UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1567

September Term, 2015

JORDAN NATHANIEL JACKSON

v.

STATE OF MARYLAND

Krauser, C.J.,
Woodward,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: September 2, 2016

A jury in the Circuit Court for Baltimore County convicted Jordan Jackson ("Jackson") of murder in the first degree, attempted murder in the first degree, illegal possession of a handgun, and two counts of use of a handgun in a crime of violence. Jackson was sentenced to a term of life imprisonment, with all but 65 years suspended. In this appeal, Jackson presents three questions for our review:

1. Did the trial court err in permitting appellant to be impeached with a prior conviction for possession with intent to distribute?

2. Did the trial court err in permitting the State to elicit evidence that appellant did not make a statement to police after he was arrested?

3. Did the trial court err in permitting the State to call a rebuttal witness to testify concerning the administration of *Miranda* warnings and appellant's post-*Miranda* silence?

Finding no error, we affirm.

BACKGROUND

In the evening hours of September 14, 2014, Ira Sydnor was at her home on Upper Mills Circle in Baltimore County when she heard "three loud pops." She looked out of her window and saw a "tall, thin build, black male" walking "at a fast pace" toward a red van. When that man got in the driver's seat, she noticed a second black male in the passenger seat. The van "sped off at an increased rate." Ms. Sydnor then called 911.

Uzma Patel was driving her vehicle when she heard "what appeared to be gunshots firing." After turning her vehicle onto Upper Mills Circle, Ms. Patel saw an "African-American" man in a gray shirt with "a gun in his hand." That man emerged from the driver's side of a white car. She also observed that there was a red minivan parked slightly

in front of the white car. Ms. Patel drove past the cars, looked in her rearview mirror, and observed the red minivan driving behind her.

Around the same time, Sergeant Farfoglia of the Baltimore County Police Department was refueling his vehicle in the area of Upper Mills Circle when he heard multiple gunshots. Sergeant Farfoglia got into his vehicle and drove in the direction of the gunshots. Shortly thereafter, Sergeant Farfoglia witnessed an individual, later identified as Vincent Timmons, crossing the road at the intersection of Johnnycake Road and Upper Mills Circle. The officer exited his car, approached Mr. Timmons, and observed blood dripping down Mr. Timmons's leg.

Sergeant Farfoglia and another officer helped Mr. Timmons to the curb, at which time Sergeant Farfoglia directed his attention to a second victim, later identified as James Cornish, who was in a white vehicle parked on Upper Mills Circle. Around the same time, Detective Jeffrey Lauer arrived on the scene and saw Mr. Cornish in "a white Honda Accord…suffering from multiple gunshot wounds."

Another officer (Officer Jones), who was on patrol at the time, heard over his radio that shots had been fired and multiple units were needed in the area.[1] The officer reported to the scene, at which time a witness provided him with a description of "[t]he vehicle." The officer got back in his cruiser and began searching for a "red Ford van." Not long afterwards, Officer Jones located the van "sitting at a stop light indicating that it was going

[1]The first names of Sergeant Farfoglia and Officer Jones are not in the record.

to turn[.]" Once the van turned, Officer Jones activated his lights and siren, but the van sped away. After a brief pursuit involving multiple police units, the van came to a stop.

The driver of the van was Jackson and his passenger was Christopher Williams. Both were removed from the vehicle and arrested.[2] When he looked inside of the van, Officer Jones observed two handguns, which were later matched to ballistic evidence found at the scene of the shooting. A pair of black plastic gloves were found on Jackson's person, and gunshot residue was found on his gloves. Mr. Cornish's blood was recovered from Mr. Williams clothing, and gunshot residue was recovered from Mr. Williams's hands. The other victim, Mr. Timmons, gave a recorded statement to police, identifying Jackson as a participant in the shooting. Mr. Cornish, who was shot in the head and neck, died as a result of the shooting.

Prior to Jackson taking the stand, defense counsel said that Jackson would take the position that he was not involved in the shooting. The State then indicated that it intended to impeach Jackson with a 2013 conviction for possession with intent to distribute a controlled dangerous substance (CDS). Defense counsel objected, and the court overruled the objection, and explained:

> [I]n this case I believe that the impeachment value of the possession with intent to distribute is…great and the Court of Appeals and the Court [of] Special Appeals have found that distributing CDS is relevant to credibility, and I believe it is. This is a…2013 conviction which is not remote from the incident in question, which was September of 2014. It's within two years. So the length of time is relatively short.

[2]Jackson was described at trial as a young, tall, thin, black male and he was wearing a black t-shirt, black sweatshirt, and jeans when he was arrested. Williams was described as the older of the two and wearing a grey t-shirt when he was arrested.

> Given the defense in this case…it is important that the credibility of [appellant] is…going to be a major issue in the case and therefore the conviction that relates to [appellant's] credibility is very relevant and significant to an issue that is being injected into the case by [appellant] himself, and I believe that the probative value of admitting the evidence outweighs the danger of unfair prejudice[.]

Jackson testified that, in the months leading up to the shooting, he acquired a red van and decided to make some money by "hacking."[3] On the day of the shooting, Jackson was driving the van when he encountered Mr. Williams on the street and asked him if he needed a ride and Mr. Williams said that he did. After picking up Mr. Williams, Jackson drove "downtown" and picked up two more persons, whom Jackson had never met. The two new customers indicated that they wanted to make a "quick stop" at someone's house and directed Jackson to Upper Mills Circle. After Jackson arrived at that location, the two new customers got out, but Mr. Williams did not. The two new customers returned "in an aggressive manner," and Jackson saw that one of them had a gun in his hand and blood on his person. The new customers then commanded: "Get us…out of here," and Jackson drove "around the corner[.]" The two new customers then told Jackson to stop, which he did, and they "got out and left." Jackson drove off and was subsequently arrested.

Jackson further testified that following his arrest, he was held in jail pending trial. During this time, Jackson had conversations with "multiple people" over the telephones at the Detention Center. In some of these conversations, which were recorded, Jackson said that he could not remember what happened or why he was in jail.

[3] Jackson described "hacking" as follows: "[Y]ou ride around and you find people that are looking for a ride, by they seeing you like this standing on the sidewalk, and indicating that you want a ride, that somebody pay you for."

On cross-examination, the State asked Jackson about his 2013 conviction for possession with intent to distribute a CDS. Defense counsel did not lodge an objection at this time. The State also questioned Jackson about his recollection of events, specifically whether he remembered talking to a detective on the night of his arrest. Jackson responded that he "didn't say nothing to him." Later, the State returned to the subject of Jackson's conversations with police, asking Jackson whether he chose not to tell the detective "anything about all of this that you have just told[.]" Jackson responded that he told the detective that he could not remember anything because he was "high from Xanax." At no time did defense counsel object to this line of questioning.

Shortly thereafter, the State again asked Jackson whether he chose not to tell the police his version of events "when [he] had the opportunity to tell the detectives who could be responsible for [the shooting]." At this point defense counsel objected on the grounds that the question was "asked and answered." The trial court sustained the objection and gave the following instruction:

> Ladies and gentlemen, the objection to the last question by the State is sustained, and I'll inform you that [appellant] has a right to remain silent. He has no obligation whatsoever to talk to the police or to tell them anything.

After the defense rested, the State informed the court that it intended to call Detective Eric Dunton as a rebuttal witness to testify to the statement made by Jackson at the time of his arrest, in which he [Jackson] said that he could not remember the events surrounding the shooting. The State also told the trial judge that it wished to show a video recording of the statement to the jury so that it could see Jackson's "behavior during the statement, his manner[.]" Defense counsel objected, arguing that such testimony was

"outside the scope of rebuttal." The court overruled the objection, stating that Jackson "telling the Detective during the interview that he doesn't remember what happened, that is rebuttal to his testimony on the stand when he gave a detailed explanation of what happened[.]" As for anything beyond Jackson's statement, the trial court stated that it was reserving its ruling:

> As far as any other, I don't know what else is going to be asked during [the interview]. So [I am] just going to have to take it question by question. I mean, if it really is truly outside the scope of your cross[-]examination, then I'll listen to an objection. We'll have to stop the tape. So I am not going to rule carte blanche that the entire [interview] is admissible but certainly his saying he doesn't remember what happened is…rebuttal to the testimony he gave from the stand yesterday.

Detective Dunton then testified that he recorded an interview with Jackson at police headquarters following his arrest and that Jackson signed a *Miranda* form and agreed to speak with the detective. The interview was then played for the jury in conjunction with Detective Dunton's testimony. Although the trial transcript does not reflect the exact substance of what was played for the jury, it appears that the State was having difficulty with the audio and that the jury watched while the video was silent. Defense counsel did not object at any time when the recording was played, nor did he object during Detective Dunton's testimony.

DISCUSSION

I.

Jackson first argues that the trial court erred in permitting the State to impeach him with his prior conviction for possession with intent to distribute. More specifically, Jackson contends that the trial court "abused [its] discretion in determining that the

probative value of the prior conviction militated in favor of admissibility." Jackson argues that the conviction was "vastly dissimilar to the present allegation," "did very little to elucidate upon [his] credibility," and "tarnished his standing before the jury[.]"

Before addressing Jackson's claim on the merits, we will first address the State's claim that this issue was waived. According to the State, although defense counsel made a timely motion *in limine* to exclude the evidence prior to Jackson's testimony, defense counsel failed to renew his objection at the time the evidence was presented, which he was required to do. Jackson concedes that his defense counsel did not raise a contemporaneous objection but argues that this Court should excuse defense counsel's oversight given that "there was a motion *in limine*…and immediate elicitation of the prior conviction by the State in the first question posed in cross-examination[.]" We agree with Jackson that the issue was adequately preserved.

"Ordinarily, improper admission of evidence will not be preserved for appellate review unless the party asserting error objected at the time the evidence was offered or as soon thereafter as the grounds for the objection became apparent." *Dyce v. State*, 85 Md. App. 193, 196 (1990); *See also* Md. Rule 4-323(a). Such a contemporaneous objection is required even when a trial court has previously ruled on a motion *in limine* to exclude the evidence at issue; however, both this Court and the Court of Appeals have held that such an objection is not required when the court's ruling and the subsequent admission of the evidence are within a reasonably close temporal proximity to one another. *See Watson v. State*, 311 Md. 370, 372 n.1 (1988); *Dyce*, 85 Md. App. at 198.

In *Dyce*, we faced an analogous situation to the one presented in the instant case. In that case, the State informed the trial court that it intended to introduce the defendant's prior conviction during his testimony, and defense counsel moved to exclude the evidence. *Dyce*, 85 Md. App. at 195. The court denied the motion and the defendant gave direct testimony. *Id.* During cross-examination, the State introduced the conviction, and defense counsel did not object. *Id.* at 196. On appeal, we held that defense counsel's failure to object was not fatal:

> [T]he unequivocal ruling on [defense counsel's] motion *in limine* and the prosecutor's inquiry as to [defendant's] prior criminal record, the first question posed on cross-examination, was separated only by [defendant's] direct examination. His testimony…was relatively brief (it is recorded on 14 pages of the trial transcript). Nothing elicited during that direct examination provided any information bearing upon the exercise of the court's discretion to admit evidence of the prior conviction. Given the temporal proximity between the ruling on the motion *in limine* and the prosecutor's initial inquiry on cross-examination we shall exercise our discretion…and consider the issue[.]

Id. at 198.

As in *Dyce*, the trial court in the instant case ruled on defense counsel's motion just prior to Jackson's direct testimony, and nothing was elicited during direct testimony that bore upon the court's ruling. Moreover, Jackson's direct testimony was the only evidence received by the court between the time of its ruling and its admission of the prior conviction. *Compare with Morton v. State*, 200 Md. App. 529, 541-42 (2011) (finding issue unpreserved where court's ruling on motion to exclude evidence and the introduction of said evidence were separated by opening statements and the testimony of two witnesses).

Accordingly, we conclude that the issue was preserved.[4] We now turn to the merits of Jackson's argument.

Under Maryland Rule 5-609(a), evidence of a witness's prior conviction may be admitted for the purpose of attacking the witness's credibility, "but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party."[5] *Id.* Jackson concedes that his conviction for possession with intent to distribute satisfies the first prong of Md. Rule 5-609[6]; therefore, the sole issue before this Court is whether the probative value of Jackson's conviction was outweighed by the danger of unfair prejudice. We review the trial court's decision on this matter for abuse of discretion. *See Dallas v. State*, 413 Md. 569, 585 (2010).

Generally, when a trial court determines that the probative value of evidence under Md. Rule 5-609 outweighs any unfair prejudice, our review of this determination is guided by "five non-exhaustive factors, namely: '(1) the impeachment value of the prior crime; (2) the point in time of the conviction and the defendant's subsequent history; (3) the

[4]The State argues that *Dyce* is distinguishable from the instant case because the trial court's ruling and appellant's impeachment were separated by "[n]early 50 pages of transcript" and several tangential issues. Nevertheless, we find the rationale of *Dyce* applicable, despite certain factual differences.

[5]The prior conviction must also have occurred no more than 15 years prior to the date of its admission. Md. Rule 5-609(b).

[6]*See State v. Giddens*, 335 Md. 205 (1994).

similarity between the past crime and the [current] charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility.'" *Cure v. State*, 421 Md. 300, 325 (2011) (internal citations omitted). Nevertheless, it bears repeating that "[w]hen the trial court exercises its discretion in these matters, we will give great deference to the court's opinion." *Jackson v. State*, 340 Md. 705, 719 (1995)(citations omitted).

In light of the above factors and the evidence in this case, we hold that the trial court did not abuse its discretion in admitting evidence of Jackson's prior conviction. First, the impeachment value insofar as it concerned Jackson's credibility was significant in part because "a narcotics trafficker lives a life of secrecy and dissembling in the course of that activity, being prepared to say whatever is required by the demands of the moment, whether the truth or a lie." *State v. Giddens*, 335 Md. 205, 217 (1994)(citation and quotation marks omitted) (holding that a prior conviction for cocaine distribution is admissible for impeachment purposes). Moreover, Jackson was convicted of the prior offense in March of 2013, a mere 18 months prior to the instant case. *See Cure*, 421 Md. at 329 ("It is well-settled that the more recent a conviction, the more probative value it has for purposes of impeachment."). There are no similarities between the two crimes – possession with intent to distribute and murder –which alleviates some of the danger of unfair prejudice faced by Jackson. *See Jackson*, 340 Md. at 716 (The risk of prejudice inherent in Md. Rule 5-609 is "particularly great where the crime for which the defendant is on trial is identical or similar to the crime of which he has previously been convicted."). Lastly, the importance of Jackson's testimony and his attendant credibility were evident, as Jackson was the only

witness to provide an alternative explanation for the very damaging evidence presented by the State.

II.

Jackson next argues that the trial court erred in permitting the State to improperly utilize Jackson's post-arrest silence against him. Jackson maintains that the State, on three separate occasions, impermissibly elicited information from Jackson regarding his decision not to tell police his version of events on the night he was arrested. Although Jackson acknowledges that his counsel only lodged an objection to the last question, he nevertheless contends that "[t]he error in permitting the State to elicit this evidence, and the attendant prejudice from the use of this evidence, is so grave that it should be addressed even in the absence of an objection at trial."

We hold that this issue has been waived. Jackson cites three instances of "error" on the part of the trial court, but admits that no objection was lodged following the first two instances. Accordingly, any error related to these instances was not preserved. *See* Md. Rule 4-323(a). Regarding the third instance, although defense counsel did object, he did so on the grounds that the question posed by the State was "asked and answered," and the trial court sustained that objection. At no time did defense counsel put forth the argument that Jackson now raises on appeal; thus, the error alleged by Jackson regarding this last instance was also unpreserved. *See State v. Jones*, 138 Md. App. 178, 218 (2001) ("[W]hen particular grounds for an objection are volunteered…'that party will be limited on appeal to a review of those grounds and will be deemed to have waived any ground not stated.'")(citations omitted).

Even if we were to address Jackson's claims on the merits, we would find no error. In this regard, it is important to remember that appellant, after waiving his *Miranda* rights, did not choose to remain silent. He gave the police a statement in which he said basically that he didn't remember what happened because he was high on Xanax. Thus, the cases appellant cites where the accused made no post-arrest statement are inapposite.

The first instance cited by Jackson, when the State asked whether Jackson remembered speaking to Detective Dunton, was not designed to elicit information about Jackson's post-arrest silence, but instead was designed to elicit information about what he did and did not remember saying on the night of the shooting. It was Jackson who testified on direct-examination that he remembered speaking to the detective.

Furthermore, Jackson later admitted that he did make a statement to the detective that night, namely a statement in which he said that he could not remember what happened. It was this statement that the State was referring to during the second instance cited by Jackson, when the State asked whether Jackson told Detective Dunton about the version of events he recounted at trial. The State was not commenting on Jackson's post-arrest silence, but was appropriately focusing on Jackson's post-arrest statement to the police, which was inconsistent with his trial testimony. In sum, the trial court's failure to intervene during either instance did not qualify as error, much less the sort of error "so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial." *Trimble v. State*, 300 Md. 387, 397 (1984) (discussing plain error review).

The final instance cited by Jackson, when the State again asked about Jackson's decision made on the night of the shootings not to tell police his version of events, was

properly preserved, but on completely different grounds from those put forth by Jackson in this appeal. And, in any event, the trial court sustained the objection and instructed the jury, *sua sponte*, that Jackson had the right to remain silent and was under no obligation to inform the police about anything. It can scarcely be said that the trial judge committed plain error when the judge sustained defense counsel's objection before Jackson could respond, and then, on his own initiative, told the jury that appellant had no obligation "to talk to the police or to tell them anything." *See* Md. Rule 5-103(a) ("Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling[.]").

III.

Jackson's final contention is that the trial court erred in allowing the State to call Detective Dunton as a rebuttal witness. Jackson maintains that Detective Dunton's testimony fell "well outside the proper scope of rebuttal testimony," as it did not "respond to or contradict anything offered by [Jackson] in his testimony-in-chief; it merely rehashed the points elicited by the State in cross-examination." Jackson also maintains that admitting this recorded interview constituted error because "Maryland law universally prohibits introduction of post-arrest, post-*Miranda* silence[.]"

Generally, the State is required to "put in the whole of [its] evidence upon every point or issue which [it] opens, before the defendant proceeds with the evidence on his part." *Wright v. State*, 349 Md. 334, 341 (1998) (citation and quotation marks omitted). One exception to this rule is that the State may offer rebuttal evidence if such evidence is competent and "explains, or is a direct reply to, or a contradiction of, 'material evidence

introduced by the accused[.]'" *Id.* at 342-43 (citations omitted). The decision to admit rebuttal evidence rests with the trial court and "will be reversed only if it is 'manifestly wrong and substantially injurious.'" *Rollins v. State*, 161 Md. App. 34, 89 (2005) (citations omitted).

In the present case, we hold that the trial court did not err in admitting Detective Dunton's rebuttal testimony. As the court explained when it issued its ruling, Jackson's statement to Detective Dunton – that he did not remember anything on the night of the shooting – certainly contradicted a new matter brought about by the defense during its case, namely that Jackson did remember, in great detail, his actions on the night of the shooting. It was Jackson, not the State, who chose to introduce his version of events during direct examination. Accordingly, the trial court was within its discretion in allowing the State to introduce Jackson's statement in rebuttal. *See McClain v. State*, 425 Md. 238, 250 (2012) ("When determining whether inconsistency exists between testimony and prior statements . . .'the courts should lean toward receiving such statements to aid in evaluating the testimony.'") (citations omitted).

As to Jackson's claim that the evidence was inadmissible because it concerned Jackson's post-arrest silence, we find this argument unavailing. The trial court made clear that it was Jackson's statement (that he could not recall) that was being admitted for rebuttal purposes. The trial court then stated that any additional information contained in the recorded interview would need to be objected to at the time it was revealed to the jury; however, defense counsel did not lodge a single objection during Detective Dunton's testimony. Moreover, the record before us does not give any indication that any

objectionable material was revealed when the recording was played for the jury. Therefore, we hold that the record does not show any error on the part of the trial judge concerning admission of rebuttal evidence.

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