IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2009

NO. 151

JUSTIN RAY HANNAH,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF RAP LYRICS AND ASSOCIATED DRAWINGS.

Several points made by Respondent in its brief merit response.

A. The Disputed Evidence Was Not A Fair Response To Evidence Adduced By The Defense

The State, relying heavily upon the alleged impeachment value of the disputed evidence as contradicting evidence previously generated by the defense,

argues that Petitioner "...had presented evidence from several sources, attempting to prove not only that he had never owned a gun, but also that he had no interest in or knowledge of guns." (Brief at 7.) That is not a fair summary of what actually occurred. The thrust of the defense evidence was that Mr. Hannah did not possess a gun, and had no access to one. (E.57). The separate question of whether he had an *interest* in guns was brought into the case by the State, on cross-examination, for the clear and specific purpose of attempting to lay a foundation for admitting the rap lyrics:

> Q: You told the ladies and gentlemen of the jury that you do not possess a gun?
>
> A: No, ma'am.
>
> Q: You never held a gun?
>
> A: No, ma'am.
>
> Q: You never fired a gun?
>
> A: That's correct.
>
> Q: *But you do have interest in guns, don't you*?
>
> A: Do what?
>
> Q: *But you do have interest in guns, don't you*?
>
> A: Like what do you mean by interest?
>
> Q: *You are interested in them.*
>
> A: No, ma'am.
>
> Q: Not at all?
>
> A: I don't have an interest in guns.

Q: *Did you ever write about guns*?

A: I have wrote raps, like freestyles about them. Like not about them, but it had been incorporated.

MS. DELP: Your Honor, may counsel approach?

THE COURT: Sure.

(WHEREUPON, COUNSEL APPROACHED THE BENCH AND THE FOLLOWING ENSUED.)

MS. DELP: Again, giving notice of where I intend to go with Mr. Hannah, he has said that he has no interest in guns. I intend to show him a copy or the original of his composition book which was recovered from his bedroom which has rap lyrics of driveby shootings and people going pop, pop, pop and the burners, which I believe is another word for gun, is under the seat and finishing off with artwork of a semi-automatic nine millimeter. (E.91-92, emphasis added.)

Therefore, the record fails to establish that the highly prejudicial lyrics were a fair response to anything raised by the defense. In essence, the State, quite by design, set up the straw man of an interest in guns so that it could demolish it with the disturbing contents of Mr. Hannah's notebook. This a party may not do. See, *e.g.*, this Court's jurisprudence on the admissibility of rebuttal evidence, which is proper only where that evidence is responsive to some new matter injected into the case by the defense. *Huffington v. State*, 295 Md. 1, 13-14, 452 A.2d 1211 (1982), applying *State v. Hepple*, 279 Md. 265, 368 A.2d 445 (1977). The State may not pull itself up by its bootstraps by eliciting testimony solely so that it may adduce prejudicial evidence in response. To similar effect, *see Bradley v. State*, 333 Md. 593, 636 A.2d 999 (1994), prohibiting the State from eliciting testimony that it knows will not be helpful to it so as to open the door to a prior inconsistent

statement damaging to the defense, and citing *Wright v. State*, 89 Md. App. 604, 610, 598 A.2d 1214 (1991), where the Court found such tactics to set up "a proverbial strawman." Even if writing rap lyrics about guns two years in one's past indicates some "interest" in guns two years later, which Petitioner disputes, that conduct certainly does not establish possession or access.

B. The Status Of State's Exhibit 69

While the State is correct that State's Exhibit 69 was not formally admitted into evidence, it remains true that "...no magic words are necessary to find that a piece of evidence has been admitted as an exhibit in the trial of a case." *Morris v. State*, 59 Md. App. 659, 679, 477 A.2d 1206 (1984). Here, the prosecutor "open[ed]" the notebook in the jury's presence. (E.93). She proceeded to show Mr. Hannah, again in the jury's presence, a drawing of what he agreed represented a "semi-automatic nine millimeter" (E.94), and then extensively quoted from the most violent and prejudicial of the lyrics, including reference to the gun manufacturer Glock. As a practical matter, the exhibit was before the jury.

C. The Probative Value Of The Evidence

As the caselaw cited in Petitioner's principal brief makes clear, it is important to analyze the linkage, *vel non*, between the lyrics written and the offense of which the defendant is accused. If the crime on trial involves a dismembered body, rap lyrics writing about cutting up a body, in the same time frame as the homicide, possess probative value.

Here, there is no probative value at all. While portions of projectiles were recovered at the crime scene, they were of "unknown caliber" (T.11/8/07, 138-39), and no gun was recovered. Thus, there was no evidence of the use of either a Glock or of a nine millimeter weapon. And even if the State is correct that the portion of the notebook dealing with drugs was not shown to the jury, the jurors were exposed to the even more prejudicial, and utterly irrelevant, crime of carjacking: "Ya just got jacked, we leave da scene in da lime green." (E.95).

In any event, even if this evidence possessed some minimal probative value, Rule 5-403's balancing should have mandated its exclusion. The State is not permitted, in responding to defense evidence, to kill an ant with a pile driver. *Terry v. State*, 332 Md. 329, 338-39, 631 A.2d 424 (1993). The references to violent crime in Petitioner's notebook, penned well before any of the circumstances giving rise to this prosecution had arisen, were admitted in error.

CONCLUSION

For the foregoing reasons, and those set forth in Petitioner's Brief, Petitioner respectfully requests that this Court reverse the judgment of the Court of Special Appeals.

Respectfully submitted,

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Counsel for Petitioner

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PERTINENT AUTHORITY

Rules

Maryland Rule 5-403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.