UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0834

September Term, 2014

DOMINICK BROOKS

v.

STATE OF MARYLAND

Wright,
Reed,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: July 9, 2015

Convicted by a jury in the Circuit Court for Baltimore City of first degree murder and related offenses, appellant, Dominick Brooks,[1] presents five questions, which we rephrase for clarity,[2] for our review:

I. Did the court abuse its discretion in admitting evidence of the content of a voicemail?

II. Was Brooks prejudiced by the court's admission of hearsay?

III. Did the court abuse its discretion in precluding trial counsel from using hearsay to impeach a witness?

IV. Where the court, in response to a request by the jury, gave the jury a written copy of the elements of first degree murder and second degree murder, did the court abuse its discretion in denying Brooks's request that the court also give the jury a written copy of the court's instruction on reasonable doubt?

V. Did the court abuse its discretion in controlling the scope of trial counsel's closing argument?

---

[1] In the record, appellant is also identified as "Dominick Brooks." For consistency, we shall identify appellant as "Brooks."

[2] Brooks's questions presented *verbatim* are:

1. Did the trial court err in admitting evidence of a voicemail message purportedly left on Carly Patrick's phone by Mr. Brooks?

2. Did the trial court err in admitting hearsay testimony from detectives as to what Carly Patrick told them?

3. Did the trial court err in unduly limiting Mr. Brooks's cross-examination of Detective Ross?

4. Did the trial court err in refusing Mr. Brooks's request that the jury be given a written copy of the instruction on reasonable doubt when they were given written instructions on the substantive crimes?

5. Did the trial court err in unduly limiting Mr. Brooks's closing argument on the existence of reasonable doubt?

Finding no reversible error, abuse of discretion, or prejudice, we affirm the circuit court's judgments.

Facts and Proceedings

In the early morning hours of May 22, 2012, Baltimore City Police Officer Kwok Kam was notified of an "unresponsive male" at 634 North Carey Street, a row house containing multiple apartments. When Officer Kam arrived at the row house, a woman on the third floor of the building yelled from her window that she "heard a few loud bangs and [was] afraid to come downstairs." The woman threw a set of keys to the officer, who used the keys to enter the building. In a second floor apartment, Officer Kam discovered a man, later identified as Sylvester Rogers, laying on the floor and unresponsive. The officer requested an ambulance and contacted the Department's "Homicide Unit."

During a "canvass" of the building, Officer Kam spoke with three third floor residents: Pear Johnson, Gonesha Brown, and Delrica Savage. The women stated that they "were the ones that called the police and they heard loud bangs from there." The officer also spoke with a second floor resident named Magora, who stated that she "heard an unknown individual kicking the door and . . . an argument." Finally, Officer Kam spoke with a third floor resident named Miller, who stated that she "heard someone kicking the door and two loud booms."

Arriving at the row house, Detective Robert R. Ross of the Homicide Unit noticed that the door to Rogers's residence had been forced open. While walking around the

exterior of the row house, Detective Ross discovered, on the porch of 628 North Carey Street, a "Cricket" cell phone.

Later that morning, Detective Ross attended the autopsy of Rogers's body, which was performed by Dr. James Locke of the Office of the Chief Medical Examiner. Dr. Locke determined that the cause of Rogers's death was gunshot wounds to his lower lip, left arm, and right index finger. The doctor determined that the bullet that struck Rogers in his lower lip ultimately struck his first cerebral vertebrae, causing a "fatal wound" to his spinal cord. Dr. Locke further determined that the bullet that struck Rogers's right finger then struck the right side of his face, indicating that Rogers was shot twice.

At trial, the State called Brooks's mother, Antoinette Brooks (hereinafter "Antoinette"), who testified that a woman named Cassie Bradford is the mother of Brooks's son. Antoinette further testified that the cell phone discovered by Detective Ross belonged to her, that the number of the phone was 443-897-4578, and that she last saw the phone in her living room on or about May 19 or 20 of 2012. On the day of the shooting, Antoinette received a call from her daughter, Delrica, who was calling from Bradford's apartment. Delrica stated: "Mommy, Homicide is down here. The man downstairs got shot and we're locked in on the third floor, me, Cassie, and the children." Following Antoinette's testimony, the parties stipulated that on May 23, 2012, Antoinette told Detective Ross that "Brooks took [her] cell phone as of the Saturday night before Sylvester Rogers was shot."

The State next called Carly Patrick, who testified that, from April 2012 to the end of May 2012, she was "in an intimate relationship" with Brooks. When asked "what phone

[Brooks] was using" on or about May 21, 2012, Patrick replied: "I think it was his mother's." When shown the phone recovered by Detective Ross, Patrick stated that the case on the phone resembled the case on Antoinette's phone.

Patrick testified that in the early morning hours of May 22, 2012, Brooks called her and stated: "I need to come to wherever you at. Can you pay for the hack?" Brooks then stated "that something happened with some man in the apartment building and that he had shot the man." Brooks stated that "he got into an altercation with the man because the man grabbed Cassie's butt," and "he shot the man in the face twice." After "a few . . . calls" with Brooks, Patrick, who "had to go to court" later that day, "turn[ed] the phone off and [went] to sleep."

The State also called Detective Ross, who testified that, following the autopsy, he received a call from Detective Anthony Forbes. Detective Forbes stated that "he had received a phone call from . . . Patrick, and she was calling to see if he had any kind of information in reference to a shooting that had occurred overnight [in] the 600 block of North Carey Street." Patrick stated that she "had received a phone call from her soon-to-be baby's father and she had indicated that he needed help, that he had just shot somebody and that he needed her help."

Later, Detective Ross met with Patrick at the Homicide Unit. During the meeting, Patrick stated that the "incident . . . with Mr. Rogers, the butt-grabbing and . . . the shooting," occurred "near his residence." Patrick further stated that "while she was talking with . . . Brooks on the phone, . . . he had told her that he had messed up again and that he had left his phone inside the gentleman's apartment that he had just shot." When Detective

Ross "asked [Patrick] to describe that phone[,] she described that it was a Cricket phone with a white case around it."

Patrick then gave police "permission to exploit her phone." During the investigation, officers performed a "phone dump," in which they extracted "all of the information . . . on the phone." The officers discovered that, on May 19, 2012, Patrick's phone received 12 calls from the number associated with Antoinette's phone. On May 20, 2012, Patrick's phone received 10 calls from that number. On May 21, 2012, Patrick's phone received 30 calls from that number. Finally, on May 22, 2012, Patrick's phone did not receive any calls from that number.

Additional information will be included in our discussion, below.

Discussion

I.

At trial, Patrick testified that she had pleaded guilty to theft, received probation before judgment, and was "in jail pending a violation of probation." On the morning of May 22, 2012, Patrick went to the "North Avenue District Court," where she discovered that she had been indicted for robbery. Later that day, Patrick discovered that Brooks had left on her phone a voicemail, in which he stated, in pertinent part: "I swear to [G]od on everything I love. If you don't give me this money to pay this man I'll blow your whole face off yo."

Later that day, Patrick called the police. Responding to the call, Detective Forbes picked Patrick up and began to transport her to the Commissioner. After speaking with

Patrick, Detective Forbes contacted Detective Ross. Detective Forbes then transported Patrick to the Homicide Unit, where Patrick played the voicemail for Detective Ross.

Prior to trial, Brooks made a "motion in limine . . . regarding the" voicemail. Defense counsel argued that "what the State is trying to do is bring up impermissible character evidence to go towards propensity." The prosecutor responded:

> [A]s a result of this statement, as a result of receiving this call, [Patrick] called the police. This is the reason that she called the police. The defense has tried to argue that the reason that she called the police is because she had a pending case, a pending matter and that she wanted to try to make a deal for herself, but it was really as a result of this voice message and this is, corroborates the fact that there were conversations back and forth between her and [Brooks] and that he left her this message. She as a result of listening to the message in the morning called the police.

Following argument, the circuit court stated:

> Your request to deny the State use of this phone call that was made allegedly by your client . . . is denied. You're saying that is for propensity purposes. I've already told you that that's not going to happen. I agree with you that the State cannot sit there and say because he threatened to shoot Ms. Carly in the face, he likely shot the victim in the face. That is improper use of this, but what is proper use of this based on what you have presented to the [c]ourt is the fact that there is allegedly a series of calls between [Brooks] and this Carly individual and things have escalated. He allegedly told her that he shot someone and then based on her hearing this, her perception, is that wow, I may have some information. Apparently, you're going to argue that she's really doing it cause she got arrested and this goes contrary to that. So, I think for those reasons the State can use the statement.

During trial, the prosecutor asked Patrick why she called the police. Patrick responded: "Because I was mad because of that ignorant-ass voicemail he left on my phone the night before." When the prosecutor asked Patrick "what . . . it [was] about the voicemail . . . that was so concerning to" her, she stated: "Because I'm not the type of person that likes to be talked to any kind of way. I mean, you can say a lot of things to me, but you

can't threaten my life." The prosecutor elicited other testimony from Patrick regarding the voicemail, submitted a transcript of the voicemail into evidence, and played the voicemail for the jury.

During cross-examination, the following colloquy occurred:

> [MR. WALSH-LITTLE:][3] You talked to Detective Ross the next day in the afternoon between – sometime around 2:00; is that right?
>
> [PATRICK:] Right.
>
> [MR. WALSH-LITTLE:] And that's after you went to court; is that correct?
>
> [PATRICK:] Right.
>
> [MR. WALSH-LITTLE:] And after you went to North Avenue District Court; is that correct?
>
> [PATRICK:] Right.
>
> [MR. WALSH-LITTLE:] And you were pending a robbery; is that right?
>
> [PATRICK:] Right.
>
> [MR. WALSH-LITTLE:] And you found out when you got there you were indicted for the robbery; is that correct?
>
> [PATRICK:] That didn't have nothing to do with – the only reason why I made that phone call was because of that voicemail. My indictment had nothing to do with it. Dominick had nothing to do with the robbery. So I'm not sure where you was going with that.

During closing argument, defense counsel stated, in pertinent part:

> The entire case rests on Ms. Patrick's shoulders[.] This is a convicted thief within the last six months[.] . . . She's on probation. Now, she said

[3] At trial, Brooks was represented by two attorneys: Todd Oppenheim, Esq., and David Walsh-Little, Esq.

> that she is not motivated by that and it does not affect her testimony. However, you can accept that or reject it. There is no deal that's been discussed between her and the State, according to her, but there is in her mind, especially when you saw her testimony, the possibility that she, a person like that, a convicted thief, may think, "I scratch your back and you scratch my back." Would someone like that think that? You think? Once she said "no," though, but how can you believe anything?

Brooks contends that the "admission of the contents of the voicemail . . . violated" Md. Rule 5-404(b) ("[e]vidence of other crimes, wrongs, or acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith"). Alternatively, Brooks contends that "[t]he prejudicial impact of the voicemail . . . so clearly outweighed its marginal relevance that it was an abuse of discretion to allow the State to use it at all." *See* Md. Rule 5-403 ("[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice").

The State counters that Brooks's contention "is not properly before" us, "because Brooks did not object when the [voicemail] was played for the jury." Alternatively, the State contends that "it is not likely that the content of the [voicemail] aroused an emotional reaction that unfairly influenced the jury's decision." (Internal citation, quotations, and brackets omitted).

We agree with the State that Brooks's contention is not properly before us. We have stated that, "to preserve an objection, a party must either object each time a question concerning the matter is posed or . . . request a continuing objection to the entire line of questioning," and this "requirement . . . applies even when the party contesting the evidence has made his or her objection known in a motion in limine[.]" *Wimbish v. State*, 201 Md. App. 239, 261 (2011) (internal citation, quotations, and brackets omitted). Here, defense

counsel did not object when the prosecutor asked to play the voicemail for the jury, and did not request a continuing objection to the entire line of questioning regarding the voicemail. Hence, the objection is not preserved.

Even if the objection was preserved, we would conclude that the circuit court did not abuse its discretion in admitting evidence of the content of the voicemail. *See Donati v. State*, 215 Md. App. 686, 708 (we "review[] a trial court's evidentiary rulings for abuse of discretion" (citation omitted)), *cert. denied*, 438 Md. 143 (2014). We have stated that "[e]vidence of other crimes may be admissible . . . if the evidence has special relevance, *i.e.* is substantially relevant to some contested issue in the case[.]" *Id.* at 738 (internal citations and quotations omitted). Here, the issue of why Patrick contacted the police following her court appearance was highly contested. The content of the voicemail is substantially relevant to that issue, and hence, the court did not violate Md. Rule 5-404(b) by admitting evidence of the content of the voicemail.

We also conclude the statement's probative value was not substantially outweighed by the danger of unfair prejudice. The Court of Appeals has stated that "probative value is outweighed by the danger of unfair prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case." *Odum v. State*, 412 Md. 593, 615 (2010) (internal citation, quotations, brackets, and emphasis omitted). Here, before the State offered evidence of the content of the voicemail, Patrick testified that, while speaking with Brooks on the phone, he stated that "he got into an altercation with [a] man" and "shot the man in the face twice." We do not believe that, having heard this testimony, the jury experienced such an emotional

response to evidence of the content of the voicemail that logic could not overcome the prejudice or sympathy injected by the evidence into the case. Hence, Brooks was not unfairly prejudiced by the admission of the evidence.

II.

At trial, the State called Detective Forbes, and the following colloquy occurred:

> [PROSECUTOR: W]hat did you do when you picked [Patrick] up?
>
> * * *
>
> [DET. FORBES]: She told me she had information in reference to a shooting.
>
> * * *
>
> [PROSECUTOR:] And what information did she share with you?
>
> * * *
>
> [DET. FORBES:] She had information in reference to a shooting that occurred in the 600 block of N. Carey Street.
>
> * * *
>
> [PROSECUTOR: W]hat information regarding the shooting in the 600 block of N. Carey Street did the witness . . .
>
> [DET. FORBES:] She said she received a call from –
>
> MR. OPPENHEIM: Objection.
>
> THE COURT: Overruled.
>
> [DET. FORBES]: She received a call from Dominick, a person who she's in a relationship with and he said to her that . . . he just shot someone twice in the face and he needed her to pay for his hack once he, when he got there.

Later, during Detective Ross's testimony, the following colloquy occurred:

> [PROSECUTOR: W]hat information, if any, did Ms. Patrick give you regarding the shooting that occurred?
>
> [DET. ROSS:] She began from the beginning. She said that she was –
>
> MR. OPPENHEIM: Objection.
>
> THE COURT: Overruled.
>
> [DET. ROSS]: – that she was sleeping, that she had received a frantic phone call from her soon-to-be baby's father by the name of Dominick Brooks and that Mr. Brooks had been calling her, telling her about this – that he had just shot somebody two times in his face after his current baby's mother was outside – they were all hanging outside in the hundred block that – you know, in front of the residence, that Mr. Rogers was present at that time, that they had been drinking some alcohol, and that when Ms. Cassie Bradford, his current baby's mother, had stood up, that Mr. Rogers had grabbed her in his [sic] buttocks and this enraged Mr. Brooks, and Mr. Brooks went upstairs to Mr. Rogers'[s] apartment and forced his way into his apartment and shot him two times in his face.
>
> * * *
>
> [] She had also said that he had left a voicemail on her phone when she wasn't answering the phone saying that he needed a ride and that she needed to answer the phone, or he was going to come up there and shoot her in the face.

Brooks contends that the circuit court "erred" in overruling defense counsel's objections, because the detectives' "testimony . . . was indisputably inadmissible hearsay." He further contends that the "testimony was highly prejudicial," because "[h]aving two detectives relate concisely and unequivocally what Ms. Patrick may have said to them strongly bolstered Ms. Patrick's testimony and made the chances of [Brooks's] reasonable doubt defense based on Ms. Patrick's questionable credibility much less likely to succeed."

The State counters that Brooks's contention is "waived." Alternatively, the State contends that Brooks "was not prejudiced by the trial court's rulings," because the testimony "was cumulative of other unobjected [-] to testimony on the same issue."

We conclude that Brooks's contention is not preserved for our review. Defense counsel did not object each time the prosecutor posed a question to the detectives concerning the matter, and did not request a continuing objection to the entire line of questioning. Hence, the objection is not preserved.

Even if the objection was preserved, Brooks would not prevail. *Yates v. State*, 429 Md. 112 (2012), is instructive. We quote at length from the Court of Appeals's opinion:

> On the night of January 7, 2009, Shirley Worcester was standing outside her home in Middle River, Maryland, when she was fatally wounded by a stray gunshot. Moments earlier, Worcester had stepped outside of her home to take two trash bags to the curb. Worcester's sister-in law, Linda Fuller, was sitting in a car parked in the driveway talking with Worcester when she heard what sounded like a car backfiring. "I've been hit," Worcester said. Fuller and her husband got out of the vehicle and saw a man, wearing a dark hooded sweatshirt with the hood pulled up over his head, fall in Worcester's yard around the same time as the gunshots went off. The man ran off between houses, and Worcester's relatives called 911. Worcester later died from the gunshot wounds.
>
> Police responding to the 911 call stopped a suspicious-looking man, later identified as [Yates's] co-defendant, Donald Kohler, not far from the scene of the shooting. Police investigation revealed that Kohler, the hooded man who fell in Worcester's yard and then ran off, was the gunman's intended target and Worcester was the innocent victim of an errant shot.
>
> The shooting was preceded minutes earlier by a drug transaction between Kohler and [Yates]. It developed at trial that Kohler had contacted Christopher Jagd and Justin Wimbush seeking to buy four pounds of marijuana. The men in turned contacted [Yates], who agreed to sell Kohler the drugs. Kohler, [Yates], and their associates met at another individual's home to conduct the transaction. [Yates] was accompanied by William Griffin. [Yates] presented the marijuana to Kohler and received from him a

bag that appeared to contain the purchase money. Immediately after the exchange, Kohler ran from the house, and [Yates], after glancing in the bag and learning it contained fake currency, chased after Kohler carrying a handgun. Investigators deduced that, during the chase, [Yates] fired at Kohler, missed him, and the stray bullet struck Worcester, wounding her fatally.

[Yates] and Kohler were jointly tried before a jury for their roles in the drug transaction and subsequent shooting. According to several witnesses, Kohler had come to the drug transaction wearing a hooded sweatshirt and all black clothes, similar to the description given to police of the clothing worn by the man who fell in the yard and ran off between buildings after Worcester was shot. In the vicinity of the shooting, police found two shell casings and a trash bag containing four plastic bags filled with marijuana.

Two of the men present for the drug transaction were called as State's witnesses and connected [Yates] to the shooting. Christopher Jagd initially testified that he did not see [Yates] fire the gun, but later acknowledged that he remembered seeing [Yates] pointing the gun, moving it to the side, and firing. Jagd further testified that [Yates] had told him either that he, [Yates], "got him," referring to Kohler, or that he did not know if he had "got him." William Griffin similarly testified that [Yates] told Griffin he fired the gun but did not know "if he hit anybody or nothing." In addition, Detective Sekou Hinton testified, over defense objection, that Jagd told him that [Yates] had confessed to the shooting. Specifically, Jagd told the detective that [Yates] had said to Jagd, "I popped that nigga." Jagd, however, denied at trial that [Yates] had made that statement to him.

The jury returned a verdict on October 9, 2009. The jury acquitted [Yates] of first-degree murder and found him guilty of second-degree felony murder, use of a handgun during the commission of a felony, use of a handgun during the commission of a violent crime, drug trafficking with a firearm, distribution of marijuana, conspiracy to distribute marijuana, and first-degree assault . . . .

[Yates] noted an appeal to the Court of Special Appeals.

* * *

The State conceded before the Court of Special Appeals (and repeats that concession here) that Detective Hinton's testimony, repeating what Jagd told him that [Yates] said to Jagd, was inadmissible hearsay. The State

argued, though, that [Yates] was not entitled to reversal of his convictions on that ground because the error was "harmless error." The Court of Special Appeals agreed that the trial court erred, yet held, by application of the test for "harmless error" set forth in *Dorsey v. State*, 276 Md. 638, 350 A.2d 665 (1976), that the error did not entitle [Yates] to reversal of his convictions.

Yates, 429 Md. at 116-20 (citation and footnotes omitted).

Affirming our judgment, the Court of Appeals stated:

> This Court has long approved the proposition that we will not find reversible error on appeal when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury *without objection* through the prior testimony of other witnesses . . . .
>
> We agree with our colleagues on the Court of Special Appeals that Detective Hinton's statement is cumulative of other evidence to which [Yates] did not offer an objection[.] Two other witnesses, Jagd and Griffin, testified that [Yates] admitted to them that he fired his gun.
>
> * * *
>
> [Yates] argues that these additional statements about [Yates's] firing a gun are not cumulative because they are not of the same quality as the statement relayed by Detective Hinton. [Yates] cites *State v. Simms*, 420 Md. 705, 739-40, 25 A.3d 144 (2011), for the proposition that erroneous evidence is not cumulative if it is of a "different quality" than other admitted evidence. As [Yates] sees it, his supposed admission to Jagd that he "popped that nigga" was "far more powerful" than the other statements admitted at trial because the statement was callous and made it seem as if [Yates] had "coolly bragged" about the crime. [Yates] argues that it is not merely the content but also the manner in which that content is delivered that matters to whether the evidence is cumulative. [Yates] noted in oral argument before this Court that the statement came from the testimony of Detective Hinton, a police officer "who is more likely to be credited by the jury" than the individuals involved in the drug deal with [Yates]. [Yates] maintains that the detective's hearsay statement bolsters the testimony of both Griffin and Jagd, giving added credence to their version of events. A boastful, unambiguous statement that [Yates] "popped" someone, [Yates] contends, would have more of an impact on the jury that [Yates's] statements that he was unsure if he hit anyone.

> We disagree. . . . The[] statements, although using different words, reach the same conclusion: that [Yates] fired a gun shortly after chasing Kohler out of the house.
>
> [Yates] places too great an emphasis on the fact that the challenged hearsay statement came through Detective Hinton. It is conceivable that the jury found Detective Hinton more credible than Jagd and concluded that Detective Hinton correctly recalled what Jagd had said. But in order to convict [Yates], the jury would have had to believe not only that Detective Hinton was correct in remembering Jagd's statement to him, but that Jagd himself was credible in relating to the detective what [Yates] had told him. For the jury to believe that the statement was credible it would need to believe both Detective Hinton *and* Jagd. Ultimately, though, the jury would had to have focused on the credibility of Jagd and Griffin in connection with their statements implicating [Yates]. There were three such statements: two from Jagd (one relayed through Detective Hinton) and one from Griffin. Jagd testified that [Yates] ran out of the house with a gun and fired in the direction of Kohler. Both Jagd and Griffin testified that [Yates] admitted that he fired his gun and thought he hit something or was unsure if he hit something. [T]his testimony establishes the essential contents of the hearsay from Jagd that Detective Hinton repeated to the jury.
>
> We agree with the Court of Special Appeals that the admission of the hearsay evidence did not ultimately affect the jury's verdict given the cumulative nature of the similar statements offered at trial. We therefore hold that the erroneous admission of the hearsay statement from Detective Hinton does not entitle [Yates] to a new trial.[4]

Yates, 429 Md. at 120-24 (internal citations, quotations, and footnote omitted) (emphasis in original).

We reach a similar conclusion here. The detectives' testimony is cumulative of other evidence to which Brooks did not offer an objection. Like Yates, Brooks places too great an emphasis on the fact that the challenged hearsay came through the detectives. In

[4] The Court further concluded that, because it found "that Detective Hinton's statement is cumulative of other evidence to which [Yates] did not offer an objection," *Yates*, 429 Md. at 121, the Court "therefore ha[d] no need to address [Yates's] claim that [we] misapplied the *Dorsey* standard of harmless error." *Id.* at 121 n.3.

order to convict Brooks, the jury would have had to believe not only that the detectives were correct in remembering Patrick's statements to them, but that Patrick herself was credible in relating to the detectives what Brooks had told her. For the jury to believe that the statements were credible, they would need to believe the detectives *and* Patrick. Ultimately, though, the jury would had to have focused on the credibility of Patrick in connection with her statements implicating Brooks, and hence, the admission of the hearsay did not ultimately affect the jury's verdict.

III.

During defense counsel's cross-examination of Detective Ross, the following colloquy occurred:

> MR. OPPENHEIM: Okay. Now, in your investigation of the case, you developed a motive into the case, correct?
>
> [DET. ROSS:] Yes.
>
> MR. OPPENHEIM: And what you stated when the State was asking you questions, you said that there was an incident when several individuals are hanging out and drinking in Ms. Cassie Bradford's apartment; is that correct?
>
> [DET. ROSS:] No.
>
> MR. OPPENHEIM: Well, you said that her butt was grabbed during an incident when people were hanging out and drinking?
>
> [DET. ROSS:] That's correct. I had learned that they were out on the front porch outside of the residence and that that's where the drinking and socializing was going on.
>
> MR. OPPENHEIM: And that's where she was touched?
>
> [DET. ROSS:] Yes.

MR. OPPENHEIM: Okay. And you met with Cassie Bradford in your investigation, correct?

[DET. ROSS:] Yes.

MR. OPPENHEIM: Ms. Bradford lives in the building, obviously, correct?

[DET. ROSS:] Yes.

MR. OPPENHEIM: She's in Apartment 3F, right?

[DET. ROSS:] Correct.

MR. OPPENHEIM: She had been there about a couple weeks to a month prior to the incident. Is that what you found out?

[PROSECUTOR]: Objection, Your Honor.

THE COURT: Sustained.

MR. OPPENHEIM: Did you find out about how long she had lived in the building?

[PROSECUTOR]: Objection, Your Honor.

THE COURT: Approach.

(Counsel approached the bench and the following ensued:)

THE COURT: Basis for your objection?

[PROSECUTOR]: Well, at this point, it's hearsay. Ms. Bradford hasn't testified.

THE COURT: Agreed. So what –

MR. OPPENHEIM: Well, I mean, that's what the State's witnesses did with everyone else.

THE COURT: I don't understand what –

MR. OPPENHEIM: I think that there was plenty of other testimony from the detective about other people that gave statements. Other witnesses during the trial did the same thing. I'm not going for the truth of the matter asserted here. I mean, this is going to specific impeachment as to the motive because the statement she gave him –

THE COURT: Who is "she"?

MR. OPPENHEIM: – Cassie Bradford – contradicts – I mean, she (unintelligible) denies (unintelligible) is completely void of drinking or hanging out on the front porch.

THE COURT: Okay. Then she testified to that, but at this point, (unintelligible) impeach because she hasn't testified.

MR. OPPENHEIM: Well, I'm impeaching what – he just said his motive for the case and that it's based on his investigation. I mean, I could go to his notes. I mean, they're in his notes.

THE COURT: Well, I think you're missing something. There's an objection made about hearsay. You're asking things about Cassie Bradford that she hasn't testified to.

* * *

[] So, since there isn't – I can only rule when there's an objection. If there wasn't an objection for other things, I don't rule, but there's now an objection and so the objection is sustained unless there's a basis for it.

MR. OPPENHEIM: We're saying there's an exception here because we're impeaching –

THE COURT: What is the exception?

MR. OPPENHEIM: – we're impeaching him. That's why I started off with –

THE COURT: How do you impeach him? I don't understand.

MR. OPPENHEIM: Well, I just asked him what he developed as the motive for the case. Yet, his own notes reflect the complete opposite of what he has developed for the motive for the case.

> THE COURT: Okay. That's not impeachment. So, the objection is sustained.

Brooks contends that the circuit court "erred" in sustaining the prosecutor's objections. He claims that "the line of questioning [defense] counsel sought to pursue was proper impeachment," because "[c]ounsel was attempting to show that what the State was presenting to the jury as the ostensible motive for the shooting was the product of bias or prejudice on the part of Det. Ross[.]" *See* Md. Rule 5-616(a).[5] He further claims that the "error was not harmless," because "the impact of [defense counsel's subsequent cross-examination] would have been much stronger had [defense] counsel been allowed to ask Det. Ross directly what information he had obtained in his investigation from Cassie Bradford about the supposed motive he was presenting to the jury."

The State counters that we "should decline to consider" Brooks's contention, because "the argument Brooks raises on appeal is not the same argument he raised at trial," and he "did not proffer the substance of the testimony he sought to elicit from Detective Ross." Alternatively, the State contends that the "court properly exercised its discretion,"

[5] Md. Rule 5-616(a) states, in pertinent part:

> **Impeachment by inquiry of the witness.** The credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at:
>
> * * *
>
> (4) Proving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely[.]

because "Ms. Bradford's statements [did not fall] within an exception to the hearsay rule of exclusion."

We conclude that Brooks's contention is not preserved for our review. Md. Rule 5-103(a) states that "[e]rror may not be predicated upon a ruling that . . . excludes evidence unless" the "substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered." Here, when the court asked defense counsel for the substance of the evidence with which he intended to impeach Detective Ross, defense counsel stated only that the evidence was in the detective's notes. Defense counsel did not specify the particular responses that Detective Ross elicited from Bradford during his investigation, and the substance of those responses were not apparent from the context within which they were offered. Hence, error may not be predicated upon the circuit court's ruling.

Even if Brooks had preserved his contention for our review, he would not prevail. The Court of Appeals has stated that "[t]he scope of cross-examination lies within the sound discretion of the trial court." *Pantazes v. State*, 376 Md. 661, 681 (2003) (citations omitted). We have stated that "a party may attempt to impeach a witness by challenging his or her credibility." *Bell v. State*, 114 Md. App. 480, 496 (1997) (citations omitted). But, "[s]tatements that are otherwise inadmissible are not salvaged by invoking the mantra of 'impeachment.'" *Id.* A party is not "entitled to impeach [a witness] with the hearsay statement of a material eyewitness who was not present at trial, whose unavailability was not established, and whose oral statement was neither tested in another proceeding, proffered as a sworn statement, nor adopted by the declarant." *Id.* at 497.

Here, Bradford was not present at trial, and her unavailability was not established. Moreover, her statement to Detective Ross was not tested in another proceeding, proffered as a sworn statement, or adopted by the detective. The statement was not salvaged by defense counsel's invocation of the mantra of "impeachment," and hence, the circuit court did not abuse its discretion in precluding defense counsel from using the statement to impeach the detective.

Even if the circuit court abused its discretion, we would conclude that the abuse was harmless. Patrick testified that Brooks admitted to twice shooting Rogers in his face and leaving a cell phone at Rogers's residence. Dr. Locke testified that the cause of Rogers's death was two gunshots, one of which was to his face. The State presented evidence that Rogers's assailant forced his way into Rogers's residence, and that Rogers's neighbors heard someone force his way into Rogers's residence, followed by an argument and two gunshots. Finally, the State presented evidence that Brooks's mother's cell phone, which had been taken by Brooks and used by him for several days prior to Rogers's death, was later found near Rogers's residence. In light of this evidence, we can declare a belief, beyond a reasonable doubt, that the court's preclusion of defense counsel from using Bradford's statement to impeach Detective Ross in no way influenced the verdict. *See Dorsey v. State*, 276 Md. 638, 659 (1976) ("unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that [an] error in no way influenced the verdict, such error cannot be deemed harmless") (quotations omitted)).

IV.

Following the close of the evidence, the following colloquy occurred:

[THE COURT:] We have the jury instructions from yesterday. I think there are some minor changes.

* * *

All right. I'll get you a copy of the instructions. I'll also get you a copy of – I'll probably, although they may not ask for it, but I'll have ready a copy of the elements. Most jurors seem to ask for it nowadays. So, unless there's an objection, I'll give them a copy of the elements, if they ask for it. I'm not going to give it to them initially.

MR. OPPENHEIM: Would you also give them reasonable doubt?

THE COURT: No. I'm going to read them reasonable doubt, but I just give a copy of the elements themselves. I don't highlight any of the other instructions that I give and I don't consider the elements to be instructions. They're the elements.

* * *

MR. OPPENHEIM: [I]n a completely factually debatable case – it's not even a legal case – the legal side is totally the State's argument and their burden, and we're not even going to discuss in our closing argument. So, to hand those instructions to the jury without at least inserting in each one that reasonable doubt is required, or just the reasonable doubt instruction is a nod towards the State.

THE COURT: No, it's not.

* * *

MR. WALSH-LITTLE: We would like the [c]ourt to give them all or none and your colleagues have done it.

THE COURT: Oh, there's the standard I use.

MR. WALSH-LITTLE: I know, but I'm just saying it does stress the elements and what they're proving, and I know that's not persuasive to the

> [c]ourt, but I think it does and I think it stress, you know, the elements which the State wants to focus on and not as procedure.
>
> * * *
>
> THE COURT: So, nice arguments, but not likely to happen.

The circuit court subsequently instructed the jury as to, *inter alia*, the presumption of innocence and reasonable doubt. The court also instructed the jury as to the elements of first degree murder and second degree murder.

During deliberations, the jury sent to the circuit court a note in which they stated: "Legal [d]efinition of murder 1 and . . . 2 [a]gain please." The following colloquy occurred:

> THE COURT: All right. And they're asking for a definition. I indicated to you before that if they did do that, I would give them – you have a copy over there, I believe –
>
> MR. WALSH-LITTLE: We do, Your Honor, yes.
>
> THE COURT: – of first degree and second degree?
>
> MR. OPPENHEIM: Yes.
>
> THE COURT: And you're objecting to it for the record, correct?
>
> MR. WALSH-LITTLE: Yes, Your Honor, simply because in order for the jurors to assess any of the substance of these elements of these crimes, the procedural elements, the standard, the presumption, the decision not to talk about, for example, Mr. Brooks'[s] assertion of his 5th [A]mendment right are all part and parcel of assessing that.
>
> THE COURT: Okay.
>
> MR. WALSH-LITTLE: We don't object to sending all of it back. That would give them the correct holistic assessment of the instructions.
>
> * * *

> THE COURT: Thanks. All right. And the note from the jurors indicated, it says, "[l]egal definition of murder one and two again, please." They do not say, "[p]lease give us all of the instructions." They do not say anything else. I'm going to respond to their particular request. So I'm going to give the definition of first-degree murder, which I did read to them, and second-degree murder, which I did read to them, but you're objecting to not sending all of the elements back; is that correct?
>
> MR. WALSH-LITTLE: Yes. All or none. Your Honor could read it to them.
>
> MR. OPPENHEIM: Or reasonable doubt.
>
> * * *
>
> THE COURT: All right. Over the defense's objection, I'm going to send a copy of this back.

Brooks contends that the "court erred in refusing Brooks's request that the jury be given a written copy of the instruction on reasonable doubt." He claims that, "in giving a written supplementary instruction limited to the elements of the crime of murder, without reminding the jury of the importance of all the other instructions generally, or of the importance of the burden of proof and reasonable doubt standards in particular, the . . . court placed undue emphasis on one aspect of the instructions and thereby minimized the jury's attention to other aspects essential to the defendant's due process right to a fair trial." (Citations omitted.) In response, the State counters that "the court's election to send only the requested instructions was a proper exercise of its discretion."

We agree with the State. "We review a trial court's decision to give a particular jury instruction under an abuse of discretion standard." *Appraicio v. State*, 431 Md. 42, 51 (2013) (citations omitted). "[W]hen [a] question [from a deliberating jury] involves an issue central to the case," a "court must respond . . . in a way that clarifies the confusion

evidenced by the query," *State v. Baby*, 404 Md. 220, 263 (2008) (citation omitted), and "as directly as possible[.]" *Appraicio*, 431 Md. at 53. Here, the jury's request involved an issue central to the case, specifically whether Brooks's actions constituted first degree murder or second degree murder, and the only confusion evidenced by the query was the difference between the offenses. The circuit court's response clarified the confusion and was direct as possible to the jury's request. Hence, the court did not abuse its discretion in declining to give the jury a written copy of the instruction on reasonable doubt.

V.

During defense counsel's closing argument, the following occurred:

> [MR. OPPENHEIM:] Now, when Ms. Patrick testified, the entire ship sank. She is the woman that the detective based their [sic] case on. Let's just do a quick reasonable doubt check because there are not "could haves," "maybes," or "likelies." If that's your feeling, then you have to acquit. You have to find not guilty. The standard here is if you find reasonable doubt, then you can't convict. So, if you find that you were laughing at Ms. Patrick's testimony, then you have reasonable doubt.
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained. Ladies and gentlemen, it's for you to determine what is reasonable doubt in this case.
>
> MR. OPPENHEIM: If you find that you question what her name is –
>
> [PROSECUTOR]: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> MR. OPPENHEIM: – then you may have reasonable doubt.
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Overruled.

MR. OPPENHEIM: If you find that Ms. Patrick is spiteful towards Dominick and is motivated to bring this false accusation against him, then you may have reasonable doubt.

[PROSECUTOR]: Objection, Your Honor.

THE COURT: Overruled. It's argument.

MR. OPPENHEIM: If you find that her story simply does not add up, then you have reasonable doubt.

[PROSECUTOR]: Objection.

THE COURT: Sustained. Again, ladies and gentlemen, it is for you to determine the standard of beyond a reasonable doubt. It is not for counsel to tell you what it is.

MR. OPPENHEIM: I will suggest another possible reasonable doubt, and that is, if you are uncomfortable about the complete lack of other evidence to corroborate this statement – you know, it's a ridiculous statement, as it is, but maybe if there was some other evidence with it, it might make the statement a little bit believable – then that, again, can be something that you can find.

Now, Ms. Patrick is walking, talking reasonable doubt. She causes hesitation in any consideration that you're supposed to make. You really would have to fully accept her story to do what they want.

Brooks contends that the circuit court "erred" in sustaining the prosecutor's objections. He claims that the court "unduly restricted [defense] counsel's closing argument," because "[t]he State's case rested heavily, if not exclusively, on the credibility of . . . Patrick." The State counters that "the court properly controlled the scope of [defense] counsel's argument," and "because [defense] counsel nevertheless continued his argument on the subject of reasonable doubt[,] Brooks was not prejudiced by the court's rulings."

Donati, *supra*, is instructive. Donati was charged with "one count of distribution of marijuana, two counts of obstruction of justice, two counts of making a false statement to

a police officer, [and] two counts of intimidating a witness, *i.e.*, Jason Allen and Alex Zeppos[.]" 215 Md. App. at 694. "At trial, . . . Allen acknowledged that in 2001 he pled guilty to impersonating a police officer." *Id.* at 733 n.15.

During defense counsel's closing argument, the following colloquy occurred:

> [DEFENSE COUNSEL]: The only marijuana that we've actually seen or heard testimony of that anyone had was on Allen's property. Inside, outside. And now let's talk about, let's talk a little about Mr. Allen's character. Who is the only person that you heard from this whole week who was impeached by a prior conviction? That's one of the instructions. The only witness, and you've got an instruction specifically on that, 322, impeachment by prior conviction.
>
> You have heard evidence that Jason Allen has been convicted of a crime. And what was that crime? Does anyone remember? Did you write that down? Impersonating a police officer. Pretending to be somebody you're not. Taking on a false identity. What kind of person is convicted of that crime? He has got to be a dishonest person, deceitful, deceptive –
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.
>
> * * *

Counsel then continued his closing argument, making the following remarks with respect to Mr. Allen:

> This man was convicted, convicted of impersonating a police officer. You can consider that when it comes to the truthfulness of his testimony, and that is exactly what the pattern jury instruction says. You may consider this evidence in deciding whether the witness is telling the truth. Right there. You're going to get a copy of that.
>
> So, was he telling the truth when those police officers banged on his door about the marijuana? Was he telling the

> truth about smoking marijuana inside his house? Question mark. That's up to you to decide.

Id. at 733-34 (footnote omitted).

On appeal, Donati contended that the "court abused its discretion" by "quash[ing defense] counsel's legitimate efforts to attack the credibility of . . . Allen[.]" *Id.* at 730 (quotations omitted). "Based on the above, we disagree[d] with" Donati, and "perceive[d] no abuse of discretion by the trial court in controlling the scope of [defense] counsel's closing argument." *Id.* at 734.

We reach a similar conclusion here. During closing argument, defense counsel extensively attacked Patrick's credibility. Of the five objections made by the prosecutor during this portion of closing argument, three were overruled by the trial court. Like in *Donati*, moreover, defense counsel was allowed to continue his attack upon Patrick's credibility after the court sustained two of the prosecutor's objections. Based on these circumstances, we perceive no abuse of discretion by the circuit court in controlling the scope of defense counsel's closing argument.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.