Circuit Court for Cecil County
Case No. C-07-CR-19-001040

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2333

September Term, 2019

JOHN SCOTT, JR.

v.

STATE OF MARYLAND

Arthur,
Wells,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Arthur, J.

Filed: October 12, 2021

*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.

A Cecil County jury convicted appellant John Scott, Jr., of first-degree assault, second-degree assault, reckless endangerment, and using a firearm in the commission of a felony or crime of violence. For first-degree assault, the court sentenced Scott to incarceration for 15 years, but suspended all but five. For the use of a firearm, the court sentenced Scott to a consecutive term of 10 years, but suspended all but the mandatory minimum sentence of five years without the possibility of parole. The remaining counts merged for sentencing purposes. This timely appeal followed.

QUESTIONS PRESENTED

Scott presents the following questions, which we have reordered to give priority to the first question:

I. Did the trial court err in admitting the complainant's prior consistent statements?

II. Did the trial court err in admitting testimony that [Scott] "looked scared" in the presence of the police?

III. Did the trial court err in failing to determine that the State violated its discovery obligations?

IV. Did the trial court abuse its discretion in sentencing [Scott] for use of a firearm in the commission of a felony?

For the reasons set forth below, we conclude that the court committed reversible error in allowing a law enforcement officer to bolster the complainant's testimony by recounting one of the allegations that she made against Scott. For guidance on remand, we address the admissibility of the testimony that Scott "looked scared" and hold that the court did not abuse its discretion in allowing it. In view of our disposition of the first issue, it is unnecessary to address the remaining issues.

FACTUAL AND PROCEDURAL BACKGROUND

Sarah Beattie had an on-and-off relationship with Scott. In January 2019, she moved into Scott's apartment in the town of North East, Maryland.

On June 12, 2019, at 11 a.m., Ms. Beattie went to a doctor's appointment. From there, she went to her parents' house to do some laundry.

Ms. Beattie claimed that she told Scott about her plans to go to the doctor's appointment and her parents' house, but at 3:30 p.m., when she returned to the apartment, Scott seemed irritated. He was lying down listening to music and had a beer can in his hand. There were beer cans around him, and he had been drinking. Scott told Ms. Beattie that he was upset because she had been out and that he had been wondering where she was.

Ms. Beattie went into the kitchen, and Scott followed her. Ms. Beattie told Scott that her mother had offered to take her to dinner. She had not confirmed any plans with her mother because she wanted to see what Scott wanted to do. An argument ensued, and Scott raised his voice.

Ms. Beattie tried to walk away, but Scott followed her. She went into a guest bedroom, shut the door, and sent a text to her mother to make plans to meet for dinner.

Scott started kicking the door to the guest bedroom. He entered the room and picked another fight about where Ms. Beattie had been and what she had been doing. When Ms. Beattie told Scott she had made plans to have dinner with her mother, he became more upset, spoke louder, moved closer to her, and got "in [her] face."

Ms. Beattie went back into the kitchen. Scott yelled that she had already seen her mother that day and did not have to see her again. Ms. Beattie was crying and felt "terrified" and "scared."

At about 5:50 p.m., Ms. Beattie's mother texted that she was about arrive. Ms. Beattie told Scott that she was leaving because her mother had arrived.

At that point, Scott walked into the dining area and returned to the kitchen holding one of his rifles. According to Ms. Beattie, he put the rifle to her temple and told her that he did not want her to go anywhere. Ms. Beattie thought Scott "was going to kill [her]." She had "never been that scared in [her] life."

Scott got between Ms. Beattie and the door. Ms. Beattie told Scott that her mother was outside and would know if anything happened to her. She got past him and went out the door. On cross-examination, Ms. Beattie asserted that Scott "put his hands on" her and denied telling the police that Scott had not laid a hand on her. She acknowledged that Scott let her out the door to go to her mother.

When Ms. Beattie entered her mother's car she began to cry and told her mother about the argument that had led to Scott pointing a gun at her. Ms. Beattie's mother called the police. Ms. Beattie and her mother also called Ms. Beattie's father and asked him to help move her belongings out of the apartment with a police escort.

Ms. Beattie and her mother returned to the apartment, where they met the police and Ms. Beattie's father. Ms. Beattie and her parents went into the apartment to gather her possessions while Scott sat outside on a deck. Ms. Beattie testified that Scott's

demeanor had changed. He "wasn't angry anymore," and "[h]e looked scared." Ms. Beattie identified Scott to the police as the person who had pointed a gun at her.

Senior Deputy Jeff Wathne of the Cecil County Sheriff's Office testified that on June 12, 2019, he responded to a "keep the peace" call to help someone move their belongings out of a residence. When he arrived, Scott was on the porch with another officer. Scott appeared to be "very calm," was "seemingly friendly," "was smiling," and was "laughing." Ms. Beattie, by contrast, was "visibly upset." She had been crying and "appeared to be very nervous, walking around the apartment."

Deputy Wathne found three firearms in a guest bedroom. He observed ammunition on the kitchen table. He seized the firearms, photographed them, and had the serial numbers checked.

Over objection, Deputy Wathne reported that Ms. Beattie had said that Scott told her that she was not free to leave and that he pointed a firearm at her head. As part of his investigation, the deputy asked Scott whether he had pointed a gun at Ms. Beattie's head, and Scott said that he had not. While the deputy was questioning Scott about Ms. Beattie's account, Scott was "calm and friendly," he "wasn't aggressive," and "was smiling" and "kind of laughing."

In his report on the incident, the deputy had written that Ms. Beattie said that Scott "never laid a hand on her or hurt her." On cross-examination, the deputy agreed that Ms. Beattie had said that Scott never laid a hand on her.

Scott elected not to testify, and the defense called no witnesses. In his closing argument to the jury, Scott's counsel referred to Ms. Beattie's statement that Scott had

never hit her. He suggested that she had fabricated the allegation that Scott pointed a gun at her head, because she made only a "keep the peace call" and did not call 911 to report a criminal assault.

After about two hours of deliberations, the jury found Scott guilty of first-degree assault, use of a firearm in the commission of a crime of violence, and other charges.

We shall supply additional factual details as they become relevant.

DISCUSSION

I.

On direct examination, Deputy Wathne testified Ms. Beattie was "visibly upset," "had been crying," "appeared to be quite nervous," and was "quite emotional." He asked whether she was okay. When he began to relate Ms. Beattie's response, the court sustained a defense objection. The prosecutor admonished him that he could not testify about what Ms. Beattie had said to him.

The following colloquy occurred:

> Q. . . . As a result of her response, what did you do next?
>
> A. I started looking for the firearms that she had told me about that were in the residence. She told me exactly where they are.
>
> [DEFENSE COUNSEL]: Your Honor?
>
> THE COURT: I'm going to allow it. Do you have another question?
>
> [PROSECUTOR]: Please continue what you did as a result of your investigation.

> [Deputy Wathne]: She told me exactly where the firearms were in the residence. I also observed ammunition on the kitchen table. And from there, continued to speak with her about what happened.

The prosecutor proceeded to question Deputy Wathne about any further investigation he might have conducted after the weapons were seized. Deputy Wathne responded that he "continued to ask [Ms. Beattie] what had happened prior to [his] arrival . . . ." As the deputy began to recount Ms. Beattie's response, defense counsel objected again.

At a bench conference, the trial judge asked defense counsel whether the State sought to introduce Ms. Beattie's statement to explain why the deputy did what he did in response to it, and not for the truth of the matters asserted therein. Defense counsel responded that the statement was cumulative and irrelevant. The State proffered that Deputy Wathne would testify that Ms. Beattie said that she "was meeting her mom for dinner, that Mr. Scott did not want her to go, he put a gun to her head, [and] she was terrified." The judge cautioned the prosecutor:

> I don't want it to be bolstering testimony. If it's offered because he did something, that's fine, and it's not offered for the truth of the matter. But if it's simply bolstering, I can't permit it, and that's where we are.

After further conversation about Deputy Wathne's potential testimony, the court reiterated that Ms. Beattie's alleged statement would not be "offered for the truth of the matter" and, hence, would not be used to corroborate or bolster her testimony. The court said that it would permit the State to introduce the alleged statement for the "limited purpose" of explaining what the deputy did as a result of receiving that information. The court granted defense counsel a continuing objection.

After the conference ended, the prosecutor questioned Deputy Wathne:

> [PROSECUTOR]: After you seized the firearms themselves, did you have a conversation with Miss Beattie?
>
> [Deputy Wathne]: Yes, I did.
>
> Q. Okay. And did Miss Beattie give you any information that caused you to have further investigation?
>
> A. Yes.
>
> Q. Okay. What was that information?
>
> A. That prior to my arrival she was going to go have dinner with her mother, but that Mr. Scott told her she was not free to leave, pointed a firearm at her head and, yeah.
>
> Q. And what?
>
> A. And that was – that he pointed a firearm at her head and she was not free to leave.

Deputy Wathne went on to testify that he asked Scott whether he had pointed a gun at Ms. Beattie's head. According to the deputy, Scott responded that he had not. As previously stated, the deputy remarked that Scott was "smiling" and "kind of laughing" when he denied the allegations.

At the bench conference, the court had volunteered that it would give a limiting instruction to the effect that Deputy Wathne's account of Ms. Beattie's statement was not evidence that Ms. Beattie actually said that Scott pointed a gun at her head and that the jury should consider it solely for the purpose of understanding why the deputy did what he did in response. The court, however, did not give the instruction. Defense counsel did not object to the failure to give the instruction.

In closing argument, the State recognized that its case turned on whether the jury believed Ms. Beattie. Hence, the State undertook to address the absence of any evidence corroborating her testimony, such as photographs of an injury. In doing so, the State highlighted Deputy Wathne's testimony that Ms. Beattie said that Scott had pointed a gun at her head:

> What was Senior Deputy Wathne supposed to take a photo of that day? He took a photo of what Sara Beattie told him what happened, [h]e took a rifle and he put it in my face and he told me I couldn't leave.

A few moments later, the State returned to the same theme, explicitly arguing that the deputy's testimony corroborated Ms. Beattie's account:

> What's the evidence I'm supposed to show you? I showed you what I had. Sarah Beattie. She came in front of you. She told you her story. And this is what I want to tell you, you heard one voice, you heard Sarah Beattie's voice. You didn't hear anything that poked holes in her story. You didn't hear anything that said, Sarah, you are lying. You didn't hear anything that said, Sarah, you have a motive. You heard one voice, and that was Sarah's voice, and she said, [t]his is what happened to me, and she swore under oath that that is what happened to her. *It's the same thing she told Senior Deputy Wathne when he showed up. So she told the exact same thing to Senior Deputy Wathne on June 12th of 2019 that she told you on November 13th and 14th of 2019.*

(Emphasis added.)

In rebuttal, the prosecutor reiterated that Ms. Beattie had consistently spoken with "one voice":

> [Y]ou have heard one story, one voice, one collective timeline, one. That's it. So what that she said he didn't lay a hand on me today[?] So what[?] He doesn't have to lay a hand on her to put her in fear.

Scott argues that the court erred in permitting Deputy Wathne to testify that Ms. Beattie told him that Scott had pointed a gun at her head. He principally argues that the testimony was inadmissible hearsay.

"Maryland Rule 5-802 prohibits the admission of hearsay, unless it is otherwise admissible under a constitutional provision, statute, or another evidentiary rule." *Wallace-Bey v. State*, 234 Md. App. 501, 536 (2017). Unlike many rulings on the admissibility of evidence, which are reviewed for abuse of discretion, the issue of "'[w]hether evidence is hearsay is an issue of law reviewed *de novo*.'" *Parker v. State*, 408 Md. 428, 436 (2009) (quoting *Bernadyn v. State*, 390 Md. 1, 8 (2005)); *see Gordon v. State*, 431 Md. 527, 533 (2013); *Wallace-Bey v. State*, 234 Md. App. at 536.

In contending that the statement was inadmissible hearsay, Scott cites *Parker v. State*, 408 Md. 428 (2009). In *Parker*, a confidential informant tipped off a police officer "that a black male wearing a blue baseball cap and a black hooded sweatshirt was selling heroin at a particular intersection." *Id.* at 431. Traveling to that location, the officer saw Parker, "a black male wearing a blue baseball cap and a black hooded sweatshirt[.]" *Id.* When the police stopped and searched Parker, they found several gel caps of heroin on him. *Id.* at 432. Appealing his conviction for possession of heroin, Parker argued that the trial court erred in allowing the officer to testify about the hearsay information provided by the informant, in violation of the Maryland Rules and his Sixth Amendment confrontation rights. *Id.* at 434. The State countered that such testimony was not hearsay, because it was not offered for its truth, but rather to explain why the officer was at that location and why Parker was stopped and searched. *Id.* at 435.

The Court of Appeals held that the trial court erred in admitting the informant's statement. *Id.* at 431. Although an extrajudicial statement may sometimes be relevant and admissible to prove why a police officer took action against a suspect, the *Parker* Court reasoned that such a statement should be excluded when, as in that case, the officer "'*becomes more specific by repeating definite complaints of a particular crime by the accused*[.]'" *Id.* at 440 (quoting *Graves v. State*, 334 Md. 30, 39-40 (1994)) (emphasis in original). In those circumstances, the statement is inadmissible hearsay because it "*is so likely to be misused by the jury as evidence of the fact asserted*[.]" *Id.* (emphasis in original) (citations omitted).

The *Parker* Court relied on *Graves v. State*, 334 Md. 30 (1994). In that case, the court permitted a police officer to testify that a suspect told him that Graves was his accomplice. *Id.* at 35. The only nonhearsay purpose for that testimony was to explain why the officer included Graves's photograph in a photo array that he showed to the victims. *Id.* at 42. "That conduct," the Court of Appeals wrote, "would have been just as effectively explained by testimony that his selection of the photographs was based 'on information received.'" *Id.* Weighing "that limited probative value against the unfair prejudice to [Graves] because of the likelihood that the jury would misuse that information as substantive evidence of guilt," the Court of Appeals held "that the trial judge abused his discretion in admitting the testimony." *Id.* If the statement "was offered for its limited probative value to show that the officer acted upon it in arranging the photographic array, that probative value was greatly outweighed by its unfair

prejudice to Graves because of the danger of misuse of the information by the jury." *Id.* at 43.

Under *Parker* and *Graves*, we conclude that the court erred in permitting Deputy Wathne to testify that Ms. Beattie told him that Scott had pointed a gun at her head. Although the court admitted the testimony solely for the nonhearsay purpose of explaining why the deputy questioned Scott as he did, the testimony required the deputy to "'repeat[] definite complaints of a particular crime by the accused.'" *Parker v. State*, 408 Md. at 440 (quoting *Graves v. State*, 334 Md. at 39-40). Consequently, the testimony was "*likely to be misused by the jury as evidence of the fact asserted*[.]" *Id.* (emphasis in original). Moreover, the "limited probative value" of the testimony "was greatly outweighed by its unfair prejudice to [Scott] because of the danger of misuse of the information by the jury" – i.e., the danger that the jury would use the statement as substantive proof that Scott pointed a gun at Ms. Beattie's head. As in *Parker*, 408 Md. at 446, and *Graves*, 334 Md. at 42, the court should have required Deputy Wathne to explain why he did what he did by saying that he acted on the basis of "information received," or something similarly opaque, without repeating the substance of what Ms. Beattie said.

Our conclusion is strengthened by the uses to which the State put the statement in closing argument. *See Parker v. State*, 408 Md. at 446. The State, in closing, did not use the deputy's testimony for the limited purpose of explaining why he did what he did. Rather, the State used the testimony to bolster Ms. Beattie's account and to stress that she had told a single, consistent story throughout the ordeal. Because the State used the

statement for the truth of the matters asserted therein, we can only infer that the jury must have done so as well.[1]

The State argues that Ms. "Beattie's statement was foundational to the State introducing evidence of Scott's reaction to Beattie's accusation, including evidence of Scott's demeanor." According to the State, "[t]he jury could not have contextualized Scott's 'smiling' and 'laughing' reaction unless it knew what Deputy Wathne had asked him." We are unpersuaded. If Scott's reaction to the deputy's question was the State's key point, then we see no reason why the jury needed to hear anything other than the deputy's question itself. For the State to elicit evidence of Scott's reaction to the deputy's question, it was unnecessary to have the deputy repeat what Ms. Beattie had told him before he asked the question.

In an effort to uphold the convictions on other grounds, the State argues that Deputy Wathne's account of what Ms. Beattie told him was admissible under the "verbal completeness doctrine." Under the doctrine, which is "partially codified" in Maryland Rule 5-106,[2] "[w]hen part or all of a writing or recorded statement is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." The Court of Appeals has stated, when a party has

[1] The State does not argue that Scott waived his objection to Deputy Wathne's account of what Ms. Beattie told him by not objecting to the use of that testimony as substantive evidence in closing.

[2] *Otto v. State*, 459 Md. 423, 447 (2018); *Conyers v. State*, 345 Md. 525, 540 (1997).

introduced part of a conversation (as opposed to a writing or recorded statement), the common-law doctrine of verbal completeness may permit the other party to admit other parts of the conversation. *Conyers v. State*, 345 Md. 525, 541 (1997).

The State principally relies on *Paschall v. State*, 71 Md. App. 234 (1987). In that case, the defense cross-examined a witness by pointing out inconsistencies between his trial testimony and his statement to the police. *Id.* at 237. The State responded by moving to admit additional parts of the witness's statement that pertained to the same subject matter. *Id.* at 237-38. Because the jury might have been misled unless it heard the additional parts of the witness's statement, the trial court permitted the State to introduce them under the doctrine of verbal completeness. *Id.* at 238. This Court affirmed. *Id.* at 241.

Turning to this case, it is unclear whether we are even allowed to say that the trial court in this case was "right for the wrong reason" on the ground that it might have admitted the challenged testimony under the doctrine of verbal completeness. Assuming that the doctrine of verbal completeness even applies in this case, the trial court would, at most, have had the discretion to allow, or not to allow, the testimony. *Otto v. State*, 459 Md. 423, 446 (2018); *Conyers v. State* 345 Md. at 543. The court, however, did not exercise its discretion to allow the testimony under the doctrine of verbal completeness. Thus, if we were to uphold the trial court on the basis of a discretionary decision that it did not make, we, as an appellate court, would be making the discretionary decision in the first instance. It is doubtful that we are allowed to do so. *See North River Ins. Co. v. Mayor and City Council of Baltimore*, 343 Md. 34, 48 (1996).

In any event, this is not a case like *Paschall*, in which one party impeached a witness with a prior inconsistent statement, and the court permitted the other party to introduce additional parts of the statement for context. Instead, during the direct examination of Deputy Wathne, before anyone had attempted to impeach him about anything, the State asked to introduce part of Ms. Beattie's statement to the deputy (as reflected in his report). Obviously, the State was not attempting to introduce part of the report in order to explain or supply context for another part of the report that the jury had already heard, because the report had not even been marked as an exhibit at that time. The doctrine of verbal completeness did not permit the State to introduce Ms. Beattie's statement to the deputy during the direct examination of the deputy.[3]

[3] The language of Rule 5-106 underscores why the doctrine of verbal completeness does not justify the State's effort to introduce Ms. Beattie's statement during the direct examination of Deputy Wathne. The rule states that "[w]hen part or all of a writing or recorded statement is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." In other words, the rule envisions that, if one party introduces part of a writing or recorded statement during its examination of a witness, an adverse party "may require" the introduction of other parts of the statement even before the adverse party had the opportunity to question the witness. "There is no need to wait until one's turn to conduct cross-examination or redirect for the necessary clarification," *see* Lynn McLain, *Maryland Evidence State and Federal* § 106.2, at 199-200 (3d ed. 2013), as there was at common law. *See id*. at 191. Because the rule is designed to permit a party to introduce part of a written or recorded statement during *its adversary's* examination of a witness, it obviously does not permit a party to introduce part of a statement during *its own* examination of a witness, as occurred in this case. Nor did the common-law doctrine, which Maryland retains (*see id*. at 190; *id*. at 196), permit a party to introduce part of a statement during its own examination of a witness. Instead, under the common-law doctrine of verbal completeness, if one party introduced part of a statement during its examination of a witness, the adverse party was entitled to introduce other parts of a statement when it had the opportunity to examine the witness. *See id*. at 196. The common-law doctrine would

Furthermore, under the doctrine of verbal completeness, "where the evidence sought to be admitted is not otherwise inadmissible, the evidence may be admitted, in fairness, 'as an explanation of the previously admitted evidence and not as substantive proof.'" *Otto v. State*, 459 Md. at 447 (quoting *Conyers v. State*, 345 Md. at 541). In closing argument in this case, the State employed Deputy Wathne's account of Ms. Beattie's statement as substantive proof. For that additional reason, the doctrine of verbal completeness does not apply.[4]

Finally, the State argues that Deputy Wathne's account of Ms. Beattie's statement was admissible to rehabilitate her testimony under Md. Rule 5-616(c)(2). That rule provides as follows:

> A witness whose credibility has been attacked may be rehabilitated by:
>
> * * *
>
> (2) Except as provided by statute, evidence of the witness's prior statements that are consistent with the witness's present testimony, when their having been made detracts from the impeachment.

not allow a party to introduce additional parts of a statement during its examination of its own witness, as occurred here.

[4] Scott cites *Otto v. State*, 459 Md. at 450, for the proposition that, under the doctrine of verbal completeness, "[n]o more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable." In his view, Ms. Beattie's statement that Scott "pointed a gun at her head" does not concern the same subject matter as her statement that he never "laid a hand on her or hurt her." According to Scott, her statement that he never "laid a hand on her or hurt her" is a "complete, stand-alone statement, which is not misleading and which requires no further explanation. We express no view on this subject, because "[d]etermining whether separate statements are admissible under the doctrine of verbal completeness is . . . a discretionary act" for the trial court to perform in the first instance. *Id*. at 446.

"Prior consistent statements used for rehabilitation of a witness whose credibility is attacked are relevant not for their truth since they are repetitions of the witness's trial testimony." *Holmes v. State*, 350 Md. 412, 427 (1998). "They are relevant because the circumstances under which they are made rebut an attack on the witness's credibility." *Id.*

The State argues that Scott impeached Ms. Beattie (by suggesting that she had told the police that he never laid a hand on her). Thus, the State argues that her "prior consistent statement" – apparently the statement that Scott pointed a gun at her head – "is admissible to rehabilitate [her] as long as the fact that the witness has made a consistent statement detracts from the impeachment."

As with the doctrine of verbal completeness, it is unclear whether we are even allowed to opine about whether the trial court in this case might have been "right for the wrong reason" on the ground that it could have admitted the challenged testimony under Rule 5-616(c)(2). A trial court, in the first instance, must exercise its discretion to evaluate whether a prior consistent statement is admissible under this rule. *See Hajireen v. State*, 203 Md. App. 537, 552-53 (2012); *id.* at 558; *see also* Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 1305, at 630 (4th ed. 2010) (stating that Rule 5-616(c) "gives the trial judge wide discretion to admit rehabilitation evidence"). In this case, however, no one ever asked the court to exercise its discretion. As an appellate court, we are disinclined, if not disempowered, to exercise that discretion in the first instance. *See North River Ins. Co. v. Mayor and City Council of Baltimore*, 343 Md. at 48.

In any event, the State's argument fails for one of the same reasons that its verbal completeness argument fails. Under Rule 5-616(c)(2), a prior consistent statement is admissible only insofar as it detracts from the impeachment; it is not admitted for the truth of the matters asserted therein. *Holmes v. State*, 350 Md. at 427. In closing argument, however, the State used the statement as substantive proof that Scott had pointed a gun at Ms. Beattie's head. In these circumstances, Rule 5-616(c)(2) does not apply. *See Thomas v. State*, 429 Md. 85, 111 (2012) (holding that statements "were not admissible under Rule 5-616(c)(2) because they were not offered or relied upon for rehabilitative purposes only").[5]

Having concluded that the trial court erred in permitting Deputy Wathne to recount Ms. Beattie's statement that Scott pointed a gun at her head, we turn to the question of whether the error was harmless beyond a reasonable doubt. *See Dionas v. State*, 436 Md. 97, 108 (2013). "[H]armless error review 'is the standard of review most favorable to the defendant short of an automatic reversal.'" *Id.* at 109 (quoting *Bellamy*

[5] Citing *Holmes v. State*, 350 Md. at 415-16, the only case on which the State relies for its argument concerning Rule 5-616(c)(2), Scott argues that the rule applies only if the prior consistent statement concerns "the precise same subject matter as the prior inconsistent statement." Thus, for example, in *Holmes*, the prior consistent statement and the prior inconsistent statement both concerned whether the witness had seen the defendant shoot the victim. *Id*. In one, she said she had; in another, she said that she had not. *Id*. By contrast, the statements in this case concern whether Scott ever laid a hand on Ms. Beattie and whether he pointed a gun at her. Scott is correct in arguing that, absent some "alignment of subject matter between the prior inconsistent statement with which the witness was impeached and the prior consistent statement used to rehabilitate," the rule "would allow bolstering in the guise of impeachment anytime a witness was impeached." Nonetheless, because Rule 5-616(c)(2) requires a discretionary decision by a trial court in the first instance, we leave it to the trial court, on remand, to evaluate this issue, if it recurs.

v. State, 403 Md. 308, 333 (2008)). A "'reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of – whether erroneously admitted or excluded – may have contributed to the rendition of the guilty verdict.'" *Morris v. State*, 418 Md. 194, 221-22 (2011) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). "'[T]he burden is on the State to show that [the error] was harmless beyond a reasonable doubt' and did not influence the outcome of the case." *State v. Dove*, 415 Md. 727, 743 (2010) (quoting *Denicolis v. State*, 378 Md. 646, 658-59 (2003)) (alteration in original).

In the circumstances of this case, we cannot say that the error was harmless beyond a reasonable doubt. This case turned on whether the jury was persuaded, beyond a reasonable doubt, of Ms. Beattie's account of what occurred. By introducing Deputy Wathne's testimony about what Ms. Beattie told him, the State succeeded in improperly bolstering her testimony with a prior consistent statement that was not otherwise admissible. The error requires reversal and a remand for a new trial.[6]

[6] In view of our resolution of the issue, we need not decide whether the court erred in failing to give the limiting instruction that it said it would give (i.e., an instruction that Deputy Wathne's account of Ms. Beattie's statement was admissible only for the purpose of explaining why he did what he did in response and not for the purpose of proving that Scott actually pointed a gun at her). For the same reason, we need not consider whether Scott waived his right to a limiting instruction by not objecting to the court's failure to give the instruction that it said it would give.

II.

In a separate argument, Scott contends that the court erred in admitting Ms. Beattie's testimony that he "looked scared" after the police arrived. We address that contention in order to provide guidance on remand.

On direct examination, Ms. Beattie gave the following testimony:

> [PROSECUTOR]: When you came back to the apartment with your parents and the police, had the defendant's demeanor changed in any way?
>
> [MS. BEATTIE]: Yes.
>
> Q. How?
>
> A. He wasn't angry anymore. He looked scared.
>
> [DEFENSE COUNSEL]: I would object to that, and move to strike that.
>
> THE COURT: I'll allow it.

Scott argues that Ms. Beattie's testimony, that he "looked scared," was not relevant. Even if it was relevant, he argues that its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. He maintains that the testimony could have misled the jury to conclude that he was afraid of the police "because of some other criminal conduct on his part, imputing to [him] a criminal propensity, which constitutes unfair prejudice and violates Maryland Rule 5-404(b)." He puts forward an elaborate argument to the effect that the single statement, that he "looked scared," was inadmissible evidence of consciousness of guilt. Lastly, he argues that even if Ms. Beattie's testimony was relevant and not unfairly prejudicial, it was inadmissible lay opinion testimony.

In general, the admission of evidence is committed to the sound discretion of the trial court. *State v. Young*, 462 Md. 159, 169-70 (2018); *Johnson v. State*, 457 Md. 513, 530 (2018). The question of whether evidence is relevant is, however, as a matter of law, which we review without deference to the trial court. *State v. Simms*, 420 Md. 705, 725 (2011).

In this case, the relevance of Ms. Beattie's testimony is blindingly obvious: Scott's frightened demeanor suggested that he knew that he had done something wrong. In fact, Scott himself recognizes the relevance of the testimony when he argues elsewhere that the testimony was evidence of his consciousness of guilt. There is no merit to Scott's contention that Ms. Beattie's testimony was irrelevant.

It is equally obvious that Ms. Beattie's testimony was admissible as a lay opinion. *See, e.g.*, *Walter v. State*, 239 Md. App. 168, 200-01 (2018) (affirming the admission of lay opinion testimony that the defendant looked as though he was "trapped" when confronted him about his interactions with his alleged victim); *Jones v. State*, 132 Md. App. 657, 679-81 (2000) (affirming the admission of lay opinion testimony that the defendant appeared to be nervous as police officers approached him); *see generally* Md. Rule 5-701.

A lay opinion, like Ms. Beattie's opinion in this case, is typically a conclusion that a witness may express when it is "impossible, difficult, or inefficient to verbalize or communicate" the underlying observations on which the conclusion is based. *Robinson v. State*, 348 Md. 104, 119 (1997); *accord Walter v. State*, 239 Md. App. at 200. Lay opinion testimony encompasses "'an endless number of items that cannot be described

factually in words apart from inferences.'" *Ragland v. State*, 385 Md. 706, 718 (2005) (quoting *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995)); *accord Walter v. State*, 239 Md. App. at 200. A "'prototypical example'" of lay opinion testimony is testimony that relates to a person's "'manner of conduct,'" *Ragland v. State*, 385 Md. at 718 (quoting *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d at 1196), like Ms. Beattie's testimony in this case. As long as the lay opinion is helpful to the jury and rationally based on the perceptions of the witness (Md. Rule 5-701), as Ms. Beattie's was, it is more efficient to permit the witness to express the opinion than to require the witness to enunciate the underlying observations on which the conclusion is based. The court did not abuse its discretion in admitting Ms. Beattie's lay opinion testimony in this case.

Once it is established that Ms. Beattie's testimony was admissible as a lay opinion, Scott's other objections fall away. The testimony that Scott "looked scared" is no more unfairly prejudicial than the testimony that an alleged child abuser looked as though he was "trapped" when his family members confronted him in *Walter*, or the testimony that a murder suspect appeared to be nervous when the police officers approached him in *Jones*. The testimony that Scott "looked scared" does not impute a criminal propensity to him any more than the testimony that the defendant in *Walter* looked "trapped" or that the defendant in *Jones* looked "nervous" imputed a criminal propensity to them.[7]

[7] Scott argues that, if he looked scared, it was because he was concerned that the police would find his stash of illegal drugs. In fact, the officers evidently did find the drugs, because the State charged Scott with various drug offenses and drug-related

Scott's "consciousness of guilt" argument deserves one further comment. Scott argues that because his "scared" demeanor evidences his consciousness of guilt, the court could not permit Ms. Beattie to testify that he "looked scared" unless the State first established something akin to the four prerequisites for giving a jury instruction about the defendant's flight. *See Thompson v. State*, 393 Md. 291, 312 (2006) ("for an instruction on flight to be given properly, the following four inferences must reasonably be able to be drawn from the facts of the case as ultimately tried: that the behavior of the defendant suggests flight; that the flight suggests a consciousness of guilt; that the consciousness of guilt is related to the crime charged or a closely related crime; and that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime"). The short answer to that contention is that this case does not involve a jury instruction; it involves a witness's answer to an open-ended question on direct examination. It is absurd to suggest that the State must establish something like the *Thompson* inferences before one of its witnesses can answer a question about the defendant's appearance or demeanor.

firearms offenses, but dismissed them before trial. Scott argues that it was unfairly prejudicial to allow Ms. Beattie to testify that he "looked scared," because that testimony forced him to choose between (1) telling the jury that he was actually only scared of being arrested on drug charges or (2) saying nothing and thus allowing the jury to infer that he was scared of being brought to account for pointing a rifle at Ms. Beattie. We see no basis to conclude that the trial court was somehow aware of the Hobson's choice that Scott now says he confronted. Hence, we cannot say that the court abused its discretion in its evaluation of whether the probative value of the testimony was substantially outweighed by the danger of unfair prejudice. Md. Rule 5-403.

In any event, even if the court somehow erred in allowing Ms. Beattie's testimony, we would not have the slightest difficulty in concluding that the error was harmless beyond a reasonable doubt. *Dorsey v. State*, 276 Md. 638, 659 (1976). Ms. Beattie mentioned Scott's demeanor only in passing. In closing arguments, neither party referred to Ms. Beattie's comment about his demeanor. In fact, to the extent that the State discussed Scott's demeanor, it focused on his laughter in response to the question of whether he had pulled a gun on Ms. Beattie. In other words, the State completely ignored Ms. Beattie's testimony about Scott's demeanor and argued that Scott was guilty not because he "looked scared," but because he laughed inappropriately when Deputy Wathne asked him whether he had pointed a gun at her.

JUDGMENTS OF THE CIRCUIT COURT FOR CECIL COUNTY REVERSED; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY CECIL COUNTY.