Circuit Court for Prince George's County
Case No. CT0001481X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1223

September Term, 2020

JEROME FLEMING

v.

STATE OF MARYLAND

Fader, C.J.,
Friedman,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: October 19, 2021

In 2001, a jury sitting in the Circuit Court for Prince George's County found the appellant, Jerome Fleming, guilty of conspiracy to commit murder. In 2020, the circuit court granted Mr. Fleming a right to file this belated appeal, in which Mr. Fleming contends that during the 2001 trial, the trial court abused its discretion when it permitted the State to reopen its case to introduce evidence essential to his conviction. We hold that the circuit court did not abuse its discretion and, accordingly, will affirm Mr. Fleming's conviction.

BACKGROUND

Factual Background

On December 15, 1998, Robert Colbert was found dead from a single gunshot wound to the chest. In connection with the shooting, the police arrested Mr. Fleming and three other individuals they believed were involved in the murder, Stephen Garcia, Christopher Donte Prince, and Keith Jamison. The State charged Mr. Fleming with murder, conspiracy to commit murder, use of a handgun in the commission of a felony, and being an accessory after the fact.

At the March 2001 trial, the State called seven witnesses in its case-in-chief but all the evidence concerning Mr. Fleming's involvement in the murder came from the testimony of two of his alleged co-conspirators, Messrs. Garcia and Prince. In their testimony, which was largely consistent, both men identified Mr. Fleming as the shooter and claimed that he had acted at the behest of Mr. Jamison.

After the State rested, the defense moved for a judgment of acquittal on the ground that the testimony of Messrs. Garcia and Prince about Mr. Fleming's role in the murder

had not been corroborated by any independent evidence and, therefore, the State had not satisfied the requirements of the accomplice corroboration rule.[1] The following colloquy took place:

> [DEFENSE]: It has always been the law in this State, Your Honor, that a defendant cannot be convicted on the uncorroborated testimony of an accomplice. The corroboration has to either show that the defendant committed the crimes charged, or the defendant was with others who did commit the crime. I don't recall other than the testimony of accomplices in this case any such testimony, and for that reason, we would be asking for judgment of acquittal on all counts.
>
> [STATE]: Well, I think [defense counsel] is correct when he said, an accomplice. I think that Mr. Garcia was corroborated in large part by Mr. Prince and vice versa, that their testimony was independent based on their own personal experience, and I think that as a result of that, the law is sufficient that these two gentlemen can corroborate each other. They did. We would ask that the motion be denied.
>
> THE COURT: Was it an accomplice or any number of accomplices?
>
> [DEFENSE]: It is any number of accomplices. They still have – you can't use one to bootstrap the testimony of [the] other. I certainly don't understand that to be the law.
>
> [STATE]: Court's indulgence. May we approach?
>
> (Counsel approached the bench and the following ensued.)
>
> [STATE]: I have a pair of alternative requests. One, that I be allowed to go and pull some case law, and [two] that I be allowed to reopen, and I'll put the defendant's statement in.

[1] Prior to the Court of Appeals' decision in *State v. Jones*, Maryland followed the "common law accomplice corroboration rule, which requires that accomplice testimony be independently verified to sustain a conviction." 466 Md. 142, 145 (2019). In *Jones*, the Court of Appeals abrogated the rule, but only prospectively. *Id.* at 145, 169. The ruling in *Jones* thus does not apply to Mr. Fleming's case.

THE COURT: I'll permit you to reopen.

[STATE]: Thank you very much.

[DEFENSE]: That would be over defense's objection.

THE COURT: Yes.

Following a 20-minute recess, the trial court informed the jury that the State would return with additional evidence after the lunch break.

After the lunch break, approximately two hours after the State had initially rested, the State called two additional witnesses, Detectives Charles Richardson and Keary Jernigan, both of whom had spoken to Mr. Fleming after his arrest and taken a statement from him. In the statement, Mr. Fleming had denied participating in the murder but admitted to being with Mr. Prince on the day of the murder at the apartment complex where the shooting occurred and to having heard a gunshot. The State questioned each witness briefly about the procedure used to procure Mr. Fleming's statement and then introduced the statement into evidence. Mr. Fleming was permitted to cross-examine each witness. After the court admitted the statement, the State rested for a second time.

Mr. Fleming then renewed his motion for judgment of acquittal as to all counts. The court granted the motion as to the accessory-after-the-fact charge but otherwise denied it. Mr. Fleming rested without putting on any evidence and again renewed his motion for judgment of acquittal, which the court again denied as to the remaining charges. The jury began deliberations that afternoon. The following afternoon, the jury rendered verdicts of not guilty on the charges of first- and second-degree murder as well as the handgun charge

but found Mr. Fleming guilty of conspiracy to commit murder. This Court affirmed in an unreported opinion. *Fleming v. State*, No. 681, Sept. Term 2001 (filed Aug. 29, 2002).

In 2016, Mr. Fleming filed a petition for post-conviction relief in the Circuit Court for Prince George's County. The circuit court granted the petition and ordered a new trial. This Court reversed in an unreported opinion but remanded the case to the circuit court to determine whether to grant Mr. Fleming the right to file a belated appeal. *Fleming v. State*, No. 1083, Sept. Term 2017, 2019 WL 5295147 (Md. App. Oct. 18, 2019), *cert. denied*, 470 Md. 213 (Aug. 21, 2020). On December 9, 2020, the circuit court granted Mr. Fleming the right to file this belated appeal, which Mr. Fleming did.

DISCUSSION

Mr. Fleming contends that the trial court abused its discretion in granting the State's request to reopen its case because, under the circumstances, doing so deprived him of a fair trial. Mr. Fleming also contends that the record does not demonstrate that the court exercised its discretion in granting the State's request.

THE TRIAL COURT'S DECISION TO PERMIT THE STATE TO REOPEN ITS CASE DID NOT DEPRIVE MR. FLEMING OF A FAIR TRIAL.

A. We Review a Trial Court's Decision to Permit the State to Reopen Its Case for Abuse of Discretion, Focusing on Whether the Decision Impaired the Ability of the Defendant to Answer or Otherwise Receive a Fair Trial.

A trial court has "broad discretion to reopen a case to receive additional evidence." *Dyson v. State*, 328 Md. 490, 500 (1992). We review a trial court's decision to vary the order of proof by permitting the State to reopen its case after it has rested for abuse of discretion. *State v. Payton*, 461 Md. 540, 558 (2018). In doing so, the focus of our inquiry

is "whether the trial court's decision has impaired the defendant's right to a fair trial." *Id.* Although "trial courts should be reluctant to exercise their discretion to permit the State to reopen its case-in-chief and should only do so under extraordinary circumstances," appellate courts "afford deference to the trial court's determination of whether the circumstances warrant reopening the State's case." *Id.* at 557-58. A decision to permit the State to reopen its case "will not constitute an abuse of discretion 'so long as [it] does not impair the ability of the defendant to answer and otherwise receive a fair trial.'" *Collins v. State*, 373 Md. 130, 142 (2003) (alteration in original) (quoting *State v. Booze*, 334 Md. 64, 69 (1994)). "Ordinarily, there is no abuse of discretion in permitting the State to reopen its case for the purpose of proving important or even essential facts to support a conviction[.]" *Spillers v. State,* 10 Md. App. 643, 649 (1971).

At the outset, we find it useful to review some basic principles established in Maryland caselaw concerning a trial court's discretion to permit the State to reopen its case after it rested. Our starting point is that "[a]n orderly conducted criminal trial anticipates the State adducing all of its evidence in chief and resting its case." *State v. Booze*, 334 Md. 64, 67 (1994). However, the Court of Appeals has long recognized that a trial court may depart from this "general rule" to "meet the requirement[s] of particular cases," and that decisions to depart from the "proper order . . . must be allowed to rest in the discretion of the Court directing the trial[.]" *Bannon v. Warfield*, 42 Md. 22, 39 (1875). Indeed, the Court's "experience has shown that justice does not require the following of the [usual order of proof] as an inflexible and undeviable procedure." *Mayson v. State,* 238 Md. 283, 289 (1965). Thus, while "'the presentation of evidence must come to an end at some time,

and the parties must be forewarned that the desirability of maintaining an orderly trial process militates strongly against receiving evidence' out of turn," *Booze*, 334 Md. at 70 (quoting *Dyson v. State*, 328 Md. 490, 503 (1992)), "a trial court may permit the State to reopen its case . . . and admit evidence which more properly should have been adduced in the State's case in chief," *Booze*, 334 Md. at 69.

Fifty years ago, this Court observed that, "[o]rdinarily, there is no abuse of discretion in permitting the State to reopen its case for the purpose of proving important or even essential facts to support a conviction[.]" *Spillers v. State*, 10 Md. App. 643, 649 (1971) (stating that the Court has "reviewed this contention in a number of cases and [has] uniformly held [that] trial judges are vested with the widest discretion in the conduct of trials."). Indeed, this Court has held that, at least in some circumstances, to prohibit the trial court from permitting the State to reopen its case would be to "preclude public justice." *Jones v. State*, 2 Md. App. 356, 363 (1967).

Although trial courts have discretion to permit the State to reopen its case, that discretion is, of course, not without limits. The Court of Appeals confronted those limits in *State v. Booze*, a seminal decision on this topic. There, in its case-in-chief, the State had decided to present the testimony of only three eyewitnesses to events surrounding a shooting, and to withhold that of a fourth. *Booze*, 334 Md. at 66, 71. After the State rested, one of the two defendants presented the testimony of two other witnesses who supported the defense's theory that when the defendants were observed by a police officer running near the scene of the shooting, they were fleeing from a gun battle in which they were not involved. *Id.* at 72. The State then sought to present, purportedly as rebuttal evidence, the

testimony of the fourth eyewitness. *Id.* The State acknowledged that it had been aware of the substance of that witness's testimony before closing its case-in-chief and that it had decided not to present it at that time because it was waiting to see what defense would be offered. *Id.* at 72-73. Because the trial court concluded that much of the newly offered witness's testimony was not proper rebuttal, "the State requested, at the trial court's suggestion, that its case be reopened." *Id.* at 73. Over defense objection, and notwithstanding its view that the State should have presented the witness during its case-in-chief and that its reasons for not doing so were "phony," the court granted the request. *Id.* at 73-74. This Court reversed. *Booze v. State*, 94 Md. App. 331 (1993).

In affirming this Court's decision, the Court of Appeals identified the question before it as "directed at determining whether, by permitting the State's case to be reopened, the defendant's ability to receive a fair trial has been impaired," which, "in turn, requires consideration of the nature of the evidence, *i.e.*, whether it is cumulative or corroborative of other evidence already adduced by the State in its case-in-chief, the reason for the timing of the offer of the evidence, and, of course, the effect of its late admission into evidence." *Booze*, 334 Md. at 74-75. The "critical issue," the Court said, "is whether the reopening of the State's case impaired the ability of the defendant to answer and otherwise receive a fair trial," which "is answered by reference to the State's intention in withholding the evidence, *i.e.*, whether it did so in order to gain an unfair advantage from the impact later use of the evidence likely would have on the trier of facts, the nature of the evidence, and its relationship to evidence already in the case." *Id.* at 76. Whether the "trial court abused its discretion must be determined from the totality of the circumstances." *Id.* at 74.

Under the circumstances in *Booze*, the Court concluded that the defendants' right to a fair trial had been impaired. *Id.* at 79. The Court determined that the State had intentionally withheld the evidence to gain an unfair tactical advantage by introducing it after the defendants had presented their defense. *Id.* at 77. The Court observed that the evidence was not proper rebuttal evidence; to the contrary, "it [wa]s cumulative to, and corroborative of, evidence that the State itself produced in its case in chief," which then "took on added importance" after the presentation of the defense case. *Id.* That was especially the case because the defense had attempted to exploit an ambiguity left in the State's case after it initially rested, which the fourth eyewitness's testimony was offered to "explain away." *Id.* at 78. The Court held that it was improper for the State to use direct evidence that it should have presented during its case-in-chief to address the defense at a time when it was "likely to be given undue emphasis by the trier of the fact." *Id.*

Twelve years after *Booze*, this Court decided *Wisneski v. State*, 169 Md. App. 527 (2006), *aff'd* 398 Md. 578 (2007). In *Wisneski*, this Court considered whether a trial court abused its discretion by permitting the State to reopen its case to put into evidence a stipulation it mistakenly believed had already been admitted. 169 Md. App. 527 (2006). The defendant in *Wisneski* was charged with possession of a firearm by an individual who had previously been convicted of a disqualifying crime, among other charges. *Id.* at 529. Before trial, the parties had agreed to a stipulation that the defendant had previously been convicted of a disqualifying crime. *Id.* at 531. After the State rested without introducing the stipulation or any other evidence of the prior conviction, however, the defendant moved

for judgment of acquittal. *Id.* at 533. The State moved to reopen its case to introduce the stipulation, which the court then granted. *Id.* at 533-34.

This Court held that the trial court did not abuse its discretion in permitting the State to reopen its case. *Id.* at 555. We found "no evidence that the State withheld the stipulation for tactical advantage"; to the contrary, the prosecutor had "mistakenly thought the stipulation was already on the record." *Id.* We also observed that reopening the State's case did not impair the defendant's ability to respond to the evidence or impede his right to a fair trial because he had previously agreed to the content of the stipulation and "was not surprised by it." *Id.* Moreover, "from the jury's viewpoint, the stipulation was not presented out of the normal order, because the court read it to the jury at the end of the State's case."[2] *Id.*

The most recent appellate decision concerning a trial court's discretion to permit the State to reopen its case is *State v. Payton*. There, the defendant was charged with murder and related charges. *Payton,* 461 Md. at 545. In its case-in-chief, the State called a fingerprint expert who provided testimony about matching a handprint found on the hood of an eyewitness's car to the defendant's prints in a database. *Id.* at 546-47. Two days later, after the State rested, the defense moved for judgment of acquittal on all charges. *Id.* at 548. Before the defense stated the basis for the motion, the trial court interjected,

[2] The Court of Appeals subsequently granted certiorari in *Wisneski* on a different issue, 398 Md. at 580 n.1, and affirmed the judgment of this Court, *id.* at 604. The defendant did not seek certiorari review of the decision to permit the State to reopen its case to introduce the stipulation and the Court of Appeals did not comment on that issue in its decision.

expressed doubt about the State's case based on questions concerning the expert's testimony, and suggested that the State reopen its case to recall the expert and ask specific additional questions. *Id.* at 548-49. Over the defendant's objection, the State did so. *Id.* at 550-51. The jury ultimately convicted the defendant of first-degree murder and other charges. *Id.* at 551 n.7. This Court reversed the judgments. *Payton v. State*, 235 Md. App. 524 (2018).

The Court of Appeals affirmed this Court's reversal of the judgments. 461 Md. at 570. The Court first determined that the trial court had "exceeded the bounds of judicial impartiality and essentially acted as a prosecutor." *Id.* at 562. By expressing doubt that the State had satisfied its burden and instructing the State on how it could rectify the problem, "the trial judge provided the State with an unfair opportunity to clarify a gap that the judge perceived in the evidence." *Id.* at 564. "Under the circumstances," the Court concluded that "it was fundamentally unfair to [the defendant] for the court to permit the State to recall a witness in order to persuade the trial judge and eventually the jury that the evidence in the case was legally sufficient to sustain a conviction." *Id.* Because "a reasonable person would be justified in questioning the trial judge's impartiality," the Court concluded that the trial court had abused its discretion and "deprived [the defendant] of his right to a fair trial." *Id.* at 565.

The Court then turned to consider whether, "[s]eparate from the trial judge's duty of impartiality, . . . the trial judge properly exercised his discretion to reopen the State's case." *Id.* In doing so, the Court identified and applied the factors set forth in *Booze*, which "serve to weigh any prejudice to the defendant that may come from varying the standard

order for the presentation of evidence." *Id*. All those factors ultimately "focus our review on '[t]he critical issue [which] is whether the reopening of the State's case impaired the ability of the defendant to answer and otherwise receive a fair trial.'" *Id.* (alterations in original) (quoting *Booze*, 334 Md. at 76). *Booze*, the Court observed, "unmistakably reminds us that, when reviewing a trial court's exercise of discretion to reopen the State's case, we must examine the effect the act of reopening had on the entire trial and whether the defendant's right to a fair trial was compromised as a result." *Id.* at 566-67.

Under the totality of the circumstances presented in *Payton*, the Court held that the defendant's right to a fair trial had been compromised. *Id.* at 570. The Court concluded that, faced with the motion for judgment of acquittal, "the trial judge should have evaluated the legal sufficiency of the State's evidence and then ruled on the motion." *Id*. at 567. Instead, based on considerations of "the public interest," the court "gave the State an unfair second chance to present the crux of its case to [the defendant's] disadvantage." *Id.* The Court focused particularly on the fact that the trial court was, at that point, "unpersuaded that the State had connected [the defendant] to the crimes alleged" and "was on the brink of acquitting [him]." *Id.* By reopening, the court "permitted the State to . . . doubl[e] down on one piece of evidence" that was "exacerbated by the fact that [the expert's] testimony on reopening was elicited two days after the State rested and in isolation to other evidence in the case." *Id.* at 568. Under those circumstances, the Court held, "the trial judge's decision to reopen the State's case critically affected [the defendant's] right to receive a fair trial." *Id.*

Finally, the Court concluded that the trial court's error was not harmless beyond a reasonable doubt because, "[u]nder these circumstances," in which the court had expressed doubt about the State's evidence and "allowed the State to reopen its case in order to avoid ruling on [the defendant's] motion for judgment of acquittal[,] . . . the trial judge's decision impaired [the defendant's] right to a fair trial to such an extent that, as a matter of law, the error was unduly prejudicial." *Id.* at 569. Observing that the jury may have harbored similar doubts concerning whether the State had connected the defendant to the crime, the effect on the jury of bolstering the expert's testimony by presenting it a second time two days later, and the court's "abandonment of judicial impartiality," the Court concluded that the errors "were prejudicial as a matter of law" and required reversal. *Id.*

B. Maryland Has Not Adopted a Per Se Rule that a Trial Court Always Abuses Its Discretion if It Permits the State to Reopen Its Case Before Ruling on a Motion for Judgment of Acquittal.

Before we apply the *Booze* factors to the facts of this case, we must first tackle a question that is suggested, albeit in less clear terms, by Mr. Fleming's arguments before us. That question is whether the Court of Appeals adopted in its decision in *Payton* a per se rule that a trial court always abuses its discretion if, after a defendant moves for a judgment of acquittal, it permits the State to reopen its case without first ruling on the motion. If the Court did so, Mr. Fleming would be entitled to a reversal of his conviction. The State reads *Payton* differently, noting the dissimilar circumstances in that case. Although we acknowledge that the Court in *Payton* used some language that, on its own, is suggestive of such a rule, based on the totality of the Court's analysis in that case, we do not think it adopted a per se rule.

The circumstances of *Payton* diverged from those here in several significant respects. There, when the defendant moved for judgment of acquittal, the court did not even listen to the basis for the motion before interjecting with its own doubts about the State's evidence. 461 Md. at 548-49. The court identified its concern, indicated that it had concluded that it would be required to grant the motion based on the current state of the record, suggested that the State reopen its case to fix the problem, and essentially told the State how to do so. *Id.* at 548-50. The court also appears to have been motivated, at least in part, by consideration of the severity of the charges pending against the defendant, which the Court of Appeals determined was an impermissible consideration. *Id.* at 562.

Here, by contrast, the trial court entertained the motion for judgment of acquittal, heard the basis offered by the defense, and then asked a qualifying question that suggested that the court was unsure of the application of the accomplice corroboration rule in the circumstance presented: "Was it an accomplice or any number of accomplices?"[3] At that point, with the parties having articulated two different understandings of the accomplice corroboration rule, neither supported by caselaw, the prosecutor made "a pair of alternative

[3] The basis for the motion for judgment of acquittal was that, as defense counsel put it, "a defendant cannot be convicted on the uncorroborated testimony of *an* accomplice." (Emphasis added). In response, the prosecutor argued that the rule did not apply because the evidence against Mr. Fleming came from *two* accomplices, who had corroborated each other's testimony. The court then asked, apparently in reference to the scope of the accomplice corroboration rule, "Was it an accomplice or any number of accomplices?" Defense counsel responded that the requirement applied to the testimony of "any number of accomplices," such that Messrs. Garcia and Prince could not provide the necessary corroboration of each other's testimony. Although the defense's position was, at that time, the correct one as a matter of law, *see State v. Jones*, 466 Md. 142, 151-52 (2019), it does not appear that the court had reached that conclusion when it permitted the State to reopen its case.

requests." The prosecutor asked to either be permitted "to go and pull some case law," presumably to support his understanding of the rule, or "that I be allowed to reopen" to "put the defendant's statement in." Without expressing any conclusion on the legal question, the court permitted the State to reopen. Thus, unlike in *Payton*, the court here did not abandon its impartiality, did not tell the State how to save its case, and did not suggest that it had reached any conclusion concerning how it would resolve the motion for judgment of acquittal if it had not permitted the State to reopen its case.

To be sure, there are several statements in *Payton* that, at least in isolation, can be read to support a per se rule that a trial court lacks discretion to permit the State to reopen its case when a motion for judgment of acquittal is pending. Those include:

- "Upon consideration of the defendant's motion, the trial court must assess the legal sufficiency of the State's evidence. *State v. Taylor*, 371 Md. 617, 651 (2002) (citing *Brooks v. State*, 299 Md. 146, 150 (1984))." *Payton*, 461 Md. at 556.
- "On the other hand, if the trial judge does not find evidence that is legally sufficient to sustain a conviction, the judge must grant the motion for judgment of acquittal. *Taylor*, 371 Md. at 651." *Payton*, 461 Md. at 557.
- "Under the circumstances, it was fundamentally unfair to Respondent for the court to permit the State to recall a witness in order to persuade the trial judge and eventually the jury that the evidence in the case was legally sufficient to sustain a conviction. For us to condone such a procedure would result in two grave consequences: 1) there would be no finality when a prosecutor closes [the prosecutor's] case and 2) a trial judge would be able to take over the prosecution of a criminal case without violating the defendant's right to a fair and impartial trial." *Payton*, 461 Md. at 564.
- "At worst, the trial judge exhibited bias against Mr. Payton and that was the very reason the State overcame the motion for judgment of acquittal and secured a guilty verdict. At best, the trial judge gave the appearance of helping the State meet its burden of proof and emphasized or highlighted an important aspect of its evidence. In either instance, the trial judge relinquished his role as an impartial and disinterested arbiter when he decided

to permit the State to reopen its case instead of ruling on Respondent's motion for judgment of acquittal. *See Brooks v. State*, 299 Md. at 151 ('If the trial judge finds that there is no relevant evidence which is legally sufficient to sustain a conviction, he [or she] must grant the motion for judgment of acquittal.')." *Payton*, 461 Md. at 564.

- "In accordance with this Court's jurisprudence, the trial judge should have evaluated the legal sufficiency of the State's evidence and then ruled on the motion. *See Brooks v. State*, 299 Md. 146, 151 (1984) ('If the trial judge finds that there is no relevant evidence which is legally sufficient to sustain a conviction, he [or she] must grant the motion for judgment of acquittal.')." *Payton*, 461 Md. at 567.
- "Finally, the trial judge acted in contravention to our caselaw pertaining to reopening the State's case-in-chief when he permitted the State to reopen its case to avoid granting Respondent an acquittal." *Payton*, 461 Md. at 570.

For several reasons, however, we do not think that the Court in *Payton* intended to adopt a per se rule that effectively removes a trial court's discretion to permit the State to reopen its case when a motion for judgment of acquittal is made. First, the Court did not articulate such a rule. To the contrary, in identifying the standard of review applicable to a decision to permit reopening, the Court observed that although such a decision is disfavored, it is nonetheless entitled to "deference" and will be disturbed only "if the trial court abused its discretion." *Id.* at 558. Indeed, the first sentence of the Court's concluding paragraph reaffirmed that "trial judges have discretion to allow the State to reopen its case-in-chief." *Id.* at 569. Had the Court intended to adopt a per se rule that a court always abuses its discretion in permitting the State to reopen its case if a motion for judgment of acquittal is pending—which is essentially equivalent to a rule that a trial court has no discretion at all in that circumstance—it likely would have said so directly.

Second, the bulk of the Court's analysis in *Payton* would have been entirely unnecessary had the Court intended to adopt a per se rule. The first part of the Court's

analysis focused on the trial court's abandonment of its impartiality by *sua sponte* identifying a flaw in the State's case, suggesting that the State reopen its case to fix the flaw, and telling the State how to do so. *See generally id.* at 561-65. It was in that context that the Court concluded that, regardless of whether the trial court had actually "exhibited bias" against the defendant or just "gave the appearance of" doing so, permitting the State to reopen its case rather than ruling on the motion for judgment of acquittal constituted an abandonment of the court's "role as an impartial and disinterested arbiter." *Id.* at 564. None of that analysis would have been necessary if there were a per se rule against allowing the State to reopen its case with a motion for judgment of acquittal pending.

The second part of the Court's analysis—which the Court considered "[s]eparate[ly] from the trial judge's duty of impartiality,"[4] *id.* at 565—focused on whether the trial court abused its discretion in permitting the State to reopen its case, which in turn focused on whether the reopening deprived the defendant of a fair trial. *See generally id.* at 565-69. In that analysis, the Court stated and then applied the relevant factors identified in *Booze* to the circumstances before it. *Id.* at 565. Although the fact that the motion for judgment of acquittal was pending when the court permitted reopening was significant to the Court's analysis, the Court did not treat it as dispositive. To the contrary, the Court focused on the prejudice to the defendant's right to a fair trial that resulted from the type of testimony—

[4] Because the Court had already determined that the judgment needed to be reversed based on the perception of the court's partiality, 461 Md. at 564, the discussion of the *Booze* factors was arguably dicta, *Bowers v. State*, 227 Md. App. 310, 321 (2016) (citing *Obiter dictum*, *Black's Law Dictionary* 1240 (10th ed. 2014)) (explaining that "'dictum' is typically a judicial comment 'that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)'").

cumulative, corroborative, bolstering testimony from a key State's witness whose earlier testimony the court had found confusing, *id.* at 568—and the timing of the testimony—two days after the witness had first testified, at a time when the jury was likely to give it additional weight, *id.*—presented on reopening. Again, none of that analysis would have been necessary if there were a per se rule against allowing the State to reopen its case with a motion for judgment of acquittal pending.

Third, neither of the cases on which the Court relied for the statements we have quoted above concerning a trial court's duties in addressing a motion for judgment of acquittal—*State v. Taylor* and *Brooks v. State*—speaks to whether a court may entertain a request for reopening before ruling on such a motion. In *Taylor*, the issue was whether the erroneous grants of pretrial motions to dismiss criminal charges, based on findings of insufficiency of the evidence, were acquittals that were not subject to appellate review. 371 Md. at 620. The Court of Appeals concluded that they were. *Id.* at 654. The portion of the opinion in *Taylor* that the Court cited in *Payton* simply sets forth the analysis a trial court must employ in considering a motion for judgment of acquittal, which "involves weighing the State's evidence in an attempt to determine whether it is sufficient to support a conviction." *Taylor*, 371 Md. at 651.

In *Brooks*, after the State rested, the trial court granted the defendant's motion for judgment of acquittal as to one charge. 299 Md. at 152. The prosecutor then asked the court to revisit the decision. *Id.* After initially reserving ruling on the request to reconsider, the trial court later reversed itself and denied the motion for judgment of acquittal. *Id.* at 153. The Court of Appeals held that doing so had violated double jeopardy principles

because the acquittal, once granted, was final. *Id.* at 155. The portion of *Brooks* that the Court cited in *Payton*, like the portion it cited from *Taylor*, set forth the analysis a trial court must employ in ruling on a motion for judgment of acquittal:

> In determining the disposition of a motion for judgment of acquittal, however, the trial court is passing upon the sufficiency of the evidence to sustain a conviction. If the trial judge finds any relevant evidence which is legally sufficient to sustain a conviction, [the judge] must deny the motion for judgment of acquittal and allow the evidence to go before the trier of fact. The defendant is entitled to have the denial reviewed on appeal. If the trial judge finds that there is no relevant evidence which is legally sufficient to sustain a conviction, [the judge] must grant the motion for judgment of acquittal.

Brooks, 299 Md. at 150-51 (internal citations and footnote omitted). *Brooks* did not present, and the Court did not purport to address, the issue of whether a trial court is prohibited from permitting the State to reopen its case before ruling on a motion for judgment of acquittal.

Fourth, in identifying the appropriate standard of review as abuse of discretion, the Court of Appeals' decision in *Payton* cited this Court's decision in *Wisneski* as "deciding that the trial court did not abuse its discretion in letting the State reopen its case to introduce a stipulation into evidence." *Payton*, 461 Md. at 558. As noted above, the trial court in *Wisneski* had permitted the State to reopen its case after the defense moved for judgment of acquittal, for the purpose of introducing a stipulation without which the State could not have met its burden on one of the charges. *Wisneski*, 169 Md. App. at 555. If the Court in *Payton* had intended to adopt a per se rule that it is always an abuse of discretion to permit reopening before ruling on a motion for judgment of acquittal, it is reasonable to expect

that the Court would have expressed disapproval of a decision that it otherwise cited approvingly for the abuse of discretion standard the Court employed.

Fifth, the Court in *Payton* focused on the fact that the trial court had permitted reopening after apparently concluding that it would otherwise have been required to grant the pending motion for judgment of acquittal, for the apparent purpose of avoiding making that ruling. 461 Md. at 569. Moreover, the trial court made that decision based on its impermissible consideration of the gravity of the charges pending against the defendant, adding to the appearance that the court was acting to aid the State rather than to conduct a fair trial. *Id.* at 562. Here, by contrast, the trial court did not indicate that it had reached any conclusion concerning the outcome of the motion for judgment of acquittal at the time it permitted the State to reopen. Counsel had provided the court with competing understandings of the application of the accomplice corroboration rule when multiple accomplices corroborated each other, neither had provided the court with any caselaw supporting their position, and the court indicated its own uncertainty. The prosecutor even requested the opportunity to pull caselaw addressing the issue.

Sixth, when the Court stated that for it "to condone such a procedure would result in two grave consequences," one of which was that "there would be no finality when a prosecutor closes [the prosecutor's] case," *id.* at 564, we understand it to have been referring to the circumstances of *Payton*. Indeed, the Court expressly recognized that reopening, while disfavored, remains within the discretion of the trial court. *Id.* at 569. The Court did not mean that the State's case, once rested, could not be reopened.

Although we do not understand *Payton* to establish a per se rule that a court may never permit the State to reopen its case before ruling on a motion for judgment of acquittal, that case still stands for the proposition that permitting the State to reopen is generally disfavored, *id.* at 558, and even more so when a motion for judgment of acquittal is pending, *id.* at 562. It will be the rare case in which a court will not abuse its discretion by permitting the State to reopen while a motion for judgment of acquittal is pending. As we discuss below, this is one of those rare cases.

C. The Court Did Not Abuse Its Discretion in Permitting the State to Reopen Its Case.

As we observed above, in the absence of a per se rule removing a trial court's discretion, the critical inquiry in determining whether a trial court abused its discretion in permitting the State to reopen its case is whether doing so "impaired the ability of the defendant to answer and otherwise receive a fair trial." *Payton*, 461 Md. at 565. To inform that inquiry, the Court has identified factors a court should consider in weighing the prejudice to the defendant, including: (1) "the State's intention in withholding the evidence, *i.e.*, whether it did so in order to gain an unfair advantage from the impact later use of the evidence likely would have on the trier of facts," *id.* (quoting *Booze*, 334 Md. at 76); (2) "the nature of the evidence," *id.*; (3) the relationship of the evidence "to evidence already in the case," *id.*; (4) "the effect of the evidence's late admission," *Payton*, 461 Md. at 565; and (5) the "probability that the trier of fact will give it undue emphasis," *id.* In the context of this case, we must also consider the pendency of the motion for judgment of acquittal. We will analyze each in turn.

With respect to the first factor, it is apparent that the State did not withhold Mr. Fleming's statement to gain an unfair advantage. To the contrary, the State's failure to present the statement was based only on its incorrect understanding of the accomplice corroboration rule. Indeed, the State and Mr. Fleming both referenced the statement in their opening statements, apparently under the assumption that it would be introduced during the trial. The record contains no indication of any kind that the State's intention was to gain an unfair advantage. *Cf. Booze*, 334 Md. at 79 (concluding that the State intended to gain a tactical advantage by waiting to introduce testimony of additional witness after seeing what defense was presented).

Mr. Fleming suggests that we should nonetheless find that the first factor weighs in his favor because the State was aware of the existence of the statement before closing its case-in-chief and intentionally chose not to introduce it. The focus of the first factor, however, is not the intentionality of the State's decision not to introduce the evidence but whether it was the State's intention by doing so to gain a tactical advantage in the trial. *See State v. Hepple*, 279 Md. 265, 271 (1977) (describing the first factor as considering "whether the State deliberately withheld the evidence proffered in order to have it presented at such time as to obtain unfair advantage by its impact on the trier of facts") (quoting *Hepple v. State*, 31 Md. App. 525, 534 (1976)). Here, that was not the State's intention. This factor thus weighs against finding an abuse of discretion.

Mr. Fleming also suggests that to the extent the State's failure to introduce the evidence during its case-in-chief was the result of a misunderstanding of the law, rather than an intentional tactical choice, the State should not be permitted to benefit from that

misunderstanding. Quoting *Booze*, 334 Md. at 77, Mr. Fleming contends that condoning the circuit court's action here "would put a premium on ignorance and lack of preparation rather than on diligence and preparation." Although we have some sympathy for that view, and errors in a prosecution can and do sometimes lead to acquittals, criminal prosecutions are not "gotcha games" designed to promote results based on technicalities. The point of our inquiry here is to determine whether Mr. Fleming received a fair trial, not whether he should have received a windfall based on the prosecutor's mistake.[5]

The second and third factors also weigh against finding an abuse of discretion. Here, the nature of the evidence was a statement made by Mr. Fleming after his arrest and provided to him by the State in advance of trial. The statement was not a surprise to anyone, as both attorneys had referenced it in their opening statements and expected that it would be introduced into evidence during the trial. The statement was also introduced to remove uncertainty concerning whether the State had satisfied a technical legal requirement—one that the Court of Appeals has subsequently abandoned, *Jones*, 466 Md. at 145—not to alter the quantum or clarity of the evidence in the case. With respect to its relationship to other

[5] As Mr. Fleming points out, in *Booze*, the Court of Appeals also worried that condoning the variation of the order of proof in the circumstances of that case might have disrupted the "orderly and predictable trial pattern" and allowed "taking evidence out of turn [to] become the rule, rather than the exception." 334 Md. at 77. There, however, evidence that should have been presented in the State's case-in-chief was intentionally withheld until after the defense had presented its case and was prejudicial to the defendant. *See id.* at 80-81. Moreover, although we decide here that the trial court did not abuse its discretion in granting the State's request to reopen, it also would have been entirely within the court's discretion to deny that request and rule on the pending motion for judgment of acquittal. It would be a grave mistake for the State to think it could rely on a trial court permitting it to reopen to correct a mistake in any particular case in the future.

evidence, the statement was not cumulative or corroborative of evidence previously offered; instead, it was new evidence that contradicted the State's theory of the case that Mr. Fleming was the shooter. *See, e.g.*, *Hepple*, 279 Md. at 271 (stating that trial court should consider "whether the proposed evidence is merely cumulative to, or corroborative of, that already offered in chief or whether it is important or essential to a conviction"); *Wisneski*, 169 Md. App. at 555 (finding no abuse of discretion in permitting State to reopen its case to present a stipulation containing a fact essential to conviction); *Spillers v. State*, 10 Md. App. 643, 649 (1971) (stating that "[o]rdinarily, there is no abuse of discretion in permitting the State to reopen its case for the purpose of proving important or even essential facts to support a conviction," and finding none where the State was permitted to reopen its case to establish a fact essential for the convictions). Mr. Fleming also was given, and took, the opportunity to cross-examine the officers through whom the statement was introduced.

Turning to the fourth factor, the record contains no indication that the late admission of the statement had any significant effect on the trial. Although the statement was introduced out of order in the sense that the State had rested, it was not introduced out of order otherwise because, from the jury's perspective, it came at the end of the State's case-in-chief, interrupted only by a long lunch break, through witnesses from whom the jury had not previously heard. Mr. Fleming had not presented any evidence or made any argument to the jury in the interim. Had the State intended to introduce the statement from the beginning, it could, of course, have chosen to introduce it in exactly the same way at the end of its case-in-chief, before lunch rather than after it, to the same effect. And

although the statement being in evidence permitted the State to make arguments about it in closing, and for the jury to rely on it in reaching its verdict (including its guilty verdict on the conspiracy charge), that was a function of it being in the record, not of the timing of its introduction.

With respect to the fifth factor, beyond the fact that the jury heard that the State had rested, nothing in the record suggests a probability that the jury would have given the statement undue emphasis. The timing of the statement did not bolster the testimony of any witness who had previously testified, and its substance did not support the State's theory of the case. As both parties appeared to recognize at trial, the statement as a whole was supportive of Mr. Fleming's defense generally, because he denied participation in the shooting.

Finally, we consider the additional factor that the motion for judgment of acquittal was pending at the time the State asked to reopen its case. Although that factor weighs in favor of finding an abuse of discretion, it is critical here that the court had not concluded that the motion would need to be granted if it did not permit reopening. As discussed, the parties offered competing understandings of the law, neither had presented the court with caselaw, the court indicated uncertainty about the rule, and both parties had anticipated that the evidence the State sought to offer was going to be admitted. Unlike in *Payton*, therefore, the court did not permit the State to reopen for the purpose of avoiding granting the motion for judgment of acquittal.

Considering all the relevant factors, we conclude the trial court did not abuse its discretion in permitting the State to reopen its case because doing so did not interfere with

Mr. Fleming's ability to respond to the State's case or otherwise render his trial unfair. Although a reopening with a motion for judgment of acquittal pending is disfavored and should rarely be granted, *Payton*, 461 Md. at 569, in the absence of a per se rule precluding reopening, we cannot conclude that Mr. Fleming was deprived of a fair trial under the circumstances presented here.

D. The Trial Court Did Not Fail to Exercise Discretion.

Mr. Fleming also contends that the record does not reflect that the trial court exercised its discretion in granting the State's request to reopen. We disagree. "A trial court is presumed to know the law and apply it properly," and is not required to "spell out every step in weighing the considerations that culminate in a ruling." *Wisneski*, 169 Md. App. at 555-56 (first citing *State v. Chaney*, 375 Md. 168, 181 (2003), then citing *Streater v. State*, 352 Md. 800, 821 (1999)). Here, the record reflects that the trial court considered the State's alternative requests, one of which was to reopen its case, and picked one. There is no suggestion in the record that the court believed it was bound to pick that option or, indeed, to grant either of the State's alternative requests. Its decision to do so was an exercise of discretion.

Mr. Fleming's sparse argument to the contrary is grounded in a quotation from *Booze*, in which the Court of Appeals stated that although courts have discretion both to vary the order of proof and to admit rebuttal evidence, they "may not exercise either discretion interchangeably with the other" and, therefore, a court must make clear which "particular discretion it purported to exercise." 334 Md. at 70. Here, however, the trial court was plainly exercising its discretion to vary the order of proof to permit the State to

reopen its case. There is no suggestion that it did so interchangeably with a different discretionary decision or that it was confused about the discretion it was exercising. On that point, *Booze* is inapposite.

CONCLUSION

We hold that the trial court did not abuse its discretion when it permitted the State to reopen its case to introduce additional evidence because doing so did not impair Mr. Fleming's right to a fair trial. Accordingly, we will affirm Mr. Fleming's conviction.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS ASSESSED TO THE APPELLANT.