[Cite as *State v. Carrasquillo*, 2010-Ohio-5063.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO	C.A. No. 09CA009639
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
PAMELA CARRASQUILLO	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellant	CASE No. 07CR073187

DECISION AND JOURNAL ENTRY

Dated: October 18, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Someone shot Herminio Carrasquillo while he was in bed around 3:00 a.m. on January 4, 2007. Mr. Carrasquillo identified his wife, Pamela Carrasquillo, as the shooter. A jury convicted Ms. Carrasquillo of attempted murder, and the trial court sentenced her to ten years in prison. Ms. Carrasquillo has appealed, arguing that the trial court incorrectly refused to let her call two "surrebuttal" witnesses, incorrectly let a police officer testify about a scientifically invalid firearm demonstration, and incorrectly refused to let her lawyer participate in a review of a police detective's prior statements to determine if they were inconsistent with his testimony on direct examination. She has also argued that it was plain error for the court to let a police officer testify about the warmth of her car's radiator after the shooting and that her lawyer was ineffective for not objecting to that testimony. This Court reverses because the trial court should have let Ms. Carrasquillo's "surrebuttal" witnesses testify.

BACKGROUND

{¶2} The Carrasquillos married in 1979. They had four children, all of whom were adults at the time of the shooting. During the first seven years of their marriage, they experienced turmoil because Mr. Carrasquillo engaged in an extramarital affair. After counseling, however, they reconciled for a period of time.

{¶3} In 2004, Mr. Carrasquillo began a romantic relationship with a co-worker. The co-worker testified that, as her relationship with Mr. Carrasquillo progressed, she grew upset that he had yet to initiate divorce proceedings. In January 2005, Mr. Carrasquillo told Ms. Carrasquillo that he wanted her to leave their home. He found a house for her that was approximately 1.2 miles from the marital home. Ms. Carrasquillo moved into the other house in February 2005, but continued to have a sexual relationship with Mr. Carrasquillo.

{¶4} According to Mr. Carrasquillo, in the early morning hours of January 4, 2007, Ms. Carrasquillo entered the marital home and shot him multiple times. He was in bed at the time of the shooting, but woke up just before it began. He testified that he could tell it was his wife because, although it was night, there was light coming into the room from a street light and the moon, which was full.

{¶5} After the shooter left, Mr. Carrasquillo called 911. Several officers responded to his house. After they ensured that the shooter was no longer in the house and spoke with Mr. Carrasquillo, some of them went to Ms. Carrasquillo's house to speak with her. According to one of the officers, Ms. Carrasquillo told him that she had not driven her vehicle in several hours. He testified, however, that, when he touched the vehicle's grille, it was warm.

SURREBUTTAL TESTIMONY

{¶6} Ms. Carrasquillo's first assignment of error is that the trial court incorrectly refused to let her introduce the testimony of two "surrebuttal" witnesses that would have impeached the credibility of one of the State's "rebuttal" witnesses. She has argued that the error was not harmless and violated her due process rights.

{¶7} During her case-in-chief, Ms. Carrasquillo testified on direct examination that she did not shoot Mr. Carrasquillo. On cross-examination, the prosecutor asked her if she had discussed her case with anyone while she was in jail awaiting trial. In particular, the prosecutor asked her if she had spoken to Connie Childers about her visit to a shooting range before the shooting, about the shooting itself, and about the police's investigation of the shooting. Ms. Carrasquillo denied that she had spoken to Ms. Childers about any of those subjects. On redirect, she testified that she was popular in the jail because her case was on the news. She said that Ms. Childers "really . . . kept up with the news . . . . She was reading the papers. She knew more about my case than I did." She denied having spoken to Ms. Childers about her case, however, because Ms. Childers scared her.

{¶8} After Ms. Carrasquillo closed her case-in-chief, the lawyers spoke with the trial judge about having rebuttal and surrebuttal witnesses transported to the courthouse. When the jury was brought back in, the judge told them that "[t]his part of the case is called rebuttal, and I don't know what the evidence will be, but 'rebuttal' means this: It means that the defense has put on some witnesses – who have testified to various things, and the State of Ohio gets an opportunity to put on testimony that would rebut what they said. It will be up to you to determine whether – whether the evidence has been rebutted. But that's the purpose of this part of the case, is for the State to be able to come back with witnesses to challenge the defense

witnesses. After that, the defense is entitled to put on what we call surrebuttal, and that means that the defense can put on witnesses who challenge the witnesses that you're hearing now."

{¶9} The State called three witnesses, one of whom was Ms. Childers. Ms. Childers testified that Ms. Carrasquillo had spoken to her about her case. She testified that Ms. Carrasquillo had told her how she had gone to and from the marital home the night of the shooting, how she had entered the house, how she had shot Mr. Carrasquillo, how she had cleaned up any traces of snow when she returned to her house, and how she had pretended to be asleep when the police arrived at her house. She testified that Ms. Carrasquillo told her that she shot Mr. Carrasquillo because she was tired of him "running back and forth between her and his girlfriend" and other women. She also testified that Ms. Carrasquillo had asked her to try to arrange to be photographed with Mr. Carrasquillo so she could blackmail him.

{¶10} Ms. Childers admitted that she had told the police that she wanted "some consideration" before talking to them, "maybe a little lesser sentence, or a little time taken off or something." She said that, in exchange for her testimony, the prosecutor had reduced the most serious charge she was facing from a felony of the first degree to a felony of the second degree. She said that, although the prosecutor did not guarantee the length of her sentence, she hoped it was for only about two years. On cross-examination, she admitted that she had been sent to prison two other times and that she would love to get out sooner so that she could see her children. She denied that she had talked to an inmate named Bobbie Stottlemire about making a deal with prosecutors. On redirect, Ms. Childers admitted that she had told Ms. Stottlemire about the deal, but explained that she had known Ms. Stottlemire from one of her previous prison terms, that news of her deal was spreading around the jail, and that she wanted Ms. Stottlemire to hear the news directly from her instead of someone else. On recross, Ms. Childers denied that

she told Ms. Stottlemire that, "[i]f you want to get a deal cut, you turn a snitch, too, and the prosecution will give you some relief."

{¶11} Following Ms. Childers's testimony, the trial judge told the jury that "the State, as you heard, has rested its case in rebuttal. Now it's the opportunity of the defense to present testimony in what we call surrebuttal, and the only purpose of this, of this testimony, would be to attack the testimony of [Ms.] Childers, the witness that you just listened to." Ms. Carrasquillo called Leah Stewart, who testified that she had been in the same jail unit as Ms. Carrasquillo and Ms. Childers. She testified that there were a total of four women in the unit and that her bed was next to Ms. Carrasquillo's. Before she said anything further, the trial court interrupted her testimony, asking the lawyers to approach. After a sidebar that was off the record, the court told the jury that it had "determined, after listening to the preliminary questions asked of the witness, together with the sidebar, that this witness would not be a rebuttal witness – or, a surrebuttal witness, and therefore the witness will be excused. [Ms. Carrasquillo's lawyer] can proffer the witness's testimony for the record at the conclusion . . . of the trial."

{¶12} In light of the court's ruling on Ms. Stewart, Ms. Carrasquillo did not call Ms. Stottlemire. At the conclusion of the trial, Ms. Carrasquillo's lawyer proffered that Ms. Stewart "would have testified that she was the closest person to [Ms.] Carrasquillo, and spent the entire time of Ms. Carrasquillo – with her, and would have said that she had a bed immediately next to her, and at all times, in her observation, she had never observed [Ms.] Carrasquillo even talking to [Ms.] Childers." "[Ms.] Stottlemire, had she testified, would have indicated that she . . . was approached by . . . [Ms.] Childers, and that . . . Ms. . . . Childers told her that she was getting out of jail because she had cut a deal with the State of Ohio, which would reduce her time to time served, and it would include a reduction in sentence. Ms. Stottlemire would have also said that

[Ms.] Childers offered to her that – that if she wanted help in cutting a deal with the prosecutor on a particular drug case, she would assist her, and she, too, could get her sentence reduced based on her previously referenced connections."

{¶13} "Rebutting evidence is that given to explain, refute, or disprove new facts introduced into evidence by the adverse party; it becomes relevant only to challenge the evidence offered by the opponent, and its scope is limited by such evidence." *State v. McNeill*, 83 Ohio St. 3d 438, 446 (1998); *State v. Grinnell*, 112 Ohio App. 3d 124, 146 (1996) ("The purpose of rebuttal is to permit the state the opportunity to refute new evidence offered by the defendant in the presentation of his case."). The Ohio Supreme Court has held that "[a] party has an unconditional right to present rebuttal testimony on matters which are first addressed in an opponent's case-in-chief and [that is not testimony that should have been presented] in the rebutting party's case-in-chief." *Phung v. Waste Mgmt. Inc.*, 71 Ohio St. 3d 408, 410 (1994). It has also written that "[i]t is within the trial court's discretion to determine what evidence is admissible as proper rebuttal." *State v. McNeill*, 83 Ohio St. 3d 438, 446 (1998) (citing *N.W. Graham & Co. v. W.H. Davis & Co.*, 4 Ohio St. 362, 381 (1854)).

{¶14} In *N.W. Graham & Co.*, the plaintiff hired the defendant to transport goods by steamboat. The plaintiff sued the defendant after the steamboat struck a snag and sank. The parties' contract provided that the defendant would not be liable for a loss that was attributable to the inherent danger of river navigation. The plaintiff established a prima facie case for recovery by introducing evidence that it had delivered the goods to defendant for transport and the defendant failed to redeliver them at their destination. The burden then shifted to the defendant to prove that its failure to redeliver the goods was caused by the inherent danger of river navigation rather than by its negligence. As part of its case-in-chief, the defendant called

witnesses who testified that the boat was sound and that the pilot's actions in proceeding as he did, which was, among other things, under steam after striking the river bottom, were proper. Neither counsel specifically asked defendant's witnesses whether the pilot should have shut the steam off and floated past the snag that the boat ultimately struck. On rebuttal, the plaintiff presented witnesses who testified that the pilot should have shut the steam off and let the boat float downstream. The defendant then attempted, as surrebuttal, to recall some of its witnesses and call additional witnesses to testify that the pilot did not have a duty to shut off the steam. The trial court, however, did not let them testify. The Ohio Supreme Court concluded that the trial court's action was proper because the testimony about stopping the engines was not a "new matter": "Now, what could have been accomplished by recalling the defendant's witnesses, other than a repetition of the opinion previously expressed, we are quite unable to see. It is true, they might have said, expressly, that the pilot should not have stopped the engine (a question they had not before been asked), but, in the end, it would amount to nothing more than an opinion that he should have done as he did, and not differently." *N.W. Graham & Co. v. W.H. Davis & Co.*, 4 Ohio St. 362, 381 (1854); see also *Ketcham v. Miller*, 104 Ohio St. 372, 378 (1922) (concluding that additional evidence defendant wished to present after it closed its case-in-chief "was not competent as rebuttal [evidence]."). That is, the testimony the defendant wished to present as rebuttal should have been presented, if at all, as part of its case-in-chief.

{¶15} In *McNeill*, Mr. McNeill was convicted of aggravated murder and sentenced to death. During the penalty phase of his trial, Mr. McNeill called a witness who testified about the joy he had brought to the life of others. As rebuttal, the State called the son of the person Mr. McNeill had killed, who testified about the sadness Mr. McNeill had caused him and his family. The Ohio Supreme Court concluded that, under Section 2929.03(D)(2) of the Ohio Revised

Code, the State was allowed to present evidence attempting to rebut the mitigating evidence offered by Mr. McNeill. *State v. McNeill*, 83 Ohio St. 3d 438, 446 (1998). It also concluded that the trial court exercised proper discretion in allowing the son of the victim to testify. *Id*. at 446-47.

{¶16} *N.W. Graham & Co.* and *McNeill* do not stand for the proposition that the trial court has discretion to determine what evidence is proper rebuttal evidence; only that it has discretion to determine which proper rebuttal evidence may be admitted. "A party has an unconditional right to present rebuttal testimony on matters which are first addressed in an opponent's case-in-chief and [is not testimony that should have been presented] in the rebutting party's case-in-chief." *Phung v. Waste Mgmt. Inc.*, 71 Ohio St. 3d 408, 410 (1994). A party does not have a right to present, as rebuttal evidence, testimony that should have been presented as part of its case-in-chief.

{¶17} Ms. Childers's testimony in this case was not proper rebuttal evidence. The evidence the State called Ms. Childers to rebut was not new facts introduced by Ms. Carrasquillo in her case-in-chief, but testimony elicited by the State in its cross-examination of Ms. Carrasquillo. See *Weimer v. Anzevino*, 122 Ohio App. 3d 720, 726 (1997) ("[A]ppellant cannot rebut evidence that was introduced by appellant's own counsel. Appellant may rebut evidence adverse to her side, but that evidence must be introduced by the opposing party and not by appellant herself."). Although Ms. Carrasquillo also testified about whether she had had any conversations with Ms. Childers on redirect, redirect testimony is generally considered to be evidence clarifying matters raised on cross-examination, not new evidence. See *Weiner v. Kwait*, 2d Dist. No. 19289, 2003-Ohio-3409, at ¶17. Ms. Childers's testimony should have been presented by the State, if at all, as part of its case-in-chief. Its relevance was not that it rebutted

any evidence Ms. Carrasquillo presented, but that it tended to prove she had shot Mr. Carrasquillo, the very thing the State had the burden of proving. See *Phung v. Waste Mgmt. Inc.*, 71 Ohio St. 3d 408, 410-11 (1994).

{¶18} Although a trial court does not have discretion to let a party present non-rebuttal evidence as rebuttal evidence, it does have discretion to let a party reopen its case-in-chief to introduce non-rebuttal evidence. R.C. 2945.10(D) (permitting trial courts to allow "evidence to be offered by either side out of . . . order."); *State v. Bayless*, 48 Ohio St. 2d 73, paragraph three of the syllabus (1976), vacated in part on other grounds, 438 U.S. 911 (1978) ("Any decision to vary the order of proceedings at trial in R.C. 2945.10 is within the sound discretion of the trial court . . . ."); *N.W. Graham & Co. v. W.H. Davis & Co.*, 4 Ohio St. 362, 381 (1854) (noting that, although evidence was not proper rebuttal evidence, the trial court could have, in the exercise of sound discretion, permitted the witnesses to testify). If the court allows one party to reopen its case, the opposing party has a right to reopen its case to present additional evidence in its favor. *Ketcham v. Miller*, 104 Ohio St. 372, 379 (1922) ("The case, having been reopened for the purpose of permitting the [plaintiffs] to introduce additional evidence, was reopened for the [defendant] for all purposes, and the refusal to permit such evidence was erroneous.").

{¶19} In *State v. Spirko*, 59 Ohio St. 3d 1 (1991), the Ohio Supreme Court wrote that "[t]he denial of surrebuttal testimony by a criminal defendant lies solely within the discretion of the trial court" and that "[a] court does not, *ipso facto*, abuse its discretion in denying a criminal defendant the opportunity to present surrebuttal testimony." *Id*. at 28. Those statements were dicta, however, in that the Supreme Court had already determined that the testimony that the defendant attempted to offer at trial was not proper surrebuttal evidence. *Id*. The Ohio Supreme Court's suggestion regarding a trial court's discretion as to surrebuttal evidence may be

appropriate in cases in which the State has introduced proper rebuttal testimony, testimony that is not testimony that should have been presented as part of the rebutting party's case-in-chief.

{¶20} Turning to the facts of this case, the trial court let Ms. Childers testify about a matter Ms. Carrasquillo had not raised in her case-in-chief. Although the testimony was not proper rebuttal evidence, the trial court characterized it as rebuttal evidence and the parties appear to have agreed to that characterization. Ms. Carrasquillo did not object to the testimony. Her failure to object, however, appears to have been based on the parties' mutual understanding that she would be able to present her own witnesses regarding Ms. Childers's testimony.

{¶21} Although the trial court characterized Ms. Childers's testimony as rebuttal testimony, since it was testimony tending to prove that Ms. Carrasquillo shot Mr. Carrasquillo, the court was actually allowing the State to reopen its case-in-chief. Ms. Carrasquillo, therefore, also had the right to reopen her case-in-chief. The proffer regarding Ms. Stewart establishes that her testimony would have challenged Ms. Childers's claim of having spoken to Ms. Carrasquillo about Ms. Carrasquillo's case. The proffer Ms. Carrasquillo made regarding Ms. Stottlemire establishes that Ms. Stottlemire's testimony would have impeached Ms. Childers's testimony that she did not want her case dismissed and that she had not given out advice about cutting a deal with prosecutors. Ms. Childers's offer to help Ms. Stottlemire cut a deal could have led the jury to infer that Ms. Childers's allegations were, themselves, manufactured.

{¶22} We also note that, having allowed Ms. Stewart to begin testifying, the trial court interrupted Ms. Carrasquillo's direct examination, concluding that "this witness would not be . . . a surrebuttal witness." The trial judge, in essence, told the jury that he had independently concluded that Ms. Stewart's testimony would not challenge Ms. Childers' testimony, even

though Ms. Stewart would have told the jury that she had spent all of her time with Ms. Carrasquillo and had never seen Ms. Carrasquillo talking to Ms. Childers.

{¶23} Under Rule 403(B) of the Ohio Rules of Evidence, relevant evidence may be excluded "if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence." Under Evidence Rule 103, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." Furthermore, under Rule 52(A) of the Ohio Rules of Criminal Procedure, "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."

{¶24} Under the peculiar facts of this case, we conclude that the trial court incorrectly refused to let Ms. Stewart and Ms. Stottlemire testify. By letting Ms. Childers testify about what Ms. Carrasquillo allegedly told her about the shooting, the court, essentially, let the State reopen its case. Having permitted the State to reopen its case-in-chief, the court was required to permit Ms. Carrasquillo to reopen her case-in-chief. *Ketcham v. Miller*, 104 Ohio St. 372, 379 (1922). Because the testimony of Ms. Stewart and Ms. Stottlemire would not have been cumulative and would have lent support to Ms. Carrasquillo's claim that she had not talked to anyone about her case and that Ms. Childers was only testifying against her in an attempt to avoid a prison term, we conclude the error affected her substantial rights.

{¶25} The trial court incorrectly refused to let Ms. Carrasquillo call Ms. Stewart and Ms. Stottlemire. Her first assignment of error is sustained. Because her other assignments of error concern issues that may not arise in the same context on retrial, this Court declines to address them. See App. R. 12(A)(1)(c).

CONCLUSION

{¶26} Because the State reopened its case-in-chief, the trial court should have let Ms. Carrasquillo reopen her case-in-chief to call two witnesses to challenge the new evidence. The judgment of the Lorain County Common Pleas Court is reversed, and this matter is remanded for a new trial.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.

CLAIR E. DICKINSON
FOR THE COURT

BELFANCE, J.
CONCURS

WHITMORE, J.
DISSENTS, SAYING:

{¶27} I respectfully dissent, as I would affirm Carrasquillo's conviction. Carrasquillo's first assignment of error reads as follows:

> "PAMELA CARRASQUILLO WAS DENIED DUE PROCESS OF LAW WHEN THE TRIAL COURT REFUSED TO ALLOW THE DEFENSE TO INTRODUCE THE TESTIMONY OF TWO SURREBUTTAL WITNESSES THAT WOULD HAVE IMPEACHED THE CREDIBILITY OF THE STATE'S REBUTTAL WITNESS, CHILDERS."

In the body of her brief, Carrasquillo argues that: (1) it was unfair that she was not permitted to present surrebuttal testimony; and (2) the absence of the surrebuttal testimony harmed her because the testimony would have shown the State's rebuttal witness, Childers, was lying. That is the extent of her argument.

{¶28} Carrasquillo does not argue that the trial court erred by construing Childers' testimony as rebuttal testimony. She does not argue that before admitting testimony such as Childers' a trial court must engage in a two-step analysis, first determining as a matter of law whether the type of rebuttal evidence the State seeks to introduce is proper rebuttal and then determining, in an exercise of its discretion, whether to admit proper rebuttal evidence. She does not argue that the State may not rebut testimony it elicits from a defendant on cross-examination. And she does not argue that the content of Childers' testimony was such that it properly belonged in the State's case-in-chief. Because this Court has repeatedly held that "[i]f an argument exists that can support [an] assignment of error, it is not this [C]ourt's duty to root it out," *Cardone v. Cardone* (May 6, 1998), 9th Dist. No. 18349, at *8, I would not make the foregoing arguments on her behalf.

{¶29} Carrasquillo did not object to Childers' testimony. Nor did she object to the court's refusal to allow her additional witness, Stewart, to finish testifying. In fact, the reason that the trial court did not believe Stewart's testimony was properly admissible does not even appear in the record because the court had an unrecorded sidebar conference on the issue. Carrasquillo did not protect the record below and has a very limited argument on appeal. Moreover, even disregarding all of the foregoing, it is unclear how the court's refusal to allow Carrasquillo's additional witnesses prejudiced her. See, e.g., *State v. McNeill* (1998), 83 Ohio St.3d 438, 447 (concluding that admission of improper rebuttal constituted harmless error). Carrasquillo argues that she was prejudiced because the jury was not made aware that Childers' motivation to testify was that she wanted to avoid prison and expected to receive a reduced sentence. Yet, Childers admitted that she had a considerable list of prior convictions, hoped to receive a reduced sentence as a result of her testimony, and wished she could be released sooner so that she could be with her children. The jury was aware that Childers wanted a reduction in sentence in exchange for her testimony. Therefore, I would conclude that Carrasquillo's argument that she was prejudiced lacks merit.

{¶30} Because I would overrule Carrasquillo's first assignment of error, I also would address and overrule her remaining assignments of error. See *State v. Carrasquillo*, 9th Dist. No. 09CA009639, 2010-Ohio-1373. As such, I would affirm the judgment of the trial court.

APPEARANCES:

MARK B. MAREIN, and STEVEN L. BRADLEY, attorneys at law, for appellant.

DENNIS WILL, prosecuting attorney, and BILLIE JO BELCHER, assistant prosecuting attorney, for appellee.