Circuit Court for Frederick County
Case No. C-10-CR-22-000482

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 51

September Term, 2023

JESSE B. ERICH

v.

STATE OF MARYLAND

Reed,
Ripken,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: March 13, 2024

A jury in the Circuit Court for Frederick County found the appellant, Jesse B. Erich ("Appellant"), guilty of second-degree child abuse, second-degree assault, reckless endangerment, theft of property valued under $100, and possession of drug paraphernalia. As to the second-degree child abuse conviction, the court sentenced Appellant to 15 years of incarceration with all but six years suspended and five years of supervised probation. For the theft conviction, the court sentenced Appellant to a term of time served, reflecting 255 days of incarceration. The remaining convictions merged for sentencing purposes. Appellant noted this timely appeal and presents two questions for our review:[1]

I. Whether the circuit court erred in permitting the State's rebuttal evidence?

II. Whether the circuit court erred in permitting Officer Fernholz's opinion that Appellant possessed drug paraphernalia?

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

FACTUAL AND PROCEDURAL BACKGROUND

The charges stemmed from an incident that occurred at a Goodwill store on June 18, 2022. On that date, Joyce Smith ("Smith") called 911[2] and described Appellant's interaction with Appellant's four-year-old son ("Child") at the store. During Smith's 911 call, she described her observations as follows:

[1] Rephrased from:

1. Did the court err in permitting the State to present rebuttal as to [Child's] behavior?
2. Did the court err in permitting Officer Fernholz to offer an opinion that Ms. Erich possessed drug paraphernalia?

[2] During the State's case-in-chief, the audio of the 911 call was played for the jury.

> [T]he child is screaming and the woman's in the child's face just telling him to shut up . . . and she's just screaming in his face. The child's kicking and screaming, the store workers are looking, everybody's looking, this child is screaming over his lungs and the woman she's got scars all over her face and she's telling him, shut the F. up, I said right now, right now.
>
> * * *
>
> She grabbed him under the shoulder, he got underneath the clothes rack like he's being terrorized.
>
> * * *
>
> [S]he jerked him up out of that stroller and he's underneath the rack now and he's just terrified.

At trial, Smith testified about her visual perspective of Appellant's actions during the incident:

> [THE STATE]: Well, what did you see?
>
> [SMITH]: Hand go up, hand go down to the stroller, but the angle the stroller was at, I don't know what part, where her hand landed.

Janel Yablon ("Yablon") also called 911[3] because of Appellant's actions. During the 911 call, Yablon reported that Appellant "put her hands around [Child's] neck. . . . He is in the stroller and she is cursing at him. Smacking him. And she put her hands around his neck, shoving him."

At trial, Yablon testified that Appellant "put both of her hands around [Child's] neck . . . and shoved him forcefully into the stroller." Then, Child "was squirming out of the stroller and that's when [Appellant] was yanking his arm and trying to get him back

[3] During the State's case-in-chief, the audio of Yablon's 911 call was also played for the jury.

in the stroller. [Child] was hiding under the racks of the clothing and [Appellant] is screaming." At that time, Appellant "was saying I'm going to f[] you up. I'm going to beat the crap out of you. Wait till we get out of here. You're going to pay for this." Yablon further testified that Appellant "smacked" Child "[a]t least five" times with an "[o]pen" hand on Child's "chest, his shoulder, [and] his arms."

During police body-worn camera footage that was admitted at trial, Yablon's teenage daughter, D.Y., who was with her at Goodwill at the time of the incident, told police that Child "was hiding from [Appellant] like really shaking and she kept going, you're going to really get it this time[.]"At trial, D. Y. testified as follows:

> [THE STATE]: Okay. What first brought your attention to that incident? What do you remember first hearing or seeing?
>
> [D. Y.]: So the lady began screaming and I noticed that the kid was crying and it wasn't like throwing a tantrum. The kid needed help. He was hiding from I believe mom and then she started getting physical. She was shoving the kid like so hard that the stroller fell. She choked the kid like choked.

Officer Shawn Fernholz responded to the Goodwill and spoke to Appellant. Appellant told Officer Fernholz that Child "was spazzing out." Officer Fernholz testified about his conversation with Appellant, stating "I said okay. What is he upset about and [Appellant's] response was I didn't hit my child or something to that effect." Appellant was placed under arrest. Following the arrest, Officer Fernholz searched Appellant's purse and recovered "several items of drug paraphernalia[,]" including "a glass smoking device which is commonly referred to on the street as a crack pipe[,] . . . two cut

straws[,]" and "a cooking cap." Officer Jeffrey Putman further testified that surveillance video showed Appellant leaving the store without paying for $14.27 of merchandise.

Dr. Pamela Holtzinger, who accepted as an expert in the area of pediatric strangulation, testified at trial. After the incident, Dr. Holtzinger examined Child in the pediatric emergency department at Frederick Health. Dr. Holtzinger noted that Child "was afraid[,]" "[h]e was backed up against the wall[,]" and "[h]e did talk, but it was limited at that point." Dr. Holtzinger observed that Child "had a very obviously raspy voice" and a "red" "linear pattern on the front of his neck." She confirmed that Child's raspy voice and the linear pattern on his neck were consistent with the witnesses' observations.

Additional facts will be included as they become relevant to the issues.

DISCUSSION

I. THE COURT DID NOT ERR IN PERMITTING THE STATE'S REBUTTAL EVIDENCE.

A. Parties' Contentions

During the defense's case at trial, Appellant and her sister, Michelle Erich ("M. Erich"), testified that Child routinely threw temper tantrums in public. Appellant claims that the court erred in permitting the State's rebuttal evidence, which consisted of testimony from M. Erich about Child's good behavior at the courthouse during the trial. According to Appellant, the court failed to exercise its discretion to determine whether M. Erich's testimony amounted to proper rebuttal evidence. Appellant further contends that M. Erich's testimony "did not address any new matter that the defense brought into

the case[.]"

The State responds that this issue is unpreserved for our review. As to the merits of Appellant's argument, the State asserts that M. Erich's testimony was proper rebuttal evidence because "her testimony was a direct reply to and a contradiction of a matter raised by the defense[,]" i.e., Child's behavior in public.

B. Background

After the State presented its case-in-chief, Appellant testified that the witnesses at Goodwill had misinterpreted her behavior towards Child, maintaining that she neither smacked nor strangled Child. She testified that Child had thrown temper tantrums at grocery stores before the incident at the Goodwill. Similarly, M. Erich testified during the defense's case about an incident at Walmart. As to one specific instance that occurred five months before trial, M. Erich testified that she refused to buy Child cookies at Walmart and Child "[s]cream[ed] to the top of his lungs."

After the defense rested at trial, the State asked to recall M. Erich, and the following colloquy occurred:

[THE STATE]:	Your Honor, if I could actually recall Michelle Erich? []
THE COURT:	Okay.
[DEFENSE COUNSEL]:	I'm going to object.
(Bench conference follows[])	
[DEFENSE COUNSEL]:	This witness is not on the State's email.
THE COURT:	It's a rebuttal witness.

[DEFENSE COUNSEL]: I don't know what it is.

THE COURT: It's obviously in rebuttal. You called the witness, and now she's calling them.

[DEFENSE COUNSEL]: Okay. I'm objecting.

THE COURT: Overruled.

During rebuttal, the State elicited testimony from M. Erich about Child's behavior during trial. As to Child's behavior in the courthouse, M. Erich testified that Child had done "a great job" behaving, he had been "[p]laying games on the phone[,]" and he was "a little upset about the phone that died, but other than that . . . we've . . . kept him pretty quiet."

C. Analysis

First, we shall address the State's contention that Appellant failed to preserve this challenge to the State's rebuttal evidence. The State argues that Appellant's arguments are unpreserved because, when Appellant's counsel sought to exclude the rebuttal evidence, Appellant's counsel stated: "[t]his witness is not on the State's email" and "I don't know what it is."

Appellant's arguments regarding rebuttal evidence on appeal are more specific than the arguments raised at trial. However, "[p]reservation for appellate review relates to the issue advanced by a party, not to every legal argument supporting a party's position on such issue." *Smith v. State*, 176 Md. App. 64, 70 n.3 (2007). *See also* Md. Rule 4-323(c) ("For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes

known to the court the action that the party desires the court to take or the objection to the action of the court."). Appellant sought to exclude the State's rebuttal evidence based on the content of M. Erich's anticipated testimony. As a result, this claim is preserved for our review.

"Rebuttal evidence is any competent evidence which explains, or is a direct reply to, or a contradiction of any new matter that has been brought into the case by the defense." *Johnson v. State*, 228 Md. App. 27, 56 (2016) (internal quotation marks and citation omitted). "[W]hat constitutes rebuttal testimony rests within the sound discretion of the trial court, whose ruling may be reversed only when it constitutes an abuse of discretion, *i.e.*, it has been shown to be both manifestly and substantially injurious." *State v. Booze*, 334 Md. 64, 68 (1994) (internal citations and quotation marks omitted). However, if a witness's testimony "did not constitute rebuttal evidence, the circuit court had no discretion to admit it as such." *Kulbicki v. State*, 102 Md. App. 376, 383–84 (1994).

According to Appellant, the State's rebuttal evidence did not respond to a new matter because the State elicited evidence during its case-in-chief "that [Child] routinely threw temper tantrums in public . . . when Officer Fernholz testified that Ms. Erich had stated that [Child] 'does this many times. Toddler tantrums. He does this all the time.'" Appellant also notes that "the State played Officer Fernholz's body-worn camera footage, in which Ms. Erich is heard saying '[h]e does this all the time,' referring to [Child] 'spazzing out.'" Thus, Appellant claims that Child's behavior in public "was not a new matter brought out on defense that would have justified the State's rebuttal evidence."

To be sure, the State's case-in-chief contained general references to Child's past conduct in public. By contrast, during the defense's case, M. Erich provided a detailed account about a specific instance when Child threw a temper tantrum at a different store. During the defense's direct examination of M. Erich, she testified as follows:

[DEFENSE COUNSEL]: What do you mean by, [Child]'s a handful?

[M. ERICH]: I have two kids, and this -- yeah, I mean, he's -- he's a lot.

[DEFENSE COUNSEL]: He's a lot?

[M. ERICH]: Yes. We actually don't go to the store.

[DEFENSE COUNSEL]: Why don't you go to the store?

[M. ERICH]: I took him to a Walmart --

[DEFENSE COUNSEL]: How long ago?

[M. ERICH]: Probably five -- five months now? Five months.

[DEFENSE COUNSEL]: Since this event?

[M. ERICH]: After. . . .

[DEFENSE COUNSEL]: Yeah. Tell the jury what happened.

[M. ERICH]: So he wanted Oreos off an endcap, and I said no, and I thought I could just treat it like I did my kids. Hey, you can't. I'm going to -- you know, let's go. . . .
Just kind of, like, hey, I'm going to do the soft parenting, let's get up, let's -- . . . .

Let's do this, we'll get the Oreos, we'll -- you know, just thinking I could handle it, because I had seen him be -- prior to this, in a store.

[DEFENSE COUNSEL]: What happened?

[M. ERICH]: Same thing. Like, just -- if he didn't get what he wanted, it was a big scene. So I tried that. It didn't work. He threw himself on the ground. I then carried him, picked him up, and I was, like, nervous and scared, because he was at me -- you could not tell who was doing what at the time.

[DEFENSE COUNSEL]: Was he making any noise?

[M. ERICH]: Screaming to the top of his lungs. . . . I had many looks. I was humiliated.

[DEFENSE COUNSEL]: You were humiliated?

[M. ERICH]: Yes, because I thought somebody was going to call somebody on me because, like I said, I was trying to protect me, so I -- you know, it would've been, hey, you're holding his hands or, you know, he was -- like I said, I was trying to protect myself. It was a big scene. And it actually started at the back of Walmart, near the milk, and I had to walk the entire way up with people watching and stopping and making remarks and --

[DEFENSE COUNSEL]: You were holding him?

[M. ERICH]: I was -- I had to, yeah.

[DEFENSE COUNSEL]: Why?

[M. ERICH]: Well, he was on the floor, kicking and knocking the stuff off the shelves as we walked by. So the diapers, the cookies, the --

[DEFENSE COUNSEL]: You didn't try and walk him out quietly?

[M. ERICH]: There was no walking quietly, no.

[DEFENSE COUNSEL]: Did you have a stroller?

> [M. ERICH]: We tried the cart. Again, trying to be a big boy. Let's do a cart. . . . Wouldn't get in to start. And like I said, I was trying to kind of do the soft, like, okay, you know, and it was -- it was not good. . . . And we have not been back to a store.

Before M. Erich's testimony in the defense's case, evidence about Child's good behavior in the courthouse was irrelevant. However, M. Erich's detailed testimony of Child's temper tantrum at a Walmart introduced a new matter into the trial. Hence, the State was entitled to rebut that testimony by introducing competent evidence of Child's good behavior, which "directly replied to, and contradicted [a] 'new matter . . . brought into the case by the defense.'" *Johnson*, 228 Md. App. at 58 (quoting *Rollins v. State*, 161 Md. App. 34, 89 (2005)).

Next, Appellant argues that the court erred because it "cursorily determined, '[i]t's a rebuttal witness,' without having heard any proffer from the State as to what evidence the State intended to elicit from [M. Erich]." According to Appellant, the court thus "failed to exercise its discretion to determine whether [M. Erich's] testimony would have constituted proper rebuttal."

The court considered Appellant's objection to M. Erich's rebuttal testimony and stated "[i]t's obviously in rebuttal." The trial court was not required to demand a proffer from the State as to the content of the rebuttal testimony. Instead, the court was obligated to determine whether the rebuttal evidence was "'competent evidence which explains, or is a direct reply to, or a contradiction of any new matter that has been brought into the case by the defense.'" *Johnson*, 228 Md. App. at 56 (quoting *Rollins*, 161 Md. App. at 89). The court fulfilled that obligation by noting that it was obvious that M. Erich's

rebuttal testimony would reply to her testimony elicited during defense counsel's direct examination.

For all these reasons, the court did not err in permitting the State's rebuttal evidence.

II. IF PRESERVED, THE ADMISSION OF OFFICER FERNHOLZ'S OPINION THAT APPELLANT POSSESSED DRUG PARAPHERNALIA WAS HARMLESS.

A. Parties' Contentions

Appellant argues that the court erred in allowing Officer Fernholz to provide an expert opinion that the item found in Ms. Erich's purse was a "crack pipe." According to Appellant, the court erred because "the State never gave notice that Officer Fernholz would be providing expert opinion on the identification of drug paraphernalia and Officer Fernholz was never proffered or qualified as such an expert." The State asserts that "[a]ny error in this regard was waived and harmless because the trial was replete with references to [Appellant's] drug use and addiction, including [Appellant's] own admission that she used drugs the evening before the incident at the Goodwill store." In reply, Appellant contends that when she testified about her substance use disorder, she did not waive her objection to Officer Fernholz's improper opinion that she possessed a "crack pipe."

B. Background

Count 8 of the State's indictment charged Appellant with "possess[ion] with intent to use drug paraphernalia, to wit: a crack pipe, used to introduce into the human body by smoking a controlled dangerous substance of Schedule II, to wit: Cocaine[.]" Officer

Fernholz testified regarding the pipe and other items that he recovered from Appellant's purse:

[THE STATE]: [W]hat, if anything, of significance did you find in [Appellant's] purse?

[OFFICER FERNHOLZ]: So she had several items of drug paraphernalia that were located in the purse to include a glass smoking device which is commonly referred to on the street as a crack pipe. It had burnt CDS residue, drug residue, on the end of it. There were two cut straws. Again, cut straws are used to snort drugs.

[DEFENSE COUNSEL]: Objection. Calls for speculation.

THE COURT: Overruled.

[OFFICER FERNHOLZ]: Used to snort CDS that had suspected drug residue on it as well and a cooking cap. For those who are not familiar, cooking caps are --

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[OFFICER FERNHOLZ]: --generally used to prepare the CDS, specifically heroin, into liquid form before they load it into a syringe for use.

* * *

[THE STATE]: [W]hat is your training and experience in drug recognition?

[OFFICER FERNHOLZ]: So in the Academy we get an eight hour block of specific CDS training to include, you know, identification. We get to see all of the drugs. They do controlled burns. I have also taken numerous trainings outside of the Academy related to drug identification, paraphernalia, drug usage. Several hours' worth of readings

outside of the Academy.

During the State's redirect examination, Officer Fernholz testified without objection as to his opinion about the purpose of the crack pipe:

> [THE STATE]: Officer, the crack pipe that you recovered without having tested the residue in your training and experience what is that device used for?
>
> [OFFICER FERNHOLZ]: It is used for smoking CDS, specifically crack cocaine.

C. Analysis

We will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). Rule 4-323(a) governs methods of properly objecting at trial and provides in relevant part: "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." Moreover, "[o]bjections are waived if, at another point during the trial, evidence on the same point is admitted without objection." *DeLeon v. State*, 407 Md. 16, 31 (2008). *See also Paige v. State*, 226 Md. App. 93, 124 (2015) (holding that an appellate issue was unpreserved despite defense counsel's general objection because "similar testimony came in later without objection.").

As noted, on redirect examination, Officer Fernholz testified—without objection—that the pipe recovered from Appellant's purse was "used for smoking CDS, specifically crack cocaine." Although defense counsel initially objected to Officer Fernholz's opinion that Appellant possessed a "crack pipe[,]" that objection was waived

when similar testimony was admitted without objection. As a result, Appellant's challenge to Officer Fernholz's opinion that she possessed a crack pipe is not preserved for our review.

Even if this claim had been preserved, we would determine that any error was harmless. To the extent that Appellant argues that the court erred in admitting Officer Fernholz's opinion that Appellant possessed other types of paraphernalia (e.g "cut straws" and cooking caps"), any error was harmless. An error is harmless when "there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict." *Dorsey v. State*, 276 Md. 638, 659 (1976). "In order for the error to be harmless, we must be convinced, beyond a reasonable doubt, that the error in no way influenced the verdict." *Weitzel v. State*, 384 Md. 451, 461 (2004). In reviewing the record, we weigh "the importance of the tainted evidence; whether the evidence was cumulative or unique; the presence or absence of corroborating evidence; the extent of the error; and the overall strength of the State's case." *Rosenberg v. State*, 129 Md. App. 221, 254 (1999) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

Appellant testified at trial that she used "crack cocaine."[4] *See* Md. Code, CRIM. LAW § 5-619 ("[t]o determine whether an object is drug paraphernalia, a court shall

[4] The trial was replete with additional references to Appellant's substance abuse. For example, on the body-worn camera footage that was played for the jury at trial, Appellant told Officer Fernholz that she had "a syringe" in her purse and she confirmed that heroin was her "drug of choice[.]" She further testified about her substance abuse before the incident, stating that she was "on something" "[m]aybe that night, hours before."

consider, among other logically relevant factors: (1) any statement by an owner or a person in control of the object concerning its use[.]"). In addition, the pipe recovered from Appellant's purse was admitted without objection as an exhibit at trial. Although Appellant denied being under the influence of a substance during the incident at the Goodwill, she testified that she was "on something" "[m]aybe that night, hours before."

For all these reasons, we are persuaded that any error related to Officer Fernholz's opinion that Appellant possessed drug paraphernalia was harmless beyond a reasonable doubt.

JUDGMENTS OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.