Circuit Court for Baltimore City
Case No. Criminal No. 115096012

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2379

September Term, 2015

ROHAN REID

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Friedman,
JJ.

Opinion by Kehoe, J.

Filed: August 25, 2017

After a jury trial in the Circuit Court for Baltimore City, Rohan Reid was convicted of first-degree assault, second-degree assault, reckless endangerment, and wearing and carrying a dangerous and deadly weapon. The court sentenced him to fifteen years in prison, with all but three years suspended, on the first-degree assault count, and imposed concurrent sentences for the other convictions.

On appeal, Reid presents four issues, which we have reworded:

> 1. Did the trial court err improperly restrict Reid's efforts to testify as to his state of mind and his intentions in a case in which the State alleged specific intent crimes and Reid claimed self-defense?
>
> 2. Were Reid's constitutional rights to a fair trial violated by the State's failure to produce the weapon allegedly wielded by the victim and recovered by the State prior to trial, but neither disclosed to the defense before trial nor introduced by the State into evidence at trial?
>
> 3. Did the trial court erroneously prevent Reid from presenting evidence that the police "rushed to judgment" by charging him without conducting an adequate investigation of his claim that he was acting in self-defense?
>
> 4. Should Reid's sentence for his second-degree assault conviction merge into his sentence for his conviction for first-degree assault?

We answer "no" to the first three questions. As for the fourth, the State acknowledges that the sentence for Reid's second degree assault conviction should merge into his conviction for first degree assault. We agree. We will affirm the court's judgments except for the sentence for second degree assault and remand the case to give the circuit court an opportunity to correct the record in this regard.

Background

Viewed in the light most favorable to the State as the prevailing party, on March 12, 2015, Reid, at the time a student at Morgan State University and residing in a school dormitory, got into an argument with a suitemate, Justin Smith, about housekeeping. The argument led to a fistfight. Reid left the suite and went to speak with Jevon James, a resident assistant of the dormitory. James was not present but Shakeem White,[1] James's roommate, was. While in James's room, Reid picked up a pair of scissors that he had previously lent to James. Accompanied by White, Reid returned to his suite and he became involved in another altercation with Smith and stabbed him in the chest. Smith was badly injured and was hospitalized.[2] After the incident, the police were called and Reid gave them an inculpatory statement after the police read him his Miranda rights.

At trial, Reid admitting to the stabbing but asserted that he was acting in self-defense. The jury acquitted him of attempted murder but convicted him of the charges noted previously.

[1] White's first name is sometimes rendered as "Shakim" in the record.

[2] He has since recovered.

Analysis

I. Reid's Testimony as to his State of Mind

Reid testified in his own defense. His trial counsel[3] elicited testimony from him regarding his state of mind during his second encounter with Smith. The court sustained numerous objections made by the State regarding the defense counsel's questions. On appeal, Reid argues the court erred and the sum effect of these evidentiary rulings prevented him from explaining his state of mind during his second and critical altercation with Smith. Reid argues this evidence would have been relevant to his claim of self-defense. In response, the State asserts that: *first*, Reid's contentions are not preserved for appellate consideration because trial counsel failed to proffer the substance of Reid's testimony at the times that the prosecutor's objections were sustained; s*econd*, that the trial court committed no error; and *third*, any suppositional error was harmless beyond a reasonable doubt.

A. Preservation

As a general rule, when evidence is excluded by a trial court, a proffer of the substance and relevance of the testimony is required to preserve the issue for appeal. *See*

[3] Mr. Reid was actually represented by two lawyers at trial but we will refer to them collectively as "trial counsel."

Md. Rule 5-103(a)(1);[4] *see also Conyers v. State,* 354 Md. 132, 164, *cert. denied*, 528 U.S. 910 (1999). However, the requirement of preservation exists so that "other parties and the trial judge are given an opportunity to consider and respond to the challenge." *Chaney v. State*, 397 Md. 460, 468 (2007). For this reason, a proffer is not required to preserve the issue for appeal when "the substance of the evidence . . . was apparent from the context within which the evidence was offered." Md. Rule 5-103(a)(2).

In this instance, the questions propounded by defense counsel met that threshold. Specifically, each of these questions was designed to elicit testimony from the defendant regarding his intent, his reasonable belief of his imminent danger, or his claim of self-defense. No proffer was necessary to preserve the issue for appeal because the substance of the information elicited from each question was plain from the questions posed. For this reason, Reid's objections were preserved. We turn to the parties' substantive contentions.

B. Error and Harmless Error

We start our analysis with some basic concepts.

A leading question is one which suggests an answer. *See Johnson v. State*, 9 Md. App. 327, 332 (1970). A trial judge has the discretion to sustain objections to leading

[4] Rule 5-103(a)(1) states in pertinent part: "In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was requested by the court or required by rule."

questions on direct examination and should do so because leading questions on direct examination are generally improper. Md. Rule 5-611(c).[5] A trial court should also exercise "reasonable control . . . to avoid needless consumption of time[.]" Md. Rule 5-611(a). This includes repetitive questions. Finally, a trial court's erroneous decision to sustain an objection is generally harmless if the same testimony is admitted later. *Bruce v. State*, 328 Md. 594, 624 (1992). With all of this in mind, we turn to the parties' contentions.

C. Questions Pertaining to Reed's Subjective Intent

Reid takes issue with evidentiary rulings by the trial court which, he claims, prevented him from explaining to the jury his intentions when he stabbed Smith and thus improperly "foreclosed [him] from discussing his intentions in swinging at Smith, silencing the defendant on [the] critical issue" of his state of mind. He raises this argument, or close variants on it, with regard to several points in his testimony.

C.-1 The First Sequence of Questions, Objections and Court Rulings

> [Defense Counsel]: Mr. Reid, at any point in your interaction with Mr. Smith did you intend to attempt to murder Justin Smith?
>
> [Prosecutor]: Objection.

[5] Leading questions on direct examination are permitted when the witness is a hostile one or when they are necessary to develop the witness's testimony. Md. Rule 5-611(c). An excellent summary of circumstances in which leading questions are appropriate in the latter context may be found in Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 1205[A] (4th Ed. 2010).

The Court: Sustained. Stricken.

[Defense Counsel]: When you interacted with Mr. Smith, what were your intentions?

[Prosecutor]: Objection.

The Court: Sustained. Stricken. Irrelevant.

To this Court, Reid asserts that, by sustaining these objections, the trial court improperly "foreclosed [him] from discussing his intentions in swinging at Smith, silencing the defendant on [the] critical issue" of his state of mind. We do not agree.

The trial court did not err in sustaining the objection to the first question, because it was clearly leading. The second question was overly broad because it did not identify a specific temporal point in the two interactions between Reid and Smith. The question was irrelevant for the same reason. The question was also repetitive—Reid had already testified that, when Smith opened the door to the suite, Smith was "ready to fight again" but that Reid "wasn't trying to fight again 'cause I was scared. I just got beat up by this man. I ain't trying to fight again." Moreover, Reid had also already testified that, after the stabbing, he "was in shock . . . . "I didn't want it to be that way. I mean, I was tryin' to defend myself."

C.-2 The Second Sequence . . .

[Defense Counsel]: When you said you swung at Mr. Smith, how many times did you swing at Mr. Smith?

[Reid]: I only swung at him once and that's when the scissors connected to his shoulder.

[Defense Counsel]: And your swing was in response to what act - - -

[Prosecutor]: Objection.

The Court: Sustained.

The trial court did not abuse its discretion in sustaining the objection because the question was repetitive. Reid had already testified that he swung the scissors at Smith after Smith swung at him and after he saw that Smith was holding a knife.

C.-3 The Third Sequence . . .

[Defense Counsel]: Mr. Reid, what possible reason did you have for your interaction with Mr. Smith in a violent manner?

[Prosecutor]: Objection.

The Court: Sustained.

. . . .

[Defense Counsel]: And your swing [with the scissors at Smith] was in response to what act (indiscernible) –

[Prosecutor]: Objection.

The Court: Sustained.

Again, the trial court did not abuse its discretion in sustaining these objections. The questions were repetitive. Because they were repetitive, Reid was not prejudiced by the court's rulings because Reid had already explained his state of mind to the jury.

Moreover, Reid covered this same ground on re-direct. In response to a series of questions from his counsel regarding his actions after he returned to the suite, Reid testified that, when he entered the suite, he:

> thought everything was good. . . . so I was walking past him to go to my room and that's when he opened the door and the first thing he said was "What's up". . . like he's trying to fight again, which I wasn't trying to fight again.
>
> . . . .
>
> [A]fter he let me in, I was tryin' to walk past him. And that's when he was like, "What's up?", tryin' to fight. I didn't want to fight. I was still tryin' to walk to go to my room, but then he was like, "What's up?", and kept like jessin' (phonetic) up like, "what's up?", kept like pushin' up.

D. Questions Pertaining to Whether Reid Had a Duty to Retreat

As a general rule, in cases in which self-defense might be asserted, "the accused normally has a duty to retreat [unless] the peril is so imminent that he cannot retreat safely[.]" *Redcross v. State*, 121 Md. App. 320, 328–29 (1998). Reid argues that the trial court prevented him from testifying to facts that would provide the jury with a basis to conclude that he was in imminent danger of death or serious bodily harm and thus could not safely retreat.

He takes issue with the court's rulings during two subsequent parts of his re-direct examination.

D.-1 The First Sequence . . .

> [Defense Counsel]: Mr. Reid, what reason, if any, did you have for not retreating to your room and locking the door –
>
> [Prosecutor]: Objection.
>
> The Court: Sustained.

Counsel's question was leading and the trial court did not abuse its discretion in sustaining the objection. Moreover, Reid was not remotely prejudiced by the court's

ruling because, a few moments later, he testified that he didn't go to his room because "I thought Smith was just trying to beat me up real bad."

D.-2 The Second Sequence . . .

During re-direct examination, the following exchange occurred:

[Defense Counsel]: And Mr. Reid, after Mr. Smith let you into the hallway, what was your sole purpose in reaching your room?

[Prosecutor]: Objection.

The Court: Sustained. Asked and answered.

[Defense Counsel]: Mr. Reid, what purpose, if any, did you have in further confrontation with Mr. Smith?

[Prosecutor]: *Objection.*

The Court: *Sustained to the form of the question.*

. . . .

[Defense Counsel]: Mr. Reid, after Mr. Smith let you in, aside from your immediate reaction, what did you do next?

Reid: Oh, after he let me in, I was tying to walk past him. I didn't wanna fight. I was still trying to walk to go to my room, but then he was like "What'sup?", and kept like jessin' (phonetic) up like, "What's up", kept like pushing me.

The Court: Next question.

[Defense Counsel]: *And when you said you didn't wanna fight him, what did you mean by those words.*

[Prosecutor]: *Objection.*

The Court: *Sustained. Asked and answered*.

Reid does not address whether these rulings were correct — which they were — but rather asserts that the court's "repeated rulings effectively gagged [him] and foreclosed his right to explain his intentions and actions to the jury." This argument is not persuasive. Reid had an opportunity to explain, and did explain, that he did not go into his room because, when he attempted to walk past him, Smith acted in an aggressive manner and was pushing him.

In summary, the difficulties that one of Mr. Reid's trial lawyers sometimes experienced in framing questions and the niceties of the trial court's evidentiary rulings should not distract us from the larger picture. Reid told his story to the jury: he did not know Smith, one of his suite-mates, very well and got into an argument with him regarding housekeeping. The argument degenerated into a physical altercation and Smith got the better of Reid. Reid then left the suite and went down two floors to seek the assistance of Jevon James, a resident assistant. When Reid left the suite, the door to his bedroom was unlocked. James wasn't there but White, James's roommate, was in the room. While in the room, Reid saw a pair of scissors which he had previously lent James and put them in his pocket. Because the door to his personal room in the suite was unlocked, Reid was concerned that Smith would steal or damage his mobile telephone, his wallet, and other personal property. He returned to the suite and banged on the door. Smith opened the door and Reid entered, intending to walk past Smith and thence into his room. When he entered the suite, he had no intention of fighting Smith—he was scared and had just been beaten up by him—but Smith acted aggressively, giving Reid the

impression that a new fight was about to start. He pulled the scissors out of his pocket, and Smith swung at him. Seeing a knife in Smith's hand, he swung the scissors one time, stabbing Smith. Afterwards, he was "in shock" and had "just been trying to defend [him]self."

Despite the prosecutor's objections, the trial court permitted Reid to present this narrative. Reid's contentions that the trial court's evidentiary rulings were erroneous is not persuasive. Assuming error on the trial court's part, there was no prejudice because the information that counsel attempted to elicit by the objected-to questions was presented to jury through Reid's testimony through his responses to other questions.

II. A *Brady v. Maryland* Violation?

Reid argues that the State suppressed evidence that would have strengthened his claim of self-defense.

By way of additional background, Reid and White, who witnessed the second altercation between Reid and Smith, both testified at trial that Smith was holding a knife in his hand when Reid stabbed him with the scissors. James's testimony is unclear as to whether he saw the stabbing, but he did tell the jury that, shortly after the stabbing, he saw Smith with a knife in his hand. Furthermore, Smith testified that he had a knife when he was stabbed but that it was in his pocket.

After the police responded to the scene, they took Smith to the hospital. At the hospital, officers found a knife in the pocket of Smith's pants and retained it. The police

did not disclose that they had recovered a knife from Smith during discovery although they had assigned an evidence control number to it. On the third day of trial, Sergeant Gregory House revealed during cross examination that a knife had been recovered from Smith at the hospital. At this point, Reid objected, asserting that the knife "wasn't part of the evidence that was presented to the Defendant which is required by law."

On appeal, Reid does not assert that the State's failure to disclose that it had seized a knife violated its duties under Maryland's criminal discovery rule, Md. Rule 4-263.[6] The "law" to which defense referred was the *Brady* Doctrine.

In *Brady v. Maryland*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). In order to assert a *Brady* violation, "the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is

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[6] In his pre-trial discovery motion, Reid requested that the State:

> Identify and produce for examination, inspection, and/or copying any . . . tangible items *which the State intends to offer at trial* . . . and which the State contends, shows, or demonstrates criminality and/or inculpatory of the Defendant.
>
> Produce and allow the Defendant to inspect . . . all the tangible items of evidence *which the State proposes to use in this case,* including . . .weapons[.]

(Emphasis added.).

Reid did not contend at trial that the State's failure to produce the knife was a violation of the State's obligations under Maryland's criminal discovery rule, Nor does he on appeal.

impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Yearby v. State*, 414 Md. 708, 717 (2010). Evidence is considered suppressed if it "is information which had been known to the prosecution but unknown to the defense." *Diallo v. State*, 413 Md. 678, 704 (2010) (internal citations and quotations omitted). Furthermore, "the prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Id.* at 707. Suppressed "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Adams v. State*, 165 Md. App. 352, 427 (2005) (internal citations and quotations omitted).

To this Court, Reid presents two arguments based upon what he asserts was a failure by the State to comply with the requirements of *Brady* and related decisions. *First*, he asserts that the *Brady* doctrine required the State to disclose the existence of the knife prior to trial. *Second*, he contends that the same legal principle required the State to produce the knife to the court. In response, the State says that there was no *Brady* violation and, in any event, any failings on the part of the prosecutor do not warrant reversal of Reid's convictions.[7]

[7] The State also makes a preservation argument. The issue is a close one but we will address the merits of Reid's claims.

A. The State's Failure to Make a Pre-Trial Disclosure

Reid first contends that:

> The defense did not learn that the police recovered the knife in time to use it effectively in the presentation of its case or in its trial preparation. For this reason, even if the court had ruled that the State must produce the knife or details of its characteristics upon the defense's request during trial, producing such evidence on the third day of trial would not have enabled the defense to use it effectively.

To support his contention that the prosecution's failure to make timely pre-trial disclosure constitutes a *Brady* violation, Reid cites *Miller v. United States*, 14 A.3d 1094, 1111 (D.C. 2011) (holding that disclosing evidence on the eve of trial constitutes a *Brady* violation); and *State v. Kemp*, 828 So.2d 540, 546 (La. 2002) (per curiam) (holding that a *Brady* occurred because impeachment evidence was revealed as the trial was "drawing to a close.").

We respect the out-of-state authority cited by Reid, but the law in Maryland is to the contrary. *See, e.g., Williams v. State*, 416 Md. 670, 691, (2010) ("The cases are legion, however, that evidence known to the defendant or his counsel, that is disclosed, even if during trial, is not considered suppressed as that term is used in *Brady*[.]" (emphasis and bracketing omitted), citing, among other cases, *United States v. Presser,* 844 F.2d 1275, 1283 (6th Cir. 1988) ("So long as a defendant is given impeachment material, even exculpatory impeachment material, in time for use at trial, we fail to see how the Constitution is violated."); and *United States v. Vap,* 852 F.2d 1249, 1256 (10th Cir. 1988) ("*Brady* is not violated when the Brady material is available to [a defendant]

during trial.")); *Yearby*, 414 Md. at 722 ("Prosecutorial suppression of evidence is a predicate to a *Brady* claim. . . . with regard to suppression of evidence, *Brady* deals with the issue of withholding the knowledge from the jury, right through to the close of trial.") (internal citations omitted).; *see also United States v. Augurs*, 427 U.S. 97, 103 (1976), ("The rule of *Brady* . . . arguably applies in three quite different situations. Each involves the discovery, *after trial*, of information which had been known to the prosecution but unknown to the defense.") (emphasis added).

B. The State's Failure to Produce the Knife at Trial

Reid contends that

> At the beginning of the third day of trial, defense counsel alerted the judge to the State's failure to disclose the knife and made a specific request that the State produce it. The trial court ruled that the State is "not required to present any evidence other than that which is in [its] opinion sufficient to convict." Further, the court insisted that "whoever is the proponent of that evidence under the rules is the one under -- who has a duty to put it forward." These rulings ignored the State's obligation under *Brady*.
>
> Evidence of the knife was improperly suppressed as a matter of law because the prosecution was aware of the evidence and the defense was not. Even if the [prosecutor] was unaware that the police had recovered the knife, this ignorance would not have precluded its duty to disclose the knife under *Brady* because the State had a duty to learn that the police had recovered the knife. The State also had an independent duty to produce the knife irrespective of whether the defense made a general or specific request for exculpatory materials. Moreover, this duty existed whether the State intentionally or inadvertently suppressed the evidence.

(Citations and bracketing omitted).

Reid's contentions are not persuasive for several reasons. As an initial matter, we read the transcript differently than does Reid.

After Sergeant House testified that the police had recovered a knife from Smith, the transcript states in relevant part:

> [Defense Counsel]: Yesterday afternoon late, the State's attorney and I both discovered that the weapon had been recovered.
>
> [Defense Counsel]: Judge, I don't wanna mention that they willfully concealed, that it was never given to us. I'd like the trial to be on the truth. *The truth is that it wasn't part of the evidence that was presented to the Defendant which is required by law.*
>
> The Court: Well, that's not –they're not required –
>
> [Defense Counsel]: So most important –
>
> The Court: *They're not required to present any evidence other than that which is in their opinion sufficient to convict. There's nothing to stop you from using it.*
>
> [Defense Counsel]: Well, we don't have it. *They got it.*
>
> The Court: *Well, but the person who recovered it is out there. Tell them you want to call them as your witness* and – I mean, you know, I'm not representing your client but I know ten ways I could get it.
>
> [Defense Counsel]: Well, Judge, at the last – certainly if I knew up in advance we would've --
>
> The Court: Well, but you knew yesterday.
>
> [Defense Counsel]: --summoned it.
>
> The Court: *So there's nothing that stops you from saying we demand the production of the knife. There's nothing. And we're going to have a break. He can go get it.* If you intend to use it, so – you know, but that's all I'm going to say because now I'm becoming an advocate instead of the referee. But that ain't an insurmountable mountain. You can climb that hill.
>
> . . . .
>
> The Court: No, I said I've done cases. But here, they have the knife. *There's nothing that precludes that – the defense from using that knife.*
>
> [Defense Counsel]: *It's not my job to put it forward. I think it's up to the State to* –
>
> The Court: well, that's not true.
>
> [Defense Counsel]: -- *give us all the evidence*.

> The Court: *Whoever is the proponent of that evidence under the rules is the one under – who has a duty to put it forward.* See, if you're the proponent then you've got – you've got to do something rather than – you know, that's almost like the missing witness. The law is if a witness is equally available to both sides, you can't argue missing witness. That's the rules.

To a certain extent, the trial court and defense counsel were talking past one another; defense counsel was referring to the State's obligation to produce the knife for inspection, while the court was focused upon whether the State was obligated to introduce the knife into evidence as part of its case in chief. Nonetheless, the trial court unmistakably invited defense counsel to "demand the production of the knife" and the court pointed out that "we're going to have a break. He [i.e., Sergeant House] can go get it." In this context, we do not perceive a meaningful distinction between a court's ordering the prosecution to produce the knife and a judge's inviting defense counsel to initiate the process.[8]

In any event, there was no *Brady* violation in this case because the State disclosed that it had possession of the knife during its case. *See Yearby*, 414 Md. at 722–24 ("With regard to suppression of evidence, *Brady* deals with the issue of withholding the knowledge from the jury, right through to the close of trial. . . . [T]he necessary inquiry is whether the defendant knew or should have known facts that would have allowed him to access the undisclosed evidence.") (Internal citations, quotations, and brackets omitted).

[8] Our analysis would be different if Reid had demanded that the State produce the knife and the prosecution had been unable or unwilling to do so.

Because Reid has not persuaded us that the State suppressed information about the knife, it is not necessary for us to decide whether there was a reasonable probability that the disclosure of the information would have resulted in a different verdict. *See Adams*, 165 Md. App. at 427.

III. Reid's "Rush to Judgment" Defense

At trial, defense counsel wanted to argue to the jury that there was a "rush to judgment" by the investigating police because they failed to investigate thoroughly whether Reid acted in self-defense. Reid argues that the court's ruling on certain objections raised by the prosecutor prevented him from fully exploring what he asserts were deficiencies and oversights in the police investigation. Reid's appellate contentions pertain to his cross-examinations of Vena Mitchell and Gregory House, two officers with the Morgan State University Police Department, as well as to his trial counsel's closing argument.

A. Officer Mitchell

Officer Mitchell was the State's first witness at trial. On cross-examination, defense counsel first established that Officer Mitchell prepared a statement of probable cause on March 13, 2015, that is, the day after the stabbing took place. The statement contained the following (format altered and some punctuation added):

> After the incident this officer took two written statements from . . . White[9] and Jevon James who both stated that they witnessed Mr. Reid . . . stab the victim. . . . *The witnessed [sic] stated that they observed Mr. Smith with a knife in his hand prior to the stabbing*.

The statement of probable cause was not introduced into evidence.

Defense counsel provided Mitchell with a copy of the statement and asked him to review it. The following exchanges then took place (emphasis added):

> [Defense Counsel]: And in the Statement of Probable Cause, would you be surprised -- or, excuse me -- *would it be fair to say that you wrote in this statement, "The witness has stated"* --
>
> [Prosecutor]: *Objection*.
>
> The Court: *Sustained*.
>
> [Defense Counsel]: As part of your investigation and as part of what you wrote on the Statement of Probable Cause, did you not write this following sentence (indicating)?
>
> * * *
>
> [The Witness]: Yes.
>
> [Defense Counsel]: You did write this sentence, correct, sir?
>
> [The Witness]: That's correct.
>
> [Defense Counsel]: *And this sentence, if I were to read it, states, "The witness"* --
>
> [Prosecutor]: *Objection*.
>
> The Court: *Sustained. Hearsay*.
>
> [Defense Counsel]: *Your Honor, I'm just questioning whether Officer Mitchell wrote something down or not -- not for the truth or veracity of the matter, but what Officer Mitchell wrote through the investigation*.

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[9] In fact, White gave two written statements. In the first, dated March 13, 2015, White described the stabbing but made no mention of the knife. In the second, dated March 23, 2015, White stated that he "saw a hint of a blade" in Smith left hand before the stabbing. These portions of his statements were admitted into evidence.

> The Court: Well, it's still hearsay. What he learned from the -- he could only have learned what somebody told him.
>
> [Defense Counsel]: *All right*.
>
> The Court: Right? Don't make it true somebody told him that he wrote it down. That doesn't make it true. That's called hearsay. Sustained.
>
> [Defense Counsel]: *No problem*.

In his brief, Reid contends that the trial court "simply misapplied the hearsay rule in precluding this line of inquiry." (citing *Daniel v. State*, 132 Md. App. 576, 589 (2000)). The State responds with several contentions, including that Reid's argument is not preserved for review because Reid didn't make a proffer of the substance of the statement. This particular contention isn't persuasive because it is clear from the context that defense counsel was referring to the portion of the statement of probable cause that averred that White and James had "observed Mr. Smith with a knife in his hand prior to the stabbing." There is a different, and more significant, preservation problem with Reid's appellate argument, however.

Defense counsel's question sought an out-of-court statement by Officer Mitchell that in turn set out two additional out-of-court statements. If this testimony were offered to prove that White and James told Mitchell that they had seen a knife, such testimony would have been hearsay. If it were offered to demonstrate that Smith actually had a knife when he was stabbed, the officer's testimony would have been hearsay within

hearsay and equally inadmissible.[10] To be sure, after the trial court initially sustained the prosecutor's objection on the ground that the response would be hearsay, defense counsel stated that it would not be introduced "for the truth . . . . of the matter, but what Officer Mitchell wrote through the investigation[.]" Counsel's response characterized the evidence Reid sought to introduce, but counsel did not explain how the statements were relevant if they were not offered for the truth of the matter asserted. The trial court is not required to speculate. As we explained in *Randall v. State*, 223 Md. App. 519 (2015):

> when evidence is inadmissible on its face and admissible only for a limited purpose or under some theory, the proponent must also explain to the court how the evidence is admissible and why it should be received.

Id. at 557.

Moreover, defense counsel's responses to the court's explanation of why the statements were inadmissible—"All right" and "No problem"—indicated that counsel agreed with the court's explanation of the reasons for its ruling. Had trial counsel disagreed, and presented to the court the substance of the argument contained in Reid's appellate brief, both the court and the prosecutor could have responded to it. Under the

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[10] In an analogous situation, the Court of Appeals has stated that it is generally error for a trial court to admit an out-of-court statement by a police informant even if the statement is not being offered for the truth of the matter asserted:

> Our Court of Special Appeals and courts in other jurisdictions, when confronted with an officer's trial testimony that relays specific information received from an informant, generally have ruled such testimony to be inadmissible hearsay.

Parker v. State, 408 Md. 428, 441-42 (2009). This is because the information bears a high probability of being misused for its truth, and thus its prejudicial impact outweighs its probative value. *Id*. 441-42.

circumstances, Reid has not preserved the argument that he presents to us. *See Gilliam v. State*, 331 Md. 651, 691 (1993) (When a party "did not object to the [ruling of] the court, and apparently indicated his agreement with it, he cannot now be heard to complain that the court's action was wrong.").

B. Sergeant House

In his brief, Reid states:

> when the defense attempted to refresh Officer House's memory regarding what he was told by two witnesses in order to pursue the same "rush to judgment" theory, the court foreclosed the line of inquiry. In so doing, the court ignored Maryland Rule of Evidence 5-612, ruling that counsel somehow was running afoul of the hearsay rule.

In response, the State asserts that the trial court did not prevent defense counsel from questioning Sergeant House on this issue. The State is correct. An extended quotation from the transcript will put the parties' contentions into proper focus. (We have emphasized two portions of the transcript. The italicized passage is the basis for Reid's appellate argument; the underlined passages are the basis of the State's.)

> [Defense Counsel]: Sergeant, you stated that [during] the early morning hours of March the 13th, you reviewed both Mr. Reid's statements and other witness's statements, correct?
>
> [Officer House]: Yes, sir.
>
> [Defense Counsel]: And in those written statements, did you review specifically the written statements of Mr. Shakeem White and Jevon James?
>
> [Officer House]: Yes, I did.
>
> [Defense Counsel]: *And do you recall what was written in those statements?*
>
> [Officer House]: *Vaguely. I would have to refer to the statements, if I could.*
>
> [[Defense Counsel]: *Sure. Would it help if I refresh your recollection?*

[Prosecutor]: *Objection, Your Honor.*

The Court: *Sustain. Hearsay*.

[Defense Counsel]: Your Honor, if he doesn't remember, I can refresh his recollection.

The Court: Well, I sustain at this point. You haven't laid a foundation.

[Defense Counsel]: Sure.

(Bench Conference)

[Prosecutor]: Your Honor, the Defense is trying to get in inadmissible hearsay by asking him about what witnesses said in their written statements.

. . . .

The Court: Well, he can say "Was there a reported knife?" He just testified that the victim said, "I had a knife." I mean so . . . . that's not an improper question. Now if he askes another question, you may wish to object, but there's already been testimony that the victim had a knife.

[Prosecutor]: Right.

The Court: They recovered a knife at the hospital, so his question was, "Was there a report of a knife?" That's not objectionable.

[Prosecutor]: Okay.

. . . .

(Bench Conference Ends)

. . . .

[Defense Counsel]: After reviewing the statements, would it be fair to say that . . . the results of your investigation indicated that Mr. Smith had a knife?

[Officer House]: The results were inconsistent. You had Mr. Reid who said that he thought he saw something in his hand, he thought it was a knife. Shakeem White said — never mentioned a knife.[11] Jevon James mentioned seeing a knife

[11] In his brief, Reid asserts that Sergeant House "erroneously testified that White never mentioned seeing a knife." As we explained in footnote 9, White actually signed two written statements. In the first, dated March 13, 2015, he described the stabbing but made no mention of the knife. In the second, dated March 23, 2015, (which was after the statement of probable cause was prepared), White stated that he "saw a hint of a blade" in Smith left hand before the stabbing. Nothing prevented defense counsel from questioning Sergeant House regarding this discrepancy.

> after Mr. Smith was stabbed. He said is was a 'long knife." So you had reports that Mr. Smith had a knife but they were, like I said, their statements were inconsistent.

Reid is correct that defense counsel's attempt to refresh Sergeant House's recollection by showing him copies of the written statements, was not a violation of the general prohibition against the introduction of hearsay evidence. This is because documents used to refresh a witness's recollection are not normally introduced into evidence.[12] Had the matter ended there, the trial court would have erred. But the dialogue between court and counsel did not end at that point. During the ensuing bench conference, the court made it clear that Sergeant House could testify about the knife. The transcript is also clear that, after the bench conference, Sergeant House actually reviewed the statements and responded to trial counsel's question. The court's momentary lapse is not the basis for appellate relief.

C. Closing Argument

Reid asserts that:

> During its closing argument, defense counsel attempted to tie the evidence to its theory that the State rushed to judgment regarding Rohan Reid's culpability and had failed to fully investigate Smith's aggression toward Reid and Reid's claim of self-defense. The trial court, however, foreclosed the defense's ability to

[12] Rule 5-612 would have permitted the State to introduce the statements into evidence "for the limited purpose of impeaching the witness as to whether the item in fact refreshes the witness's recollection."

discuss essential elements of that defense, again relying on an erroneous definition and application of the hearsay rules.

This contention is not supported by the record. The relevant portion of the transcript is (emphasis added):

> [Defense Counsel]: I also told you that the defense in this case was self-defense. Now, let's go with the facts in this case. You will recall that when the police arrived, they went upstairs, walked around a little bit, and well, where is Mr. Reid who has not left the premises, he was downstairs. They went downstairs and the first thing they did was throw the handcuffs on him, a rushing to judge him without hearing from the two witnesses. And I am not going to tolerate anything but the truth.
>
> *And I'm going to tell you, the policeman wrote in the report that --*
>
> [Prosecutor]: Objection.
>
> The Court: Overruled.
>
> [Defense Counsel]: -- *the two witnesses saw him* --
>
> [Prosecutor]: Objection.
>
> [Defense Counsel]: -- *with the knife prior to* --
> The Court: Sustained.
>
> . . . .
>
> [Defense Counsel]: Judge, I'm not going to—may I approach the bench?
>
> The Court: Yes.
>
> [Defense Counsel]: Is this an effort to get to the truth or not?
>
> The Court: No, no, no, but that's not the testimony --
>
> [Defense Counsel]: You want to say it's hearsay, when you will --
>
> [Prosecutor]: That's facts not in evidence.

. . . .

[Defense Counsel]: Well, just a minute.

. . . .

[Defense Counsel]: Judge, may I say this? *Will this file go-- can you put the file to the jury?*

The Court: *It's not in evidence.*

[Defense Counsel]: Well, you could put in the indictment.

The Court: *It's not in evidence. It's indictments or charging documents, I've already told them --*

Defense Counsel: Well, let us try not to get to the truth then.

The Court: Those are not in evidence. . . . Sustained. The jury is directed to disregard that argument. That was not evidence.

The trial court sustained the State's objection because, as the court had already instructed the jury, the charging documents, including the statement of probable cause, were not evidence. This was not a hearsay issue. The court did not err in foreclosing defense counsel's argument that was based on matters not in evidence.

D. Harmless Error

In any event, any suppositional error on the court's part regarding Reid's "rush to judgment" defense was harmless. An error is harmless in a criminal case only if "'a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdictl[.]'"

Perez v. State, 420 Md. 57, 66 (2011) (quoting *Dorsey v. State*, 276 Md. 638, 659, (1976)).

Reid's rush to judgment argument is based on the assertion that the police did not adequately investigate the possibility that he was acting in self-defense when he stabbed Smith. But whether the police "rushed to justice" in deciding to charge Reid was irrelevant to the issues before the jury in this case.

Concerns about the adequacy of the police investigation may affect the jury's decision making process if there is doubt as to the identity of the criminal actor. In this case, however, there was never any doubt whatsoever that Reid stabbed Smith. He confessed to the police that he had done so prior to his arrest. At trial, he admitted that he had done so, and the victim and the only eyewitness gave similar testimony. The notion that someone other than Reid stabbed Smith was never presented to the jury. Under these circumstances, we find beyond a reasonable doubt that what Reid terms the trial court's restrictions upon trial counsel's rush to judgment argument did not affect the jury's verdict.

IV. The sentences for the assault convictions

Reid was convicted of assault in the first degree and assault in the second degree. The trial court imposed a sentence of incarceration for first degree assault and a concurrent sentence for the second degree assault conviction.

Reid contends that the sentence for second degree assault should merge into the sentence for first degree assault because second degree assault is a lesser included offense to first degree assault and both convictions arose out of the same unit of prosecution, namely, the stabbing of Smith. He asserts that the trial court erred in imposing a separate, albeit concurrent, sentence for the lesser included offense. He is correct, and the State concedes the point in its brief. A court cannot impose a separate punishment for a lesser included offense. *Moore v. State*, 198 Md. App. 655, 689-90 (2011).-The State further argues that the problem was resolved at the trial court level. We do not agree.

At the sentencing hearing, the court imposed a sentence of incarceration for a term of fifteen years, with all but three years suspended, for the first degree assault conviction. The court then imposed a concurrent sentence of five years incarceration for the second degree assault conviction. However, the docket entries state that the sentence for second degree assault merged with the sentence for first degree assault. The commitment record, signed by the clerk, also states that the sentence for second-degree assault was merged with the sentence for first-degree assault. The State bases its argument on the docket entries and the commitment record.

As a general rule, the docket entry is controlling. *Vieira v. Prince George's County*, 101 Md. App. 220, 229-30 (1994) ("This Court must take the record and docket entries as they are, and not read information into them that does not exist."). However, "[w]hen there is . . . a discrepancy between the transcript and the docket entries, absent any evidence that there is error in the transcript, the transcript controls." *Turner v. State*, 181

Md. App. 477, 491 (2008) (citing C*arey v. Chessie Computer Servs*., Inc., 369 Md. 741, 748 (2002)). Neither party suggests that there's an error in the transcript. The trial court unambiguously imposed a concurrent sentence for second degree assault. Under these circumstances, the appropriate remedy is for us to remand the case to the circuit court so that it can correct the sentence. *See* Md. Rule 8-604(d)(2).

THE JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY ARE AFFIRMED WITH THE EXCEPTION OF THE SENTENCE FOR SECOND DEGREE ASSAULT. THE CASE IS REMANDED TO THE CIRCUIT COURT FOR LIMITED PURPOSE OF MERGING THE SENTENCE FOR ASSAULT IN THE SECOND DEGREE INTO THE SENTENCE FOR ASSAULT IN THE FIRST DEGREE.

COSTS TO BE PAID: 75% APPELLANT; 25% BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.