Circuit Court for Wicomico County
Case No. 22-K-16-000386

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2393

September Term, 2019

GREGORY DAVID STERLING, SR.

v.

STATE OF MARYLAND

Nazarian,
Wells,
Raker, Irma
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: December 7, 2021

Gregory Sterling was tried by jury in the Circuit Court for Wicomico County on December 11 and 12, 2019. He was convicted of attempted first-degree murder and carrying a dangerous weapon openly with the intent to injure. On appeal, he argues that the trial judge erred in allowing the State to impeach him with a forty-year-old conviction for armed robbery. We affirm.

I. BACKGROUND

A. The Incident.

Gregory Sterling was an employee of the victim, Stephen Byrd, who owned a consignment shop in Fruitland. Mr. Byrd paid Mr. Sterling forty dollars per day to work around the shop and allowed Mr. Sterling to live in a motor home on his property. Each man's account of the events of the day in question differs, but there is no dispute that two to three months before the incident at issue, Mr. Sterling and Mr. Byrd were drinking together at a bar and Mr. Byrd accused Mr. Sterling of stealing $9,000 from him. Mr. Byrd attacked Mr. Sterling and a fistfight ensued. Mr. Sterling sustained injuries from the fight, but decided not to press charges because he feared losing his job and place to live.

It also is undisputed that on May 2, 2016, Mr. Byrd arrived at the store towing a trailer behind his vehicle. He exited his vehicle and approached Mr. Sterling, who was in or near the shop. What happened next, though, is where the stories diverge. According to Mr. Byrd, Mr. Sterling then said "I'm gonna rob you and kill you" and struck Mr. Byrd in the torso with a machete. Mr. Byrd emptied his pockets and dropped cash on the ground. Mr. Sterling continued to strike Mr. Byrd with the machete as he attempted to get back in

his vehicle. Eventually, Mr. Byrd crawled under the trailer to escape. At that time, a customer arrived and threatened to run over Mr. Sterling if he didn't leave the area. Mr. Sterling gathered the bloody cash from the ground and pursued Mr. Byrd to the passenger side of the customer's van. As the customer was on the phone with the 911 operator, he told Mr. Sterling the police were on the way, and Mr. Sterling fled to the nearby woods with the cash and machete. The customer testified that Mr. Byrd was "full of blood from head to toe."

Mr. Sterling testified in his own defense. In his version, Mr. Byrd arrived with a machete for cutting some branches, then accused Mr. Sterling of stealing $9,000 and threatened to fire him. Mr. Sterling replied that he would turn him in to the police for selling drugs if he fired him. Mr. Byrd became angry, said "I'll kill you," and attacked Mr. Sterling with the machete. An altercation ensued where Mr. Byrd dropped the machete and picked up a claw hammer to attack Mr. Sterling. Mr. Sterling said that he stabbed Mr. Byrd with the machete and ran from the building. Mr. Byrd continued to pursue Mr. Sterling with the hammer. Mr. Sterling hit Mr. Byrd four more times with the machete to get away from him, and Mr. Byrd dove under the trailer to call for help. The customer arrived a short time later. Both the customer and Mr. Byrd yelled at Mr. Sterling to leave when Mr. Sterling told Mr. Byrd that he owed him for the day's pay. Mr. Byrd reached into his pocket and handed Mr. Sterling $66, which he counted on his way through the woods.

Mr. Sterling was apprehended by the Fruitland Police Department minutes after the attack. The Wicomico County Sheriff's Department inventoried his property, which

included $346.48; Mr. Sterling said a portion of this was earnings from wages. Mr. Byrd suffered numerous permanent injuries, including multiple lacerations about his body, collapsed lung, perforated stomach, and lacerated diaphragm. His left kidney was damaged and required removal. Police reported that Mr. Sterling had a minor scratch on his back and slight redness on his right palm.

Trial testimony from emergency medical services and hospital technicians revealed that Mr. Byrd told them Mr. Sterling was the assailant, but they deny Mr. Byrd telling them that Mr. Sterling threatened to kill or rob him. A detective testified that he interviewed Mr. Byrd at the hospital on May 23, 2016. He recalled Mr. Byrd was in poor health and upset about the events of May 2, 2016. Mr. Byrd recounted to the detective the fistfight a couple of months before the machete attack and that he suspected Mr. Sterling of taking $9,000 from him. He also blamed Mr. Sterling for the fact that a trailer on his property had burned down.

B. Procedural History.

Mr. Sterling was charged with attempted first-degree murder, attempted second-degree murder, first-degree assault, second-degree assault, and openly wearing and carrying a dangerous weapon with intent to injure. Before trial, Mr. Sterling discharged his assigned assistant public defender and proceeded without counsel. He was convicted on all counts and sentenced to life in prison on the attempted first-degree murder conviction. He appealed and contended that the trial court erred when it failed to comply strictly with the mandates of Maryland Rule 4-215. We held that the prosecutor inaccurately advised

Mr. Sterling of the maximum penalty for attempted murder, reversed the conviction, and remanded for a new trial. *Sterling v. State*, No. 105, Sept. Term 2019, 2019 WL 2513351 at *3–4 (Md. App. June 11, 2019).

The second trial was held on December 11 and 12, 2019. After the State rested its case, the defense informed the trial court that Mr. Sterling intended to testify. The trial court directed counsel to advise Mr. Sterling of his Fifth Amendment rights. In the course of advising him, counsel stated that Mr. Sterling's criminal record contained many prior convictions, but that any impeachable offenses were more than fifteen years old and should not be used to impeach him. Counsel stated further that if the State intended to question Mr. Sterling about those offenses that counsel be allowed an opportunity to approach the bench and discuss. The trial court assured both parties there would be an *in camera* discussion, then turned to Mr. Sterling and explained how his previous convictions could be used against him:

> Sir, what she is explaining to you is that if you have been convicted of an infamous crime or crime relevant to your credibility, it may be brought out against you during testimony but only if the Court determines that the probative value of admitting the evidence outweighs the danger of unfair prejudice. But I believe all of your impeachable -- so-called impeachable offenses are over 15 years old.

The trial court asked the State if it had a "different understanding." The prosecutor replied "I don't Your Honor [but] . . . [i]f the State believes that there is an opportunity to inquire, the State will approach the Court first -- and we can have that discussion in camera." The trial court asked Mr. Sterling if he "underst[ood] all of those rights," and he

stated that he did and was prepared to testify.

During cross-examination, the State asked Mr. Sterling about a letter he had written to the trial court asking for the return of the money the police confiscated when he was arrested. Mr. Sterling's letter requested $280.48. When asked why he wanted that particular amount, he stated "that $66 was Mr. Byrd's, not mine. $280.48 was mine." When questioned by the State as to why he did not claim the $66 if it was money he earned for wages, Mr. Sterling replied that he didn't want to take something that didn't belong to him:

> I was trying to verify it through the Courts, too, that, hey, he gave me $66. I wanted that in documentation that I'm admitting that he handed me $66. That's why I did not claim $348.48 [sic] because of the money he gave me, the $66, specifically. I wanted to set the record clear. *I wasn't trying to take nothing that weren't mine. I didn't want nothing, never did, take anything that weren't mine*. I earned that money . . . [h]e gave it to me, yes. But in my mind, I wanted the court to know of what really happened. I had to put it out like that . . . the court will not see that he handed me $66.

(Emphasis added.)

The State countered and said, "You didn't want the $66 back because you robbed him of it, isn't that true?" Mr. Sterling denied that he robbed Mr. Byrd and said he could have claimed $346.48 because it was all his. The State approached the bench and said to the court, "He just said I wouldn't take anything that wasn't mine. He's been convicted of armed robbery. How is he not again open[ing] the door?" The trial court agreed, stated that it was "pretty clear he has opened the door on that one," and permitted the State to ask Mr. Sterling if he had ever been convicted of armed robbery. The defense objected that the question was outside the scope of impeachment, and the trial court overruled. The

following dialogue ensued where the State used Mr. Sterling's previous conviction against him:

> [THE STATE]: A moment ago you testified I wouldn't take nothing that wasn't mine. Did you say that?
>
> [MR. STERLING]: Yes.
>
> [THE STATE]: Mr. Sterling, have you ever been convicted of armed robbery before?
>
> [MR. STERLING]: Yes.
>
> [THE STATE]: So you would agree with me that you would take things that aren't yours?
>
> [MR. STERLING]: That's been 40 some years, 40 some years. I paid my debt to society. I got nothing to hide about it, yes. I done a stupid thing when I was 19 years old. I'm 62 now. I think it's a lot of years in between that -- that I paid my debt to society. I don't owe society nothing.

The jury convicted Mr. Sterling of attempted first-degree murder and carrying a dangerous weapon openly with the intent to injure. He was sentenced to life imprisonment. He filed a timely appeal. We supply additional facts as necessary below.

II. DISCUSSION

Mr. Sterling raises one question on appeal: "Did the trial court err in allowing the State to impeach [him] with a 40-year-old conviction for armed robbery?" Mr. Sterling argues that the State's impeachment of him with a forty-year-old conviction for armed robbery was impermissible as a matter of law under Maryland Rule 5-609 and that his conviction should be reversed.

Mr. Sterling approaches this argument from three angles. *First*, he argues that the door was not opened because his prior conviction for armed robbery was not inconsistent with and did not rebut his assertion that he would never take anything that wasn't his.

Next, he argues the open-door doctrine applies only when the defense presents evidence to be rebutted in the first instance. He contends the State obtained evidence from him not because he presented it in the first instance, but during cross-examination. *Finally*, he argues the open-door doctrine does not allow for the admission of incompetent evidence, and his prior conviction for armed robbery is incompetent evidence because it was inadmissible for reasons other than relevancy.

We review the trial court's ruling on the admissibility of evidence for abuse of discretion. *State v. Robertson*, 463 Md. 342, 351 (2019). "Abuse of discretion [exists] where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to [ ] guiding rules or principles." *Id.* at 364 (*quoting Alexis v. State*, 437 Md. 457, 478 (2014)). Errors of law, purely legal questions, and questions of relevance are reviewed *de novo*. *Id.* at 351.

Maryland Rule 5-401 defines the scope of admissible evidence in terms of relevance, *i.e.*, evidence that tends to make the existence of a fact more or less probable. Md. Rule 5-401. All relevant evidence is admissible, with certain exceptions,[1] and evidence that isn't relevant isn't admissible. Md. Rule 5-402. "A trial court does not have discretion to admit irrelevant evidence." *State v. Heath*, 464 Md. 455, 457–58 (2019) (*citing State v. Simms*, 420 Md. 705, 724–25 (2011)). But relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair

[1] "Except as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible." Md. Rule 5-402.

prejudice." Md. Rule 5-403.

A. Mr. Sterling Cracked The Door Open.

First, Mr. Sterling argues that he didn't open the door to impeachment with his old conviction for armed robbery because that conviction was not inconsistent with and did not rebut his assertion that he would never take anything that wasn't his. The State responds that Mr. Sterling assaulted Mr. Byrd as part of a planned robbery and that when Mr. Sterling said he would never take anything that wasn't his, he was saying it is less likely that he assaulted Mr. Byrd as part of a robbery.

The legal doctrine of "opening the door" expands the scope of relevancy. *Heath*, 464 Md. at 459. The doctrine "'authorizes admitting evidence which otherwise would have been irrelevant in order to respond to (1) admissible evidence which generates an issue, or (2) inadmissible evidence admitted by the court over objection.'" *Id.* (*quoting Clark v. State*, 332 Md. 77, 84–85 (1993)). "The open door doctrine is based on principles of fairness and serves to 'balance any unfair prejudice one party may have suffered.' It authorizes parties to 'meet fire with fire,' as they introduce otherwise inadmissible evidence [henceforth, 'rebuttal evidence'] in response to evidence put forth by the opposing side." *Robertson*, 463 Md. at 351–52 (alterations in original) (*quoting Little v. Schneider*, 434 Md. 150, 163, 157 (2013)).

Mr. Sterling's proffered evidence of his character—that he would never take anything that wasn't his—is admissible under Maryland Rule 5-404(a)(2)(A), which applies in criminal cases and states in relevant part "[a]n accused may offer evidence of the

accused's pertinent trait of character. If the evidence is admitted, the prosecution may offer evidence to rebut it." Md. Rule 5-404(a)(2)(A).

The question is whether Mr. Sterling "opened the door" here when he volunteered that he "wasn't trying to take nothing that weren't mine. I didn't want nothing, never did, take anything that weren't mine," and whether this statement put at issue his reputation, and specifically his reputation for taking things that weren't his. If he did, the State was permitted to rebut Mr. Sterling's proffered evidence of his character—that he would never take anything that wasn't his—under Maryland Rule 5-405(a), which states, "[i]n all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." Md. Rule 5-405(a).

The statement arose during cross-examination, when the State confronted Mr. Sterling with a letter he had written seeking to recover some of the cash that had been seized when he was arrested. The questioning dealt exclusively with the events at issue, and neither his direct testimony nor the cross to that point had sought to raise broader questions of his past or his character.

In the course of attempting to distinguish money he claimed that he indisputably had earned from money he was alleged to have taken, Mr. Sterling uttered the two sentences that, the State claims, opened the door. The first sentence—"I wasn't trying to take nothing that weren't mine"—didn't open anything. It related solely to what he was or

wasn't taking at the time of these alleged crimes. Viewed by itself, that sentence couldn't support a finding that Mr. Sterling had opened the door to impeachment about his character.

But the second sentence—"I didn't want nothing, never did, take anything that weren't mine"—can be read as a character statement. Its first and third clauses, like the first sentence, talk only about what he didn't want or didn't take at the time. The second clause, though, appears to set up the third, and when he says he "never did, take anything that weren't mine," he gestures much more broadly than the night at issue. The word "never" is the key, and when he expanded the temporal scope of the actions he wanted the court and jury to consider, he invited scrutiny of those actions.

This admittedly is a close call. Were it not for the word "never" in the second sentence, the State's interpretation of Mr. Sterling's testimony in the trial court and here couldn't hold water—we would be left with Mr. Sterling saying only that he didn't take anything that wasn't his. But he did volunteer that he "never did, take anything that weren't mine," and we cannot say that the circuit court erred in interpreting that statement as a more general statement of his character of not taking things that weren't his. Mr. Sterling may not have kicked the door down, but he cracked it open enough to support the court's decision to allow the State to respond.

Second, Mr. Sterling contends that the open-door doctrine applies only when the defense presents evidence to be rebutted in the first instance, not where it arises only during cross-examination by the State. Again, the context was a series of questions by the State about a letter Mr. Sterling had written to the trial court asking the court to return a portion

of the money he had when he was arrested, but not the $66 that he contended belonged to Mr. Byrd. The State argues that the prosecutor did not prompt Mr. Sterling to say that he never took anything that didn't belong to him, but that Mr. Sterling made a non-responsive statement when the State asked him if he believed the $66 belonged to him. Instead of answering the question with a "yes" or "no," Mr. Sterling answered with a non-responsive "blurt" that he never took anything that isn't his—a response that, in its view, the State was not responsible for causing.

Mr. Sterling points to *Cason v. State*, in which the defendant denied using heroin or knowing how it is packaged and the State cross-examined the defendant with a prior conviction for heroin possession. 66 Md. App. 757, 763–64, 776 (1986). In *Cason*, the State asked the defendant if he knew how heroin is normally packaged for sale, and the defendant replied that he didn't. *Id.* The State argued that this statement opened the door and offered his twenty-year-old conviction as proof that he *did* know how heroin was packaged. *Id.* at 764–65. We held that this form of impeachment was improper because heroin possession is not an "infamous" crime, such as "treason, felony, perjury, forgery," and the conviction was more than ten years old. *Id.* at 774–75. We went on to find that "[s]econdly, and most important, the State's reliance on the doctrine of 'curative admissibility' is misplaced . . . [because it] applies when the evidence to be rebutted is presented by the defense in the first instance." *Id.* at 776. (*quoting Savoy v. State*, 64 Md. App. 241, 253–54 (1985)). We noted as well that "upon cross-examination, *the State* built the strawman which it now seeks to tear down," meaning that the State created the need to

introduce impeachment evidence in the first place, rather than the defendant opening the door to introduce impeachment evidence. *Id.*

The State counters with *Bradley v. State*, in which, while questioning their own witness, the State improperly pursued an independent line of questioning for the purpose of introducing otherwise inadmissible impeachment evidence. 333 Md. 593, 601–04 (1994). The State contends that "where the State is not responsible for a 'blurt' that harms its case, a prior inconsistent statement remains permissible impeachment evidence." *Id.* at 607. Regardless, *Bradley* held that "the State is permitted to impeach *its witness* with a prior inconsistent statement if the State did not create the need to impeach," *id.* (emphasis added), and Mr. Sterling was a defendant and testifying on his own behalf.

In this case, the State didn't seek to rebut the fact that Mr. Sterling wrote a letter asking for his money, but to rebut Mr. Sterling's testimony that he wouldn't take anything that wasn't his. Although the State was cross-examining Mr. Sterling when he made the statement, the State didn't elicit it—Mr. Sterling offered it to make it look less likely that he stabbed Mr. Byrd in the course of robbing him. Once Mr. Sterling offered testimony of his broader character for not taking what wasn't his, we agree with the circuit court that the reference to his old armed robbery conviction was fair game.

B. The Admission Of Mr. Sterling's Conviction Is Not Inadmissible *Per Se*.

Finally, Mr. Sterling argues that his forty-year-old conviction for armed robbery was inadmissible *per se* under Maryland Rule 5-609. Rule 5-609(a) permits the admission of past convictions as relevant to the witness's credibility "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 objecting party." The Rule specifies further that "[e]vidence of a conviction is not admissible *under this Rule* if a period of more than 15 years has elapsed since the date of conviction." Md. Rule 5-609(b) (emphasis added).

But the fifteen-year time limitation does not apply where other rules, specifically Maryland Rule 5-404(a)(2)(A), provide an independent basis for admissibility. And when asked "to read the same fifteen-year limitation expressly written in Maryland Rule 5-609, implicitly in Maryland Rule 5-404," the Court of Appeals declined. *Williams v. State*, 457 Md. 551, 567–68 (2018). In interpreting the Maryland Rules, the Court "first examine[s] the plain language." *Id.* at 568 (*citing Pinkney v. State*, 427 Md. 77, 88 (2012)). "After this step, our analysis ends if: 'the words are clear and unambiguous.'" *Id.* (*quoting State v. Taylor*, 431 Md. 615, 630–31 (2013)). "Following these cardinal rules of interpretation we decline to read a fifteen-year limitation into Maryland Rule 5-404 where none exists." *Id.* The Court held that Maryland Rule 5-404 "unambiguously does not provide a fifteen-year limitation for rebuttal evidence, thus we decline to create one where no clear avenue exists." *Id*. at 573.

As discussed above, Mr. Sterling's proffered evidence of his character—that he would never take anything that wasn't his—became relevant when he opened the door to it. *See* Md. Rule 5-404(a)(2)(A) ("An accused may offer evidence of the accused's pertinent trait of character. If the evidence is admitted, the prosecution may offer evidence

to rebut it."). And because that Rule provides a basis for admissibility, the fifteen-year time limit in Maryland Rule 5-609 does not apply and does not bar the State from using evidence of Mr. Sterling's forty-year-old armed robbery conviction for the purpose of impeachment.

C. The Probative Value Of The Evidence Outweighed The Danger Of Unfair Prejudice.

From there, Mr. Sterling argues that any minimal probative value of his forty-year-old conviction for armed robbery was outweighed by unfair prejudice and that the trial judge did not, and could not, conduct the balancing test without first knowing the age of the conviction. He points to *Beales v. State*, where the trial court judge did not conduct a balancing test when admitting a fourteen-year-old theft conviction under the predecessor to Maryland Rule 5-609. 329 Md. 263, 273 (1993). The trial court had "focused largely on the proper form of the impeaching question, rather than its possible impact" and found that "[t]he remoteness of a prior conviction is a critical factor to be weighed in the balance." *Id.* at 274.

The State contends that the trial court knew that Mr. Sterling's conviction for armed robbery was over fifteen years old and was aware of the need to balance probativity against prejudice because it discussed the potential admissibility of Mr. Sterling's earlier conviction with him before he testified:

> Sir, what she is explaining to you is that if you have been convicted of an infamous crime or crime relevant to your credibility, it may be brought out against you during testimony but only if the Court determines that the probative value of admitting the evidence outweighs the danger of unfair prejudice. But I believe all of your impeachable -- so-called impeachable offenses are over 15 years old.

After Mr. Sterling opened the door and the State was allowed to raise his old conviction, his answers provided context to the jury, specifically the fact that he had committed the crime as a teenager:

> That's been some 40 years ago, 40 some years. I paid my debt to society. I got nothing to hide about it, yes, I done a stupid thing when I was 19 years old. I'm 62 now. I think that's a lot of years in between that—that I paid my debt to society. I don't owe society nothing.

Because Mr. Sterling put his character at issue when he testified that he "never" stole anything, the State was allowed to introduce evidence to rebut those false statements. The State is permitted to attack a witness's credibility under Maryland Rule 5-616(a)(2) to "[p]rov[e] that the facts are not as testified to by the witness," but not if "its probative value is substantially outweighed by the danger of unfair prejudice." Md. Rule 5-403. There is no doubt that the revelation of his old conviction was prejudicial to him—the question is whether that prejudice was unfair and outweighed its probativity substantially. We agree with the circuit court that it wasn't. Both the probativity of the old conviction and the potential for prejudice were relatively minor. A long time had passed since Mr. Sterling's conviction, and the danger of prejudice to the jury is small because Mr. Sterling himself offered that the armed robbery being used by the State for impeachment was over forty years old. We cannot find that the circuit court abused its discretion in determining that the balance of the relative value and harm from this testimony tipped toward admitting it.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. APPELLANT TO PAY COSTS.