Circuit Court for Baltimore County
Case No. 03-K-18-004984

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2535

September Term, 2019

THEODORE R. JOHNSON

v.

STATE OF MARYLAND

Nazarian,
Beachley,
Ripken,

JJ.

Opinion by Ripken, J.

Filed: July 13, 2021

The case before us is on appeal from the Circuit Court for Baltimore County, where Theodore Johnson ("Johnson") was convicted of attempted second-degree murder, use of a firearm in the commission of a crime of violence, and illegal possession of a regulated firearm after a disqualifying conviction. Johnson's sole contention on appeal concerns the State's introduction of an excerpt of his statement to the police as rebuttal evidence after he testified in his own defense. We hold that Johnson failed to preserve this contention of error but that, even if preserved, the circuit court did not abuse its discretion by permitting the State to introduce the excerpt in rebuttal. We thus shall affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

The Shooting and Investigation

On October 25, 2018, Jermain Clark ("Clark") was shot approximately 16 times outside of 3703 Brownbrook Court, a single-family home in Randallstown occupied by Shonna Jeffries ("S. Jeffries")—Clark's then girlfriend—and their 4-year-old son. Clark survived his injuries[1] and identified Johnson, who lived in a basement apartment of the house next door, as the shooter.

After Clark was shot, he managed to drive himself less than a mile, to his ex-girlfriend, Michele Saunders' ("Saunders") house on Church Lane. Saunders found Clark

[1] Clark later passed away prior to sentencing. No direct causal link was established between the shooting and his death.

next to a white van, bleeding profusely. She called 911. The responding officer asked Clark if he knew who shot him, and Clark replied, "[y]es."

Clark was transported by ambulance to Northwest Hospital and then flown to Shock Trauma. He had been shot in his back, his head, his stomach, his legs, and his hands. He required 28 surgical procedures and was hospitalized for approximately two months.

Meanwhile, police interviewed the neighbors who called to report gunshots. During the investigation, the police spoke briefly with Johnson, who rented a basement apartment next door to S. Jeffries. Johnson indicated that he did not know anything about the shooting.

Three days after the shooting, Clark was able to speak at length to the police. This interview took place at Shock Trauma. Clark told detectives that Johnson had shot him. Later that day, the detectives returned to Shock Trauma with a photograph of Johnson from the Motor Vehicle Administration database, and Clark identified him as the shooter.

On October 29, 2018, Johnson was arrested and charged with attempted first-degree murder, first-degree assault, and use of a firearm in the commission of a crime of violence or felony.[2] The police advised him of his Miranda rights. Johnson elected to speak with the police. In the recorded interview, Johnson denied any involvement in the shooting.

[2] The police also executed a search warrant at Johnson's home, but no items of evidentiary value were located.

Proceedings

A jury trial commenced in October 2019. Among other witnesses, the State called Clark. Clark testified that he had been living with S. Jeffries and their son at 3705 Brownbrook Court for about five years. Clark knew Johnson as a neighbor throughout that time, but the two were not friends. Clark also supervised Johnson on a construction crew for a few months approximately one year before the shooting. Clark explained that he and Johnson "didn't . . . click," but had "no beef." About a week or two before the shooting, Johnson gave Clark $20 worth of marijuana, and Clark promised to pay Johnson for it later.

On the day of the shooting, Clark spent the day with friends in the area of Reisterstown Road and Belvedere Avenue. At approximately 11 p.m., he and a friend drove in the friend's white van back to S. Jeffries' house on Brownbrook Court. Upon arriving, they parked the van across the street from S. Jeffries' house.

Clark observed Johnson smoking in the driver's seat of Johnson's burgundy Hyundai Elantra parked outside Johnson's house. Johnson got out of his car and walked across the street toward the white van. As Johnson approached, Clark got out of the passenger side of the van, which was closest to the curb, and walked toward the driver's side. At the same time, Clark was calling his brother on his cell phone.

Johnson asked Clark if he had the twenty dollars he owed him. Clark replied, "[n]o, not yet," and asked Johnson to "[g]ive [him] a minute" because Clark was on the phone. Johnson replied, "I don't give a damn who you on the phone with," followed by,

"[f]**k that[.]" Clark turned toward Johnson just as Johnson began shooting. The first shots hit Clark in his back. Clark begged Johnson to stop shooting. He was hit with bullets in his stomach, face, and hands. As Johnson continued shooting, Clark climbed into the van through the open driver's side door. Eventually, Clark observed Johnson run to the back of his house, where a basement door led to Johnson's apartment.

Clark started driving himself to Northwest Hospital, but once on Church Lane he became faint. He realized he was near Saunders' house, pulled into her driveway, and started honking. When the police arrived following Saunders' 911 call, Clark recalled that he told them that his neighbor shot him. He also recalled being interviewed a few days later when he was at Shock Trauma and identifying Johnson as the shooter both by name and from a photograph. Clark testified that he was certain of Johnson's identity, saying it was "definitely him." The investigating detective also testified describing his interview with Clark at Shock Trauma on October 28, 2018. The audio recording of the interview was admitted into evidence and played for the jury.

The State rested its case-in-chief. Johnson then testified in his own defense. He stated that he lived in the neighbor's basement apartment next door to S. Jeffries' house with his "lady friend" and his 19-year-old son. He testified that on the night of the shooting, he heard "three pops," but was not outside at any time that night. He stated that he did not own a gun and was not involved in the shooting. Defense counsel asked Johnson if, when he spoke to the police after his arrest, he "told them what [he's] telling the jury now?" Johnson replied, "[y]es."

On cross-examination, the prosecutor asked Johnson to elaborate on his activities on the night of October 25th. Johnson said he played with his youngest daughter at his house. The following exchange then occurred:

> [PROSECUTOR]: Okay. You—you left the home on October 25th, 2018, correct?
>
> [JOHNSON]: Yes.
>
> [PROSECUTOR]: And you went to the store?
>
> [JOHNSON]: Yes.
>
> [PROSECUTOR]: And what did you do? What did you get at the store?
>
> [JOHNSON]: Two sodas.
>
> [PROSECUTOR]: Okay. And how did you get to the store?
>
> [JOHNSON]: Walked, me and my son.
>
> [PROSECUTOR]: Did you drive?
>
> [JOHNSON]: I ain’t got no license, I don't even have a car.
>
> [PROSECUTOR]: Okay. Do you recall telling the police that you drove your burgundy Hyundai to the store?
>
> [JOHNSON]: No.
>
> [PROSECUTOR]: Okay. You do have a burgundy Hyundai though, correct?
>
> [JOHNSON]: No.
>
> [PROSECUTOR]: It was sitting out in front of the—your home?
>
> [JOHNSON]: No.

> [PROSECUTOR]: Okay. So and—and I would just like you to—to think back to when you talk—talked to the police.
>
> Are you sure—are you positive that you did not drive the Hyundai, the burgundy Hyundai, to the store?
>
> [JOHNSON]: It's been a long time. Like, you know, bits and pieces, you know.
>
> [PROSECUTOR]: Okay. Well, let me ask it this way. Isn't it true that on October 25, 2018, you drove that burgundy Hyundai?
>
> [JOHNSON]: No.

The prosecutor returned to the subject of Johnson's trip to the store a moment later, asking him again if he was certain that he and his son walked to the store. Johnson reiterated that he walked to the store with his son to purchase two sodas.

Rebuttal Evidence

The defense rested and, in rebuttal, the State asserted that there was an "important inconsistency" between Johnson's statement to the police and his testimony at trial and the State sought to play a clip from the statement ("Exhibit 13") to impeach his credibility. Defense counsel objected. The court asked defense counsel to explain "[t]he nature of [his] objection" and he replied, "[t]he nature of my objection strictly is . . . that it is collateral." He reasoned that the prosecutor had asked Johnson if he owned a burgundy Hyundai, and Johnson said, "[n]o," and the State was "stuck with the answer."

The court noted that the State could have introduced all or part of Johnson's statement to the police during its case-in-chief. The prosecutor agreed but explained that the State had "no need to play his statement" until there was "some sort . . . of inconsistency." He emphasized that the inconsistency was "certainly not a collateral

matter" because Clark had testified that Johnson was sitting in a burgundy car smoking just before the shooting.

Defense counsel responded that the area of inquiry "was solely set up by [the prosecutor]" and that defense counsel had not asked any questions about "this walk or ride to the store to buy a bottle of soda." He reiterated that the prosecutor "got the answer that he didn't want, and I submit it's a collateral issue." Defense counsel added, "to use . . . an issue you set up that is collateral to try and show in your rebuttal I . . . think is inappropriate."

The court reasoned that if the prosecutor had "set him up" or tried to "trick him," it might be improper, but that the prosecutor had "blundered into this." The State then played Exhibit 13 for the court. The court took the matter under advisement.

The next day of trial, the court ruled that Exhibit 13 would be admitted for rebuttal. With respect to defense counsel's objection that the excerpt was "collateral," the court determined that though it might "have some collateral aspects to it, it is not collateral completely." Consequently, the State was permitted to play Exhibit 13 and it was admitted into evidence.[3] The recorded interview began with a Detective asking Johnson why "other people" said they saw Johnson outside at the time of the shooting, and the following exchange occurred:

[3] The court gave defense counsel the option to admit the entire recorded statement, but he elected not to do so.

[JOHNSON]: I don't know. They probably seen me get the soda like I told you, coming from the store with a soda. I had two sodas—

[DETECTIVE WISNIEWSKI]: What time?

[JOHNSON]: I don't know. I know it was dark. I got two sodas for my children.

[DETECTIVE LANGE]: What store did you go to?

[JOHNSON]: Carroll High.

[DETECTIVE LANGE]: Where is it?

[JOHNSON] Carroll High on Liberty Road.

[DETECTIVE WISNIEWSKI]: Did you go by yourself?

[JOHNSON]: It was me and my son.

[DETECTIVE WISNIEWSKI]: Did you drive?

[JOHNSON]: Um hum.

[DETECTIVE WISNIEWSKI]: What did you drive?

[JOHNSON]: A Hyundai.

[DETECTIVE WISNIEWSKI]: What color?

[JOHNSON]: Burgundy.

[DETECTIVE WISNIEWSKI]: Was it your car?

[JOHNSON]: Yes.

The jury found Johnson guilty of attempted second-degree murder and related firearm charges. The court sentenced him to 40 years for attempted second-degree

murder, with all but 30 suspended, and to two concurrent 5-year terms on the firearm charges.

This timely appeal followed.

ISSUE PRESENTED FOR REVIEW

In this appeal, Johnson presents one issue for our review: Did the court err in allowing admission of [his] statement to police as rebuttal evidence on a topic on which the defense did not introduce any evidence?

For the reasons to follow, we hold that the trial court did not err.

DISCUSSION

Johnson contends that Exhibit 13 "falls well outside the proper scope of rebuttal evidence" and, thus, should not have been admitted. He emphasizes that the defense did not introduce into the case any evidence bearing upon Johnson's movements to and from a convenience store on October 25, 2018, or his ownership of a burgundy Hyundai. Because his testimony about the trip to the convenience store was elicited by the State on cross-examination, he argues, it was not properly the subject of rebuttal evidence and, consequently, the court abused its discretion by admitting Exhibit 13. The State responds, as a threshold matter, that Johnson failed to preserve this contention for appellate review because the only objection raised at trial was that the subject of the rebuttal evidence was "collateral." Alternatively, the State asserts that the court properly exercised its discretion by admitting Exhibit 13 to impeach Johnson's trial testimony that he did not go outside on the evening of October 25, 2018, or drive a burgundy Hyundai. We first address the

preservation argument, second discuss the standard of review, and third address the parties' legal contentions.

A. Preservation

Pursuant to Md. Rule 8-131(a), this Court ordinarily will not address any non-jurisdictional issue "unless it plainly appears by the record to have been raised in or decided by the trial court[.]" "[T]he rule limiting the scope of appellate review to those issues and arguments raised in the court below 'is a matter of basic fairness to the trial court and to opposing counsel, as well as being fundamental to the proper administration of justice.'" *In re Kaleb K.*, 390 Md. 502, 513 (2006) (quoting *Medley v. State*, 52 Md. App. 225, 231 (1982)). When counsel provides specific grounds for the objection, "the litigant may raise on appeal only those grounds actually presented to the trial judge." *Anderson v. Litzenberg*, 115 Md. App. 549, 569 (1997).

Here, defense counsel specified on eight separate occasions that his objection to the admission of Exhibit 13 was that the subject matter of the inconsistency was "collateral."[4] Though defense counsel twice referenced the fact that the State elicited the testimony that was the subject of the rebuttal evidence, he never argued that the fact that the evidence was adduced on cross-examination precluded the State from rebutting that evidence with Exhibit 13. Further, when the court ruled that Exhibit 13 would be

[4] Introduction of extrinsic evidence to impeach a witness is generally not permitted on a collateral matter. *Smith v. State*, 273 Md. 152, 157 (1974). "A collateral issue is one that is immaterial to the issues in the case." *State v. Heath*, 464 Md. 445, 459 (2019).

admitted, it ruled only on the ground that the prior statement was not "collateral completely." Because the contention advanced on appeal was not raised in or decided by the trial court, we are not convinced that it is preserved for appellate review. Notwithstanding this lack of preservation, we are satisfied that the court did not abuse its discretion in admitting Exhibit 13 as rebuttal evidence.

B. Standard of Review

"It is well settled that '[a]ny competent evidence which explains, or is a direct reply to, or a contradiction of, material evidence *introduced by the accused* may be produced by the prosecution in rebuttal.'" *Johnson v. State*, 408 Md. 204, 226 (2009) (alteration in original) (quoting *Lane v. State*, 226 Md. 81, 90 (1961)). "[W]hat constitutes rebuttal [evidence] rests within the sound discretion of the trial court, whose ruling may be reversed only when it constitutes an abuse of discretion[.]" *State v. Booze*, 334 Md. 64, 68 (1994) (internal citations and quotation marks omitted). A trial court has no discretion to admit irrelevant evidence. *State v. Heath*, 464 Md. 445, 457–58 (2019).

C. Admission of Rebuttal Evidence in Maryland

The general principles governing a criminal case dictate that an "'orderly conducted criminal trial anticipates the State adducing all of its evidence in chief and resting its case,'" followed by the defense putting on its evidence, if any. *Wright v. State*, 349 Md. 334, 341(1998) (quoting *Mayson v. State*, 238 Md. 283, 288 (1965)). To allow a "contrary practice" would not only "'greatly prolong trials,'" but also "'lead to surprise and injustice.'" *Id*. (quoting *Bannon v. Warfield*, 42 Md. 22, 39 (1875)). The rule that the

State must introduce all relevant evidence during its case-in-chief is subject to two exceptions: the first is a request to reopen the State's case, and the second, applicable in this case, is the introduction of rebuttal evidence after the defense rests. *Id*. at 341–42.[5]

To the second exception, rebuttal evidence is evidence that "is designed solely to address new matters or facts introduced by the defendant during the defendant's case" and thus, "ordinarily would have been inadmissible, as irrelevant" during the State's case. *Wright*, 349 Md. at 343. Evidence that is "proper rebuttal evidence" is admissible as a matter of right, and the court abuses its discretion by not admitting it. *Id*. Falling within this category is any evidence "offered to *impeach the opponent's witnesses*[.]" *Id*. at 344.

In *Bruce v. State*, Bruce was charged along with other co-defendants in relation to a mass murder at an apartment. 318 Md. 706, 711–12 (1990). The State adduced evidence that Bruce participated in the crimes and then fled to Virginia, Florida, and, ultimately, to New York, where he was arrested. *Id.* at 713–14. Bruce testified in his defense that he was present at the apartment but that he did not participate in the crimes and left as soon as the shooting began. *Id*. at 715. He also admitted to traveling to Virginia, Florida, and New York after the murders, but he claimed that the trip to Florida was preplanned. *Id*.

[5] *See Booze*, 334 Md. at 70 ("No matter how much discretion a court may have to vary the order of proof or to admit rebuttal evidence, a court may not exercise either discretion interchangeably with the other. In other words, to uphold an exercise of discretion by the trial court, it must be clear that the trial court was indeed exercising the particular discretion it purported to exercise.").

As the State concedes, the State did not request to reopen its case, but instead sought to admit Exhibit 13 solely in rebuttal. Therefore, the first exception is not at issue.

On cross-examination, the State elicited from Bruce that he knew a man named Kenneth Clee ("Clee") from New York, but Bruce denied having told Clee that he was "on the run from the F.B.I." because of murders in Maryland. *Id*. at 728. After the defense rested, the State was permitted, over objection, to call Clee as a rebuttal witness to testify that Bruce made that statement to him. *Id*.

The Court of Appeals affirmed Bruce's conviction, reasoning that Clee's testimony was proper rebuttal evidence:

> [Bruce]'s admissions to Clee that he was fleeing from the F.B.I. and had killed a couple of people in Maryland could have been introduced as substantive evidence in the State's case-in-chief. They constitute admissions of flight and admissions of criminal agency. Instead of offering these statements as part of its case, the State waited, and when [Bruce] took the witness stand and denied participation in any killings and testified that the trip to Florida was pre-planned, the State attempted to impeach this testimony through the prior inconsistent statements made to Clee. When [Bruce] denied making the statements to Clee, the State quite properly, in rebuttal, offered the prior inconsistent statement through Clee.

Id. at 728–29 (footnote omitted) (citations omitted).

The Court later distinguished the admissible *Bruce* rebuttal evidence from that found in *Wright v. State*, 349 Md. at 349. Wright was charged with second-degree rape and related sexual offenses of his girlfriend's 12-year old sister. *Id.* at 337. While he was incarcerated before trial, he made a "full confession" to his cellmate. *Id*. at 338. The State included Wright's cellmate on its list of potential witnesses prior to trial but elected to not call him in its case-in-chief. *Id.* Rather, the State chose to rely on the testimony of the 12-year old child, her mother, and a doctor who examined the child at the hospital a few days after she reported Wright's assault. *Id.*

Wright elected to testify in his own defense and denied that he engaged in any sexual contact with the child. *Id.* at 339. Defense counsel did not ask Wright about the conversation with his cellmate during direct examination. *Id*. On cross-examination, the prosecutor elicited that Wright knew the cellmate and had spoken to him about his case. *Id*. Over objection, the prosecutor was permitted to ask Wright if he had confessed to the cellmate and to specify the substance of the alleged confession. *Id.* Wright denied having done so. *Id*. On redirect examination, Wright testified that he did not trust the cellmate and that when the cellmate had asked Wright about the charges, Wright had "told him to mind his own business." *Id*. at 339–40. After the defense rested, the State called the cellmate as a rebuttal witness, over objection, to testify to the substance of the alleged confession. *Id*. at 340.

Wright was convicted on all charges. The Court of Appeals reversed. *Id.* at 336–37. The Court framed the issue before it as:

> [W]hether it is permissible for the State to withhold from its case-in-chief an inculpatory statement by the defendant bearing directly and substantively on the defendant's guilt, set the stage for using the statement in rebuttal by asking the defendant on cross-examination whether the defendant ever made such a statement, and then using the statement in rebuttal if the defendant denies having made it.

Id. at 340. It reasoned that the answer to that question turned upon numerous factors, including "the nature of the statement, what it is intended to rebut, whether it is being offered as substantive or impeachment evidence, and whether it really could have been used in the State's case-in-chief." *Id*. at 340–41.

The Court characterized the cellmate's testimony as a "classic party admission," which would have been admissible as substantive evidence in the State's case-in-chief. *Id*. The State made a number of relevant concessions: that the cellmate's testimony was "inadmissible to rebut Wright's testimony on direct examination" that he did not commit the crimes charged; that it was intended to rebut Wright's denial that he confessed; that it was "not admissible as substantive evidence but only to impeach Wright's denial that he made the admission;" and "that the denial sought to be impeached was elicited by the State on cross-examination and was not, therefore, injected affirmatively into the case by Wright." *Id*. at 346. Against that posture, the Court held that the State was not entitled to withhold the confession to gain a tactical advantage over Wright, either by discouraging him from testifying or by "dramatically admitt[ing]" the confession just before the jury retired to deliberate. *Id*. at 348. To permit the "offensive use" of a confession was inconsistent with the long-standing Maryland rule that "the State put on its case first" and was unfair. *Id*. at 349.

In *Wright*, the Court distinguished the "situation" in *Bruce* as "much more focused," given that Bruce had testified on direct examination that he made a preplanned trip to Florida and when cross-examined on that point, denied having made an inconsistent statement to Clee. 349 Md. at 353. The trial court's decision to allow rebuttal evidence on that "limited point was legitimately allowed" and did not "raise the same kinds of issues that are presented when . . . the State deliberately holds back a full and detailed confession to rebut not the defendant's substantive testimony on direct

examination but a statement elicited by the State on cross-examination," as was the case in *Wright*. *Id.*

We return to the instant case. Here, like in *Wright* and in *Bruce*, Exhibit 13 would have been admissible in the State's case-in-chief as a statement of a party opponent. The State acknowledged this fact to the trial court and concedes it in this Court. The facts of this case otherwise bear little resemblance to *Wright*. There, the State engaged in purposeful gamesmanship by withholding a full confession until after the defendant had testified, permitting it to present highly prejudicial evidence immediately before the jury retired to deliberate. Conversely, in our case, Johnson did not inculpate himself in his statement to the police. In addition, the State did not withhold Johnson's statement during its case for tactical reasons, but rather did not admit it because it was not material at that stage. As is ordinarily the case with rebuttal evidence, it became material to rebut Johnson's testimony in his case when, as the trial court found, the prosecutor "blundered into" the inconsistency between Johnson's statement to the police and his trial testimony.

Further, contrary to Johnson's argument, the general subject of the rebuttal evidence was injected into the trial by the defense. Defense counsel asked Johnson if he had been "outside at anytime" on the night of October 25, 2018, and he replied, "[n]o." Johnson also confirmed *on direct examination* that his trial testimony did not differ from what he told police upon his arrest. In fact, Johnson had told police that he had left his house after dark on October 25, 2018, to drive to a convenience store in a burgundy Hyundai. The State properly impeached Johnson with that statement during cross-

examination, and, when he denied having made that statement, it properly sought to introduce Exhibit 13 as rebuttal evidence to impeach his trial testimony. As in *Bruce*, this was a focused and limited rebuttal, not a broad-ranging attempt to gain an unfair tactical advantage. We hold that the trial court did not abuse its discretion by permitting the State to introduce the excerpt of Johnson's statement to police to rebut his trial testimony.[6]

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

[6] Though Johnson's statement to the police would have been admissible substantively had it been introduced in the State's case-in-chief, it was admissible as impeachment evidence only in rebuttal. *Bruce*, 318 Md. at 706. Nevertheless, as in *Bruce*, Johnson did not request a limiting instruction to that effect, and none was given. *See id*. at 729. ("We note that [Bruce]'s statement when offered in rebuttal was not admissible at that stage as an admission, but was admissible at that stage as a prior inconsistent statement to impeach [Bruce]'s testimony. [Bruce] could have requested a limiting instruction that the prior inconsistent statement was admissible only to impeach [Bruce]'s testimony, and not as substantive evidence, but he did not do so, and the trial judge ordinarily is not required to give a limiting instruction in the absence of a request.").