gunshot wounds, one in his head and the other in his left leg. Corporal Webb found two bullet holes in the Taurus; one was an entrance hole and the other was an exit hole. According to Corporal Webb, a trajectory rod was used to determine that the bullet entered near the top of the door frame and traveled down toward the driver's seat. He also recovered a black 9 millimeter Hi-Point model C gun from the roof of the Taurus and a silver

.38 special Smith & Wesson revolver with black grips from the top of a trash can in Ragland's garage. The Hi-Point gun had some ammunition lodged in the chamber and duct tape around the handle. The Smith & Wesson revolver was registered to Ragland's wife, and additional .38 caliber cartridges and a gun box were found in Ragland's garage.

A forensic firearms examiner, who testified as an expert in firearms and tool mark examinations, opined that the Hi-Point gun was missing a number of parts and was inoperable. The Smith & Wesson revolver functioned properly. The firearms examiner examined a bullet obtained from Mitchell-Senior's body during an autopsy and a cartridge recovered from the scene of the shooting, and determined that they had been fired from Ragland's Smith & Wesson revolver.

An assistant medical examiner from the Office of the Chief Medical Examiner for the State of Maryland, who testified as an expert in the field of forensic pathology, opined that gunpowder stippling around the gun shot wound to Mitchell-Senior's temple indicated "close-range firing." He defined "close range" to mean "within two feet."

Tyiesha Moore, a DNA analyst for the Prince George's County Police Department, examined the DNA profile obtained from the black glove. She excluded Mitchell-Senior, Mitchell-Junior, and Garner as possible sources of the DNA, but included Ragland as a possible contributor. She testified that the chance of selecting an unrelated individual as a possible contributor from a random population would be one in 22.2 trillion African-Americans.

When police searched Ragland's home, they found a video surveillance system that included two monitors, two VCRs, a number of VHS tapes, and a number of external cameras. From one of the cameras, the Mitchells' house was visible.

Ragland testified on his own behalf. He recounted that he had moved to Charm Court with his wife and three sons in 1996. The Mitchells moved into the house across the street in approximately 2006. Initially, he had a neighborly relationship with the Mitchells. That relationship changed in 2007 after another neighbor's house was broken into. After the break-in, that neighbor told Ragland she was afraid to stay in the house any longer, and she asked Ragland to keep an eye on it. The next day, Ragland saw Mitchell-Junior, his twin brother, and a few of their friends skateboarding on the neighbor's driveway and banging up against the garage door "numerous times." Ragland confronted the boys and asked them to come off the driveway. The boys responded with "cussing words," and telling him, "you don't live here." One of the boys went home and came back with Mitchell-Senior. Mitchell-Senior spoke with Ragland and told him: "[Y]ou don't talk to my son that way."

Ragland attributed other subsequent misconduct to the Mitchell children. Ragland had had eggs thrown at his house, something poured on his front shrubbery, and spare lumber spread across his front yard. One of the other neighbors had his garage doors spray painted after having "words" with Mitchell-Junior and some of his friends. Ragland said that, on one occasion, Mitchell-Junior and some of his friends threw bricks into Ragland's front glass storm door and dining room window while his grandchildren were in the room. Ragland called the police, but no charges were filed. He also complained to Mitchell-Senior on

several occasions, but the father invariably denied that his son did what Ragland accused him of doing.

Around 2007, Ragland purchased eight surveillance cameras that focused on his driveway, the front and sides of his house, and the deck in his back yard. From the time he purchased the surveillance cameras until 2010, no damage was done to his property. In approximately 2008, Ragland and his wife purchased a firearm that they initially kept in a box in a safe in their house. At some point before May 2010, Ragland moved the gun to a ladder in his garage and covered it up.

Ragland said that, in early 2010, traffic related to drug sales at the Mitchells' house started blocking Ragland's driveway. Frequently, when he left his home near midnight to go to work as a truck driver for Safeway, there were cars everywhere. The parties stipulated that the Prince George's County Police Department had received complaints about suspected drug activity at the Mitchells' home on April 19 and 30, 2010. Ragland admitted that he called the police on one occasion and that, thereafter, Mitchell-Junior was arrested. A police officer contacted Ragland about setting up surveillance from Ragland's property, and an appointment had been scheduled for the Monday following the shooting.

Ragland testified that, after Mitchell-Junior's arrest, the relationship between the Mitchells and Ragland changed for the worse. Mitchell-Senior told Ragland that "he was going to put a hole" in his head for calling the police and having his son locked up. Ragland said he simply walked away and "let it go." Mitchell-Junior and his "fellas" made hand

gestures toward Ragland as if pointing a gun to the side of their head. Ragland testified that he did not engage them.

Ragland testified that, on May 2, the day of the shooting, he was in his garage working on the brakes of his car when he noticed Mitchell-Junior pull into the Mitchells' driveway in the white Ford Taurus. Mitchell-Junior yelled: "You the one that called the Po-Po on me, and I'm going to put a hole in your head and it's going to happen today." Sometime after that, Ragland got into his black car and went to get some gas.

When Ragland returned, he saw Mitchell-Junior in the white Taurus. Ragland drove around some more, pumping his brakes. As he drove down Kathleen Lane, a neighbor flagged him down to ask if he still wanted a television they previously had spoken about. Ragland picked up the television and put it in the trunk of his black car and then returned to his home and backed into his driveway. Upon returning home, Ragland saw Mitchell-Junior and a young lady in the white Taurus pulling into the Mitchells' driveway.

As Ragland backed his car into his own driveway, Mitchell-Junior was threatening him and saying to him "what he's going to do to me that day." Ragland got out of his car to press down his trunk lid so he could see better as he backed into the driveway. As he was doing this, he saw Mitchell-Senior get into the white Taurus, back out of the Mitchell's driveway, and drive toward the intersection of Charm Court and Kathleen Lane. The young lady went in the Mitchells' home.

At that point, Mitchell-Junior "came off the grass" of the Mitchells' yard and came onto the street, "telling [Ragland] what's going to happen to [him] today" and that "it's going

to take place today." As Mitchell-Junior entered the street, Mitchell-Senior backed up in his car, and pulled back into the Mitchell's driveway, with the trunk of the Taurus remaining in the street. Ragland testified that he saw Mitchell-Senior "pointing a gun straight at [Ragland]" with his right hand.

On direct examination, Ragland testified: "When I saw the gun pointing at me, . . . I took off running." Mitchell-Junior came around the open door of Ragland's car. Ragland saw that Mitchell-Junior had one hand in his pocket, which was bulging, and that he was trying to get something out. Ragland believed that Mitchell-Junior intended to do him bodily harm. Ragland ran to his garage and retrieved his revolver from where he had placed it on a ladder. At that point, according to Ragland, Mitchell-Junior was in Ragland's driveway. Ragland turned and fired five times in rapid succession. The first shot was fired when Ragland was near a green trash can that was kept "indoors" in his garage. Ragland believed that the first shot struck Mitchell-Junior, who then turned and started back down the driveway. The second shot was fired at Mitchell-Senior, who was sitting in the white Taurus in the Mitchells' driveway. The third and fourth shots were fired at Mitchell-Junior, who was running back to his own yard, while Ragland was "coming out of [his] driveway" into the street. Ragland testified that, when he fired the last shot, he was on the Mitchells' grass.

Ragland testified that he was "scared out of my mind" because Mitchell-Senior had pointed a gun at him and Mitchell-Junior had come up his driveway with his hand in his pocket. Ragland admitted that the black glove found near the white Taurus was his, and explained that he kept it hanging out of his back pocket while working on his car's brakes.

But he did not know how the glove ended up where it was found, near the door of the white Taurus.

On cross-examination, the prosecutor played portions of the videotaped statement Ragland gave the police on the day of the shooting. After listening to the recording a second time, Ragland conceded that he had not told the detective that Mitchell-Junior was in Ragland's driveway when the first shot was fired. The following exchange took place:

> Q. [BY PROSECUTOR]: Did you tell [Detective Rodriguez that Mitchell-Junior] was in the driveway? Did you say that?
>
> A. [RAGLAND]: From what I can remember, he was in the driveway.
>
> Q. I'm asking you did you tell detective —
>
> A. Between all the fear and scaredness —
>
> [PROSECUTOR]: Objection, Your Honor.
>
> THE COURT: You have to answer the question.
>
> THE WITNESS: Yes.
>
> Q. Did you tell Detective Rodriguez that he was in your driveway at your trunk? At your trunk?
>
> A. No, I didn't, according to his statement.
>
> Q. Huh?
>
> A. According to what we just heard.
>
> Q. You never said that?
>
> A. No, I didn't.
>
> Q. You said he was in the street, according to the statement.

A. From what I can remember, he was in my driveway.

Q. Yet your memory would have been fresher the day that it happened, right?

A. Not out of the scared and fear that I went through.

Q. Were you scared when the police were there?

A. You got a pack of police and detectives around you. What's to be afraid about?

Q. Exactly. So you're not scared anymore, right?

A. No, I'm talking about at the time that all of this is taking place.

Q. I'm asking about what you told Detective Rodriguez in that —

A. And I agree with you. I just couldn't remember all that took place of the fear and the scaredness I went through.

* * *

Q. Well, would you agree that the detail that Mr. Mitchell, Jr., is on your property, that's something that is huge? That's huge, right?

A. I don't know what you mean about huge.

Q. I'm asking you whether the detail that Mr. Mitchell, Jr., was on your property, that's a big deal, right?

A. Yes.

Q. That's a big deal.

A. Yes.

Q. And you would agree that you have had more than three occasions to tell the detectives who questioned you [on the day of the shooting] that he was on your property, correct?

A. I would assume, yes.

> Q. And we have listened to the [videotaped recording of the] interviews, the two with Detective Rodriguez, the one here with Detective Brooks, and at no time do you say Mr. Mitchell, Jr., was on your property. At no time do you say that on the video.
>
> And in fact, you say you were on the perimeter of your property, in front of your car door when you fired that first shot.
>
> A. That's what I said.
>
> Q. That's what you said because that's what happened. That's what happened.
>
> A. I can't recall. I can't recall.

Despite that concession, Ragland insisted that Mitchell-Junior was in Ragland's driveway when the first shot was fired.

After he fired the fifth shot, Ragland walked back up his driveway, put the gun on a trash can, and told his wife to call 911. He then unloaded spent cartridges, re-loaded the gun with five fresh cartridges, and placed it "back on the trash can." Ragland did this because he was scared. Ragland testified that Mitchell-Junior had run into his own garage by this point, but Ragland did not know what happened to Mitchell-Senior. When the police arrived, Ragland turned himself in, saying to the police "here's who you want," as he got on the ground. He consented to a search of his home, and, after being taken to the police station, made a formal statement that was videotaped. That statement was played for the jury. Ragland denied that he stood over Mitchell-Junior and pulled the trigger two times. He also denied that he walked up to Mitchell-Senior's car, and denied that he placed a gun in Mitchell-Senior's car.

Ragland's testimony that Mitchell-Senior held a gun in his right hand was disputed by Mitchell-Junior, who testified on rebuttal that his father was left handed.

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

DISCUSSION

I.

Ragland first challenges the trial court's instructions to the jury. He argues that the trial court erred (1) in refusing to give the jury an instruction that included the definitions of "curtilage" and "home" with respect to the defense of habitation instruction; (2) in refusing to give a defense of habitation instruction with respect to the charges pertaining to the murder of Mitchell-Senior; (3) in instructing the jury that, in the defense of habitation, a defendant must not use excessive force and that all other means of preventing the crime must be exhausted; (4) in giving a creation-of-evidence instruction; and (5) in refusing to give an absence-of-flight instruction.

Standard of Review

Maryland Rule 4-325(c) provides that "[t]he court may, and at the request of any party shall, instruct the jury as to the applicable law[.]" We review "'a trial court's refusal or giving of a jury instruction under the abuse of discretion standard.'" *Stabb v. State*, 423 Md. 454, 465 (2011)(quoting *Gunning v. State*, 347 Md. 332, 351 (1997)). In deciding whether a trial court abused its discretion in granting or denying a request for a particular jury instruction, we consider "(1) whether the requested instruction was a correct statement of the

law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given." *Stabb*, 423 Md. at 465 (citing *Gunning*, 347 Md. at 351). The complaining party bears the burden of showing both error and prejudice. *Tharp v. State*, 129 Md. App. 319, 329 (1999).

As a preliminary matter, we note that the parties did not follow the procedure prescribed by Maryland Rule 4-325(e) for preserving objections to the trial court's jury instructions. That rule specifies: "No party may assign as error the giving or the failure to give an instruction unless the party objects **on the record promptly after the court instructs the jury**, stating distinctly the matter to which the party objects and the grounds of the objection." (Emphasis added.) In this case, when the court completed giving its instructions and asked counsel to approach the bench, the record reflects the following:

> THE COURT: That was long. For the record, any objections?
>
> [DEFENSE COUNSEL]: No objection, Your Honor. I would just ask that on the sheet that says battery, that you put the title second degree assault.
>
> THE COURT: That I put what?
>
> [DEFENSE COUNSEL]: That you put the title second degree assault. When it goes back, since when you refer to first degree assault, you say they must first find the elements of second degree assault, but this page only list[s] C, battery.
>
> [PROSECUTOR]: The State is fine with that.
>
> THE COURT: Do you have anything?
>
> [PROSECUTOR]: No.
>
> THE COURT: Then let's go.

Whereupon, the prosecutor began making her closing argument.

Although defense counsel made no objections to the court's instructions after the jury was instructed, appellate counsel argues that strict compliance with the procedure outlined in Rule 4-325(e) was not required in this case because the parties made a special deal with the trial judge relieving the parties from the burden of restating their exceptions. The record reflects that, after the close of evidence, on the afternoon of March 12, 2013, the court and counsel reviewed, on the record, the parties' requests for jury instructions, and the court advised the parties of the court's intention to give certain requested instructions and not to give certain other requested instructions. There were several topics, however, as to which the court did not make a conclusive ruling that afternoon. The following day, the court provided counsel with a draft of proposed instructions the court's clerk had typed after the discussions on March 12. The court asked counsel to review the court's proposed instructions, and counsel offered various comments. After defense counsel offered a few corrections, defense counsel stated: "I believe everything else is pretty consistent with what Your Honor ended up ruling yesterday, plus the special instruction I handed up this morning." After the parties debated several other points with the trial judge, defense counsel and the court had the following exchange:

> [DEFENSE COUNSEL]: Your Honor, for purposes of the record, I assume we do not need to reassert our positions that the Court ruled against yesterday in order to preserve it. At the end, when the Court asks if we have any exceptions to the instructions, it would be with the understanding that we've adopted and incorporated and preserved our original objections, correct?
>
> THE COURT: That's great. That's fine. Thank you. So other than that, can I go back and try it again? I will try again one more time.

The court then recessed to revise the instructions it intended to give the jury.

Although this procedure for preserving objections is not sanctioned by the Maryland Rules, and is not a practice we wish to encourage, the Court of Appeals has held that, if certain conditions are met, substantial compliance with Rule 4-325(e) may be sufficient to preserve arguments for appellate review. In *Gore v. State*, 309 Md. 203, 209 (1987), the Court of Appeals said:

> Several conditions for the establishment of substantial compliance with Rule 4-325(e) emerge from *Bennett* [230 Md. 562, 568-69 (1962)]: there must be an objection to the instruction; the objection must appear on the record; the objection must be accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the record and the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless.
>
> We are satisfied that Gore's objection at the bench conference was sufficient to establish substantial compliance with Rule 4-325(e) and therefore will review his assignment of error.

In the present case, we shall assume that Ragland's objections were preserved by substantial compliance with the requirements of Rule 4-325(e).

A. Curtilage

Ragland asked the court to instruct the jury that the defense of habitation could apply to the shootings of both Mitchell-Senior and Mitchell-Junior. In addition, he asked the court to modify the pattern instructions in Maryland Criminal Pattern Jury Instructions to instruct the jury that the defense of habitation applied if Ragland acted "in defense of his home *or curtilage*." (modification in italics). He further asked the court to provide non-pattern instructions regarding this defense, including this additional instruction regarding curtilage:

"[N]o duty to retreat rests upon one who, without fault, is attacked by another when in his own curtilage. The curtilage embraces such space as is occupied customarily by the dwelling house and outbuildings, including the yard around the dwelling house, the garden, and a porch attached to the dwelling." The trial court denied Ragland's request to expand the explanation of the defense to expressly include the curtilage, and the court refused to give the jury Ragland's proposed definition of curtilage.

The trial court did, however, instruct the jury on the defense of habitation with respect to the attempted murder and first-degree assault of Mitchell-Junior, using language that appears to have been modeled upon MPJI-Cr 4:17.2 and MPJI-Cr 5:02 (2d ed., 2013 Supp.).[2] MPJI-Cr 5:02 states:

> You have heard evidence that the defendant acted in defense of [his] [her] home. Defense of one's home is a defense, and you are required to find the defendant not guilty if all of the following five factors are present:
>
> (1) [name of person] entered [or attempted to enter] the defendant's home;
>
> (2) the defendant believed that [name of person] intended to commit a crime that would involve an imminent threat of death or serious bodily harm;

[2]In the first edition of the Maryland Criminal Pattern Jury Instructions (MICPEL 1986, 1995 Supp.), the defense of habitation is addressed in MPJI-Cr 5:02, which includes a usage note stating: "If the defendant is charged with murder, attempted murder, or assault with intent to murder, use MPJI-Cr 4:17.2 . . . or MPJI-Cr 4:17.3 . . . . In the alternative, draft an instruction patterned after MPJI-Cr 4:17.2 or MPJI-Cr 4:17.3 using this instruction to tailor Part 'C' . . . ." In the second edition, the defense of habitation is again addressed in MPJI-Cr 5:02, which now includes a usage note stating: "Use this instruction if the defendant is charged with an assaultive crime and the issue of justification is generated by evidence of defense of habitation. If the defendant is charged with murder, use MPJI-Cr 4:17.2(D) (Homicide -- First Degree Premeditated Murder, Second Degree Specific Intent Murder and Voluntary Manslaughter (Perfect/Imperfect Defense of Habitation)."

(3) the defendant reasonably believed that [name of person] intended to commit such a crime;

(4) the defendant believed that the force that [he] [she] used against [name of person] was necessary to prevent imminent death or serious bodily harm; and

(5) the defendant reasonably believed that such force was necessary.

In order to convict the defendant, the State must show that the defense of one's home does not apply in this case by proving, beyond a reasonable doubt, that at least one of the five factors previously stated was absent.

The instruction the trial court gave with respect to the charge of attempted murder of Mitchell-Junior was consistent with MPJI-CR 5:02:

Defense of one's home is a complete defense and you are required to find the defendant not guilty if all of the following five factors are present: One, Robert Mitchell entered or attempted to enter the defendant's home; two, the defendant actually believed that Robert Mitchell, Jr., intended to commit a crime that would involve an imminent threat of death or serious bodily harm; three, the defendant reasonably believed that Robert Mitchell, Jr., intended to commit such a crime; four, the defendant believed that the force he used against Robert Mitchell, Jr., was necessary to prevent imminent death or serious bodily harm; and, five, the defendant reasonably believed that such force was necessary.

If you find that the defendant actually believed that Robert Mitchell, Jr., posed an imminent threat of death or serious bodily harm and that such belief was reasonable, you must find the defendant not guilty. If you find that the defendant actually believed that Robert Mitchell, Jr., imposed an imminent threat of death or serious bodily harm but that such belief was unreasonable, you should find the defendant not guilty of attempted murder but guilty of attempted voluntary manslaughter.

If you find that the State has persuaded you beyond a reasonable doubt that the defendant did not have an actual belief that Robert Mitchell, Jr., posed an imminent threat of death or serious bodily harm, you should find the defendant guilty of attempted murder.

In defending habitation, the defendant must not use excessive force and all other means of preventing the crime must first be exhausted.

The trial court also gave a similar instruction with respect to the charge of first-degree assault of Mitchell-Junior:

> In terms of the law on defense of habitation, deadly force is a complete defense. It applies to first degree assault only.
>
> You have heard evidence that the defendant acted in defense of his home. Again I will tell you, defense of one's home is a defense, and you are required to find the defendant not guilty if all of the following five factors are present: One, Robert Mitchell, Jr., entered or attempted to enter the defendant's home; two, the defendant believed that Robert Mitchell, Jr., intended to commit a crime that would involve an imminent threat of death or serious bodily harm; three, the defendant reasonably believed that Robert Mitchell, Jr., intended to commit such a crime; four, the defendant believed that the force he used against Robert Mitchell, Jr., was necessary to prevent imminent death or serious bodily harm; and, five, the defendant reasonably believed that such force was necessary.
>
> In order to convict the defendant, the State must show that the defense of one's home does not apply in this case by proving beyond a reasonable doubt that at least one of five factors previously stated was absent. In defending habitation, the defender [sic] must not use excessive force and all other means of preventing the crime must be exhausted.

Ragland contends on appeal that the trial court abused its discretion in failing to give a further instruction to define the word "home" to include curtilage, and also in failing to give an instruction with his requested definition of curtilage. We are not persuaded that the instructions Ragland requested regarding the definition of "home" and "curtilage" were generated by the evidence in this case. There was no evidence that Mitchell-Junior ever attempted to enter Ragland's house. But Ragland testified at trial that Mitchell-Junior entered onto his driveway, and was near the rear of Ragland's truck, which was parked at the top of the driveway, when Ragland went to retrieve his gun from his garage. The only Maryland

case Ragland cites to support his contention that an aggressor's entry onto the driveway invokes the defense of habitation doctrine is *Braboy v. State*, 130 Md. App. 220 (2000), where we observed, in *dicta*:

> *While not relevant to this appeal*, we note the compelling comments of 40 Am. Jur. 2d Homicide § 168, suggesting that the definition of 'dwelling' may very well include areas outside of the house itself:
>
> > While the courts are agreed upon the general rule that one attacked at or in his own dwelling is not required to retreat, there is some difference of opinion regarding the extent of the premises where one may thus defend himself without retreat. That the rule is not limited to the dwelling house, strictly speaking, seems to be generally conceded, and there is general agreement that no duty to retreat rests upon one who, without fault, is attacked by another when in his own curtilage. The curtilage embraces such space as is occupied customarily by the dwelling house and outbuildings, including the yard around the dwelling house, the garden, and a porch attached to the dwelling. **It does not, however, include the street or road adjacent to the premises of the slayer,** common areas of an apartment building, **an open driveway,** or a parking lot.

Braboy, 130 Md. App. at 230 n.10 (emphasis added).

When we view Ragland's testimony in a light most favorable to him, he places Mitchell-Junior on the open driveway, and places Mitchell-Senior in a car across the street on the Mitchells' driveway. Consequently, even if the above-quoted *dicta* from *Braboy* is assumed arguendo to be a correct statement of the law of Maryland, the facts to which Ragland testified would not support a finding that Mitchell-Junior entered the curtilage of Ragland's home.

Ragland contends that *Braboy*'s exclusion of open driveways from the definition of curtilage should not apply in this case. He maintains that his front and side yards were

separated by the driveway, and argues that there is no reason in law to conclude that the areas covered with grass were within his curtilage while the paved areas of his driveway were not. Ragland's contention that there is no reason to distinguish between grassy areas of a yard and a driveway does not find support in the case law.

In addition to the *Braboy* case, the defense of habitation has been addressed by Maryland appellate courts in *Crawford v. State*, 231 Md. 354 (1963), and *Law v. State*, 21 Md. App. 13 (1974) (commenting "There is a dearth of Maryland authority upon the question of what constitutes justifiable homicide in the defense of one's home."). None of those three cases provides support for Ragland's requested modifications of the pattern jury instructions on this defense. We are satisfied that the defense was adequately addressed by the instructions given by the trial judge.

B. Defense of Habitation Instruction as to Mitchell-Senior

Ragland next contends that he was entitled to a defense of habitation instruction with respect to the murder of Mitchell-Senior. Although Mitchell-Senior was in his own car, which was at rest at the bottom of his own driveway at the time of the shooting, Ragland argued at trial, as he does on appeal, that the defense of habitation instruction was warranted because Mitchell-Senior's threat to shoot a bullet at Ragland placed him "constructively within the curtilage" of Ragland's home. The court declined to give the defense of habitation instruction as to Mitchell-Senior because there was no evidence that Mitchell-Senior ever exited his own car or entered, or attempted to enter, Ragland's home. We perceive no abuse of discretion in that decision.

There was no evidence from which the jury could have concluded that Mitchell-Senior entered or was about to enter Ragland's dwelling place. Nor have we been directed to any case law to support Ragland's theory that Mitchell-Senior could be considered constructively within the curtilage of Ragland's dwelling place based upon Ragland's testimony that Mitchell-Senior was pointing a gun at him. As the State points out, courts in other states that have considered the applicability of the defense of habitation where a defendant used force to repel an intruder who was not on his property have held that the defense does not exist when the homicide occurs away from the habitation and curtilage. *See, e.g., Watts v. Commonwealth*, 192 S.W.2d 107, 108 (Ky. 1946) (right to defend one's home by shooting an intruder, where personal violence is threatened to a person in their home, is not applicable in the absence of an attempt by the intruder to enter the home at the time of the shooting); *State v. Boyd*, 119 S.E. 839, 840 (S.C. 1923) (a person on his own land adjoining a public road, if assaulted by another on that road, "is bound to retreat before taking the life of his adversary, if there is probability of his being able to escape without losing his life or suffering grievous bodily harm."); *State v. Bryant*, 705 S.E.2d 465, 471 (S.C.Ct. App. 2010) (defense of habitation does not exist at the place of a homicide that is away from the habitation and away from the curtilage).

Moreover, Ragland's contention that he was justified in using deadly force in response to Mitchell-Senior pointing a deadly weapon at him was adequately covered by the self-defense instruction, and there was no need for the trial judge to extend the application of the defense of habitation with respect to the charges involving Mitchell-Senior. *Cf.*

DeVaughn v. State, 232 Md. 447, 454 (1963) ("As we recently stated in *Crawford v. State*, 231 Md. 354, 190 A.2d 538 (1963), the distinction that is made between defense of the home and defense of the person is merely that in the former there is no duty to retreat.").

C. Excessive Force

At the State's request, the court added to the language of pattern instructions the caveat that, "in defending habitation, the defendant must not use excessive force and all other means of preventing the crime must first be exhausted." Defense counsel objected, arguing that the concept was already adequately addressed in the pattern instruction that was given and erroneously suggested to the jury that Ragland had a duty to retreat. We conclude that the instruction was consistent with the pattern instruction, and we perceive no error in the court's use of the language.

The challenged language is a near-verbatim quote from the comments that appear under MPJI-Cr 5:02, where the committee states: "In defending habitation, the defender must not use excessive force and 'all other means of preventing the crime must first be exhausted.' *Law*, 21 Md. App. at 31, 318 A.2d at 869 (quoting Wharton, *supra*)." *See also Crawford, supra*, 231 Md. at 363 ("The doctrine of the right to protect one's habitation gives no moral right to kill another, unless necessity or apparent necessity, for purposes countenanced by law, exists[.]" *Id.* at 363. We find no error of law or abuse of discretion on the part of the trial court in giving the instruction regarding excessive force.

D. Creation of Evidence Instruction

The State requested that the trial court give Maryland Criminal Pattern Jury Instruction MPJI-Cr 3:27, regarding the creation of evidence, which the State argued was generated by Garner's testimony suggesting that Ragland planted the gun that was recovered from Mitchell-Senior's car. Defense counsel objected and suggested that the language of the pattern jury instruction be altered. The following colloquy occurred:

> [DEFENSE COUNSEL]: Well, then I think it has to be modified because the language doesn't fit here. I mean, you can't say – frankly, if you accept the State's theory, you can't say it may be motivated by other factors, some of which are fully consistent with innocence. If they believe that he planted a gun, what are the possible factors that are consistent with innocence in that?
>
> So I think what you – and also, this is a theory. So it ought to be read there is – the State takes – something to the effect that "the State argues that it has presented evidence that the defendant created evidence in this case. Such conduct is not, by itself, sufficient to establish guilt but may be considered as evidence of guilt.
>
> "You must first decide whether the defendant created evidence in this case. If you do find the defendant created evidence in this case, then you must decide whether this action shows a consciousness of guilt."
>
> [PROSECUTOR]: Well, I don't think that this is the State's theory. The State has offered evidence to support the generation of this jury instruction.
>
> [DEFENSE COUNSEL]: When you say you have heard evidence that the defendant created evidence, I think that that's suggestive as a fact, rather than a –
>
> THE COURT: That's the way the pattern jury instruction reads, and what you're arguing is all these instructions have the same premise. It's for them to decide. It says at the end, "you must first decide whether or not there was a creation of evidence."
>
> [PROSECUTOR]: I mean, just the fact that it says you heard evidence, I mean –

> THE COURT: There is evidence in this case that he created the gun, that he took it so that it would seem Mr. Mitchell, Sr., shot him. That's a fact. That's what was created. But they have to decide. Maybe they will decide that he didn't create any evidence. I don't know. They tell him that.
>
> [DEFENSE COUNSEL]: It's a pretty weak set of facts that they have because
>
> THE COURT: It's not that – as weak as you may think, is it generated enough or sufficiently to give it as an instruction is my –
>
> [DEFENSE COUNSEL]: We think not, but I understand the Court's rule on that. So now I'd like to just simply make some suggestions about the language. Perhaps –
>
> THE COURT: Let me tell you something about me. I hate to deviate from the pattern jury instructions because it comes back to haunt you.
>
> [DEFENSE COUNSEL]: I'm going to suggest something you can put in a blank and not be –
>
> THE COURT: I'm only going to put creation of evidence.
>
> [DEFENSE COUNSEL]: "You have heard that the defendant may have created" --
>
> THE COURT: No, I will not. Everything is may. It's for them to decide whether he did or not. I'm not going to say may have. I would have to say that in everything I say to them. No.

Ragland argues that the trial court abused its discretion in giving the creation of evidence instruction because it highlighted a factual inference for the jury and created the danger that the jury would give that inference undue weight. In addition, he contends that the instruction highlighted the State's version of events with respect to a hotly contested factual matter and created a danger that the jury would give undue weight to Garner's testimony.

The State argues, as a preliminary matter, that this issue is not properly before us. The State maintains that, although defense counsel noted that the instruction was "suggestive as a fact," he never objected to the instruction on that basis. According to the State, the objection pertained only to whether the instruction had been generated by the evidence presented, and whether it should have been worded differently. We disagree.

Defense counsel argued that the idea that evidence was created was merely the State's "theory," and that the language ought to be changed to make that clear so as to prevent the court from suggesting, in the instruction, that the State's theory that Ragland planted the gun was a fact. The trial court clearly rejected defense counsel's argument when it pointed out that the instruction says at the end, "you must first decide whether or not there was a creation of evidence." Nevertheless, although we deem the objection preserved by substantial compliance with Rule 4-325(e), we perceive no abuse of discretion in the trial court's refusal to modify the pattern instruction as requested by defense counsel.

Relying on *Patterson v. State*, 356 Md. 677 (1999), and *Cost v. State*, 417 Md. 360 (2010), Ragland argues that the creation of evidence instruction should not have been given because it highlighted a factual inference for the jury and gave undue weight to Garner's testimony suggesting that the gun had been planted. In *Patterson,* the Court of Appeals upheld the trial court's refusal to give a missing evidence instruction, 356 Md. at 688, whereas in *Cost*, the Court of Appeals held that, under the facts of that case, the trial court committed reversible error by failing to give a missing evidence instruction. 417 Md. at 381.

There is nothing in either *Patterson* or *Cost* that prohibited the trial judge in the present case from giving the creation of evidence instruction that was given to the jury in this case. The instruction was a correct statement of the law, and was generated by Garner's testimony. Accordingly, there was no abuse of discretion in the trial court's decision to give the instruction.

E. Absence of Flight

Ragland asked the trial court to instruct the jury regarding the "absence of flight or concealment" as follows:

> A person's flight or concealment immediately after the commission of a crime, or after being accused of committing a crime, is not enough by itself to establish guilt, but it is a fact that may be considered by you as evidence of guilt. On the other hand, the absence of a person's flight or concealment, is not enough by itself to establish innocence, but it is a fact that may be considered by you as evidence of innocence. Flight or concealment or the absence thereof under these circumstances may be motivated by a variety of factors. It is up to you to decide whether the Defendant's conduct whether this conduct [sic] shows a consciousness that the Defendant believed his conduct was consistent with the conduct of one who acted in a lawful manner.

The court declined to give the instruction. Relying on *Pierce v. State*, 62 Md. App. 453 (1985), Ragland contends that the trial court erred in refusing to give the instruction because an absence of flight was generated by the fact that he stayed at the scene of the shooting and was not covered in any other instruction. We disagree.

In *Pierce*, the defendant was involved in a confrontation with Betty Campbell. 62 Md. App. at 455-56. As the two of them were grappling, a gun carried by Pierce discharged and fatally wounded Campbell. *Id.* "Pierce fled from the scene, but voluntarily surrendered

to the police the next morning." *Id.* Testimony at trial showed that, after the shooting, Pierce went home to make arrangements for her children. *Id.* at 456.

The trial court instructed the jury that it could infer from Pierce's flight her consciousness of guilt "unless adequately explained." *Id.* at 456, 458-59. The instruction provided that the jury could "consider the motive which prompted" the flight. *Id.* at 458. Defense counsel requested an instruction concerning surrender, but the court refused to give it. *Id.* On appeal, Pierce argued that the evidence of her voluntary surrender supported the granting of an instruction in reference to it. *Id.* at 457. In rejecting that contention, we noted that the subject was fairly covered by the instructions actually given. *Id.* at 458. We noted that the flight instruction provided that "the jury may consider [Pierce's flight] 'unless adequately explained.'" *Id.* at 459. In addition, the instruction "specifically noted that the motive for the flight may be taken into account." *Id*.

In *Wooten-Bey v. State*, 76 Md. App. 603 (1988), the defendant argued that the trial court improperly excluded evidence that he did not resist extradition to Maryland to face charges against him. *Id*. at 623. Relying on *Pierce*, the defendant argued that, because the State had introduced evidence of his flight after a fatal shooting, he should have been permitted to introduce evidence that he did not resist extradition. *Id.* We disagreed and explained:

> We stated in *Pierce* that evidence of a defendant's flight is relevant because flight may reflect an awareness of guilt. The State may thus introduce such evidence. A defendant, however, can introduce proof of voluntary surrender to rebut this inference. *Ordinarily, such evidence is irrelevant because voluntary surrender is considered usual behavior.* It is only relevant to rebut the inference created by flight. *Pierce*, 62 Md. App. at 456, 490 A.2d

> 261. In *Pierce*, we were presented with a different issue from that in the instant case — whether a trial court was required to instruct the jury that voluntary surrender could indicate innocence. We held that no specific instruction was necessary. *Pierce*, 62 Md. App. at 458, 490 A.2d 261.

Id. (emphasis added).

Because evidence of voluntary surrender is normally not relevant, unless it is offered to rebut an inference of guilt from flight, there was no need for a jury instruction in the present case pertaining to Ragland's voluntary surrender. As stated in *Wooten-Bey*, such evidence "is considered usual behavior." *Id.* Moreover, the manner in which Ragland surrendered in this case — saying to the police officers who responded to the 911 call, "here's who you want" as he got on the ground — could be viewed as supporting either acknowledgment of guilt or a lack of any sense of guilt. The inference was for the jury to decide, and no specific instruction highlighting this bit of evidence was required.

II.

Ragland next contends that the trial court erred in refusing to allow defense counsel to question him about whether he wanted to shoot and kill Mitchell-Senior. At the end of the direct examination of Ragland, the transcript reflects the following exchange:

> Q. [By Defense Counsel] Now, Mr. Ragland, that day, May 2nd, did you want to shoot and kill Mitchell, Sr.?
>
> [Prosecutor]: Objection.
>
> THE COURT: Sustained.
>
> [Defense Counsel]: That's all, Your Honor.
>
> THE COURT: Cross-examination.

Ragland asserts on appeal that, because his intent was a central issue in the case, the trial court erred in sustaining the prosecutor's objection. He points out that, in order to prove first-degree murder, the State had to prove he had an intent to kill and, in order to prove second-degree murder, the State was required to prove that he had either an intent to kill or an intent to commit such serious bodily injury that death would be the likely result. In addition, Ragland maintains that testimony that he did not want to shoot and kill Mitchell-Senior was relevant to his assertions of self-defense and defense of habitation.

But Ragland argued none of these reasons at the time of trial. No proffer was made. And, because the prosecutor's objection was general, the court could have properly sustained it on the basis that counsel asked his own client a leading question. No effort was made to rephrase the question or elicit further evidence regarding Ragland's state of mind. Consequently, the arguments raised on appeal were not preserved for our review.

III.

Ragland next contends that the trial court improperly sustained the prosecutor's objection to remarks made by defense counsel during closing argument. We disagree.

Prince George's County Police Corporal Jeremy Webb testified about his investigation of the crime scene. He was not offered as an expert witness, and did not provide testimony about a "21-foot rule" during his direct examination. On cross-examination, defense counsel asked the officer if he was "familiar with something called the 21-foot rule." Corporal Webb said "[y]es," that "[i]t is the distance in which an individual can close on you, possibly prior to you being able to draw a weapon and then fire it." He

learned of it "through the police academy." Defense counsel continued to question Corporal Webb on that topic as follows:

> [DEFENSE COUNSEL]: And it basically says if somebody is going to jump you or challenge you and they do it within a 21-foot radius of you, by the time you pull out your gun and fire, they can be on you, correct?
>
> [WEBB]: That's correct, sir.
>
> Q. And that's been demonstrated on many occasions, correct?
>
> A. As far as I'm aware, yes.
>
> Q. And so in police training, one of the things you're taught in defensive tactics is if you're threatened, for example, with somebody with a knife or somebody who is going to harm you, if you're going to take defensive actions, you've got to do it out of that 21-feet radius or it may be too late for your response to be effective.
>
> A. They teach us distance and control, if that's what you're getting at. That distance can be your friend when dealing with a hostile individual.
>
> Q. And as part of that, when a hostile individual gets too close to you, if you wait to react to find out exactly what's going to happen, it may be too late.
>
> A. If you're speaking to a preemptive stance towards who is being aggressive to you, it depends on the nature of the situation.
>
> If, for instance, you're standing there with a gun, I'm not going to stand here and let you shoot me, no. I'm going to give you a chance to put the weapon down, and at that point I have to be able to evaluate, within milliseconds, whether or not you're going to be a deadly threat to myself or to any individual within this courtroom.
>
> [PROSECUTOR]: Your Honor, objection. Can we approach?

At the bench conference that followed, the State argued that there was no evidence that Ragland had any police training about the 21-foot rule, and that the testimony was irrelevant and beyond the scope of cross-examination because Corporal Webb had not been

offered or qualified as an expert witness. Defense counsel countered that the 21-foot rule applied to civilians, such as Ragland, and that his intent in questioning Corporal Webb was "to identify where a 21-foot distance is[,]" and establish that Ragland was allowed to use deadly force if the victim was within 21-feet of him.

The court ruled: "If you [Mr. Defense Counsel] have an expert that's going to talk about the 21-foot rule, I don't have a problem with it. But it's definitely outside the scope of direct, and on that basis, I'm not going to allow it." Initially, the court indicated that it would strike Corporal Webb's testimony on the subject, but after defense counsel pointed out that no objection had been lodged prior to the bench conference, the judge stated, "[a]t this point it's been objected to. I'm not going to retroactive it. But no more because it's outside the scope."

Thereafter, during closing argument, defense counsel stated: "And you heard the officer talk about the 21-foot zone and the action-reaction time." The prosecutor objected, and the court sustained the objection. Nevertheless, defense counsel argued about Ragland's "action-reaction time," and asserted: "When somebody is pointing a gun at you, you don't have to wait and see what's going to happen."

Defense counsel made no proffer during trial about any additional argument he wished to make regarding the 21-foot rule and the concept of action-reaction time. In the absence of any proffer, we are unable to perceive any prejudice in the trial court's ruling. *Cf. Conyers v. State*, 354 Md. 132, 164 (1999) (a proffer is required to preserve an appellate challenge to the exclusion of evidence).

There was no evidence that Ragland was aware of any 21-foot rule or that it played a part in his decision to retrieve the gun from his garage and fire it at the Mitchells. As a result, the court did not abuse its discretion in sustaining the State's objection to defense counsel's argument that Ragland's shooting was justified if Mitchell-Junior came within 21-feet of him.

IV.

Ragland's next contention is that the trial court abused its discretion in permitting the State to call Detectives Rodriguez and Brooks as rebuttal witnesses for the limited purpose of testifying about maps that were prepared during their interviews of Ragland following the shooting. We perceive no abuse of discretion.

Rebuttal evidence is any "competent evidence which explains, or is a direct reply to, or a contradiction of any new matter that has been brought into the case by the defense." *Wright v. State*, 349 Md. 334, 341 (1998)(internal quotations and emphasis omitted). The decision whether to allow rebuttal evidence rests in the sound discretion of the trial court. *State v. Booze*, 334 Md. 64, 68 (1994); *Sinclair v. State*, 214 Md. App. 309, 334 (2013).

On direct examination, Ragland testified that, after he was taken to the police station, he was placed in a room. Two detectives spoke to him during separate interviews, and he gave a recorded statement over the course of a couple of hours.[3] On direct examination, defense counsel questioned Ragland as follows:

[3] Although the record before us does not contain any transcription of the recording of Ragland's interviews with the detectives, as required by Md. Rule 8-411, a transcript is not necessary to our resolution of the issue presented.

[Defense Counsel]: During the course of that interviewing process, did you demonstrate for them and explain to them exactly what you've told the ladies and gentlemen of the jury?

[Ragland]: Yes, sir.

* * *

Q. Did you tell them during the course of that interview why you shot at Mitchell, Jr., and Mitchell, Sr.?

A. Yes, I did.

Q. What did you tell them?

A. I told them the story of they threatened me all day, telling me they going to put a hole in my head and it's going to take place today, and I was afraid about it. I was afraid about it.

[Defense Counsel]: May I have this marked, please?

THE DEPUTY CLERK: Defendant's Exhibit Number 33 marked for identification. (Defendant's Exhibit No. 33 was marked for identification.)

[Defense Counsel]: This is going to be 33 for identification. Have you seen this disk that has your videotaped statement on it?

[Ragland]: Yes, sir.

Q. And you reviewed it?

A. Yes, sir.

* * *

Q. Mr. Ragland, during the course of this statement, you made a demonstration, did you not, to the police immediately afterwards, in terms of what you had observed Mr. Mitchell, Sr., do with respect to the pointing of the gun; did you not?

A. Yes, sir.

> Q. I'm going to start this portion of the interview at 7:53:02 and play it through approximately 8:00 or until the demonstration is done. I'll ask you to look at the screen, please. I'm going to ask you afterwards if what is depicted in this video fairly and accurately depicts what you observed on the afternoon of May 2nd in front of your home.
>
> (Audio-videotape plays.)
>
> Q. Mr. Ragland, does that fairly represent the substance of what you told the police that night about what happened and what you observed with respect to Mitchell, Sr.?
>
> A. Yes, sir.

On cross-examination, the prosecutor questioned Ragland about the statement he gave to the detectives, and the prosecutor also played portions of the recorded statement for the jury. The prosecutor asked questions about a map that Detective Rodriguez drew during the interview based upon Ragland's statements, and whether Ragland told the detective that Mitchell-Junior had come onto his property. Ragland acknowledged that, during the interview with Detective Rodriguez, "he drawed [sic] the map of what I was saying." The map was entered in evidence as State's Exhibit 109. Ragland agreed that he supplied the information that the detective used to draw the map, but asserted that the detective did not draw everything.

Thereafter, the State announced its intention to call Detectives Rodriguez and Brooks as rebuttal witnesses to testify about the two maps that were created during their interrogation of Ragland and the location of Mitchell-Junior at the time of the shooting. Defense counsel objected on the ground that it was not proper rebuttal because the State could have introduced that evidence on direct examination. The court noted that the map

could not be seen in the recording when Detective Rodriguez and Ragland were discussing it. The court overruled the objection and allowed the prosecutor to question the detectives about the maps.

The testimony from the detectives on rebuttal was brief, and not particularly helpful to the prosecutor. Detective Rodriguez testified that he drew State's Exhibit 109, a map, as he was speaking with Ragland. He stated that he made the marks on the map, that the dashes indicated the direction of travel, and that he got that information from Ragland. The prosecutor asked Detective Rodriguez: "And everything that [Ragland] told you when you went over this map, is it depicted on the map?" The detective replied: "Not everything but, yes, what — you know, what some of the things that we spoke about."

Detective Brooks testified that he drew the map identified as State's Exhibit 110 during the course of his interrogation of Ragland. Over objection, the map was introduced in evidence. He testified, over objection, that the dots on the street were where Ragland said that Mitchell-Junior was at the time of the shooting. Detective Brooks was asked: "[D]id you draw this map at the direction of the defendant?" He replied: "Yeah, because I wanted to get an understanding myself in talking to him, so yes."

We find no abuse of discretion in the trial court's decision to allow the rebuttal testimony of the detectives. During the defendant's case-in-chief, defense counsel elicited testimony from Ragland about his interviews with the detectives and the recording of the interview was admitted in evidence. Although we do not have a transcript of that recording, Ragland acknowledged, on cross-examination, that the detectives drew maps during the

interviews. Ragland's assertion that the detectives misrepresented what he had told them when they drew the maps became an issue in the case for the first time during the defendant's case. Indeed, Ragland asserts in Appellant's Brief at 37: "Although the maps at issue were somewhat crude, *in combination with the detective[s'] testimony about them*, they amounted to evidence that directly contradicted Mr. Ragland's testimony about where Mitchell, Jr. was located when Mr. Ragland fired his weapon." Such a contradiction of testimony elicited during the defendant's case is an appropriate function of rebuttal testimony. Consequently, it was not an abuse of discretion for the trial court to permit the prosecutor to call the detectives to rebut contentions raised by Ragland for the first time during the defendant's case.

V.

The next issue presented for our consideration is whether the trial court abused its discretion in refusing to allow defense counsel to refresh Garner's recollection in an effort to motivate her to change her testimony about a statement she allegedly made to the police. As a general proposition, the decision as to "whether a witness's recollection may be refreshed by a writing or some other object depends upon the particular circumstances present in each case," and is committed to the sound discretion of the trial judge. *Oken v. State*, 327 Md. 628, 672 (1992); *Butler v. State*, 107 Md. App. 345, 354 (1995).

On cross-examination of Garner, the following occurred:

> [Defense Counsel]: Now, the same officer that you were talking to about the gun on the car after the incident, you also told those officers, did you not, that Mr. Ragland told Mr. Mitchell, Jr., to walk away if he didn't want trouble.

[Garner]: No.

Q. You don't remember saying that?

A. No.

* * *

Q. Now, you did speak to officers in the driveway, correct?

A. Yes.

Q. This was on May 2nd, shortly after the incident occurred?

A. Yes.

Q. And showing – do you remember speaking to an Officer Waters?

A. I don't remember the names.

Q. I'm going to show you –

* * *

[Prosecutor]: May we approach?

THE COURT: Yes.

At the bench conference that followed, the prosecutor objected to defense counsel's attempt to use a police officer's written statement to refresh Garner's recollection. The State argued that use of the police officer's statement would be prejudicial because, after viewing it, Garner might "get the impression that what the officer wrote down must be true and then adopt what the officer" stated as her own recollection. The court pointed out that Garner denied telling an officer that Ragland told Mitchell-Junior to walk away if he didn't want trouble; the trial judge commented that "[y]ou can't refresh something that she didn't say."

Defense counsel responded: "I thought I asked her if she remembered saying it." The following colloquy is recorded in the transcript:

> THE COURT: She already said she didn't say that to that officer.
>
> [Defense Counsel]: She said she didn't remember, Your Honor.
>
> THE COURT: No, she said she didn't say it. Now, you can ask her again what she said. I believe that she didn't say it.
>
> [Defense Counsel]: I thought I asked her if she remembered saying it.
>
> THE COURT: She said she didn't say it. You can't refresh something that she said she didn't say.
>
> [Defense Counsel]: I apologize. I thought I asked her if she remembered –
>
> THE COURT: Well, she's got it all down there somewhere. You can ask her again, but once she says she didn't say it, you're done.
>
> * * *
>
> THE COURT: No, no. **Let's say she looks at this statement and says I didn't say it. Then you're done.**
>
> [Defense Counsel]: **Yes, done with her**. Then I can go through the officer later. I would not go forward with her. **If she says she didn't remember, but then looks at this and says she does remember, then that solves the problem.**
>
> THE COURT: **Then that's all you can ask.** That's it. Nothing else. No more detail.
>
> [Defense Counsel]: **Right. No, that's all I was going to do,** to use it to –
>
> THE COURT: But I'm telling you, she said she didn't remember from the beginning.
>
> [Defense Counsel]: I apologize. I thought I asked it in a different way.
>
> THE COURT: That's okay.

[Defense Counsel]: Thank you.

(Counsel returned to trial tables and the following ensued.)

[Defense Counsel]: Ms. Garner, did you tell any officer on May 2, 2010, that Mr. Ragland had told Mr. Mitchell, Jr., to walk away if he didn't want trouble?

[Garner]: No.

Q. Thank you. Now, when you went into the house, you said that you tried to call 911. First you were in the downstairs area.

(Emphasis added.)

The cross-examination continued, with no obvious effort to refresh Garner's recollection regarding what she had told some officer on May 2, 2010.

Ragland argues on appeal that, given Garner's failure to remember telling a police officer that Ragland had told Mitchell-Junior to walk away, defense counsel should have been permitted to use the officer's written statement to refresh her recollection. As we read the above excerpt from the transcript, the trial judge ruled that counsel *could* show the statement to the witness, and then ask if she said what was attributed to her in the document, but, then, if "she looks at this statement and says I didn't say it. Then you're done. . . . Then that's all you can ask. That's it. Nothing else. No more detail." We perceive no error in that ruling.

Because the transcript does not support appellant's contention that the trial judge prohibited defense counsel from showing the officer's statement to Garner, there is no basis

for the argument that the court erred in refusing to permit counsel to try to refresh Garner's recollection.

VI.

Ragland next asserts that the trial court abused its discretion when it permitted the State to introduce a statement made by Mitchell-Junior to Officer Wutka during the ambulance ride to the hospital. Ragland contends the statement constituted inadmissible hearsay and did not qualify as an excited utterance under Maryland Rule 5-803(b)(2). This assertion is without merit.

Officer Wutka rode to the hospital in the ambulance with Mitchell-Junior. Over objection, he testified about statements that Mitchell-Junior made to him about the shooting. At a hearing out of the presence of the jury, Officer Wutka was questioned about the circumstances surrounding the statements. He stated that he was on the scene of the crime for "[m]aybe ten minutes, at the most," before leaving in the ambulance with Mitchell-Junior It took about five to ten minutes for medical personnel to secure Mitchell-Junior and to do their job, and then Officer Wutka began to speak with Mitchell-Junior about what had happened.

According to Officer Wutka, Mitchell-Junior was "very upset" and "in a lot of pain." He repeatedly asked about his father's condition. He responded to Officer Wutka's inquiry about what had happened, but was sobbing hysterically, was "very emotional, and "[v]ery upset." Officer Wutka stated that it took "a lot" to get the story from him because he kept asking about his father.

The trial court ruled that Mitchell-Junior's statements qualified as excited utterances, and the defense was granted a continuing objection to Officer Wutka's testimony. Officer Wutka testified that, while in the ambulance on the way to the hospital, Mitchell-Junior told him that, when he was in his front yard, he heard several gunshots. He felt like he was struck and then fell to the ground. Mitchell-Junior believed that the gunshots were fired by his neighbor Ragland. Mitchell-Junior also saw several rounds fired at his father, who was in the driver's seat of his car in his driveway. He then heard a clicking noise that sounded like a trigger, but nothing was fired, and then saw Ragland standing near him. At that point, he started crawling back toward his garage and then entered his home through the garage door.

Although hearsay evidence is generally inadmissible at trial because of its inherent untrustworthiness, Maryland recognizes certain exceptions that "are not excluded by the hearsay rule, even though the declarant is available as a witness." Maryland Rule 5-803. Maryland law recognizes an exception for "[a] statement relating to the startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Maryland Rule 5-803(b)(2). "The essence of the excited utterance exception is the inability of the declarant to have reflected on the events about which the statement is concerned. It requires a startling event and a spontaneous statement which is the result of the declarant's reaction to the occurrence." *Mouzone v. State*, 294 Md. 692, 697 (1982). In *Mouzone*, the Court of Appeals explained:

> The rationale for overcoming the inherent untrustworthiness of hearsay is that the situation produced such an effect on the declarant as to render his

> reflective capabilities inoperative. The admissibility of evidence under this exception is, therefore, judged by the spontaneity of the declarant's statement and an analysis of whether it was the result of thoughtful consideration or the product of the exciting event.

Id. (internal citations omitted).

"The proponent of a statement purporting to fall within the excited utterance exception must establish the foundation for admissibility, namely personal knowledge and spontaneity." *Parker v. State*, 365 Md. 299, 313 (2001). When determining the propriety of a trial court's decision to admit or reject excited utterance testimony, we apply a "case by case" analysis. *Johnson v. State*, 63 Md. App. 485, 493 (1985).

Ragland argues that Mitchell-Junior's statements to Officer Wutka did not qualify as excited utterances because approximately twenty to thirty minutes had elapsed from the time of the shooting to the start of his statement, and "significantly more time passed from the incident to the end of the statement." In addition, Officer Wutka admitted that Mitchell-Junior calmed down enough to describe what had happened, and his statements were not spontaneous, but were elicited through questioning by the officer.

We find no error in the trial court's determination that Mitchell-Junior's statements to Officer Wutka constituted excited utterances. The fact that Mitchell-Junior responded to the officer's inquiry as to what happened is of no significance in this case. The lapse of time between the shooting incident and Mitchell-Junior's statements was not great, he was in pain from being shot, he was hysterical and asking about his father's condition, and remained emotionally distraught during the entire ride to the hospital. *See Cooper v. State*, 434 Md. 209, 242-44 (2013)(statement to police officer describing sexual assault was admissible as

excited utterance where statement was made an hour after attack and victim was still emotional); *Marquardt v. State*, 164 Md. App. 95, 124 (2004) ("The lapse in time and spontaneity of the statement are factors to be considered in the analysis, but neither is dispositive. . . . The determination of whether to admit a statement as an excited utterance lies within the discretion of the trial or motions court."); *Stanley v. State*, 118 Md. App. 45, 54-55 (1997) ("Our previous decisions indicate that four-and-one-half to five hours may represent the outer limit of time that may elapse between the exciting event and an admissible utterance."). The one-hour delay in the present case was well within the range that has been found acceptable in prior cases, and the trial court was not clearly erroneous in concluding that Mitchell-Junior's statements were excited utterances that were made while he was still under the stress of excitement caused by startling events.

VII.

Ragland's final contention is that the trial court abused its discretion in failing to redact a portion of the 911 call made by Lekeysha Garner at the time of the shootings. We perceive no error.

Before the recording of Garner's call to 911 was played, defense counsel asked the trial court to redact the last two minutes of the call, *i.e.*, the portion of that call that occurred after Ragland was apprehended by the police. Defense counsel proffered that the call continued for a period of two minutes after the point in time when Ragland was apprehended by police, and, in defense counsel's view, Garner spent the next two minutes "just crying and screaming and basically swearing while on the phone." The defense argued that

Garner's purely emotional response was not relevant. The State countered that the entire recording should be played to show Garner's state of mind. The court noted that the fact that the caller was emotional during the call was not a sufficient basis to exclude it, saying: "[O]f course it's emotional if it's a shooting. There is not going to be a 911 call that is going to be, let's say, without any type of feeling at all. It's going to be a pretty horrific incident." The court denied defense counsel's request and allowed the State to play the entire recording of Garner's 911 call. The defense was granted a continuing objection.

On appeal, Ragland argues that the trial court erred in refusing to redact the last minutes of the 911 call because that portion of the recording was not relevant. Alternatively, even if that portion of the recording had some relevance, Ragland maintains that its probative value was substantially outweighed by the danger of unfair prejudice because the jury was likely to give Garner's emotions undue weight after hearing it.

Preliminarily, we note that neither the 911 recording nor a transcript of that call was included in the record before us. Maryland Rule 8-414 allows for the correction of the record on appeal, but that appears not to have been pursued here. Nevertheless, we shall address the merits of the issue presented because, in this particular case, the trial transcripts provide sufficient descriptions of the contents of the 911 recording to allow us to resolve Ragland's claim of error.

To be relevant, "evidence must tend to establish or refute a fact at issue in the case." *Thomas v. State*, 397 Md. 557, 579 (2007)(relying on *Merzbacher v. State*, 346 Md. 391, 404-05 (1997)); Md. Rule 5-401("'Relevant evidence' means evidence having 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."). Garner's ability to accurately recall information and communicate with police and emergency personnel after the shooting were issues that were contested at trial. Consequently, the entire recording of the 911 call was relevant to the jury's evaluation of Garner's state of mind following the shooting and the credibility of the account she testified to at trial.

We are also unpersuaded by Ragland's argument in the alternative that, even if the final minutes of the 911 call were relevant, the trial court abused its discretion in admitting that portion of the call because its probative value was outweighed by its prejudicial effect. We review such rulings for abuse of discretion, and here, we perceive none. The trial court recognized the emotional nature of the call, but concluded that its probative value was not outweighed by its prejudicial effect. To constitute an abuse of discretion, the "'decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *King v. State*, 407 Md. 682, 697 (2009)(quoting *North v. North*, 102 Md. App. 1, 13-14 (1994)). Under the circumstances of the instant case, the court's refusal to cut off the 911 call because it showed that Garner was extremely emotional after witnessing the shootings by Ragland was not beyond the fringe of evidentiary rulings this Court deems minimally acceptable.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.