

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1776

September Term, 2014

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AARON GREEN

v.

STATE OF MARYLAND

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Eyler, Deborah S.,  
Hotten,  
Raker, Irma S.  
(Retired, Specially Assigned),

JJ.

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Opinion by Raker, J.

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Filed: July 20, 2015

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In this criminal case, Aaron Green, appellant, presents one evidentiary question for our review: Did the trial court restrict improperly the cross-examination of a material witness in the case? We find no abuse of discretion or error and shall affirm.

I.

Appellant was convicted by a jury in the Circuit Court for Washington County of second-degree assault of a correctional officer, Correctional Officer Cory Berger. The court imposed a term of incarceration of four years, consecutive to any sentence appellant was currently serving.

The following facts were elicited at trial: Cory Berger worked as a correctional officer at Maryland Correctional Training Center. On October 2, 2013, Officer Berger was walking inmates to their “segregation walks,”<sup>1</sup> including appellant, whose hands were cuffed behind his back. Officer Berger testified that “as soon as [appellant] reached the walk cage, he slipped the cuffs, turned around, hit me in the face” with his right hand. Other correctional officers testified at trial, essentially corroborating Berger’s testimony. Appellant testified at trial, asserting self-defense. He denied ever removing his cuffs, stating instead that Officer Berger removed his handcuffs, faced him and “mushed” him in the face. He explained that “mush” means that Berger pressed an open hand up to his face and pushed him back.

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<sup>1</sup>Correctional Officer Delbert Nicewarner testified that a “segregation walk” is a form of “out of cell activity. They are on lockup so they get an hour a day and they get to walk in a REC cage.” Officer Berger was escorting inmates from their cells to the REC cages, which were about twenty-five feet away in the same tier of the prison, at the time that he was assaulted.

The cross-examination issue before this court relates to appellant’s cross-examination of Officer Berger and two areas of inquiry: first, an allegation against Berger of a prior assault on another inmate; and second, whether, after the incident and during the official investigation thereof, the investigating officer advised Officer Berger of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966).<sup>2</sup> Defense counsel asked Officer Berger: “Isn’t it true . . . that . . . you have had a prior allegation of an assault —” The State objected, and at a bench conference, defense counsel proffered the relevancy of his inquiry—that the prior allegation reflected upon Berger’s character. The following colloquy took place:

“[DEFENSE COUNSEL]: Your Honor, I would be offering this as u’m the character of the victim in the crime here which is I feel appropriate and —

THE COURT: Well I don’t have any foundation so I don’t know where you’re headed.

[DEFENSE COUNSEL]: Understood your Honor. Understood your Honor. Understood.

THE COURT: I mean what, what are you trying to get in? That he had another allegation of assault?

[DEFENSE COUNSEL]: Yes your Honor.

THE COURT: On an inmate?

[DEFENSE COUNSEL]: Yes your Honor.

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<sup>2</sup>After the incident, appellant filed retaliatory charges against Officer Berger. The Division of Corrections assigned an officer to investigate appellant’s claims. As part of the investigation, the investigating officer Mirandized Officer Berger before speaking with him.

THE COURT: Some other time?

[DEFENSE COUNSEL]: Yes your Honor.

THE COURT: I don't think that's relevant to this proceeding.

[DEFENSE COUNSEL]: Understood your Honor. I would just again argue that.

THE COURT: Okay you have your objection.

[DEFENSE COUNSEL]: Thank you your Honor”

The trial court sustained the State's objection.

As to the *Miranda* rights advisement, defense counsel asked Officer Berger to explain to the jury the essence of *Miranda* rights. The State objected, and at the bench, the prosecutor told the court that Officer Berger had been Mirandized by the investigating officer because appellant had filed charges against Berger. Defense counsel explained that his goal was to ask Berger whether he was Mirandized in connection with the instant case. The trial court sustained the State's objection.

As indicated, the jury convicted appellant, the court imposed sentence, and this timely appeal followed.

## II.

Before this Court, appellant argues that the trial court abused its discretion in restricting his cross-examination of Officer Berger because appellant's questions related to the credibility of Officer Berger, the alleged victim in the case. Appellant maintains that the

proposed questions would have elicited testimony regarding whether Officer Berger had used undue aggressiveness in a past confrontation with another inmate and that such testimony would have been probative of whether Officer Berger was telling the truth. He argues here that the evidence “would be probative of whether C.O. Berger was telling the truth when he claimed that the appellant hit him first, or whether, as the appellant maintained, C.O. Berger fabricated the incident to avoid professional retribution, or his own criminal culpability, for using excessive force in dealing with the appellant.”

The State argues first that this issue is not preserved for appellate review because appellant is offering on appeal a different theory for evidentiary admissibility than he proffered before the trial court. Before the trial court, he argued only character evidence; yet on appeal, he now argues credibility. As to the *Miranda* issue, the State argues that appellant offered below no theory of relevancy of the advisement of Officer Berger’s *Miranda* rights. Alternatively, if appellant’s contentions are preserved, the State argues that the trial court exercised its discretion properly in restricting the cross-examination and excluding the evidence related to any so-called “prior bad acts” or the advisement of *Miranda* rights.

### III.

In order to preserve for appellate review the propriety of a ruling that excludes evidence, a party must proffer to the trial court not only the substance of the evidence, but also the relevance of the testimony. *Conyers v. State*, 354 Md. 132, 164 (1999). A party

disputing the propriety of a ruling that excludes evidence is limited on appeal to those theories of admissibility that it proffered in the trial court. *Robinson v. State*, 66 Md. App. 246, 253-55 (1986). A party cannot present a new theory of admissibility on appeal, to which the trial court never had an opportunity to respond and, possibly, to avoid or correct any error. *Id.*

In addressing properly preserved objections, we recognize that a trial court has discretion under Md. Rule 5-611 to control the mode and order of interrogating witnesses and the scope of cross-examination. *Myer v. State*, 403 Md. 463, 475-76 (2008). We will reverse only where the court has abused its discretion. *Id.*

#### IV.

The *Miranda* issue is easy, and we shall address it first. The State is right in both its arguments. The issue is not preserved for our review because appellant proffered below no legal basis for admissibility, particularly relevancy. *See Conyers*, 354 Md. at 164. He simply stated that he wanted to show that Officer Berger was Mirandized in connection with this case. That's it! He proffered no showing or statement as to why the *Miranda* warnings were relevant to any issue in the case. On the merits, even if the issue was preserved for appellate review, it was irrelevant. *See* Rule 5-401; 5-402. Obviously, appellant wanted to infer to the jury that the investigating correctional officer thought Berger was guilty, and thus, so should the jury. *See United States v. Valencia*, 773 F.2d 1037, 1042 (9th Cir. 1985) (stating that

where defendant made only exculpatory or innocuous statements, *Miranda* related testimony was far more prejudicial than probative and created an inference that the defendant was guilty). The giving of *Miranda* warnings, in this context, was irrelevant. *Dupree v. State*, 352 Md. 314, 330-32 (1998).

We turn to appellant’s second issue—the trial court’s limitation of defense counsel’s cross-examination into an alleged prior assault by Officer Berger on another inmate. The first issue we must address is preservation. In the trial court, defense counsel argued for the admissibility of an alleged prior assault complaint as evidence of Officer Berger’s character. He never articulated to which character traits he believed the evidence related. Truth and veracity? Peace and good order? Notwithstanding the absence of any articulation as to which character traits counsel believed were at issue, the trial court appeared to limit the cross-examination based on a lack of any foundation. When the judge told counsel he lacked a foundation to proceed and that the court did not know where counsel was heading, counsel responded: “Understood . . . . Understood . . . . Understood.” Defense counsel never proffered a foundation for his questions, nor did he offer an explanation to the court as to where he was “head[ing].”

We hold that appellant did not preserve this issue for our review. Reflection upon Officer Berger’s character was the sole basis proffered below for admissibility. On appeal, the theory has changed. The argument now, never presented below, is that Officer Berger had a history of aggressiveness or assaultive behavior with inmates, “a fact which would

directly impact whether C.O. Berger might have [had] a motive to lie about the appellant’s involvement in provoking or assaulting him to minimize his own culpability.” This latter argument, or theory, was never presented below, and hence, it is not preserved for our review. *See Robinson*, 66 Md. App. at 254-55.

With regards to Officer Berger’s alleged previous assault, appellant’s arguments at trial and then on appeal focus on two distinct theories of admissibility: character evidence at the trial level and prior bad acts on appeal before us. At trial, appellant seemed to argue that the alleged prior assault was admissible character evidence. Under Md. Rule 5-404, character evidence is generally inadmissible to prove that a person acted in accordance with the character or trait on a particular occasion, but an exception states as follows:

“(B) Character of Victim. Subject to the limitations in Rule 5-412, an accused may offer evidence of an alleged crime victim’s pertinent trait of character. If the evidence is admitted, the prosecutor may offer evidence to rebut it.”

Appellant’s theory of admissibility under Rule 5-404 could have been that the alleged prior accusation of assault against Officer Berger showed Officer Berger’s character for violence, which would have supported appellant’s contention that he was defending himself.

On appeal, appellant turns his attention to a different theory. Appellant argues before this Court that Officer Berger’s alleged prior assault is a prior bad act pursuant to Md. Rule 5-608(b), which provides as follows:

“(b) **Impeachment by examination regarding witness's own prior conduct not resulting in convictions.** The court may permit any witness to be examined regarding the witness's own



prior conduct that did not result in a conviction but that the court finds *probative of a character trait of untruthfulness*. Upon objection, however, *the court may permit the inquiry only if the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred*. The conduct may not be proved by extrinsic evidence.” (Emphasis added).

Even if appellant preserved for review his theories of admissibility, he did not proffer any evidence to substantiate either theory. Appellant never argued to the trial court that Officer Berger’s prior assaultive incident, actually a prior bad act, had any bearing on appellant’s self-defense claim, or that it had some bearing on appellant’s state of mind at the time of the incident. Appellant never proffered to the court that appellant knew of the prior incident, or even any reasonable factual basis for asserting that the conduct of the witness occurred. Appellant never proffered any basis for the alleged incident other than an alleged complaint. He never proffered evidence of a conviction or of an administrative disciplinary finding against Officer Berger. Even if the issue was preserved for our review, we would find that the trial court did not abuse its discretion in sustaining the State’s objection, limiting the defense’s cross-examination and excluding the evidence.

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