UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2811

September Term, 2014

ERIC D. JOHNSON

v.

STATE OF MARYLAND

Graeff,
Wright,
Eyler, James, R.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: February 27, 2017

Appellant, Eric D. Johnson, was found guilty by a jury in the Circuit Court for Prince George's County of first and second-degree felony murder, second-degree "specific intent" murder, first and second-degree assault, first-degree burglary, robbery with a deadly or dangerous weapon, use of a handgun in the commission of a felony or crime of violence, transportation of a handgun in a motor vehicle, and three counts of conspiracy. The court sentenced appellant to life imprisonment, all but 50 years suspended for the first-degree murder conviction, 20 years, consecutive, with the first 5 years without the possibility of parole, for the conviction of use of a handgun in the commission of a felony or crime of violence, and 25 years, suspended, for the conviction of conspiracy to commit first-degree assault. The court merged the remaining convictions for sentencing purposes.

On appeal, appellant presents the following questions for our review:

1. Did the circuit court err in denying the motion to suppress because appellant did not validly waive his *Miranda*[1] rights?

2. Did the trial court abuse its discretion in refusing to ask a *voir dire* question proposed by the defense?

3. Did the trial court err in refusing to admit a prior inconsistent statement made by a State's witness?

4. Did the trial court err in not admitting evidence that the scene of the incident previously had been burglarized?

5. Did the sentencing court impermissibly consider appellant's decision to plead not guilty and exercise his constitutional right to a jury trial?

For the reasons that follow, we shall affirm the judgments of the circuit court.

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

FACTUAL AND PROCEDURAL BACKGROUND

Appellant's convictions arise from the robbery and killing of a longtime family friend, Alphonso ("Al") Drew. The crimes were carried out with the assistance of appellant's twin sister, Erica Johnson, their half-brother, Antonio Johnson, and a friend, Moshawn Magruder.

Woody Johnson, appellant's father, had been friends with the victim for decades. The victim was "like family," and they "did everything together." The victim was in the business of buying and selling automobiles at auction.

Antonio and Erica testified for the State pursuant to guilty plea agreements.[2] They implicated themselves, appellant, and Mr. Magruder in the crime. In addition, appellant gave a hand-written and video-recorded statement to the police, both of which were shown to the jury, and both of which implicated appellant and the others in the crime.

From those sources, the jury heard that, on Friday, May 10, 2013, appellant, his two siblings, and Mr. Magruder were present in the Johnson family home when they devised a plan to steal money from the victim, who was "known to keep money" at his home in Brandywine.

Appellant admitted to the police that he was the leader of the scheme. The plan was to lure the victim from his home and then "strong-arm" thousands of dollars from him. Erica drove to the victim's home. When they got there, Mr. Magruder, pursuant to the plan to lure the victim from his home by calling to buy a vehicle tag, dialed "*67" to call the

[2] For clarity, the Johnsons are hereinafter referred to by their first names.

victim anonymously.[3] Mr. Magruder and appellant covered their faces with masks. When they saw the victim leave his home, they ambushed him by hitting, kicking, choking and pistol-whipping him. They then stripped the victim of his clothes and left him lying bleeding by a shed. While the victim was being beaten, Antonio was searching the house for money. Appellant subsequently assisted in the search. They did not find the thousands of dollars they sought, but they did take approximately $600, which the group divided after they left.

When appellant spoke with the police, he told them that he had hidden the handgun used to pistol whip the victim in Mr. Magruder's closet. The police later searched that closet and found a loaded handgun. In addition, bloody shoes, a black mask and latex gloves were recovered from Mr. Magruder's home. Later testing would reveal the victim's DNA on the firearm and bloody shoes.

On Sunday afternoon, nearly two days after the attack, Jean Drew, the victim's sister, went to the victim's home after she had been unable to reach him by phone. The two previously had planned to go to the cemetery that day, Mother's Day, to place flowers on their mother's grave. She found her dead brother and called 911.

A post-mortem examination revealed that the victim's death had been caused by blunt force injuries.

[3] A police detective offered expert testimony that Antonio's mother's cell phone used "*67" to make four phone calls on the night of the crime, and the phone connected to cell towers in the relevant geographic area. Antonio was the only one of the group who had a phone that night.

DISCUSSION

I.

Appellant contends that the circuit court erred in not suppressing his confession because he did not expressly waive his *Miranda* rights. The State contends that no written or otherwise explicit waiver of *Miranda* rights is required, and under the totality of the circumstances, appellant validly waived his *Miranda* rights.

In reviewing a circuit court's decision on a motion to suppress, we are limited to the facts developed at the hearing, *Hill v. State*, 418 Md. 62, 67 n.1 (2011), viewing the evidence in the light most favorable to the prevailing party on the motion. *Robinson v. State*, 419 Md. 602, 611-12 (2011). *Accord Gonzalez v. State*, 429 Md. 632, 647 (2012). We review the motions court's factual findings for clear error, but we make our own independent constitutional appraisal, "reviewing the relevant law and applying it to the facts and circumstances of this case." *State v. Luckett*, 413 Md. 360, 375 n.3 (2010). *Accord Moore v. State*, 422 Md. 516, 528 (2011). The issue of whether a confession is voluntary presents a mixed question of law and fact, subject to *de novo* review, with deference given to the suppression court's factual findings. *Winder v. State*, 362 Md. 275, 310-11 (2001).

"The Fifth Amendment to the United States Constitution, which applies to the States through the Fourteenth Amendment, provides in relevant part that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.'" *Luckett*, 413 Md. at 376-377 (citations omitted). "To give force to the Constitution's protection against compelled self-incrimination, the [United States Supreme] Court established in *Miranda* [*v. Arizona*,

384 U.S. 436, 478-79 (1966)], 'certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation.'" *Luckett*, 413 Md. at 377 (quoting *Florida v. Powell*, 559 U.S. 50, 59 (2010)).

"The warnings mandated by [the *Miranda*] decision are well known and require that when an individual is taken into custody, in order to protect the privilege against self-incrimination, procedural safeguards must be employed." *State v. Tolbert*, 381 Md. 539, 549, *cert. denied*, 543 U.S. 852 (2004). "The police must warn any person subjected to custodial interrogation that he has a right to remain silent, that any statement he does make may be used in evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." *Id*. at 549. "In the absence of these warnings, or their substantial equivalent, the prosecution is barred from using in its case-in-chief any statements obtained during that interrogation." *Id*.

An individual may waive his or her *Miranda* rights, "provided the waiver is made voluntarily, knowingly and intelligently." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). In *North Carolina v. Butler*, 441 U.S. 369, 372-373 (1979), the United States Supreme Court noted that a "'heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.'" (quoting *Miranda*, 384 U.S. at 475.).

When the State intends to use a defendant's confession to the police during custodial interrogation, the prosecution must "establish by a preponderance of the evidence that the statement satisfies the mandates of *Miranda v. Arizona*, and that the statement is voluntary.

The test for voluntariness is whether, under the totality of all of the attendant circumstances, the statement was given freely and voluntarily." *Tolbert*, 381 Md. at 557.

There is, however, no requirement of an express, written waiver of *Miranda* rights. A waiver of *Miranda* may be implicit, as long as the waiver remains voluntary, knowing and intelligent. *Berghuis v. Thompkins*, 560 U.S. 370, 375-76 (2010). In *Berghuis*, the United States Supreme Court held that the defendant had, by his actions, implicitly waived his *Miranda* right to silence when, after nearly three hours of interrogation in which he mostly kept silent, he answered "yes" when asked if he prayed to God to forgive him for the shooting.

In *Warren v. State*, 205 Md. App. 93, 118, *cert. denied*, 427 Md. 611 (2012), this Court summarized the holding in *Berghuis* as follows:

> In [*Berghuis*,] the Supreme Court stated: "Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." In *Berghuis*, the Supreme Court held that the defendant knowingly and voluntarily waived his *Miranda* rights even though the defendant declined to sign a waiver and there was "conflicting evidence" of whether the defendant "verbally confirmed that he understood the rights listed on the form." *Id*. at 2256. The defendant was "[l]argely silent" during the interrogation before he responded "yes" to the question: "Do you pray to God to forgive you for shooting that boy down?" *Id*. at 2256-57. The Supreme Court noted that: (1) "there [was] no contention that [the defendant] did not understand his rights; and from this it follows that he knew what he gave up when he spoke"; (2) the defendant's "answer to [the detective]'s question . . . is a 'course of conduct indicating waiver' of the right to remain silent"; and (3) "there [was] no evidence that [the defendant]'s statement was coerced." *Id*. at 2262-63 (citations omitted); *see also North Carolina v. Butler*, 441 U.S. 369, 370-71, 373, 99 S. Ct. 1755, 60 L.Ed.2d 286 (1979) (The Supreme Court held that the defendant waived his Miranda rights when law enforcement officers informed the defendant of his Miranda rights and the defendant replied: "I will talk to you but I am not signing any form.").

Here, after appellant was arrested, Detective Windsor explained appellant's *Miranda* rights as follows:

> Detective: All right. Here's what we're going to do. So you have no questions. Okay? I know you watch Cops on TV where they read rights. Okay?
>
> Appellant: Uh-huh.
>
> Detective: I'm going to read you your rights. If you don't understand them, tell me you don't understand. Okay? And I'll stop. I'll try to explain it to you. But it's pretty easy. It's just like on Cops on TV.
>
> Are you a -- so you're not injured, which is good. Okay. I already told you my name is Detective Windsor. I'm a Prince George's County police. Okay?
>
> You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to speak to a lawyer and have him with you down in questioning. If you cannot afford a lawyer, one will be appointed for you before a statement is taken, if you wish. If you decide to give a statement, you still have the right to stop at any time so you may speak to a lawyer.
>
> Do you understand these rights?
>
> Appellant: Yes.
>
> Detective: Okay. And then what is the – did you graduate high school?
>
> Appellant: Yes
>
> Detective: Okay. What was the highest level of education you've taken?
>
> Appellant: Eleventh grade twice.
>
> Detective: Okay. And can you read and write in the English language?
>
> Appellant: Yes.
>
> Detective: Okay. And I know sometimes people may take offense to that. That's just part of making sure that you understand everything

> that's going on 'cause I may ask you to write something. I may ask you to read something. Okay? I just want to make sure you understand where I'm coming from. That's it. The reason I am here is to get this stuff taken care of and to make sure you understand everything. Okay?
>
> Appellant: Yes.
>
> Detective: All right. So you know why I'm here. And you know why you're here. I mean, I know. And I know you know. Okay?
>
> Appellant: Yeah, yeah.

Detective Windsor then began asking appellant about the events surrounding the attack on the victim. Appellant gave a full videotaped confession implicating himself as well as Erica, Antonio, and Mr. Magruder. After giving the oral confession, appellant then wrote a five-page narrative of the events, explaining what happened and that he "set the plan up."

The circumstances surrounding appellant's statement are very similar to those in *Warren*, in which this Court found a valid implicit waiver of Warren's *Miranda* rights. In that case, the defendant never explicitly waived his *Miranda* rights. Rather, as in the present case, after having been advised of those rights, and acknowledging that he understood those rights, Warren began answering police questions. *Warren*, 205 Md. App. at 99-101. Here, as in *Warren*: "(1) "there is no contention that [appellant] did not understand his rights; and from this it follows that he knew what he gave up when he spoke" about being at the crime scene; (2) appellant's answer to the detective's questions constitutes "conduct indicating waiver of the right to remain silent"; and (3) the detective, the law enforcement officer responsible for the interrogation, testified that "appellant was not coerced." *Id*. at 118-19.

Appellant seeks to distinguish this case from *Warren*, pointing out that, in contrast to Warren, he testified at his suppression hearing. The entirety of his direct examination, however, was as follows:

DEFENSE:	[Appellant] --
APPELLANT:	Yes.
DEFENSE:	-- good morning. Sir, you have heard testimony about statements that you have given and the interview you had with Detective Windsor, correct?
APPELLANT:	Yeah.
DEFENSE:	Now, at any point during that interview did you believe that you did not have the option of not talking to Detective Windsor?
APPELLANT:	I mean, I ain't know I had to talk to him, cause then I had to talk to him.
DEFENSE:	Did you understand, right, that you can stop him and have an attorney present?
APPELLANT:	No.
DEFENSE:	You didn't understand that?
APPELLANT:	(Shakes head negatively.)
DEFENSE:	Detective Windsor got into the room and started talking to you. At the beginning you noticed that he did not advise you of your rights?
STATE:	Objection to the form of the question.
THE COURT:	Sustain that.

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DEFENSE:	Was this a continuation of your discussion with him?
APPELLANT:	About my rights?

DEFENSE: No. At the beginning, the beginning conversation.

APPELLANT: No.

DEFENSE: Okay.

DEFENSE: I have no further questions, Your Honor.

On cross-examination, after the State re-played the portion of the video during which Detective Windsor explained to appellant his *Miranda* rights, the State elicited from appellant that he nodded his head affirmatively when Detective Windsor told appellant "if you have any questions, stop. If you don't understand, I'll explain it." Appellant also acknowledged understanding that he had a right to remain silent, that anything that he said could be used against him in court, and, upon clarification, that he was entitled to a lawyer. Finally, appellant acknowledged telling Detective Windsor that he understood his rights.

In declining to suppress appellant's statements to Detective Windsor, the suppression court stated:

> I have watched the tape. I have watched your client in terms of his understanding of all the questions being asked by the detective in this case, and that, in fact, he gave him his rights based on the card and every right that he's entitled to know was given to him.
>
> When he was asked, did he understand his rights, the client said, yes. What you're saying is that that was not an oral waiver of his rights because he didn't then go and say, now, I need you to say you waive your rights, to put that in a language as opposed to how he asked this, because you say as opposed to form, which has a portion on it which says do you waive it.
>
> If you look at the whole totality, what was going on -- to be honest with you he was very, how do I put this -- in the very beginning, the first six minutes very conversational with him and really asking him, do you understand everything that is going on. Very much so.

> There was never any promises, never any threats, never any inducements, nothing, in order to get him to make a statement whatsoever in this case.
>
> So, what you are saying, because he didn't make that one statement, I waive my rights is sufficient. I find that is not the case, that is not the law in the State of Maryland. So, your motion is denied.

The circuit court's finding that appellant understood his *Miranda* rights is supported by the record. And his conduct in subsequently talking with the detective supports the court's finding that appellant implicitly waived his *Miranda* rights. The suppression court properly denied appellant's motion to suppress.

II.

Appellant contends that the trial court erred during jury selection when it declined to ask the panel the following question: "Does anyone on the panel believe that a Defendant must testify if he is not guilty? Or in the alternative will hold it against a Defendant who exercises his right not to testify?" Appellant asserts that this question should have been asked because it was "aimed at exposing disqualifying jury bias," i.e., whether "prospective jurors would be prejudiced against [him] if he elected not to testify."

The State disagrees. It contends that the trial court did not abuse its discretion in declining to ask appellant's proposed question because trial courts are not obligated to ask *voir dire* questions that merely repeat jury instructions.

"A defendant has a right to an impartial jury," and *voir dire* "is critical to implementing the right to an impartial jury." *Pearson v. State*, 437 Md. 350, 356 (2014). Maryland, however, "employs limited *voir dire*." *Id*. As the Court of Appeals has explained:

> [I]n Maryland, the sole purpose of *voir dire* "is to ensure a fair and impartial jury by determining the existence of [specific] cause for disqualification[.]" . . . Unlike in many other jurisdictions, facilitating "the intelligent exercise of peremptory challenges" is not a purpose of *voir dire* in Maryland. . . .Thus, a trial court need not ask a *voir dire* question that is "not directed at a specific [cause] for disqualification[or is] merely 'fishing' for information to assist in the exercise of peremptory challenges[.]". . .
>
> There are two categories of specific cause for disqualification: (1) a statute disqualifies a prospective juror; or (2) a "collateral matter [is] reasonably liable to have undue influence over' a prospective juror." . . . "The latter category is comprised of 'biases directly related to the crime, the witnesses, or the defendant[.]". . .

Id. at 356-57.

We review a trial court's decision whether to ask a *voir dire* question for abuse of discretion. *Id*. at 356. An abuse of discretion is found when "'no reasonable person would take the view adopted by the [trial] court,' or when the court acts 'without reference to any guiding rules or principles.'" *Nash v. State*, 439 Md. 53, 67 (quoting *North v. North*, 102 Md. App. 1, 13 (1994)), *cert. denied*, 135 S. Ct. 284 (2014).

In *Baker v. State*, 157 Md. App. 600 (2004), this Court addressed a contention similar to that raised here. In that case, the requested voir dire question was:

> Number 13, which states that the defendant has an absolute constitutional right not to testify and would you draw any inference of guilt from the defendant's election not to testify or decision not to testify[?] Number 14 says that the State has the burden of proof to prove the defendant's guilty beyond a reasonable doubt, the defendant does not have to prove his innocence. Would you draw any inference of guilt if this defendant elects not to present any testimony?

Id. at 615-16. We found no abuse of discretion in the trial court's decision not to ask those questions, stating that the "trial court was not required to ask jurors whether they would draw an inference from the defendant's election not to testify." *Id.* at 616.

The basis for the *Baker* decision is found in a line of cases beginning with *Twining v. State*, 234 Md. 97 (1964), which stands for the proposition that *voir dire* need not include matters that will be dealt with in jury instructions. Appellant, however, urges us to not follow the rule set forth in *Twining*.

We previously have rejected such an argument. In *Marquardt v. State*, 164 Md. App. 95, 142 (2005), we explained:

> We begin by stating that this Court has not, nor could it, retreat from *Twining*. We have consistently held that *voir dire* need not include matters that will be dealt with in the jury instructions. *Baker*, 157 Md. App. at 616-17, 853 A.2d 796; *Bernadyn v. State*, 152 Md. App. 255, 283, 831 A.2d 532 (2003), *cert. granted*, 378 Md. 613, 837 A.2d 925 (2003); *Wilson v. State*, 148 Md. App. 601, 656-67, 814 A.2d 1 (2002); *Carter v. State*, 66 Md. App. 567, 576-77, 505 A.2d 545 (1986). As we have recently stated, "it is up to the Court of Appeals, not this Court, to decide, as appellant suggests, that the reasoning of *Twining* is 'now outmoded.'" *Baker*, 157 Md. App. at 618, 853 A.2d 796. Accordingly, we perceive no abuse of discretion in the circuit court's failure to propound [appellant's requested] questions.

Marquardt, 164 Md. App. at 144.

Additionally, the Court of Appeals subsequently reiterated the reasoning of *Twining* in *Stewart v. State*, 399 Md. 146 (2007). In that case, the Court stated: "[Q]uestions asking whether prospective jurors would follow the court's instructions on the law are disfavored in Maryland and a court does not abuse its discretion in refusing to ask them." *Id.* at 162-63.

Given this case law, we conclude that the circuit court did not abuse its discretion in declining to ask appellant's requested *voir dire* questions, which were directed at matters that were the subject of jury instructions.

III.

Appellant contends that the trial court erred in refusing to admit into evidence a written and signed prior inconsistent statement made by Antonio, in which he told the police that unknown armed men forced him to assist them in the attack on the victim. He asserts that the statement was admissible pursuant to Md. Rule 5-802.1, which provides that a prior written statement, signed by the declarant, is not excluded by the hearsay rule.

The State contends that the trial court properly exercised its discretion in declining to admit the statement, and appellant confuses "the impeaching and substantive uses of a prior inconsistent statement." In any event, it argues that any error in admitting this statement was harmless given the overwhelming evidence of appellant's guilt and the relatively diminished evidentiary value of Antonio's prior inconsistent statement.

The Court of Appeals has explained the appropriate standard of review, as follows:

> We review rulings on the admissibility of evidence ordinarily on an abuse of discretion standard. Review of the admissibility of evidence which is hearsay is different. Hearsay, under our rules, must be excluded as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence or is "permitted by applicable constitutional provisions or statutes." Md. Rule 5-802. Thus, a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility. Whether evidence is hearsay is an issue of law reviewed *de novo*.

Gordon v. State, 431 Md. 527, 535-36 (2013) (quoting *Bernadyn v. State*, 390 Md. 1, 7-8 (2005)).

Here, during cross-examination of appellant's half-brother Antonio, appellant sought to introduce into evidence a handwritten and signed statement that Antonio gave to

the police.[4] Defense counsel sought to impeach Antonio's trial testimony implicating defendant by showing that his initial statement to the police minimized his role in the offenses. When presented with his prior statement, Antonio admitted that was his "first story," which did not include him being involved in the robbery. Defense counsel moved to admit this prior statement into evidence, and the court sustained the State's objection.

Appellant asserts that this statement was admissible pursuant to Md. Rule 5-802.1, which provides as follows:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> (a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and was signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement.

[4] This statement was as follows:

> I was at [Al's] house. As we was leaving 5 guys run up with guns. [A]l takes off running and get hit by 1 of the five guys after that two of the five guys make me unlock door and check the house for money as I check the house I hear a loud scream and I get scared as I finish checking the house they tell me to cut power off and come outside to check the cars so I checked the cars for them and found nothing as I closed all the car doors I see them beating al in the face with guns i yelled stop yall goin hurt him so as they keep beating him I take off running. I dont know what to do. I run till I see somebody. I ask them can they take me the closes they can to branck ave. I get to branch ave and I ran to southern ave and got on the bus to benning rd and walk to my brother house and stayed there till the next day. I didnt know what to do so I keep my mouth closed. I know it wasnt the right thing to do but i was scared of losing my life.

We agree with appellant. Antonio's statement to the police was inconsistent with his trial testimony, it was written, and it was signed by Antonio. The trial court erred in not admitting it into evidence.

That, however, is not the end of the inquiry. We must address the State's argument that any error in failing to admit the statement was harmless, and therefore, it does not require reversal of appellant's convictions.

The Court of Appeals has set forth the standard for assessing harmless error as follows:

> [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. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of – whether erroneously admitted or excluded – may have contributed to the rendition of the guilty verdict.

Dorsey v. State, 276 Md. 638, 659 (1976). *Accord Morris v. State*, 418 Md. 194, 221-22 (2011).

Here, the evidence against appellant was overwhelming. Appellant gave a video-taped and written confession admitting his participation, and leadership, in the murder. This confession was corroborated at trial by Erica and Antonio. And the police found the handgun used to pistol-whip the victim in the place where appellant told them it could be found, in Mr. Magruder's closet. The DNA collected from both the firearm, as well as shoes found in Mr. Magruder's home, matched the victim's DNA profile. Given this overwhelming evidence, we are persuaded that the failure to admit Antonio's initial statement to the police did not impact the verdict.

IV.

Appellant contends that the trial court erred in not admitting evidence that the victim's home previously had been burglarized. Appellant maintains that this evidence was admissible pursuant to Md. Rule 5-803(b)(24), the residual or "catch-all" exception to the rule prohibiting hearsay, and the failure to admit the evidence violated his constitutional right to a fair trial.

The State contends that appellant failed to preserve this contention for appeal. In any event, it alleges that the contention is without merit, and the court properly excluded the evidence.

During the cross examination of Jean Drew, the victim's sister, appellant proffered that he wanted to ask Ms. Drew whether the victim had told her "that his place had been broken into and his speakers had been stolen sometime in the recent past." The State objected that this question was seeking to elicit hearsay, and the court asked under what theory it would be admissible. The following then occurred:

DEFENSE:	The [hearsay] exception is that -- well, give me a second. I'll come up with something. Your Honor, first of all, the -- there was some question as to when was the last time they spoke, right? I don't know when this was said or not, but I can go into if -- into specifically if this was the content of that last conversation.
THE COURT:	You can't ask -- you can ask her in her last conversation --
STATE:	I'm still -- I'm still objecting.
THE COURT:	-- Wednesday before she left --

STATE: I'm still objecting. I don't care if the conversation was the day before he died. He's talking about an event that happened in the past that he was robbed.

When I asked her, when she last spoke -- hold on just one second. When I asked her when she last spoke, she said Wednesday. And I said what was the plan? In other words, future intent, which is a hearsay exception. The plan was to meet on Sunday to go to the thing. You're talking about a fact remembered, that he told her that he had been robbed in the past.

DEFENSE: Well, the thing about it is that, I am asking because that was part of the conversation. I'm not necessarily saying it happened. So I'm not --

STATE: If that is the case, it's irrelevant then. And it's not -- it's not a Rule of Completeness. I said specifically the intent. You're going into some sort of past crime against him.

DEFENSE: No, it's not past.

STATE: Well, a burglary of his house.

DEFENSE: Well, the thing about it, I'm raising the specter of an alternative to the State's theory. Right?

The Defendant [sic] clearly has been the subject of crimes against him and his property in the past. And I think it's certainly probative in terms of relevance here.

STATE: And it might be, if you can prove it with admissible evidence, not hearsay based on the victim, perhaps, telling the witness about some facts. How do you prove that without hearsay? How do you prove that or get that in?

DEFENSE: I don't have to prove that it happened. I don't have to prove that it happened.

STATE: I'm objecting about hearsay.

THE COURT: It is hearsay unless you can tell the purpose of what he might have told her about a past incident at his house. It is. I can't change that.

Maryland Rule 8-131(a) provides that, "[o]rdinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court." "The application of the 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)). *Accord Alexis v. State*, 209 Md. App. 630, 667, *aff'd*, 437 Md. 457 (2014).

A party disputing the propriety of a ruling that excludes evidence is limited on appeal to those theories of admissibility that it proffered in the trial court. *Robinson v. State*, 66 Md. App. 246, 253-55, *cert. denied*, 306 Md. 289 (1986). A party cannot present a new theory of admissibility on appeal, to which the trial court never had an opportunity to respond and, possibly, to avoid or correct any error. *Id*.

Here, the grounds raised on appeal in support of the argument that Ms. Drew's testimony was admissible were not raised below. Under these circumstances, his argument is not preserved for this Court's review.

Even if the issue was preserved, we would find the contention to be without merit. The trial court neither erred nor abused its discretion in precluding appellant from eliciting hearsay from Ms. Drew on a collateral matter.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Absent an exception, hearsay is not admissible. Md. Rule 5-802.

Appellant relies on Md. Rule 5-803(b)(24), otherwise known as the "catchall" or "residual" exception. It provides as follows:

> (24) Other exceptions. Under exceptional circumstances, the following are not excluded by the hearsay rule: A statement not specifically covered by any of the hearsay exceptions listed in this Rule or in Rule 5-804, but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

Id.

The residual exception to the hearsay rule is meant to be used "very rarely," and it is limited to "new and unanticipated situations." *State v. Walker*, 345 Md. 293, 318, 341 (1997). There is nothing novel about the situation here, and appellant failed to establish the predicates for admissibility pursuant to 5-803(b)(24). The statement about a possible earlier burglary was a collateral matter, as opposed to evidence of a material fact. Moreover, the State asserts, without contradiction, that appellant did not notify the State of his intent to introduce this evidence. Accordingly, even if preserved, the facts here to not justify admission of the evidence under Rule 5-803(b)(24).

Appellant fares no better with his theory that the evidence was admissible as a matter of "Due Process." Before a ruling excluding evidence as hearsay can be deemed to violate the fundamental right of due process, it must be demonstrated both that the hearsay was critical to the defense and that there was no way to present that testimony within the existing hearsay rules. *Foster v. State*, 297 Md. 191, 212 (1983), *cert. denied*, 464 U.S. 1073 (1984). Here, the hearsay related to a collateral matter. Even if it had been admitted and fully credited by the jury, all it would have shown was that the victim's home had been burglarized sometime before he was killed. Such information was hardly "critical to the defense," particularly given appellant's confession to the police. If preserved, we would conclude that appellant's claim in this regard is devoid of merit.

V.

Appellant's final contention is that he is entitled to be re-sentenced because the sentencing court relied on impermissible considerations. Specifically, he contends that the court's comments indicate that it punished him for "pleading not guilty and electing a jury trial."

The State argues that this contention is not preserved for appellate review because appellant did not object below to the sentencing court's remarks. In any event, the State asserts that, when viewed in context, the sentencing court's comments were not improper.

Immediately before imposing sentence in this case, the court made the following remarks:

> And I hear your apology. I don't know how sincere it is, but you just destroyed so many lives that I do believe that of the four you are most culpable and you deserve the most severe sentence of the four for what you

> did. *At least I will give to [sic] the other three, they pled. They admitted what they did was wrong and accepted a plea. You decided to go to trial.* And I heard what was said about the Lord has led you to where you are today, and I am not really sure how I follow that logic. But there's one thing I know, the Lord doesn't condone what you did and the Lord certainly didn't condone you taking Uncle Al's life.

(emphasis added).

We agree with the State that, because appellant made no objection to the sentencing court's comments, the issue is not preserved for appeal. In *Abdul-Maleek v. State*, 426 Md. 59 (2012), the Court of Appeals explained that it had "consistently recognized that allegations of impermissible considerations at sentencing are not 'illegal sentences' subject to collateral or belated review and 'must ordinarily be raised in or decided by the trial court. . . . [A]nd, subject to the appellate court's discretion under Maryland Rule 8-131(a), the defendant is not excused from having to raise a timely objection in the trial court.'" *Id.* at 69, (quoting *Chaney v. State*, 397 Md. 460, 466-67 (2007)). Although the Court exercised its discretion to review the unpreserved issue in that case, we have explained, this Court's discretionary exercise of authority under Rule 8-131(a) to address an unpreserved issue "'1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.'" *Kelly v. State*, 195 Md. App. 403, 432 (2010) (quoting *Hammersla v. State*, 184 Md. App. 295, 306 (2009)). We decline to exercise our discretion to address this unpreserved issue in this case.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.