Circuit Court for Baltimore City
Case No. 118240023

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2453

September Term, 2019

CHRISTOPHER BROWN

v.

STATE OF MARYLAND

Graeff,
Leahy,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: May 14, 2021

Appellant Christopher Brown was convicted by a jury in the Circuit Court for Baltimore City of second-degree murder, use of a handgun in the commission of a crime of violence, and carrying a handgun. Appellant presents the following questions for our review:

> "1. Did the trial court err in admitting impermissible 'other crimes' or 'bad acts' evidence?
>
> 2. Did the trial court err in foreclosing cross-examination of Ms. Avery by precluding impeachment with her prior prostitution conviction?
>
> 3. Did the trial court err in allowing impermissible rebuttal closing argument which both shifted the burden to [the] defense and argued facts not in evidence?"

Finding no error, we shall affirm.

I.

Appellant was indicted by the Grand Jury for Baltimore City on charges of first- and second-degree murder, use of a handgun in the commission of a crime of violence, and carrying a handgun. The jury acquitted him of first-degree murder and convicted him of second-degree murder and the handgun violations. The court sentenced appellant to a term of incarceration of forty years for second-degree murder, twenty years for use of a handgun in the commission of a crime of violence, to be served consecutively, and three years for carrying a handgun, to be served concurrently.

In the early hours of July 18, 2018, Keith Hamlet was shot and killed in Baltimore City while outdoors at or near the intersection of Gorsuch Avenue and Ellerslie Avenue.

This location was near the home of Anna Davis, with whom Mr. Hamlet had been staying in the weeks before he was killed. Immediately before the killing, Mr. Hamlet had a tense encounter with Tanya Avery, who was romantically involved with Mr. Hamlet and appellant. Both Ms. Avery and Ms. Davis said that they witnessed appellant at the scene.

Ms. Davis testified that she knew Ms. Avery to be Mr. Hamlet's girlfriend, that Ms. Avery was living at Mr. Hamlet's family home, and that she often came by Ms. Davis's home to get money from Mr. Hamlet. There was turmoil in the relationship between Mr. Hamlet and Ms. Avery in the week before the shooting. On July 17, 2018, only hours before the shooting, Mr. Hamlet had been back and forth between his home and Ms. Davis's home and Mr. Hamlet and Ms. Avery were "having some sort of confrontation," Davis testified.

Between 1:00 a.m. and 2:00 a.m. on July 18, Ms. Davis was accompanying an elderly friend to a nearby ATM, and while walking back to her building she thought she saw Ms. Avery and Mr. Hamlet from across the street. She thought she heard Mr. Hamlet say, "I'm ready to talk now, Tanya." She saw a third person too, whom she understood to be appellant. Ms. Davis had seen appellant before this night but never knew his name, and when she was shown a photographic array by the police, she selected two photos, one of appellant and one of another person. Ms. Davis watched Ms. Avery and appellant approach Ms. Avery's rental car as Mr. Hamlet walked behind them with a golf club, which he used

to smash out the passenger rear window.[1] Ms. Davis said to Mr. Hamlet, "Is this how you are going to teach her a lesson? By banging out a car window that you pay the payments on?" Mr. Hamlet then turned and walked back towards her house, and Ms. Davis then heard gunshots. Ms. Davis said that she saw appellant put something silver in his pocket before he and Ms. Avery got into the car and "took off" with Ms. Avery driving. Ms. Davis saw Mr. Hamlet stumble and say, "You just killed me, Tanya, you just killed me," or "You're killing me, Tanya, you're just killing me," or "You killing me, Tanya."

Ms. Avery testified that she dated Mr. Hamlet on and off for seven years before July 2018. She testified that as of July 2018 their relationship was "rocky" and that they were no longer dating but rather "just friends," and that he gave her money for "anything I needed." She said that Mr. Hamlet paid for her "car, house, clothes, whatever I needed." Ms. Avery testified that as of July 2018 she and her three children, who were not Mr. Hamlet's children, were living at Mr. Hamlet's mother's house in Baltimore. Ms. Avery recalled that on the afternoon of July 17, she met Mr. Hamlet at Ellerslie Avenue to bring him some clothes, and that they went to make payment on a rental car and then went to Baltimore Harbor to talk. She said that they then went to pick up her children and she dropped off Mr. Hamlet at Ellerslie Avenue before returning to Mr. Hamlet's mother's house.

Ms. Avery further testified that she went with a friend, Lulu, that night to meet

[1] Mr. Earl Mines rented the vehicle on behalf of Mr. Hamlet for Ms. Avery, using Hamlet's funds.

appellant and to get marijuana. Ms. Avery said that Lulu was a drug dealer and that she dropped Lulu off to "take care of business on the next block" before Ms. Avery went to get marijuana from appellant. According to Ms. Avery, she met appellant at Lafayette and he wanted a ride to a friend's house nearby but she drove them to Ellerslie Avenue to find Mr. Hamlet because her phone service was cut off in light of the fact that the bill was not paid. Ms. Avery testified that when they arrived at Ellerslie Avenue, she addressed appellant: "I told him I'd be back; I was going to get my grandfather to pay my phone bill." As she walked up the steps to the building, she saw Mr. Hamlet in his truck in the parking lot and he called her over. Ms. Avery said that she asked Mr. Hamlet to go with her to drop off a "hack" and that Mr. Hamlet got angry with her and told her, "you bring motherfuckers where I be at." Ms. Avery claimed that appellant got out of the vehicle to urinate in the bushes, whereupon Mr. Hamlet removed a golf club from his truck, came down the stairs, and struck the rear passenger-side window of the car. Ms. Avery testified that she then walked back to the driver's side of the car intending to leave, and that appellant then shot Mr. Hamlet. According to Ms. Avery, Mr. Hamlet then said to her, "He killed me."

She said that she and appellant then got into the car and appellant told her, "Drive." Ms. Avery said that she went around the corner, "blanked out," and crashed the car. She recalled that appellant then moved over and drove the car away and that they left the car on Chase Street. She said that appellant tried to wipe off the car and that they then walked to appellant's grandmother's house, but that he then took her to another house and she stayed with him until the next day.

Ms. Avery testified that she went to the police at 5:00 p.m. or 6:00 p.m. the next day, after she learned from her mother that the police were looking for her. She said that she lied initially to the police, saying that she had just picked up a customer and did not know what happened, lying because she "didn't want to be involved." That night, the police arrested her and charged her with murder. She said that seven months later she told the police the "truth," that the charges were then dropped, and at that time she was released from prison. On February 4, 2019, she agreed with the State that the State would *nolle prosequi* her charges if she would cooperate and testify against appellant.

On the night/morning of the shooting, police interviewed Ms. Davis near the scene, and police were able to interview Earl Mines. At the crime scene, police found a golf club and broken glass near Mr. Hamlet's body. The police, together with a crime lab technician, also recovered metal fragments, one projectile, and seven cartridge casings. No fingerprints were found on the scene.

Police recovered the Nissan Altima that Ms. Avery rode in on the night of the crime. The vehicle was damaged on its front bumper and side quarter panel, it had a flat tire, and the rear passenger-side window was broken. Physical evidence and possessions connected to Ms. Avery were recovered from the vehicle. A BG&E bill addressed to Clayton Earl Roberts was in the car. In addition, police technicians swabbed the plastic cups for DNA and processed the vehicle for fingerprints. One print recovered from the exterior passenger door matched appellant's right index finger.

At trial, appellant contended that there was no cell phone evidence from either

appellant's phone or Ms. Avery's phone that could connect him to the crime scene on the date and time in question. When defense counsel cross-examined Detective McMillion about phone data records, it became clear that Detective McMillion had tendered to the State records from appellant's phone. Appellant points out that defense counsel was surprised and represented that he had no knowledge of these records.[2] In closing argument, the prosecutor referred to Ms. Avery's phone records as corroborative of Ms. Avery's testimony. Defense counsel argued that there was no evidence in Ms. Avery's phone records showing a connection with appellant—but the trial court sustained the prosecutor's objection to the defense argument that appellant's phone records indicated that he was not in the vicinity, as facts not in evidence. Defense counsel then argued that appellant's missing (or unintroduced) phone records pointed to a lack of evidence, *i.e.*, that if the State was in possession of phone records to show that appellant was in the area of the murder at the time of the murder, then the State would have introduced evidence of such. On the prosecutor's rebuttal, the judge overruled a defense objection and permitted the prosecutor to argue, "if his cell phone records pointed to the fact that he wasn't at the scene, don't you

[2] At the close of the evidence, the defense moved for a mistrial because the phone records had not been disclosed to him. The trial judge acknowledged that trial defense counsel might have been unaware of appellant's phone records because those records were not transmitted by predecessor counsel, but ruled that a mistrial was "certainly not warranted." Before this Court, the State emphasizes that trial defense counsel, who was privately retained, had obtained the discovery in the case from appellant's prior counsel. The State relates that the prosecutor advised the judge that the call data and location records had been disclosed to the predecessor defense counsel, and that trial defense counsel did not follow up with the prosecutor when contacted about whether there was any discovery that had not been received.

think those would have been entered into evidence?" The prosecutor also said that the defense team "also have the same powers that the State has to compel witnesses, to put on evidence." In appellant's view, the judge permitted the prosecutor to make a burden-shifting argument, encompassing facts not in evidence and arguably pointing to appellant's failure to testify.

Appellant was convicted and sentenced as above, and this timely appeal followed.

II.

Before this Court, appellant argues three grounds: First, appellant argues that the trial court erred in allowing impermissible "other crimes" or "bad acts" evidence in admitting Ms. Avery's testimony that she met with appellant on July 17, 2018, to obtain marijuana from him. Appellant argues that the trial judge erred by overruling the objection,[3] because the testimony was irrelevant, violative of Rule 5-401 and Rule 5-402, and because the testimony was more prejudicial than probative, thus violating Rule 5-403, and because it was evidence of "other crimes, wrongs, or acts" inadmissible under Rule

[3] The trial judge found as follows:

> "There's no testimony that Christopher Brown, this defendant, can fairly be characterized or legally characterized as a drug dealer. The testimony is only with regard to one event on July 17th, 2018, just after 11:00 p.m. or so—or sometime we know after 11:00, at least according to the testimony—where, at the request of the witness's friend Lulu, the witness went to meet Mr. Brown, with whom she had been romantically involved for one or two months, until a period of time of about two months before July 2018, for the purpose of getting weed that day. There is no evidence that the weed that day was more than ten grams of weed. It's been decriminalized. Nobody's called him a drug dealer. Overruled for now."

5-404(b).

Appellant furthers this argument by alleging that the improper character evidence was prejudicial. Appellant emphasizes the importance of Ms. Avery's testimony to the State's case, calling her its "star witness" in light of the rest of the evidence, which appellant characterizes as "very weak." Appellant points to the lack of physical evidence placing him at the scene of the shooting, and to Ms. Davis's selection of another individual from the photo array in addition to the photo of appellant, as well as Ms. Davis's admission that she did not witness the shooting. Appellant states that there was "little to no other independent evidence pointing to [appellant] Mr. Brown—save the inferential leap required as a result of the single fingerprint left on Ms. Avery's rental car by Mr. Brown, whom Ms. Avery acknowledged was at least a friend," and also highlights the evidence connecting Clayborn Earl Roberts and Earl Mines to the vehicle. Appellant concludes that "this case essentially turned on the testimony of the interested and unreliable person who was originally charged with this murder: Tanya Avery, who had a motive to kill Mr. Hamlet and who received a pass from prosecution in exchange for her testimony."

Second, appellant argues that the trial court erred in not permitting counsel to cross-examine Ms. Avery about her prior conviction for prostitution. Appellant argues that impeachment based on the prior prostitution conviction was required under Rule 5-609(a), which establishes as follows:

> "For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) the crime was an infamous

> crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party."

Appellant further argues that the exclusion from evidence of impeachment by this conviction ran afoul of the Sixth Amendment right to present a defense and to cross-examine a witness under the Confrontation Clause,[4] and of Articles 21 and 24 of the Maryland Declaration of Rights, which respectively protect a defendant's right to examine the witnesses and protect a defendant's right to due process.

Appellant asserts that the trial court erred in excluding the prostitution conviction as not amounting to either an infamous crime or a crime of moral turpitude for want of an element of "deceit," rather than making the discretionary determination that the prostitution conviction was nonetheless relevant to Ms. Avery's credibility in the context of this case. Appellant argues that the trial court failed to engage in any balancing of the probative value of the conviction versus any prejudice to Ms. Avery. Appellant reiterates that the essence of Ms. Avery's story was that she brought a man whom she claimed she was "dating" (allegedly appellant, whose last name she did not know) over to see a man who was "paying her bills" (the late Mr. Hamlet) and that she lied to this other man that Mr. Hamlet was her "grandfather." Appellant argues that the fact that Ms. Avery was a convicted prostitute bore directly on her claim about the nature of her relationship with whomever was in her car, as well as her claim about Mr. Hamlet as a love interest from whom she was receiving

[4] Appellant also inappositely invokes the Compulsory Process Clause of the Sixth Amendment.

money and with whom she was in conflict. Appellant states that the prostitution conviction was relevant to Ms. Avery's motive to murder Mr. Hamlet. Appellant states that her prostitution conviction was directly relevant to the facts and circumstances of this case, it was relevant to her ability to be truthful under oath, and the likelihood of any prejudice to her was slight.

Third, appellant argues that the trial court erred in allowing improper rebuttal closing argument on burden-shifting and facts not in evidence. Appellant argues that the prosecutor's argument was improper for the suggestion that the defense would have introduced evidence if cell phone records had indicated that appellant was not at the scene, and requires reversal because the prosecutor argued facts not in evidence, and because a criminal defendant bears no burden of proof. Further, appellant argues that the prosecutor's comments undermined his right not to have the prosecutor comment on his decision not to testify, a right protected under the Fifth Amendment to the Constitution and Article 22 of the Maryland Declaration of Rights. Appellant states that, in light of the prosecutor's knowledge that potentially exculpatory phone records existed and that the defense did not have them, the prosecutor's argument that if there were phone records showing that appellant was not near the scene then the defense could have produced them was extremely misleading and prejudicial, as was the prosecutor's argument that the defense could have produced a witness.

As to the marijuana "other crimes" issue, the State argues that the trial court properly admitted Ms. Avery's testimony that she sought to obtain marijuana from appellant shortly

before he shot Mr. Hamlet. Appellee argues that the testimony did not implicate Rule 5-404(b) and its prohibition against evidence of other crimes or bad acts, that it was relevant to explain the course of events that led to Mr. Hamlet's death, and that it was not unduly prejudicial.

As to the prostitution impeachment issue, appellee responds that the trial court correctly barred appellant from impeaching Ms. Avery with a prior conviction for prostitution. Appellee relies on Rule 5-609, which allows a witness to be impeached with evidence that the witness has been convicted of a crime "*only if*" the crime "was an infamous crime or other crime relevant to the witness's credibility." Prostitution, according to the State, is not an infamous crime and thus, as a matter of law, is not relevant to credibility. For this proposition, appellee cites to the Maryland Code Criminal Law Article § 11-303, codifying prostitution as a statutory misdemeanor, and cites to two Maryland appellate cases, *Prout v. State*, 311 Md. 348, 365 (1988) (plurality opinion) (ruling that prostitution and solicitation as isolated conduct had no bearing on a witness's credibility), and *Matthews v. State*, 68 Md. App. 282, 299–300 (1986) ("The mere fact that one engages in prostitution does not make one incapable of telling the truth and thus does not pertain to credibility").

As to the closing argument, the State responds that the trial court soundly exercised its discretion in overruling appellant's objection to the prosecutor's rebuttal closing argument. Appellee argues that the prosecutor's rebuttal did not improperly shift the burden, but rather that it was a "fair comment" in response to defense counsel's

insinuations regarding evidence that was not before the jury. Appellee further asserts that even if the prosecutor's rebuttal crossed the line into burden shifting, the balance of the record indicates that appellant suffered no prejudice.

III.

Ordinarily, this Court reviews a trial court's decision as to admissibility of evidence under an abuse of discretion standard. *Taneja v. State*, 231 Md. App. 1, 11 (2016). Relevance, however, is a legal determination that we review *de novo*. Although a trial court's exclusion of evidence is reviewed for abuse of discretion, a trial court has no discretion to admit irrelevant evidence. *Ruffin Hotel v. Gasper*, 418 Md. 594, 619–20 (2011).

Appellant asks this Court to determine whether the circuit court impermissibly admitted Ms. Avery's testimony that she met with appellant on July 17, 2018, to obtain marijuana from him. Maryland Rule 5-404(b) sets out as follows:

> "Evidence of other crimes, wrongs, or other acts including delinquent acts as defined by Code, Courts Article § 3-8A-01 is not admissible to prove the character of a person in order to show action in the conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident, or in conformity with Rule 5-413."

Acts that put the alleged crime in its immediate context are not other acts, however, and are not governed by Rule 5-404(b). Lynn McLain, 5 *Maryland Evidence: State & Federal* § 404:5(a) (2020 Supp.).

Relevant evidence means evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 5-401. Relevant evidence nevertheless may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 5-403.

We agree with the State that Ms. Avery's testimony about marijuana was relevant, that its probative value was not outweighed by unfair prejudice, and that it was not impermissible "other crimes" or "bad acts" evidence under Rule 5-404(b). Rule 5-404(b) is not implicated because we see no indication that testimony was used to prove the character of appellant or to show action in conformity with the character of someone who might sell or provide marijuana. Instead, the testimony apparently was admitted as explanatory of the course of events that led through Ms. Avery's evening on the night of Mr. Hamlet's death, the course of events that led to Mr. Hamlet's death, putting the alleged murder in its immediate context. The testimony was relevant for similar reasons. The testimony tended to make it more probable that appellant had a reason to be at the scene of Mr. Hamlet's death.

Turning to the impeachment question, we agree with the State that the trial court correctly precluded appellant from impeaching Ms. Avery with her conviction for prostitution. Rule 5-609(a)(1) permits impeachment of a witness with a prior conviction "only if" the crime "was *an infamous crime* or other crime *relevant to the witness's credibility*." *Id.* Whether a conviction is categorically eligible for impeachment is a matter

of law that we review *de novo*. *See Cure v. State*, 421 Md. 300, 324 (2011).

The category of "infamous crimes" includes treason, any common law felony (*i.e.*, murder, manslaughter, robbery, rape, burglary, larceny, and arson), and any crime of deceit (*crimen falsi*) such as perjury, false statement, fraud, or embezzlement. *See id.*; *Wicks v. State*, 311 Md. 376, 382 (1988), *overruled on other grounds by Beales v. State*, 329 Md. 263 (1993).

Prostitution is not an infamous crime, nor is it a crime relevant to credibility. Prostitution is a statutory misdemeanor. Md. Code, Ann., Crim. Law § 11-303. Prostitution is not impeachable because it is not relevant to the witness's credibility. *See Prout v. State*, 311 Md. 348, 365 (1988) (plurality opinion) ("prostitution and solicitation as isolated conduct had no bearing on the witness's credibility"); *Matthews v. State*, 68 Md. App. 282, 299–300 (1986) ("The mere fact that one engages in prostitution does not make one incapable of telling the truth and thus does not pertain to credibility"). The circuit court did not err by declining to allow impeachment with the prostitution conviction. Moreover, based upon appellant's argument before us, it appears appellant wished to use the prostitution conviction not merely for impeachment purposes but for substantive evidence that she was a prostitute at the time of Mr. Hamlet's death, a misuse of a prior conviction offered for impeachment purposes.

The third question presented impugns the propriety of the State's rebuttal closing argument. The issue is twofold: whether defense counsel opened the door to the prosecution's rebuttal argument, and whether the State impermissibly shifted the burden to

the defense.

There are two rules important for determination of the propriety of the State's rebuttal closing. Of foremost importance, the burden remains on the State throughout to prove the defendant guilty beyond a reasonable doubt, and a defendant is under no obligation to prove his innocence. *Garrison v. State*, 88 Md. App. 475, 480 (1991). Whether the burden has shifted is a fact-intensive analysis. Further, the Fifth Amendment to the United States Constitution forbids any comment by the prosecution on the accused's silence. *Griffin v. California*, 380 U.S. 609, 615 (1965).

In closing arguments at trial, courts allow liberal freedom of speech. *Wilhelm v. State*, 272 Md. 404, 412 (1974), *abrogated on other grounds, as recognized by Simpson v. State*, 442 Md. 446, n.5 (2015). Yet this freedom is not boundless. Counsel for either side may not comment upon facts not in evidence. *Smith v. State*, 388 Md. 468, 488 (2005). Comments made during closing argument that invite the jury to draw inferences from information that was not admitted at trial are improper. *See Spain v. State*, 386 Md. 145, 156 (2005). And permissible comments nevertheless may "open the door" to an argument by the other party that would not otherwise be allowed. *See Mitchell v. State*, 408 Md. 368, 387–88 (2009). The prosecution is entitled to fairly respond to an argument of the defendant by referring to the defendant's failure to produce evidence. *United States v. Robinson*, 485 U.S. 25, 34 (1988). Prosecutors may legitimately respond to defense counsel's injection into the case of facts not in evidence. *Wise v. State*, 132 Md. App. 127, 148 (2000). Maryland appellate courts have not been quick to label prosecutorial closing

comments on a shortage of defense evidence to be burden-shifting. *Harriston v. State*, 246 Md. App. 367, 379 (2020).

In addition, closing arguments are one applicable context for the "opened the door" doctrine. *Mitchell*, 408 Md. at 388. The "opened the door" doctrine permits a party to introduce evidence that otherwise might not be admissible, by way of response to certain evidence or arguments put forth by opposing counsel. *Id.* It is a fairness doctrine based on an opponent's injection of an issue into the case. *Id.*

In the instant case, defense counsel argued variations upon his statement that follows: "if they had phone records . . . which indicated that Mr. Christopher Brown was in the area of the murder at the time of the murder, you'd have thick packets showing you that. You'd have evidence showing you that."

In rebuttal, the prosecutor *responded* to defense counsel's argument about the phone records once defense counsel opened the door to that issue, eliciting the objection that appellant now argues the court overruled erroneously. The prosecutor remarked to the jury that the defense closing argument had focused significantly upon phone records when the trial contained very little evidence of or discussion of phone records until that point. The prosecutor told the jury that the burden of proof lies upon the State, but that the defense could compel witnesses and put on evidence, similar to the State's ability to do so. The prosecutor emphasized this line: "*Ladies and gentlemen, if his cell phone records pointed to the fact that he wasn't at the scene, don't you think those would have been entered into evidence*?"

We agree with the State that the prosecutor's rebuttal closing argument was not improper. In *Harriston*, defense counsel remarked in closing argument on the prosecution's failure to introduce cell location records for the defendant's phone, where such records had been available to investigators. There, the prosecutor rebutted, "The defense . . . had the same phone records. He has no obligation to put on a case whatsoever. They chose to put on a case. Why didn't they talk about the phone records? He had them the entire time." 246 Md. App. at 379. The Court found that those rebuttal comments were without fault. *Id.* at 381. The Court highlighted that the prosecutor did *not* refer to Harriston's failure to provide an explanation for his innocence. In addition, the Court emphasized that a decision by both parties not to investigate or discuss the phone records at trial, when both parties had the ability to do so, yields no implication in either party's favor. The *Harriston* Court concluded: "The prosecutor's comments may have neutralized the defense's statement, but they did not shift the burden."

So too we find here. We hold that the circuit court did not abuse its discretion in overruling the defense objection to the prosecutor's rebuttal argument after the defense opened the door to that rebuttal.

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