

Circuit Court for Prince George's County
Case No. CT14-0719X

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2815

September Term, 2015

DELROY NURSE

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: December 8, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

A jury in the Circuit Court for Prince George’s County convicted Delroy Nurse of one count of attempted first-degree murder, one count of attempted second-degree murder, two counts of first-degree assault, two counts of second-degree assault, two counts of use of a firearm in the commission of a crime of violence, and one count of wearing, carrying, or transporting a handgun. Nurse was sentenced to a total term of life imprisonment, with all but thirty years suspended. In this appeal, he presents the following questions:

1. Did the trial court err in admitting into evidence an audio-video recording of Nurse’s statement to police?
2. Is the evidence insufficient to sustain the conviction for attempted first-degree murder?

We will answer both questions in the negative and affirm the judgment of the circuit court.

BACKGROUND

Because Nurse challenges the sufficiency of the evidence as to his conviction for attempted first-degree murder, we will summarize the evidence “in the light most favorable to the prevailing party.” *Allen v. State*, 158 Md. App. 194, 249 (2004).

In the afternoon hours of April 11, 2014, Joana Mahoney was at her three-story townhome in Prince George’s County, where she lived with her husband, Nurse, and three children, Everton “Flint” Ralph, age 19, Unique Mahoney, age 18, and “K.W.,” age 9. At the time, Mahoney and Flint were on the second floor of the home, Unique was on the main floor, Nurse was in the basement, and K.W. was “outside playing.”

At some point, Mahoney went to the basement to speak with Nurse, who was “sitting in a chair towards the wall.” The two began to argue, and Mahoney told Nurse to leave the home, but he refused. Nurse then hit Mahoney in the mouth, and Mahoney “tried to hit him back” and “pulled his hair.” Flint, who came upon the scene a short time before, was eventually able to separate the two.

Nurse then went into a closet, retrieved a pistol from a safe, and sat back down in his chair. Mahoney asked Nurse why he had the gun, and Nurse responded that he was “trying to get it out of the house.” The couple engaged in another argument, after which Mahoney went to the safe to retrieve some items. As Mahoney was kneeling down and taking items from the safe, Nurse got up, pointed the gun at Mahoney, and pulled the trigger, but the gun did not fire. Nurse then “cocked the gun back” and fired in Mahoney’s direction. In that time, Flint managed to get between Nurse and Mahoney. Nurse shot him in the stomach. After shooting Flint, Nurse walked toward Mahoney, at which time Flint heard another gunshot.

Around the same time, Mahoney, who did not hear either gunshot and did not see Flint get shot, was shot in the back. Mahoney fell to the ground, and Flint fled the home. With gun in hand, Nurse approached Mahoney, told her to open her eyes, and stated that “he had to go.”

While Nurse was standing over her, Mahoney heard Unique calling her name from upstairs. Unique, who was on the main floor at the time, stood at the top of the basement stairs in an attempt to “see what was going on.” Nurse then went to the bottom of the basement stairs, pointed the gun up the stairs, and fired. Unique, who was not hit by

gunfire, went into the basement and found Mahoney “laying on the steps on her back covered with blood.” Unique then ran outside and found Flint, who was laying “on the floor holding his stomach.”

Michelle Murray, a neighbor, heard the commotion and called Mahoney to “check on her” but “didn’t get an answer.” Shortly thereafter, Murray received a call from Nurse, who told Murray to “come over right away.” Murray complied, and Nurse, still holding the gun, came to the door and let Murray inside. Upon entering the home, Murray could hear Mahoney “screaming at the bottom of the steps.” Nurse informed Murray that the couple had been arguing and “the gun went off.” Nurse also told Murray that “he had to get out of there.” At some point Nurse left the home, and Murray phoned 911. After police and paramedics responded to the scene, both Flint and Mahoney were transported to the hospital and treated for gunshot wounds. Nurse was eventually arrested.

At trial, Nurse testified that he and Mahoney did have an argument on the night of the shooting, but that Mahoney was the aggressor. According to Nurse, Mahoney tried to hit him in the head with a hammer and later grabbed a screwdriver. Nurse admitted getting items from the safe, but he claimed that Mahoney was the one who first grabbed the gun. Nurse testified that he managed to get the gun away from Mahoney, at which time she threatened to kill him and grabbed him by the shirt. Nurse stated that he put the gun in his pocket, but it later fell out and, when he picked it up, his “hand accidentally hit the trigger.” Nurse denied shooting Flint, claiming instead that Flint got hold of the gun and shot himself. Nurse also stated that he did not point the gun at or try to shoot

Unique; rather, the gun simply “went off again.” Following the shooting, Nurse got in his car and “went toward 7-Eleven,” after which he “put the gun down the drain.”

At the conclusion of Nurse’s testimony, the State called Detective Manzur Ahmed as a rebuttal witness. Detective Ahmed testified that he interviewed Nurse following his arrest and that Nurse gave a statement, which was recorded. The officer told the jury that, during the interview, Nurse never stated that Mahoney tried to hit him with a hammer or threaten him with a screwdriver. The officer also testified that Nurse never stated that Mahoney tried to take the gun from him. The State sought to introduce the recorded interview as evidence, and defense counsel objected to the introduction of “the entirety of the video.” After the State indicated that it would only be showing a short portion of the video to the jury, the court overruled the objection. Defense counsel did not lodge any further objections nor move to strike any portion of the video.

The State then showed two portions of the interview to the jury. In the first portion, which lasted approximately 30 seconds, Nurse admitted shooting the gun three times but maintained that he was not trying to kill Mahoney. In the second portion, which lasted approximately one minute, Nurse stated that he threw the gun over a bridge after the shooting. Nurse was ultimately convicted.

DISCUSSION

1. The trial court did not abuse its discretion by admitting the recording of Nurse’s statement to Detective Ahmed.

Nurse first argues that the trial court abused its discretion in admitting into evidence Nurse’s recorded interview with police following the shooting. Nurse claims that

because he made “numerous incriminating statements” during the interview, the trial court should not have permitted the State to introduce the evidence at the rebuttal stage of trial. In addition, Nurse contends that certain portions of the video, none of which were shown to the jury during trial, were not proper rebuttal evidence and were prejudicial to Nurse.

Generally, the State is required to “put in the whole of [its] evidence upon every point or issue which [it] opens, before the defendant proceeds with the evidence on his part.” *Wright v. State*, 349 Md. 334, 341 (1998) (internal citation omitted). One exception to this rule is that the State may offer rebuttal evidence if such evidence is competent and “explains, or is a direct reply to, or a contradiction of, ‘material evidence introduced by the accused[.]’” *Id.* at 342-43 (internal citations omitted). The decision to admit rebuttal evidence rests within the sound discretion of the trial court and “will be reversed only if it is ‘manifestly wrong and substantially injurious.’” *Rollins v. State*, 161 Md. App. 34, 89 (2005) (internal citations omitted).

We hold that the trial court did not abuse its discretion in admitting the entirety of the recording of Nurse’s statement as rebuttal evidence. The State’s theory of the case, as established by the testimony presented during the State’s case-in-chief, was that Nurse fired the gun without provocation and with the premeditated and deliberate intent to kill. During his direct examination, however, Nurse introduced a new theory, namely that Mahoney attacked him with various objects, that the gun went off inexplicably, and that Flint shot himself. To rebut this new evidence, the State introduced Nurse’s recorded interview with the police, showing certain portions to the jury that were a direct reply to,

and at times a contradiction of, the version of events offered by Nurse during his direct examination. Thus, the trial court did not err in admitting the interview as rebuttal evidence.

Relying almost exclusively on *Wright v. State, supra*, Nurse maintains that incriminatory statements, like those made by Nurse during his interview, are inadmissible as rebuttal evidence; however, Nurse’s reliance on *Wright* is misplaced. In that case, the defendant, Rodney Wright, was arrested following a sexual assault. *Wright*, 349 Md. at 338. While incarcerated pending trial, Wright gave a detailed confession to his cell-mate, Louis Hurt. *Id.* At trial, Wright denied having committed the sexual assault. *Id.* at 339. On cross-examination, the State asked Wright about his confession to Hurt, and Wright denied having made such a confession. *Id.* After the defense rested, the State called Hurt as a witness to rebut Wright’s assertion that he never made the confession. *Id.* at 340, 345. Over objection, the trial court allowed the evidence, and Hurt testified about the substance of Wright’s confession. *Id.* Wright was convicted and he appealed. *Id.*

The Court of Appeals ultimately overturned Wright’s conviction, holding that the trial court erred in admitting Hurt’s testimony. *Id.* at 354. In so doing, the Court noted that the State’s use of Wright’s confession as rebuttal evidence was unusual given that the confession was admissible in the State’s case-in-chief as “a classic party admission.” *Id.* at 343-44. The Court also noted that the State’s purpose in introducing the confession was not to rebut Wright’s direct testimony, during which he merely denied involvement in the sexual assault, but rather to rebut Wright’s denial of the confession, a fact that was

elicited by the State on cross-examination. *Id.* The Court then discussed the inherent danger in permitting the State to introduce a confession under such circumstances:

When viewed in this manner, which is the manner presented to us by the State, the problem emerges: the State has a confession that is admissible in its case-in-chief as substantive evidence of the defendant's guilt; instead of offering it at that stage, the State waits to see if the defendant testifies; if the defendant testifies and denies guilt, the State asks on cross-examination whether the defendant ever made the confession; if the defendant answers affirmatively, the State continues its cross-examination and brings out the entire confession as a prior inconsistent statement; if the defendant denies the confession, the State springs it, in full blossom, in rebuttal, supposedly for the limited purpose of contradicting the defendant's denial that he or she ever made the confession.

Id. at 346.

The Court went on to explain why, in that case, the State's decision to use the confession during the rebuttal stage was fundamentally unfair:

It simply defies logic to suggest that, when it really has a choice, the State would prefer to use a confession to impeach a defendant's credibility on what is essentially a collateral point – whether he or she, in fact, made such a statement – than to use it as substantive evidence of guilt. The State's true goal in this case was *not* to suggest to the jury that Wright was not telling the truth when he denied making the confession to Hurt, but rather to sandwich its case around that of the defense and put its most damaging piece of evidence after the defense has concluded its presentation.

Id. at 349.

The Court's reasoning in *Wright* is inapposite to the present case. First and foremost, the testimony that elicited the rebuttal evidence in this case was offered by Nurse during his direct examination. In addition, the State's rebuttal evidence, as it was presented to the jury, was not a detailed confession but rather snippets of an interview that, while inculpatory, directly contradicted Nurse's factual account of the shooting. Thus, unlike

in *Wright*, we are not faced with a situation in which “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.” *Id.* at 353.

Nor are we faced with a situation in which the State, as it seemingly did in *Wright*, sandbagged a defendant with a confession that fully supported the State’s theory of the case. To the contrary, the version of events that Nurse related to Ahmed—that he shot Mahoney by accident and that Flint shot himself—was at odds with the State’s only theory, namely that Nurse committed the crimes deliberately and with premeditation. In other words, the State was entitled to choose not to present Nurse’s statements in its case-in-chief because the statement did not bolster the State’s case. However, when Nurse chose to present the jury with an exculpatory version of events that was different from the exculpatory statement made to Ahmed, the State was well within its rights to present the earlier statement as rebuttal evidence.

Nurse’s alternative claim—that certain portions of the video not shown to the jury by the prosecutor did not constitute rebuttal evidence and thus should have been excluded—is unpreserved. When, as is the case here, a piece of evidence is generally admissible but may contain objectionable material, trial counsel has an obligation to bring such objectionable material to the trial court’s attention, which defense counsel failed to do in the instant case. *See Haile v. Dinnis*, 184 Md. 144, 153 (1944) (“After evidence has been admitted, and an application is made to the court to exclude it, then the onus rests upon the party making the application, to confine his objection to that portion of the evidence which is illegal.”) (citations and quotation marks omitted).

To put it another way, it would be improper for this Court to assess error when the trial court was not given the appropriate opportunity to address the problematic material. *See State Roads Commission v. Creswell*, 235 Md. 220, 229 (1964) (When a piece of evidence is admissible in part, a trial court is “neither expected nor required to search the [evidence] and sift out the objectionable material.”); *See also* 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[.]”).

2. The State presented evidence from which the jury could conclude that Nurse shot Mahoney with premeditation.

Nurse next contends that his conviction for first-degree attempted murder of Mahoney must be overturned “because the evidence cannot support a finding that at the time of the shooting [Nurse] acted with the requisite premeditation and deliberation.” Nurse maintains that “it was undisputed that the shooting was immediately preceded by a heated argument and altercation between Mahoney and [Nurse].” Nurse insists that “such an altercation is inconsistent and incompatible with premeditation and deliberation.”

“The test of appellate review of evidentiary sufficiency is whether, ‘after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *Donati v. State*, 215 Md. App. 686, 718 (2014), *cert. denied* 438 Md. 143 (2014) (internal citations omitted). “The test is ‘not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded

any rational fact finder.’” *Painter v. State*, 157 Md. App. 1, 11 (2004) ((emphasis in original); internal citations omitted). Moreover, “[w]e ‘must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [we] would have chosen a different reasonable inference.’” *Donati*, 215 Md. App. at 718 (internal citations omitted). “Further, we do not ‘distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.’” *Id.*

In order to sustain a conviction for attempted first-degree murder, the State must show that a defendant intended to kill the victim with deliberation and premeditation. *Wood v. State*, 209 Md. App. 246, 317 (2012). Deliberation requires “that the defendant have conscious knowledge of the intent to kill[.]” *Id.* (internal citations and quotations omitted). Premeditation requires “that there be enough time for the defendant to deliberate, i.e., time enough to have thought about that intent[.]” *Id.* (internal citations and quotation omitted). Although each element is distinct, “this Court has noted that the two elements are often reviewed together.” *Id.* at 318.

The Court of Appeals explained this interplay as follows:

For murder to be “deliberate” there must be a full and conscious knowledge of the purpose to kill; and to be “premeditated” the design to kill must have preceded the killing by an appreciable length of time, that is, time enough to deliberate....It is unnecessary that the deliberation or premeditation shall have existed for any particular length of time. Appreciable length of time simply means any amount of time sufficient to convince the trier of fact that the purpose to kill was not the immediate offspring of rashness and impetuous temper, but was the product of a mind fully conscious of its own design.

Mitchell v. State, 363 Md. 130, 148 (2001) (internal citations and quotations omitted).

In the present case, both Mahoney and Flint testified that, during the argument, Nurse got out of his chair, retrieved a gun from a safe, and carried it back to his chair, where he sat down. Both Mahoney and Flint also testified that, following Nurse’s retrieval of the gun, Mahoney walked away from Nurse. Then, according to Flint, Nurse got out of his chair and tried to shoot Mahoney, but the gun did not go off. Flint then stated that Nurse tried to shoot Mahoney again but failed, as Flint got in the way and was shot. Flint then witnessed Nurse walk toward Mahoney, at which time Flint heard another gunshot. Around the same time, according to Mahoney, she was shot in the back.

Based on these circumstances, a reasonable inference can be drawn that Nurse intended to kill Mahoney with premeditation and deliberation. Despite the fact that the parties may have been involved in an argument immediately prior to, or even during, the shooting, Nurse’s behavior in retrieving the gun, sitting back down, and then shooting at Mahoney while her back was turned, all suggest that Nurse intended to kill Mahoney and that he had full and conscious knowledge of this intent. *Id.* at 149 (“Although it is true that a murder committed solely on impulse...is not one committed with deliberation and premeditation, the law does not require that deliberation and premeditation be the product of clear and rational thought; it may well result from anger or impulse.”). Likewise, a reasonable inference can be drawn that Nurse acted with the requisite premeditation, particularly given that he attempted to shoot Mahoney three separate times. *Id.* at 148 (“Indeed, a delay between firing a first and second shot ‘is enough time for reflection and decision to justify a finding of premeditation.’”) (internal citations omitted).

The evidence was sufficient to support Nurse’s conviction of attempted first-degree murder of Mahoney.

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