UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1851

September Term, 2013

MARCUS EVANS

v.

STATE OF MARYLAND

Krauser, C.J.,
Zarnoch,
Reed,

JJ.

Opinion by Reed, J.

Filed: June 11, 2015

Marcus Evans, appellant, was convicted, by a jury sitting in the Circuit Court for Prince George's County, of robbery with a dangerous weapon, use of a handgun in the commission of a crime of violence, and a number of other offenses related to his involvement in the robbery and shooting of Jeremiah St. Slume. Appellant waived his right to a jury trial with respect to the charges of possession of a regulated firearm after having been previously convicted of a disqualifying crime and possession of a regulated firearm after having been previously convicted of a crime of violence; the court found appellant guilty of both offenses. Subsequently, the court imposed consecutive sentences which, on aggregate, amounted to sixty years' imprisonment, all but forty years suspended, and five years of probation upon release. This appeal followed.

Appellant presents two questions for our review:

I. Did the trial court err in admitting improper rebuttal testimony?

II. Did the trial court err, at sentencing, in allowing the prosecutor to present information that had not been previously disclosed to the defense?

For the reasons which follow, we shall affirm the circuit court's judgments of conviction, vacate the sentences, and remand the case to the circuit court for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

Given that appellant does not challenge the sufficiency of evidence, we shall not provide an exhaustive recitation of the facts supporting his convictions. *See Joyner v.*

State, 208 Md. App. 500, 503 n.1 (2012) (citation omitted). For context, we note that, at trial, the victim, Jeremiah St. Slume, gave the following account of events:

> On December the 11th I was catching a bus on my way home from work. I saw three males at the bus stop. Then I went to walk into Popeye's to get something [to] eat. One of the males I saw from the bus stop came in, looked me up and down, then asked for some napkins, and walked out. After I left the Popeye's –
>
> * * *
>
> . . . It was like 15 minutes. Then I walked home. On my way home I saw two males, one wearing a black jacket, dark pants, and a ski mask. Another one wearing an orange jacket and black sweatpants and a ski mask. I saw them out of the corner of my eye, so I didn't really get a good look. I was continuing to walk.
>
> On my way home I turned around, the one with the black jacket and the dark pants said [" ']give me your shoes.[" '] He had a gun to my head. It was a silver semiautomatic pistol. I said [" ']what you mean?[" '] So the male with the orange jacket said [" ']you think we're playing with you?[" '] Then he walked to my right. He [struck] me, tried to strongarm me to the ground. I grabbed him by his jacket and forced him to the street.
>
> Then . . . the one with the orange jacket told the male with the black jacket . . . [" ']pistol-whip him.[" '] He pistol-whipped me in my head. I was still holding onto him fighting. Then he said [" ']shoot him.[" '] That's when the other male shot me in my left rear and I fell to the ground.
>
> They went into my pockets to try to get some money and then took the shoes and ran to the neighbor's yard.

Later, Mr. St. Slume, identified appellant as the man who pistol-whipped, shot, and robbed him. He testified that he recognized appellant because he had seen him around the neighborhood for a number of years and had one brief interaction with him a

few years prior to the subject robbery. With respect to his ability to observe appellant's face during the incident in question, Mr. St. Slume testified:

> [STATE'S ATTORNEY]: . . . When you were being robbed, could you see the person's face, all of their faces?
>
> [ST. SLUME]: When I was being robbed, no, they had the ski-masks on.
>
> [STATE'S ATTORNEY]: How much of [appellant's] face was covered?
>
> [ST. SLUME]: Everything but the eyes.
>
> * * *
>
> [STATE'S ATTORNEY]: When you saw the three men at the bus stop earlier and you saw [appellant], did his clothing change at all from the time at the bus stop to the time of the robbery?
>
> [ST. SLUME]: No.

During cross-examination, Mr. St. Slume noted that, prior to the robbery, his assailants had their ski-masks "rolled up on top of their heads." Subsequently, defense counsel questioned Mr. St. Slume as follows:

> [DEFENSE COUNSEL]: You said one of them was wearing a black jacket?
>
> [ST. SLUME]: Yes.
>
> [DEFENSE COUNSEL]: Was it a hoodie?
>
> [ST. SLUME]: No.
>
> [DEFENSE COUNSEL]: You didn't see any tattoos around the eyes?
>
> [ST. SLUME]: No, not at the time of the robbery.

Following the close of the State's case, defense counsel noted that appellant would be electing not to testify, and requested that appellant's facial tattoo be published to the jury. The State objected to defense counsel's request to publish appellant's tattoo to the jury and asserted that if the request were granted then the State would want to recall Mr. St. Slume to "ask him about the tattoo." Thereafter, appellant's tattoo was published for the jury and the following colloquy occurred:

> [THE COURT]: Is there any rebuttal from the State?
>
> [STATE'S ATTORNEY]: Yes, Your Honor.
>
> [DEFENSE COUNSEL]: May we approach, Your Honor?
>
> [THE COURT]: Yes.
>
> (At the bench.)
>
> [DEFENSE COUNSEL]: There is no issue as to credibility as to a tattoo. We simply –
>
> * * *
>
> [STATE'S ATTORNEY]: When the victim indicated to the police department, he did indicate that [appellant] had [a] star . . . tattoo on his face.
>
> [DEFENSE COUNSEL]: They could have introduced that in their case-in-chief, but that doesn't rebut the publishing of the tattoo. There is no rebuttal to a tattoo.
>
> [THE COURT]: I think it does – it is rebuttal evidence to respond to the implied claim it couldn't be him because of his tattoo. I think it is appropriate rebuttal.
>
> [DEFENSE COUNSEL]: Note my objection.

Thereafter, Mr. St. Slume was recalled as a rebuttal witness and testified that, after the robbery, he told the investigating officer that appellant had a tattoo on his face, specifically, on his cheek near his eye, which depicted "a moon, a halfway moon and a star." Mr. St. Slume also noted that he had not seen any tattoos during the subject incident because his assailant's ski-mask covered the facial area where Mr. St. Slume knew appellant's tattoo to be.

At the conclusion of trial, the jury returned verdicts of "guilty" with respect to the charged offenses of: robbery, robbery with a dangerous weapon, use of a handgun in the commission of a crime of violence, first-degree assault, second-degree assault, conspiracy to commit robbery, conspiracy to commit robbery with a dangerous weapon, and conspiracy to commit first-degree assault. For its part, the court found appellant guilty of the severed charges of possession of a regulated firearm after having been previously convicted of a disqualifying crime and possession of a regulated firearm after having been previously convicted of a crime of violence.

At sentencing, the State noted that it wished to introduce evidence related to one of appellant's prior convictions. Defense counsel objected to the introduction of this evidence, the objection was argued and ruled upon as follows:

> [DEFENSE COUNSEL]: . . . we have not been provided prior notice that the State was intending to introduce this as evidence. Certainly in terms of the convictions, we do agree that there was a conviction and, in fact, it was a plea. However, in terms of what the State is proffering . . . I believe, an application for statement of charges. We don't know at this point if that was the actual factual basis for the plea. For that reason, I would object, Your Honor.

* * *

> [THE COURT]: I'm going to overrule the objection in this case. It's a certified court record that was available with the other conviction that's listed in the Presentence Investigation Report. . . . These [records] certainly could have been anticipated to have been brought up and were available. So I'm going to overrule the objection.

Thereafter, the State explained that the subject prior conviction was related to an incident in which it was alleged that appellant, along with others, used a lead pipe to attack and rob a man with whom appellant was acquainted. The State argued that, comparing the alleged facts of appellant's previous conviction and the instant case, it appeared as though appellant: (1) was "upgrading" his actions, from robbery using a lead pipe to robbery using a handgun, (2) had not learned from his prior behavior, and (3) was a "substantial threat to the rest of the community." As such, the State requested:

> [STATE'S ATTORNEY]: With regard to the robbery . . . the State is going to ask for the maximum penalty of 25 years.
>
> * * *
>
> [STATE'S ATTORNEY]: . . . I am asking for the maximum sentence with regard to use of a handgun in the commission of a crime of violence. I ask those counts run consecutive.
>
> With regard[] to [the] possession of a firearm after conviction of a disqualifying crime and related merge[d] offense . . . the State asks for the maximum penalty, to run consecutive to the other two counts.
>
> With regard[] to the conspiracy counts . . . the State is going to ask for the maximum penalty, to run consecutive, and ask that that portion be suspended.

Ultimately, the court imposed the following sentences:

> [THE COURT]: As to Count 2, which charges you with [r]obbery with a [d]angerous [w]eapon, I am going to sentence you to 20 years incarceration. . . .
>
> * * *
>
> [THE COURT]: With regard to Count 5, [u]se of a [h]andgun in the [c]ommission of a [c]rime of [v]iolence, I sentence you to ten years incarceration, which would be consecutive to your sentence as to Count 2. . . .
>
> As to Count 9, [c]onspiracy to [c]ommit [r]obbery with a [d]angerous [w]eapon, I am going to sentence [you to] 20 years incarceration. That will be consecutive to your sentences in Count 2 and Count 5, but it will be suspended.
>
> * * *
>
> [THE COURT]: . . . As to Count 14, I'm going to sentence you to ten years incarceration. That will be consecutive to your sentences in Counts 2 and 5, as well.
>
> I'm sentencing you to 20 years for the [r]obbery with a [d]angerous [w]eapon. Ten for the [u]se of a [h]andgun in that robbery, consecutive. Ten [years] for the [p]ossession of a [r]egistered [f]irearm [a]fter [h]aving [b]een [c]onvicted of a [v]iolent [c]rime, consecutive. Then 20 [years] for [c]onspiracy to [c]ommit [r]obbery with a [d]angerous [w]eapon. That also is consecutive, but part is merged.
>
> So, I'm sentencing you to 40 years in jail, plus an additional 20 years. Forty years of executed time. Plus an additional 20 years suspended.[1]

Additional facts will be provided below as our analysis requires.

[1]Appellant's other convictions merged for sentencing purposes.

DISCUSSION

i. Improper Rebuttal Testimony

A. Parties' Contentions

Appellant contends that the trial court abused its discretion by permitting testimony regarding why Mr. St. Slume had not seen a tattoo on the face of the man who beat, shot, and robbed him. He asserts that this is so because "[t]he testimony elicited from St. Slume in rebuttal concerning [appellant's] tattoo was not proper rebuttal evidence for the simple reason that it did not explain, reply to, or contradict any 'new matters or facts introduced by the defendant during the defendant's case.'" *Wright v. State*, 349 Md. 334, 343 (1998). Appellant points out that because cross-examination of Mr. St. Slume had included questions regarding whether Mr. St. Slume had seen any tattoos around his assailant's eyes, the subject testimony would have been relevant and admissible on redirect examination. He insists, however, that Mr. St. Slume's testimony speaking to the reason why he was unable to see a tattoo on the face of his assailant was improper as rebuttal testimony because it addressed matters from a cross-examination during the State's case. Accordingly, appellant contends that the trial court's error in admitting the subject testimony was not harmless and so reversal, and remand for a new trial, is required.

B. Standard of Review

We have previously explained our scope of review with regard to the admission of rebuttal evidence:

> Rebuttal evidence is "any competent evidence which explains, or is a direct reply to, or a contradiction of any new matter that has been brought into the case by the defense." *Collins v. State*, 373 Md. 130, 142 (2003); *See Shemondy v. State*, 147 Md. App. 602, 615 (2002). The trial court has the discretion to determine what constitutes rebuttal evidence and will be reversed only if it is "manifestly wrong and substantially injurious." *State v. Booze*, 334 Md. 64, 68 (1994) (quoting *Mayson v. State*, 238 Md. 283, 289 (1965)); *Shemondy*, 147 Md. App. at 615.

Rollins v. State, 161 Md. App. 34, 89 (2005) (internal parallel citations omitted).

C. Analysis

We do not agree with appellant that the rebuttal testimony regarding appellant's tattoo was improperly admitted. The defense introduced a new matter into the case by publishing appellant's facial tattoo to the jury. The State was compelled to respond to this new information and recalled Mr. St. Slume to testify whether he had viewed appellant's tattoo. We discern no error by the trial court or an abuse of its discretion.

Mr. St. Slume, during direct examination, identified Evans, specifically, as the man who had pistol-whipped, shot, and robbed him. He also stated that, during the robbery, he was not able to see the faces of his assailants because they were wearing ski-masks. On cross-examination, Mr. St. Slume clarified that, prior to the robbery, appellant and the other offenders had their ski-masks rolled up on top of their heads. When defense counsel asked Mr. St. Slume if he had seen any tattoos around his assailant's eyes, Mr. St. Slume noted that he had not seen any such tattoos during the robbery. Thereafter, during the defense's case, appellant was presented for the purpose of publishing his facial tattoo to the jury. Subsequently, the State recalled Mr. St. Slume as

a rebuttal witness. Mr. St. Slume testified that he had described appellant's facial tattoo to the police officer who investigated the subject robbery. He also explained that he had not seen the tattoo in question during the robbery because his assailant's ski-mask was covering the area where the tattoo would have been.

Simply stated, we are persuaded that Mr. St. Slume's testimony was properly admitted as rebuttal evidence to specific evidence presented during the defense case, *i.e.*, appellant's facial tattoo. Given that Mr. St. Slume had testified, during the State's case, that he had not seen a facial tattoo on his assailant, the publishing of appellant's tattoo during the defense case was clearly an effort to cast doubt upon Mr. St. Slume's identification of appellant. Indeed, the publishing of appellant's tattoo was a new matter introduced by the defense as there had been no evidence previously admitted which spoke to the presence of a tattoo on appellant's face. *See, e.g.*, *Sinclair v. State*, 214 Md. App. 309, 335–36 (2013) (holding trial court committed no abuse of discretion when trial court permitted State's rebuttal alibi evidence in response to alibi evidence introduced for first time in defense's case, even though rebuttal evidence indicated defendant was on probation); *Shemondy*, 147 Md. App. at 615–16 (holding that testimony regarding a correlation between wealth and the amount of cocaine a person possesses was a new matter introduced by the defense, and that the trial court did not err in permitting the State to introduce rebuttal evidence that the appellant did not live in an affluent neighborhood). Prior to the publishing of appellant's tattoo, the testimony elicited at trial only spoke to Mr. St. Slume's inability to view a tattoo on the face of his assailant due to

the presence of a ski-mask. Accordingly, we must conclude that the court did not abuse its discretion in permitting the rebuttal testimony in question.

ii. Failure to Disclose Presentence Information

A. Parties' Contentions

Appellant asserts that "[t]he court erred in allowing the [State] to introduce the application for statement of charges [from a case in which appellant was previously convicted] showing that [appellant], along with other individuals, attacked [a man] with a lead pipe and robbed him." He insists that this was a violation of Maryland Rule 4-342(d) because the State had not disclosed, prior to sentencing, the subject information to defense counsel. Appellant contends that the error in permitting the presentation of, and argument related to, the information at issue was not harmless and that his sentences must be vacated and his case remanded for resentencing.

The State counters that appellant failed to preserve this argument for appellate review. The State points out that at sentencing, appellant objected to the introduction of the statement of charges relating to his previous conviction on the ground that he did not know whether the facts detailed within the statement of charges were the basis for his guilty plea. The State also argues that appellant failed to request a continuance in order to determine whether it was the basis for the plea. Finally, appellant argues that any error was harmless beyond a reasonable doubt, because the evidence came from appellant's own guilty plea during a hearing at which he was present. We disagree.

B. Standard of Review

"Where, as in the present case, the sentencing judge made no specific finding as to whether the State violated the Maryland Rules, we exercise our independent judgment and review, as a matter of law, whether a violation occurred." *Dove v. State*, 415 Md. 727, 737 (2010) (citation omitted).

The Court of Appeals explained in *Noble v. State*, 293 Md. 549, 557–58 (1982), the considerations present in reviewing a violation of the Maryland Rules:

> This Court has firmly adhered to the principle that the rules of procedure are precise rubrics to be strictly followed, and we shall continue to do so. A violation of one of these rules constitutes an error, normally requiring such curative action or sanction as may be appropriate.
>
> * * *
>
> It does not follow, however, that the harmless error doctrine has no application to the Maryland Rules and that a violation of a procedural rule can never be harmless. There is no basis in authority or logic for such a holding. It is true that the violations of certain rules, because of the nature and purpose of those particular rules, can rarely be deemed harmless error. . . . Nevertheless, this Court has not held that the harmless error principle can never be applicable to a violation of the criminal rules.

Accordingly, in the event an error was made with regard to a procedural rule, we must determine if that error was harmless. "[W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is

mandated." *Dove*, 415 Md. at 743 (alteration in original) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

C. Analysis

As a preliminary matter, we address the State's contention that appellant failed to raise this argument before the circuit court. We disagree. Here, upon the State's introduction of the Application for Statement of Charges, appellant's attorney immediately objected, in which the following exchange took place:

> [PROSECUTOR]: I'll just provide this to defense counsel, a certified conviction with regards to that case.
>
> I'm going to proffer this to the Court.
>
> [APPELLANT'S ATTORNEY]: I'm going to object to that, as well, Your Honor.
>
> THE COURT: Okay. And the reason is?
>
> [APPELLANT'S ATTORNEY]: Again, we have not been provided prior notice that the State was intending to introduce this as evidence. Certainly in terms of the convictions, we do agree that there was a conviction and, in fact, it was a plea. However, in terms of what the State is proffering, it also is attached to it, has, I believe, an application for statement of charges. We don't know at this point if that was the actual factual basis for the plea. For that reason, I would object, Your Honor.
>
> THE COURT: Go ahead.
>
> [APPELLANT'S ATTORNEY]: Quite frankly, I have no issue with the docket sheet, the actual conviction itself, but with the application that is attached to it, at this point we simply don't know whether that was the actual factual basis for the plea.
>
> THE COURT: I'm going to overrule the objection in this case. It's a certified court record that was available with the

> other conviction that's listed in the Presentence Investigation Report. I don't think that -- as opposed to the other one, which weren't certified court records. They were from the police department. These certainly could have been anticipated to have been brought up and were available. So I'm going to overrule the objection.
>
> I will admit -- we'll mark and admit this as State's Exhibit 1.

It is clear from this exchange that appellant's attorney objected to the introduction of appellant's previous conviction and the statement of charges on the grounds that the State failed to provide prior notice of the introduction of this evidence, and because it was unclear whether the facts detailed in the attached statement of charges was the factual basis for the plea. It is also clear from the circuit court's response that appellant's attorney was objecting on the ground that the evidence had not been previously disclosed, when it overruled the objection on the ground that the evidence "could have been anticipated to have been brought up and were available." Accordingly, appellant properly preserved this argument on appeal as the record plainly demonstrates the issues were raised and decided by the trial court. *See* Md. Rule 8-131(a). ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal."); *Wajer v. Balt. Gas & Elec. Co.*, 157 Md. App. 228, 236–37 (2004), *cert. denied*, 383 Md. 213 (2004) (explaining that the preservation rule is one of fairness; it ensures the fair treatment of all parties by requiring litigants to present their positions to the trial court

and allowing that court the opportunity to rule on the issues presented (citations omitted)). Accordingly, we address appellant's argument below.

With respect to the State's duty to disclose information, prior to sentencing, to the defense, Maryland Rule 4-342(d) provides:

> **Rule 4-342. Sentencing – Procedure in non-capital cases.**
>
> * * *
>
> (d) **Presentence disclosures by the State's Attorney**. Sufficiently in advance of sentencing to afford the defendant a reasonable opportunity to investigate, the State's Attorney *shall disclose to the defendant or counsel any information that the State expects to present to the court for consideration in sentencing*. If the court finds that the information was not timely provided, the court shall postpone sentencing.

(Emphasis added).

"The plain language of [Rule 4-342(d)] is broad and encompasses any information on which the State plans to rely at sentencing. The Rule does not make an exception for substantial compliance or information the defendant could have requested or uncovered through investigation." *Dove*, 415 Md. at 739 (citation omitted). Further, the requirements of the Rule may not be satisfied by establishing that the defense was "aware[] that certain types of evidence might be presented[.]" *Id.* at 740 (citing *Green v. State*, 127 Md. App. 758, 774 (1999)).

In the instant case, the State does not dispute it failed to provide notice of its intent to rely on the noted application for statement of charges related to one of appellant's prior convictions. Given the unambiguous language of Rule 4-342(d), we must conclude that

it was error for the sentencing court to overrule defense counsel's objection to the admission of the subject evidence and to allow the State's argument related to the same.

Although, as the State points out, appellant failed to request a postponement, the unambiguous language of the Rule required the sentencing court to postpone the hearing. The last sentence explicitly states, in mandatory language, "If the court finds that the information was not timely provided, *the court shall postpone sentencing*." Rule 4-342(d) (emphasis added). The Rule places the onus on the sentencing court to postpone the hearing if presentence information was not timely provided. *See Dove*, 415 Md. at 741 (explaining that "the use of the word 'shall' indicates that the sentencing judge lacks the discretion to admit the evidence and proceed with the sentencing hearing; rather, the sentencing judge must postpone the hearing to allow the defendant the opportunity to investigate the evidence and prepare accordingly." (citation omitted)). Accordingly, not only should the sentencing court have sustained defense counsel's objection, but it should have postponed the hearing per the mandate of the Rule.

Our analysis then, shifts to whether the noted error was harmless. The State argues the trial court's decision at sentencing to permit presentation of the presentence information, despite the State's failure to disclose the information, was harmless error. We must disagree. We cannot discern from the record that the presentence information did not influence the sentences. Accordingly, because we are unable "to declare a belief, beyond a reasonable doubt" that the trial court's error did not influence appellant's sentences, we hold that the admission of the information was not harmless error. *See Dove*, 415 Md. at 727.

Here, following the admission of the evidence in question, the State proceeded to argue for the imposition of maximum sentences. The State explained, as was documented in the application for statement of charges, that it was previously alleged appellant, along with several others, had robbed a man. During the commission of that offense, appellant had beaten the victim with a lead pipe. The State then argued that "it appear[ed] . . . that [appellant] ha[d] . . . upgraded his actions" and had not learned from the consequences of his past behavior. Subsequently, the court, addressing appellant, noted:

> I've listened to the evidence in this trial, and I've reviewed your record. . . . You didn't make a mistake. You committed a crime. You committed a violent crime. Not for the first time, not for the second time, but you've been repeatedly committing violent crimes.
>
> You're a robber and a predator, and you're preying on people in your own community. The community needs to be protected from you. And I'm going to do just that.

Thereafter, the court imposed consecutive sentences which amounted to sixty years' imprisonment with all but forty years suspended.

Although the court did not specifically state its sentencing of appellant was based on the subject evidence presented by the State, we are unable to conclude that the court's admission of such evidence did not, in any way, influence the imposition of sentences.

Furthermore, as noted by defense counsel at sentencing, appellant had plead guilty in the noted previous case. The convictions in that matter, however, were for second-degree assault and openly wearing or carrying a dangerous weapon with intent to injure. Those convictions, on their face, did not speak directly to all of the points that formed the

basis of the State's argument seeking maximum sentences. Moreover, if the State had disclosed its intent to rely upon the noted application for statement of charges, defense counsel could have prepared to address that evidence by presenting evidence related to the terms of appellant's guilty plea. As it happened, the State's failure to comply with Rule 4-342(d) denied defense counsel a "reasonable opportunity to investigate" the information the State intended to use at sentencing and, by extension, denied defense counsel the opportunity to effectively confront the arguments related to such information. Accordingly, we must hold that the court's error in admitting the subject evidence was not harmless. Because of noncompliance with the Rule, and the error was not harmless, the sentence must be vacated, and the case remanded for resentencing.

CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY'S JUDGMENTS OF CONVICTION AFFIRMED. CORRESPONDING SENTENCES VACATED AND CASE REMANDED TO THAT COURT FOR RESENTENCING. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.