

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0940

September Term, 2013

FABIAN SHIM

v.

STATE OF MARYLAND

Woodward,
Friedman,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: April 13, 2016

*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.

Fabian Shim, appellant, was convicted by a jury sitting in the Circuit Court for Prince George’s County of first-degree murder and subsequently sentenced to life imprisonment.¹ Shim asks two questions on appeal:

- I. Did the trial court err when it limited the scope of re-cross examination of a State’s witness, Michael Stewart?
- II. Did the trial court err when it admitted into evidence several prior consistent statements from two witnesses: (a) Valerie Nichols; and (b) Selwyn Alleyne?

For the reasons that follow, we shall affirm the judgment.

FACTS

On direct appeal to the Court of Appeals, Judge Sally D. Adkins described the basic facts of Shim’s case:²

Reina Tasha Lynch lived in Prince George’s County with her two children. Fabian Andre Shim, the Respondent, is the father of Lynch’s daughter. Lynch worked during the day as a school bus driver for Montgomery County Public Schools, and at night as a security guard at a Fed Ex facility in Beltsville, Maryland. Lynch had been seeking child support from Shim, and on November 1, 2006, both attended a pretrial settlement

¹ Shim was first tried and convicted in 2007. We reversed his convictions in an unreported opinion, concluding that the trial court had abused its discretion when it declined to ask a voir dire question propounded by the defense if anyone had “such strong feelings concerning the violent death of another human being” that he or she would be unable to render a fair and impartial verdict. *Shim v. State*, No. 2100, Sept. Term, 2007 (filed November 12, 2009), *aff’d*, *State v. Shim*, 418 Md. 37 (2011).

² Judge Adkins described the facts as elicited during the first trial. Of course, the testimony at the second trial varied slightly. Judge Adkin’s recitation, however, with the exception of one quotation explained at footnote 3, provides the facts relevant to this appeal.

conference with the Maryland Child Support Enforcement Program. At the conference, the Child Support Program calculated Shim's suggested monthly child support obligation to be \$590.17 per month. After the conference, Shim told his then-fiancé, [Valerie Nichols,] with whom he was living, that he was upset and felt that Lynch was "asking for too much money."

Nine days later, a man in a dark-colored BMW pulled up to the guard shack at the Fed Ex facility around 10:45 p.m., shortly before Lynch's night shift was to begin. Lynch's coworker[, Michael Stewart,] approached the car and asked him what he was doing. The man, who looked to be between twenty-seven and thirty-three years old, stated that he was "having lunch." The man drove away shortly thereafter, before Lynch arrived. Lynch was the only security guard working the night shift on November 10. She logged tractor trailers into the facility at 12:01 a.m., 12:41 a.m., and 1:52 a.m. She logged a trailer out of the facility at 2:20 a.m. Shortly after 2:30 a.m., surveillance cameras showed a dark sedan pulling up to the guard shack, and leaving six minutes later. By the time the next truck came to the gate, the trucker got no answer from the guard shack and had to punch in a keycode to enter the facility.

Lynch's coworker[, Stewart,] came to relieve her at 6:30 a.m. He found the guard shack was locked and got no response from Lynch. At 7:20 a.m., [Stewart] called their boss and got the code to enter the shack. When he entered, he found Lynch lying on the floor in a pool of blood. Lynch had sustained two shotgun wounds, including one to her head from close range.

On the night Lynch was murdered, Shim got off work at 9:00 p.m. According to [Nichols]'s son, Shim went home and changed from his work clothes. He left the house before 10:00 p.m. and did not return until around 3:00 a.m., telling his fiancé that he had worked late. He removed his clothes and placed them into a white plastic bag, saying that he had got something on them at work. He took a shower and then sat in a chair, holding his head and saying he didn't feel right.

The next day, Shim's fiancé[, Nichols,] learned that Lynch had been killed and mentioned it to Shim. He replied, "[W]hy did that bitch go and do that. Somebody had to kill her." Later that evening, Shim, angered with [Nichols], told her [that she was "beneath him and that he was the man of the house and that I need to listen and do what he say do and if I did not, then I would end up dead like Tasha."]³ [Nichols] left the house, met with Prince George's County police detectives, and never went back.

Police investigating Lynch's murder impounded two dark-colored, older model BMWs, including a blue BMW 735i, which they recovered on Holly Berry Court, where Shim had been living. Police recovered from the blue BMW a shotgun, a pair of black shoes, six rubber gloves, and identified Shim's fingerprints on the outside of the door and on a radio found inside the left front vehicle pocket. Police were unable to include or exclude Shim's DNA from the shotgun, which contained the genetic material of three unknown contributors. At trial, the owner of the blue BMW testified that he had lent Shim his vehicle so that Shim could do some body work. The owner further testified that he had not left the shotgun or any of the clothing in the car. Another witness, an acquaintance of Shim's, testified that Shim had owned a shotgun, and that Shim had called [him] a few days after the shooting and asked him to remove the shotgun from the BMW. The police arrested Shim and charged him with first degree murder.

State v. Shim, 418 Md. 37, 40-42 (2011). Further facts are included as is necessary.

³ Although Nichols testified about Shim's threat at both trials, the words were a little different. We have replaced the words from the first trial as reported in Judge Adkins's opinion, with the words from the transcript of the second trial. *See* footnote 2, *supra*.

DISCUSSION

I. Scope of Re-Cross Examination

Shim argues that the trial court erred when it limited his re-cross examination of Michael Stewart, Lynch's co-worker at the FedEx facility, about criminal charges filed against Stewart in 2012. The State responds that the trial court did not abuse its discretion because the questions Shim wanted to ask on re-cross examination were not in response to any new material raised on redirect examination.

Stewart testified at Shim's first trial in 2007. Shim's convictions were reversed on direct appeal. After Shim's first trial but before his second, Stewart was charged with murder, weapons, and drug charges. At Shim's second trial, the State moved *in limine* to prevent Shim from cross-examining of Stewart about those charges. The State argued that Stewart's charges were not relevant and that their probative value was substantially outweighed by unfair prejudice. The trial court ruled that Stewart could be asked about the existence of the charges and whether Stewart had received any benefit from the State for testifying, but precluded Shim from asking detailed questions about the charges.

On direct examination by the State, Stewart testified about the night of the murder, including about the BMW that he saw at the FedEx facility that night. Stewart also admitted that he was facing murder, weapons, and drug charges. The State asked Stewart if he expected to receive any benefit on those charges from testifying at Shim's trial, and he said that he did not. On cross-examination, defense counsel asked Stewart numerous questions about the BMW that he saw in the FedEx facility parking lot, specifically whether he

noticed a distinctive license plate or body damage to the BMW. Defense counsel did not, however, ask Stewart any questions about his pending charges. On redirect, the State asked Stewart a single question – whether he might have failed to notice a special license plate on or body damage to the BMW. Stewart responded that it was “a possibility. I wasn’t inspecting” it. On re-cross examination, defense counsel began to ask Stewart about the pending charges. The State objected and a bench conference ensued. The State argued that the questions were “beyond the scope of redirect.” Defense counsel replied, “Based on his direct exam he said nothing to hurt me and I was happy. Then on ... redirect he gave an answer [that] undercuts the testimony that he’s given that’s helpful to me.” The State responded that its redirect examination did not impeach Stewart but “merely clarified” his answers on cross-examination about what he had noticed about the BMW. The trial court sustained the State’s objection.

Rule 5-611(a) governs the mode and order of questioning witnesses and the parties’ presentation of evidence. Rule 5-611(a) states:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Trial courts are granted broad discretion under that Rule and we review an exercise of that authority for an abuse of discretion. *Myer v. State*, 403 Md. 463, 476 (2008). We have defined the abuse of discretion standard as one “where no reasonable person would take

the view adopted by the [trial] court.” *Fontaine v. State*, 134 Md. App. 275, 288 (2000) (quotation marks and citations omitted). “Thus, where a trial court’s ruling is reasonable, even if we believe it might have gone the other way, we will not disturb it on appeal.” *Id.*

Generally, redirect examination and re-cross examination are only allowed “as to matters brought out on the opponent’s immediately preceding examination. The [trial] court has discretion to permit counsel to exceed the scope of the preceding examination, however.” *Thurman v. State*, 211 Md. App. 455, 469 (2013) (quotation marks and citation omitted). We noted that “[i]n federal court, as in state court, the same rules apply to restrict the scope of redirect to the scope of cross, re-cross to the scope of new matter brought out on redirect, and so forth, as apply to the scope of cross.” *Id.* (quoting 6 LYNN MCLAIN, MARYLAND PRACTICE, MARYLAND EVIDENCE § 611:11 at 602 (2d ed.2001)). In *Thurman*, we cited with approval the reasoning of the United States Court of Appeals for the Fourth Circuit’s decision in *United States v. Caudle*, 606 F.2d 451, 459 (4th Cir. 1979), in which the court stated:

[T]he reasons [that] we have given in support of the right of cross-examination apply with equal strength to recross examination where new matter is brought out on redirect examination. *Examining counsel is normally expected to elicit everything from a witness, so far as possible, at the first opportunity.* Where, as here, new matter is brought out on redirect examination, the defendant’s first opportunity to test the truthfulness, accuracy[,] and completeness of that testimony is on recross examination.

Thurman, 211 Md. App. at 471 (citation omitted) (emphasis added).

Shim had the opportunity and responsibility to impeach Stewart about his pending charges during his initial cross-examination. That was Shim's first opportunity to do so, and, under the law described above, he was required to take it. Additionally, we agree with the State that on redirect examination the prosecutor did not impeach Stewart's testimony but merely clarified Stewart's testimony as to his observations of the BMW. On re-cross examination, Shim could have questioned Stewart further about his observations regarding the BMW, but he was not entitled to question Stewart about his pending charges, which were not the subject of redirect examination. Under the circumstances, we are persuaded that the trial court did not abuse its discretion in restricting Shim to asking on re-cross examination only questions raised on redirect examination.

II. Admissibility of Prior Consistent Statements

Shim argues that the trial court erred in admitting the hearsay statements of two witnesses, Selwyn Alleyne and Valerie Nichols, as prior consistent statements under Rule 5-802.1 because the statements were made after the motive to fabricate arose. We note that Shim does not identify what specific statements he thinks were admitted in error but instead simply directs us to nearly 20 pages of transcript. Shim's lack of specificity has made it difficult for us, as well as for the State, to respond to his argument. Nonetheless, the State argues that Shim waived any objection to Selwyn Alleyne's testimony, and Valerie Nichols's testimony was admissible under either the doctrine of verbal completeness or Rule 5-802.1. The State further argues that even if the testimony was admitted in error, the error was harmless.

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). Subject to certain well-established exceptions, a hearsay statement offered to prove its truth is inadmissible. Md. Rule 5-802. One of those exceptions, however, permits prior consistent statements to be admitted. Rule 5-802.1 provides:

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:

* * *

(b) A statement that is consistent with the declarant’s testimony, if the statement is offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive[.]

Moreover, to be admissible under Md. Rule 5-802.1(b), the “prior consistent statement must have been made *before* the alleged fabrication or improper influence or motive arose.” *Holmes. v. State*, 350 Md. 412, 424 (1998) (emphasis added).

Rule 5-802.1 is not, however, the only path through which a court may admit a prior consistent statement. Rule 5-616(c)(2), governing the rehabilitation of a witness whose credibility has been attacked, also allows for the admissibility of a prior consistent statement “to rehabilitate a witness as long as the fact that the witness has made a consistent statement detracts from the impeachment.” *Holmes*, 350 Md. at 427. Rule 5-616(c)(2) applies when “the defendant’s opening statement and/or cross-examination of a State’s witness has ‘opened the door’ to evidence that is relevant (and now admissible) for the

purpose of ... rehabilitation[.]” *Quansah v. State*, 207 Md. App. 636, 663 (2012) (quotation marks, citation, and emphasis omitted) (ellipses and brackets added in *Quansah*). Because a prior consistent statement used for rehabilitation is relevant not for its truth, such statements are not hearsay and do not have to meet the pre-motive requirement of Rule 5-802.1(b). *Holmes*, 350 Md. at 427.

Because a statement may be admissible as substantive evidence under Rule 5-802.1(b), but admissible under Rule 5-616(c) for rehabilitative purposes only and not as substantive evidence, “the State is not required to assert the purpose for which it is seeking admission of a prior consistent statement unless asked by the court.” *McCray v. State*, 122 Md. App. 598, 609 (quotation marks and citation omitted). Because the State is not required to assert under which theory it is proceeding, a defendant has two burdens: “First, it is incumbent on the defendant to inquire about the basis upon which the State intends to introduce the prior consistent statement. Second, the defendant must request a jury instruction limiting the use of the prior consistent statement for rehabilitative purposes only.” *Id.* With this framework in mind, we examine the two challenged statements: First, the prior consistent statements of Valerie Nichols; then, the prior consistent statement of Selwyn Alleyne.

A. Valerie Nichols

We understand Shim to be arguing that the trial court erred in admitting two statements made by Nichols. Those statements are: (1) her testimony regarding the specifics of Shim’s threat against her; and (2) the specifics of how Nichols’ trial testimony

and grand jury testimony differed from what she originally told the police. To understand these two statements in context, it is necessary to understand that under the defense's theory of the case, Nichols fabricated her testimony against Shim because they were fighting over \$5,000 she had (allegedly) stolen from Shim's father's estate.

1. Shim's Threat

At trial, defense counsel questioned Nichols about her grand jury testimony in November of 2006. Specifically, defense counsel got her to admit that she had told the grand jury that other people in the house had heard Shim threaten to kill her but at trial no one other than Nichols had testified to having heard the threat.

On redirect examination, the State asked Nichols what she told the grand jury about Shim's threat. Shim asked for a continuing objection, and a bench conference ensued. The trial court asked defense counsel the basis for the objection, and defense counsel stated that it was not a prior consistent statement because her grand jury testimony occurred after her motive to testify falsely, *i.e.*, after Shim said that he was going to tell the estate attorney about Nichols's theft. The State responded that the statement was instead admissible under the doctrine of verbal completeness because defense counsel "doesn't get to pick out part of the statement." The trial court agreed, ruling:

That's the linchpin in terms of the other side of that rule, [defense counsel], is that you can't parse out part of the [g]rand [j]ury testimony and say well, this is fair game for impeachment and then not be able to rely on the same testimony at the same time and it just highlights another aspect of the same testimony.

The trial court then overruled the objection but also granted defense counsel's continuing objection as to the grand jury testimony. The State then elicited that Nichols told the grand jury about Shim's threat.

Nichols's testimony regarding Shim's threat was admissible under the doctrine of verbal completeness. The testimony was also admissible under Rule 5-616(c)(2), not for its truth, but to rehabilitate Nichols's credibility on the issue of whether, as Shim claimed, she had fabricated her testimony to exact revenge on Shim for threatening to expose her alleged theft from Shim's father's estate. Consistent with this understanding, the trial court instructed the jury to view the testimony as rehabilitative:

[Y]ou have heard testimony that certain witnesses made statements before trial or at another hearing. Testimony concerning those statements was permitted only to help you decide whether to believe the testimony that the witness gave during this trial.

It is for you to decide whether to believe the trial testimony of these witnesses in whole or in part, but you may not use the earlier statements for any purpose other than to assist you in making that decision.

Shim made no objection to the instruction.

Under the circumstances, even if the trial court had erred in admitting the testimony under the doctrine of verbal completeness, we would find no error because the testimony was admissible under Rule 5-616(c)(2). *See Gerald v. State*, 137 Md. App. 295, 305 (2001) (holding that an appellate court will generally affirm when the trial court reaches the right

result for the wrong reason). Therefore, the trial court did not err in admitting Nichols's testimony about the specifics of Shim's threat.

2. *Additional Details*

On direct examination, Nichols admitted that she was not completely accurate when she spoke to the police on November 11, 2006, because she was stressed and confused. On cross-examination, defense counsel elicited that Nichols had told the police, contrary to her trial testimony, that Shim came home on Friday, November 10, around 11:00 p.m. Additionally, she conceded that she had not told the police about Shim sitting in the chair with his head in his hands, or that he sweated profusely and talked in his sleep.

Later during redirect examination, the State asked Nichols about her grand jury testimony and how it differed from what she had told the police. Defense counsel again objected and a bench conference ensued. Defense counsel argued that Nichols's grand jury testimony was not admissible to rehabilitate her credibility because, again, her motive to fabricate came before the grand jury testimony. The trial court reviewed Rule 5-616(c)(2) and *Thomas, supra*, and ruled, "as I read this excerpt from *Thomas* I think it's evidence being offered or relied upon for rehabilitative purposes ... [n]ot necessarily for the evidentiary truth of the substance. We're talking about her credibility." (italics added). The court overruled the objection but granted Shim a continuing objection. The State then elicited from Nichols that she had testified before the grand jury, consistent with her trial testimony, that Shim came home around 2:30 a.m. Nichols also testified that she knew

additional details that she had provided to the police that were not contained in her grand jury testimony.

Nichols's testimony explaining the additional details she had not told the police was admissible under Rule 5-616(c)(2), not for its truth, but to rehabilitate her credibility. That Nichols had not told the police the additional details undercut her trial testimony, but her grand jury testimony "detract[ed] from that impeachment." *See McCray v. State*, 122 Md. App. at 608. Therefore, the trial court did not err in admitting Nichols's prior consistent testimony.

B. Selwyn Alleyne

Selwyn Alleyne was Shim's friend who was called as a witness at trial. On direct examination, Alleyne testified that on November 10, 2006, a Friday, he drove Shim to two FedEx facilities and then dropped him off at another location to pick up his friend's blue BMW. On cross-examination, defense counsel elicited from Alleyne that he gave a contrary statement to the police on May 1, 2007, six months after the murder occurred. Defense counsel also got Alleyne to say that prior to his giving the statement, the police told him that he should cooperate or he would be charged with crimes relating to the murder. Defense counsel then elicited that Alleyne told the police that he had dropped Shim off to pick up the blue BMW "mid-week," and that he did not remember if he had also driven Shim to the FedEx facilities that same day or if that happened on a different day.

On redirect examination, the following discussion occurred:

[THE STATE]: Mr. Alleyne, did you have occasion to testify under oath at a prior, previous proceeding about the days ... you thought you had taken [Appellant] to –

[DEFENSE COUNSEL]: Objection.

THE COURT: Well, let her finish the question.

[THE STATE]: – to the second location.

A bench conference ensued. The State told the court that it was attempting to elicit a prior consistent statement by Alleyne. Defense counsel objected that the prior consistent statement was inadmissible because it had occurred when he testified in September of 2007, which was after Alleyne was interrogated by the police and, therefore, after he had a motive to fabricate.

THE COURT: Well, if he set it up that way and had a specific issue that was brought out on his cross examination, I will allow it, but not just [“do you remember testifying at a previous proceeding?”] because I don’t know where you’re coming from.

But, if you are here talking about answering [“do you remember that it was[...?”] whatever, or it will refresh his recollection, I will allow that, that’s different. You understand?

[THE STATE]: Okay.

THE COURT: So the objection is sustained *as to that question*.

(emphasis added). Although it could have been clearer, the court apparently sustained the defense’s objection because the question was too vague. The State then elicited from

Alleyne, without any objection, that he had testified that he had dropped Shim off to pick up the BMW both on November 10, and mid-week.

We agree with the State that Shim has not preserved his argument for our review because the trial court sustained his objection and he did not ask for a continuing objection (as he clearly did at other points at trial) or object to the State’s further questioning. *See* Md. Rule 4-323(a) (“An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived.”); *Brown v. State*, 90 Md. App. 220, 225 (objection must be made to each and every question or require a continuing objection to the “entire” line of questioning to preserve the issue for review); 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[.]”).

Moreover, even if Shim had preserved his argument, we are persuaded that any error was harmless because it “in no way influenced the verdict[.]” *Dorsey v. State*, 276 Md. 638, 659 (1976). Whether Alleyne drove Shim to the FedEx facilities and dropped him off to pick up the blue BMW mid-week or on Friday, November 10, was of little significance because either way it occurred before the murder. Therefore, we reject Shim’s claim regarding Alleyne’s prior consistent statement.

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