UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0181

September Term, 2014

BRADFORD PIERSON LAMBERT

v.

STATE OF MARYLAND

Berger,
Nazarian,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: June 29, 2015

*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.

Following a trial in the Circuit Court for Talbot County, a jury convicted Appellant Bradford Pierson Lambert of distribution of heroin.[1] The circuit court imposed a sentence of 40 years imprisonment without the possibility of parole,[2] and Appellant filed a timely notice of appeal. He presents the following questions for our consideration:

I. Did the Motions Court err in denying the motion to suppress Mr. Lambert's statement?

II. Did the Trial Court err in precluding cross-examination, thereby unduly restricting Mr. Lambert's constitutional right/s of confrontation?

III. Did the Trial Court commit plain error in instructing the jury as to reasonable doubt?

For the reasons that follow, we affirm the judgments of the circuit court.

BACKGROUND

A. Motion to Suppress Hearing

On February 7, 2014, the Circuit Court for Talbot County ("suppression court") held a hearing on Appellant's motion to suppress, which was filed on January 10, 2014. Appellant sought to suppress an inculpatory statement that he made to Detective Shane McKinney of the Easton Police Department (the officer who arrested Appellant) while in

[1] The court instructed the jury not to consider the lesser-included counts of possession with intent to distribute heroin and possession of heroin if it convicted Appellant of distribution of heroin.

[2] Because Appellant had four prior convictions for controlled dangerous substance crimes, he was subject to the mandatory minimum sentencing as a subsequent offender pursuant to Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article § 5-608(d).

his custody and without the benefit of *Miranda*[3] warnings. Detective McKinney was the State's only witness and testified as follows.

At approximately 11:00 a.m. on August 31, 2013, Detective McKinney observed Appellant driving his red 2006 Honda Civic on Dover Street in Easton, Maryland.[4] Knowing that there was an outstanding warrant for Appellant's arrest,[5] Detective McKinney followed Appellant's vehicle, initiated a traffic stop, and ultimately arrested Appellant pursuant to that warrant. When Appellant asked about the nature of the outstanding charge, Detective McKinney advised that it was for distribution of controlled dangerous substances. After placing Appellant in his police car, Detective McKinney searched Appellant's vehicle incident to the arrest and recovered $850 in U.S. currency from the center console. The currency was wrapped in eight bundles of $100 each, along with a single $50 bill, which, based on Detective McKinney's experience, was indicative of drug sales. Detective McKinney seized the currency for civil forfeiture and the vehicle, which was thereafter towed to the Easton Police Department, because the indictment charged that Appellant had sold drugs in the vehicle. Detective McKinney then took Appellant to police headquarters, where he received a copy of his indictment.

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[4] Detective McKinney was familiar with Appellant and his vehicle.

[5] The suppression court took judicial notice of the fact that a bench warrant was issued on August 29, 2013. The prosecutor proffered that the underlying distribution offense was alleged to have occurred on or about August 14, 2013.

Detective McKinney testified that during the five-minute walking transfer from police headquarters across the street to the Commissioner's office, the following occurred:

> [W]hile transporting him over to the detection center he asked where his money was. And I told him I was seizing his money. He then asked what was I doing with his vehicle. I told him I was seizing his vehicle and I advised him, I said if you're going to continue to sell drugs we're going to continue to keep seizing it. With that he said, I have to do what I have to do.

On cross-examination, he testified about the conversation again:

> [F]rom the walk over to the jail, he happened to ask you know, where's my money? And when I told him he said, where's my car? And I told him we were seizing it. And I followed that up by saying, if you're going to keep selling drugs out of your car we're going to keep seizing it. And his response was, I have to do what I have to do.

Detective McKinney described Appellant's questioning as calm and respectful. At the time of the statement, Appellant had not been read his *Miranda* rights, and the record does not reflect that on his own accord he asked to be represented by counsel.[6] Detective McKinney denied that he intended to interrogate Appellant during the transfer. Instead, he testified that he "just made a statement to be clear to him if he wants to keep selling narcotics out of his vehicle we were going to keep seizing it." He maintained that Appellant initiated the conversation.

Appellant argued to the court that Detective McKinney reasonably should have known that his statement—"if you're going to continue selling drugs we're going to

[6] When asked whether Appellant asked to speak to an attorney, Detective McKinney responded, "I don't recall, but I don't believe he did."

continue to keep seizing it"—was likely to elicit an incriminating response from Appellant. If the question did not comprise an actual interrogation, he continued, it was the functional equivalent thereof. Because the interrogation was undertaken without *Miranda* warnings, Appellant urged that his inculpatory statement, "I have to do what I have to do," should be suppressed. The State emphasized that Appellant initiated the conversation with Detective McKinney regarding the whereabouts of his money and vehicle. Further, the State argued, Detective McKinney's answer to the question was not intended to invite an incriminating response from Appellant and, therefore, Appellant's response should not be suppressed.

The suppression court denied the motion to suppress, and explained its ruling as follows:

> Well there's several, issues rolled in here. The first one is the Motion to Suppress the alleged incriminatory statement. . . . I gotta do what I gotta do. Frankly, it's a pretty meaningless statement to me. It could mean so many things to so many people. But let's take it that it's incriminatory and that . . . would be why the State is introducing it. The first question is why didn't the officer give him Miranda rights? I mean, Detective McKinney wasn't born yesterday and I don't think this is his first rodeo. The reason he didn't give him Miranda is cause he didn't have any intention of interrogating him. He didn't need anything from him. He was walking him across the street, I mean he was in the processing stage. The guy had already been charged by the grand jury. And if he wanted a statement out of him I think I'll give Detective McKinney credit that he would take him into an interrogation room, set him down, and have a piece of paper in case the guy wants to make a statement. Say well I got a piece of paper. In the middle of a street? When he's got to watch out for traffic and everything is no place, I mean if that's the way he conducts his interrogation he ought to be reevaluated or retrained or something, frankly. It just doesn't make any sense. So obviously he says, that wasn't my intent. But I'm saying, that's subjective of course and an officer can always say that. But under these circumstances I believe him because he didn't need a statement from him. He could have cared less whether he said anything. In fact, apparently he

> didn't even write this down or he did it later in the form of a report. He's walking him across the street in a few minutes. If you're going to interrogate somebody you better allow a little bit of time so you can work them or whatever you're going to do with them. So Miranda simply wasn't required here because for one thing, he didn't start any conversation as far [as] the evidence is concerned[. T]he Defendant started the conversation by asking, what have you done with my money and my car? Well, was the officer supposed to remain mute? I mean, what's the big secret? He's going to be notified anyway sooner or later that they're going to forfeit it or that it's, you know, they're going to use it in evidence or whatever. And secondly or lastly, I believe the law is pretty clear that it is not a threat by a person to say that they're going [to] do what they have a lawful right to do. And if a person is arrested for speeding and the officer says, if you keep speeding out here I'm going to keep arresting you or if they get caught by radar, if you come through here again you're going to get another ticket because the radar is working. I don't see where that's intimidating. It's a statement of fact. This is my job. I arrest people when they violate the law. So I don't know how he could consider that incriminatory. It was a, a, an offhand conversation. The officer made what I consider to be a declaration not a question. And after he answered the question that the Defendant asked him the Defendant chose to make a response which means whatever you want it to mean, I guess. So for all of those reasons whatever statement he made, I gotta do what I gotta do. The Motion to Suppress that is denied. **(H. 47-9).**

B. Trial

Although Appellant does not challenge the sufficiency of the evidence to support his conviction, we summarize the facts presented at Appellant's jury trial held on February 27, 2014, to provide context for our examination of Appellant's contentions of error. *See Goldstein v. State*, 220 Md. 39, 42, (1959) (noting that "[t]o understand the contentions made, it is necessary to relate some of the background of the case").

In addition to Detective McKinney's testimony, which was largely consistent with his testimony at the suppression hearing,[7] the trial evidence established as follows.

Detective Robert Schuerholz of the Easton Police Department narcotics unit testified that Ms. Amber Wooters, who was recently arrested and charged with possession of drug paraphernalia,[8] agreed to become a confidential informant ("CI") for the Police Department in lieu of prosecution of the paraphernalia charge and to dismiss charges against her then-current boyfriend, Daniel Giles. She provided the names of several

---

[7] We note that Appellant refers to Detective McKinney's trial testimony several times in the portion of his brief addressing the motion to suppress, arguing that the trial testimony shows McKinney intended to interrogate Appellant. During Detective McKinney's testimony at trial, he stated at one point that he asked for a response from Appellant:

> [DETECTIVE MCKINNEY]: . . . . So as I was finished with him I walking across the street to the detection center and while doing so he asked me if was taking him money and I said, I was. And he said, are you taking my car, too? And I said, I am. And then I made a statement to him, the statement was, if you keep selling drugs out of your car we're going to keep seizing it.
>
> [THE COURT]: I'm sorry. If he keeps selling drugs out of his car you're going to do what?
>
> [DETECTIVE MCKINNEY]: We're going to keep seizing his car. And with that statement I asked for a response. He said, I have to do what I have to do.

Defense counsel did not object or cross-examine the detective over this testimony. Regardless, as we state *infra*, we only review the record of the suppression hearing when reviewing a circuit court's ruling on a motion to suppress. *Brown v. State*, 397 Md. 89, 98 (2007).

[8] Ms. Wooters admitted to having been a heroin user in August 2013.

people she knew to be involved in the distribution of heroin in Talbot County, including Appellant.

The police arranged for Ms. Wooters to engage in a "controlled buy" of heroin from Appellant on August 14, 2013. On that day, after Detective Schuerholz searched her person for contraband, he gave her $80 to complete the purchase.[9] Ms. Wooters then called Appellant, saying that she needed "some pills of dope." She then proceeded to a railroad station and waited on a bench for Appellant to arrive. The entire transaction occurred within the surveillance of the police.

Several minutes later, Detective Schuerholz observed a red Honda Civic, which he had seen Appellant drive on numerous occasions, arrive and park near Ms. Wooters. Detective Schuerholz observed Appellant as the driver of the vehicle and its sole occupant. He watched Ms. Wooters enter the vehicle, remain inside for less than a minute, exit, and walk back towards Detective Schuerholz's location as Appellant drove off. Ms. Wooters turned over to Schuerholz a single gel capsule, which was later confirmed to contain less than .1 gram of heroin. Additional relevant facts will be set forth as necessary.

[9] Although Wooters was instructed to buy only one capsule of heroin at an approximate street value of $20, she owed Appellant a debt she had to satisfy before he would have sold her drugs.

DISCUSSION

I.

Appellant first contends that the circuit court erred in denying his motion to suppress the inculpatory statement that he made to Detective McKinney while in custody. The statement, he argues, was the result of police interrogation or its functional equivalent and should not have been elicited in the absence of *Miranda* warnings. The State counters that it was Appellant who initiated the conversation with Detective McKinney and that the detective's "off-hand declaration of fact" was not the functional equivalent of interrogation. The State maintains that Detective McKinney should not have reasonably anticipated that Appellant would make an inculpatory statement in response.

Our review of a circuit court's denial of a motion to suppress evidence is ordinarily limited to information contained in the record of the suppression hearing, and we view the evidence in the light most favorable to the prevailing party, here being the State. *Brown v. State*, 397 Md. 89, 98 (2007) (citing *Myers v. State*, 395 Md. 261, 274 (2006); *Ferris v. State*, 355 Md. 356, 368 (1999)). In considering the evidence presented at the suppression hearing, we defer to the suppression court's fact-finding unless it is shown that those findings were clearly erroneous. *Gonzalez v. State*, 429 Md. 632, 647 (2012) (citing *Lee v. State*, 418 Md. 136, 148 (2011)). "'We, however, make our own independent constitutional appraisal, by reviewing the relevant law and applying it to the facts and circumstances of this case.'" *Id.* (quoting *Lee v. State*, 418 Md. at 148-49).

Law enforcement officials are required to advise an individual who is in their custody of his or her *Miranda* rights[10] before interrogating that individual. *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966). Because *Miranda* warnings serve "to insure that the right against compulsory self-incrimination [is] protected[,]" *Michigan v. Tucker*, 417 U.S. 433, 444 (1974), the failure to provide *Miranda* warnings before questioning a suspect renders any statement given thereafter inadmissible for prosecutorial purposes. *Miranda*, 384 U.S. at 479. The obligation to deliver these warnings only arises, however, when a suspect is subjected to "custodial interrogation." *Hughes v. State*, 346 Md. 80, 87 (1997) (citing *Vines v. State*, 285 Md. 369, 374 (1979)). "Custodial interrogation" means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. In the instant case, the parties do not dispute that Appellant was in custody at the time he made the statement to Detective McKinney; instead, they dispute whether Detective McKinney's comment amounted to interrogation of Appellant.

In *Rhode Island v. Innis*, the Supreme Court expounded upon what constitutes "interrogation" for *Miranda* purposes:

> [T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should

---

[10] "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444.

> know are reasonably likely to elicit an incriminating response from the suspect.

446 U.S. 291, 300-01 (1980) (footnotes omitted). Thus, interrogation can include more than explicit or direct questioning of a suspect. In fact, there is no requirement that a single question be asked; the "critical inquiry is 'whether the police officer, based on the totality of the circumstances, knew or should have known that [words spoken or actions taken] were reasonably likely to elicit an incriminating response.'" *Smith v. State*, 414 Md. 357, 366 (2010) (alterations in original) (quoting *Prioleau v. State*, 411 Md. 629, 643 (2009)) (concluding that an officer's statement during execution of a search warrant that everyone present would be arrested, coupled with his presentment of the drugs found, was not the "functional equivalent" of interrogation). "While the *Innis* inquiry focuses primarily upon the perception of the suspect rather than the intent of the police, the [Supreme] Court noted that the intent of the police is not irrelevant 'for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response.'" *Drury v. State*, 368 Md. 331, 336-37 (2002) (quoting *Innis*, 446 U.S. at 302 n.7).

Casual conversation or statements about evidence that are not designed to elicit an incriminating response are not considered interrogation. *United States v. Martin*, 238 F.Supp.2d 714, 719 (D. Md. 2003) (citing *United States v. Payne*, 954 F.2d 199 (4th Cir.), *cert. denied*, 503 U.S. 988 (1992)); *Drury,* 368 Md. at 335-36. Similarly, *Miranda* does not require suppression of a suspect's spontaneous or volunteered statements that are not the product of interrogation or its functional equivalent. *Martin*, 238 F.Supp.2d at

719; *Dawson v. State*, 40 Md. App. 640, 656 (1978). For example, an incriminating statement made to a police officer in response to a casual question not reasonably likely to elicit an incriminating response, such as "Have you ever been arrested before?" is not protected. *Rodriguez v. State,* 191 Md. App. 196, 216-17, *cert, denied*, 415 Md. 42 (2010)

In *Rodriguez*, as in the instant case, the incriminating statement was made while the officer was transporting the suspect to the police station and before the suspect was Mirandized. More specifically, the officer who was transporting the suspect (and who was not the arresting officer) testified at the suppression hearing that Rodriguez was upset, cursing, and acting strangely in the police cruiser. *Id.* at 208-09. The officer described the event leading to the inculpatory statement:

> One of the things he said to me was I can't do this anymore, I have to stop this. [Appellant] then slumped down into the seat and his eyes were extremely red, and I was concerned that something was wrong with him. So I asked him, again, are you okay?
>
> [Appellant] replied, yes. I asked [appellant]—what [ ] lead to this was that he was upset. He said that he didn't do anything, that he was going to go to jail. And I asked [appellant], I said, have you been arrested before because, you know, that's something to consider if you haven't been arrested before. I don't know why you are so upset.
>
> He had made the comment, yes, for taking a car. I can't keep doing this. I'm already in trouble. I'm going to jail. I did it.

Id. (emphasis omitted). In examining the issue on appeal, we noted that "express questioning" under *Innis* refers to the commonly understood concept of interrogation,

namely, a law enforcement officer asking a question of a suspect in custody about the suspect's involvement in a crime or where, *under the totality of the circumstances*, the officer knew or should have known that the question was reasonably likely to elicit an incriminating response. *Id*. at 219 (citations omitted). After considering the totality of the circumstances surrounding the transport of the suspect in *Rodriguez*, we concluded that the officer did not have reason to know "that her question to appellant, 'have you ever been arrested before?,' was 'reasonably likely to elicit an incriminating response' from him." *Id*. at 222 (citing *Innis,* 446 U.S. at 301). We found that the appellant's response, "'I'm already in trouble. I'm going to jail. I did it,'" was a "classic blurt" not protected by *Miranda*. *Id*. (internal quotations omitted).

Here, the evidence reflected that Detective McKinney arrested Appellant and then transported him to the police department for processing. Thereafter, Detective McKinney walked Appellant across the street to the detention center to meet with a Commissioner. At no time was Appellant read his *Miranda* rights. During this walk, Appellant initiated a conversation with Detective McKinney by calmly asking what had happened to his money and his car. McKinney advised they had been seized and said "if you're going to continue selling drugs we're going to continue to keep seizing it[.]" Appellant replied, "I have to do what I have to do," a statement that was arguably, but not obviously, inculpatory.

Based on the foregoing, the circuit court found that the statement was made after Appellant, not Detective McKinney, initiated the conversation during a less than five minute walk across the street. Detective McKinney had no recording device or paper to

detail any statement Appellant might make. Moreover, the court recognized that Detective McKinney had no investigative need for a statement given that Appellant had already been indicted and processed. Detective McKinney denied that he had intended to elicit any type of statement from Appellant, and although the court recognized the suspect nature of such a denial, it found his testimony to be credible based on the circumstances surrounding the incident.

Giving due deference to the suppression court's factual findings and viewing the facts in a light most favorable to the State as the prevailing party, we cannot conclude that the court erred in denying Appellant's motion to suppress his statement to Detective McKinney. The offhand remark made to Appellant *in response* to his question was not a statement that Detective McKinney should have known was reasonably likely to elicit an incriminating response, and a suspect similarly positioned would not feel coerced to incriminate himself in response to the statement. The statement must be considered in context, under the totality of circumstances, *Rodriguez* 191 Md. App. at 219, and here, the statement occurred during a brief walk across the street following processing in response to questioning initiated by Appellant. *Miranda* intended to safeguard suspects in custody against coercive police practices, and we are persuaded, as was the circuit court, that such a spontaneous response was not a tactical or persuasive ploy used to obtain a statement based on these facts. *See Arizona v. Mauro*, 481 U.S. 520, 529-30 (1987) ("In deciding whether particular police conduct is interrogation, we must remember the purpose behind our decision in *Miranda* and *Edwards* [*v. Arizona,* 451 U.S. 477 (1981)]: preventing government officials from using the coercive nature of

confinement to extract confessions that would not be given in an unrestrained environment.”).

The cases upon which Appellant relies are distinguishable. In *People v. Burson*, 90 Ill. App. 3d 206, 208 (1980), the officer initiated a traffic stop after seeing defendant, with whom he was familiar and knew had a revoked license, driving a vehicle. When the defendant entered the officer’s squad car, the officer and the defendant engaged in conversation about where he was going and why he was driving. *Id.* The officer then said, “Now, [defendant], you know better than to drive that car.” *Id.* The defendant responded, “Yes, I know but can’t you give me a break?” *Id.* The trial court denied the motion to suppress this statement in violation of *Miranda*, and the Appellate Court of Illinois reversed. The court observed that “[t]he words posited the guilt of the defendant as fact while attempting to elicit comments directed toward why the defendant committed the act”; that the officer knew the defendant on a first-name basis; that they were alone in the squad car; and that the tactic constituted a psychological ploy. *Id.* at 210. By contrast, Detective McKinney did not make the disputed statement amidst *affirmative questioning* about the crime in a secluded location conducive to interviewing. Instead, Detective McKinney and Appellant were taking a five minute walk across the street, open to the public, when Appellant began asking questions and Detective McKinney responded with a single remark.

Appellant’s reliance on *Blake v. State,* 381 Md. 218 (2004), and *Drury v. State,* 368 Md. 331 (2002), are also unavailing. In *Blake*, following the defendant’s invocation of his right to counsel, the officer went to the defendant’s cell and confronted him with a

charging document listing the severe crime of first-degree murder and identifying the penalty as "DEATH[,]" even though the defendant was ineligible for the death penalty as a minor. 381 Md. at 223-24. The officer then stated, "I bet you want to talk now, huh!" in a confrontational tone. *Id.* at 224. About a half hour later, the defendant asked to speak with the officer and made incriminating statements. *Id.* at 224-25. The Court of Appeals held that the defendant's statements should have been suppressed, because, based on the circumstances, "any reasonable officer had to know that his comment was reasonably likely to elicit an incriminating response[,]" given that the charging document listed a false penalty of death that was accompanied by a statement that served no other purpose than to encourage the defendant to speak. *Id.* at 235.

In *Drury*, the officer confronted the defendant in an interview room at the police department with evidentiary items confiscated from the scene of the crime and advised the defendant that the evidence would be sent away for fingerprint examination, all without delivering the defendant's *Miranda* rights. 368 Md. at 333-34. The Court of Appeals held that the officer's actions were the equivalent of express interrogation, because the defendant was at the police station for questioning and that "[t]he only plausible explanation for the officer's conduct is that he expected to elicit a statement from petitioner." *Id.* at 337.

Unlike these cases, Appellant was not confined in a room, either due to arrest or for the purpose of questioning. Detective McKinney did not show Appellant a fear-provoking charging document or evidence of the crime, accompanied with a comment that the evidence would soon be tested for fingerprints to establish guilt. In fact,

Detective McKinney did not even initiate the conversation with Appellant at all. The circumstances of this case—a brief walk across the street—contrast the factual settings of these cases. In sum, Detective McKinney's offhand remark made in response to Appellant's question was not one that the officer reasonably should have known would elicit an incriminating response and therefore was not the functional equivalent of interrogation for purposes of *Miranda*. The suppression court did not err in denying the motion to suppress.

II.

Appellant next challenges the circuit court's limitation of his cross-examination of two witnesses. First, he contends that the court erred in precluding him from cross-examining Detective Schuerholz about the amount of heroin recovered from the car in which Amber Wooters, the CI, was a passenger at the time of her and her companion's arrest. Although Ms. Wooters was not charged with possession of the heroin, Appellant argues, her "joint possession" could have led to charges and was therefore relevant and admissible as impeachment of her testimony. Second, Appellant argues that the court erred in precluding him from cross-examining Ms. Wooters regarding a charge of assault against her by her ex-boyfriend, Daniel Giles, after she stabbed him in the arm. The testimony regarding Ms. Wooters's behavior toward Mr. Giles was relevant, Appellant asserts, to allow the jury to consider whether her testimony was induced, at least in part, by a desire to aid in the disposition of charges against her ex-boyfriend and/or to exact revenge upon Appellant, an alleged former lover. The State counters that the excluded testimony was either irrelevant, not probative of Ms. Wooters' truthfulness, or both.

The Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant the right to confront the witnesses against him. *Merzbacher v. State,* 346 Md. 391, 411-12 (1997) (citations omitted). In exercising that right, a defendant may cross-examine a witness in order to impeach his or her credibility or to expose a motive to testify falsely. *Pantazes v. State,* 376 Md. 661, 680 (2003) (citations omitted). One exception to this rule is that cross-examination is not permitted on matters that are irrelevant or collateral to the case being tried. *Harris v. State*, 237 Md. 299, 302 (1965) (citations omitted).

Maryland Rule 5-608(b), governing impeachment by prior conduct *not resulting in convictions*, provides:

> The court may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction but that the court finds probative of a character trait of untruthfulness. Upon objection, however, the court may permit the inquiry only if the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred. The conduct may not be proved by extrinsic evidence.

In explaining the common law rules that were codified by this Rule, the Court of Appeals has stated that, in general, "mere accusations of crime or misconduct may not be used to impeach[,]" because accusations are still "clothed with the presumption of innocence" and are, even if an arrest or indictment resulted, "based on hearsay–an out-of-court assertion of the witness' guilt by someone the witness has no opportunity to question." *State v. Cox*, 298 Md. 173, 179, 181 (1983) (citations omitted). The Court emphasized that "when impeachment is the aim, the relevant inquiry is not whether the witness has

been accused of misconduct by some other person, but whether the witness actually committed the prior bad act. A hearsay accusation of guilt has little logical relevance to the witness' credibility." *Id.* at 181 (citations omitted).

Thus, under Rule 5-608(b), a witness may be cross-examined about prior bad acts that are relevant to an assessment of his or her credibility, but "if the bad acts are not conclusively demonstrated by a conviction, the trial judge must exercise greater care in determining the proper scope of cross-examination." *Robinson v. State*, 298 Md. 193, 200 (1983). Such an inquiry is allowed only "when the trial judge is satisfied that there is a reasonable basis for the question, that the primary purpose of the inquiry is not to harass or embarrass the witness, and that there is little likelihood of obscuring the issue on trial." *Cox*, 298 Md. at 179. The circuit court "must be alert to the possibility of prejudice outweighing the probative value of the inquiry." *Fields v. State*, 432 Md. 650, 674 (2013) (citing *Robinson*, 298 Md. at 200).

"The most salient legal characteristic of Rule 5–608(b) is that the permissibility of the use of prior bad conduct is a decision entrusted to the wide discretion of the trial judge." *Molter v. State,* 201 Md. App. 155, 173 (2011). Moreover, courts generally have "wide latitude to establish reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant." *Pantazes,* 376 Md. at 680 (citations omitted); *see also* Md. Rule 5-402 ("Evidence that is not relevant is not admissible."); Md. Rule 5-403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues,

or misleading the jury, or by considerations of . . . waste of time. . . ."); Md. Rule 5–611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence. . . . .").

First, as to Detective Schuerholz, Appellant cross-examined him about the circumstances of the traffic stop of the vehicle in which Ms. Wooters was a passenger, but when he attempted to elicit the number of heroin capsules (34) that were found in the vehicle, the State objected, arguing that Ms. Wooters was never charged with heroin possession. Appellant argued that "even though she was only charged with the paraphernalia she potentially could have been charged with possession of a large quantity so her motive in trying to get rid of these criminal charges." The circuit court sustained the State's objection, stating that Appellant was limited to asking about the paraphernalia charge and that it was not "fair to suggest that she could have been preferably charged with anything other than the paraphernalia[,] [b]ecause this deal didn't start until after those charges are even placed against her as I understand it."

We conclude that the circuit court did not abuse its discretion in precluding questioning as to the quantity of heroin. Ms. Wooters was only charged with paraphernalia possession; she was never charged with possession of heroin. Therefore, pursuant to Rule 5-608, before permitting cross-examination, the circuit court was required to satisfy itself that there was a reasonable basis for the questions, that the primary purpose of the inquiries was not to harass or embarrass the witness, and that there was little likelihood of obscuring the issue on trial. *Cox*, 298 Md. at 179.

Appellant provided no factual basis that Ms. Wooters could have been charged with joint possession of the heroin found in the car in which she was a passenger. There are any number of scenarios in which she would have been blameless. For example, the drugs may have been recovered from a secret location on her companion's person or from a locked container in the car, both which may have negated any knowledge of the drugs in the car required to impute possession to Ms. Wooters. The admission of such evidence also could have obscured the issue of whether Appellant distributed heroin. Moreover, even had Ms. Wooters been charged and convicted of possessing heroin, there is nothing to suggest that she would not have decided to be a CI in any event, and that alternative impetus for working with the police did not speak to her truthfulness as a CI. Further, any doubt of her truthfulness about the transaction with Appellant was likely dispelled by Detective Schuerholz's testimony that he personally observed her actions during the controlled buy from Appellant. Thus, the intended substance of the cross-examination was irrelevant and not probative of Ms. Wooters's character as a truthful person.

Second, as to Ms. Wooters, Appellant attempted to cross-examine her about whether her boyfriend, Daniel Giles, had recently accused her of stabbing him in the arm, and the State objected, arguing that she had only been charged, not convicted, of the crime and that it was irrelevant. Appellant argued that the incident was relevant to show that Ms. Wooters was exacting revenge on Appellant as an ex-lover by acting as a CI vis-à-vis showing that Ms. Wooters exacted revenge on another ex-boyfriend of hers. The court sustained the State's objection, ruling that Appellant could ask Ms. Wooters about "her motive in agreeing to work with the police to help her boyfriend two years ago" but

that issue has "nothing to do with an alleged assault by her on the same boyfriend which happened apparently very recently" and was "far fetched."

Again we conclude that the circuit court did not abuse its discretion in limiting the cross-examination about the charged assault. At the time of trial, Ms. Wooters had not been convicted of any crime relating to her actions against her boyfriend. Thus, as before, pursuant to Rule 5-608, before permitting cross-examination, the court was required to satisfy itself that there was a reasonable basis for the questions, that the primary purpose of the inquiries was not to harass or embarrass the witness, and that there was little likelihood of obscuring the issue on trial. *Cox*, 298 Md. at 180. Here, Appellant had no reasonable basis upon which to suggest that the assault resulted from any desire to seek revenge upon Mr. Giles, an ex-boyfriend, or details surrounding the recent incident. More importantly, Appellant failed to demonstrate how the alleged assault it would affect her truthfulness as a CI.[11] In sum, the court acted well within its discretion in declining to permit the cross-examination questions of Detective Schuerholz and Ms. Wooters on these matters.

III.

Finally, Appellant argues that the circuit court twice erred in instructing the jury about the State's burden of proving his crimes beyond a reasonable doubt. Conceding that he failed to preserve this issue, Appellant urges us to invoke our discretion to find

[11] Moreover, Ms. Wooters testified that Appellant was not an "ex-boyfriend" but that she had sex with Appellant in exchange for drugs and that she did not characterize the relationship as romantic, although did live with him at one point.

plain error in the jury instructions. The State requests that we decline plain-error review because the Court of Appeals has rejected the claim Appellant presents. Moreover, the State asserts, the court provided the jury with a written copy of its instructions containing the language Appellant complains was omitted from the oral instructions.

Following jury selection and in its preliminary instructions, the circuit court explained the presumption of innocence and burden of proof:

> Keep in mind in all criminal cases in our system the Defendant is presumed to be innocent of the charges. This presumption remains with the Defendant throughout every stage of the trial. And it is not overcome unless you are convinced beyond a reasonable doubt that the Defendant is guilty. So the State has the burden of proof in criminal cases. And this burden of proof to show the guilt of the Defendant beyond a reasonable doubt remains with thee [sic] State throughout the trial. The Defendant is not required to prove his innocence. However, the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty. Nor is the State required to negate every conceivable circumstance of innocence.
>
> * * *
>
> A reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent you would be willing to act upon such belief in an important matter in your own business or personal affairs. However if you're not convinced of the Defendant's guilt to that extent then reasonable doubt exists and the Defendant must be found not guilty. In making your decision you must consider the evidence presented here in the courtroom. That would be number one, any testimony from the witness stand here. And number two, any physical evidence or exhibits admitted into evidence. And lastly, sometimes the lawyers will enter into agreements or stipulations as to what evidence would show. In evaluating the evidence, you should consider it in light of your own experience. You may draw any reasonable inferences or conclusions from the evidence that you believe to be justified by commonsense and your own experience.

At the close of all the evidence, the court delivered the reasonable doubt instruction:

> The Defendant is presumed to be innocent of the charges. This presumption remains throughout every stage of the trial and is not overcome unless you are convinced beyond a reasonable doubt that the Defendant is guilty. The State has the burden of proving the guilt of the Defendant beyond a reasonable doubt. This burden remains on the State throughout the trial. The Defendant is not required to prove his innocence. However, the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty. Nor is the State required to negate every conceivable circumstance of innocence. A reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent you would be willing to act upon such belief in an important matter in your own business or personal affairs. However, if you are not satisfied of the Defendant's guilt to that extent, then reasonable doubt exists and the Defendant must be found not guilty.

Appellant now challenges these instructions on the ground that they did not clarify that the jurors must be willing to act on an important matter in their own affairs *without reservation*, asserting that "incorrectly set[s] forth the State's burden and was structural in nature" and should therefore be reviewed for plain error. We disagree.

Maryland Rule 4-325(e), governing jury instructions, provides:

> (e) **Objection**. No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

Thus, Rule 4-325(e) makes clear that the absence of an objection to the giving or the failure to give a jury instruction at trial ordinarily constitutes a waiver of a claim that the instructions were erroneous. *Morris v. State*, 153 Md. App. 480, 509 (2003) (quoting *Walker v. State*, 343 Md. 629, 645 (1996)). The Rule does, of course, grant us "'plenary

discretion to notice plain error material to the rights of a defendant, even if the matter was not raised in the trial court.'" *Brown v. State*, 169 Md. App. 442, 457 (2006) (quoting *Danna v. State*, 91 Md. App. 443, 450 (1992)). "In the context of erroneous jury instructions, the plain error doctrine has been applied sparingly." *Conyers v. State*, 354 Md. 132, 171 (1999). The plain error hurdle, "'high in all events, nowhere looms larger than in the context of alleged instructional errors.'" *Martin v. State*, 165 Md. App. 189, 198 (2005) (quoting *United States v. Sabetta*, 373 F.3d 75, 80 (1st Cir. 2004), *cert. denied* 543 U.S. 968 (2004)). Indeed, with regard to reviewing alleged error in jury instructions, our appellate courts have been "adhering steadfastly to the preservation requirement." *Morris*, 153 Md. App. at 508.

Our review of the record reveals no error of sufficient magnitude in the instructions as given to persuade us to deviate from the preservation requirement and undertake the extraordinary step of plain error review. We first note that the court's initial explanation regarding the reasonable doubt standard was not capable of creating instructional error. As the Court of Appeals has pointed out, "[b]ecause preliminary remarks ordinarily do not perform the function of jury instructions, such remarks cannot be considered to be jury instructions within the meaning of" the predecessor rules (Rule 757(b) and 757(d)) to Md. Rule 4-325. *Lansdowne v. State*, 287 Md. 232, 246 (1980) (explaining that preliminary instructions are unlikely to carry much weight, given the dearth of information delivered to jurors between preliminary instructions and deliberation). The plain language of Md. Rule 4-325(a) also supports that determination: "[t]he court shall give instructions to the jury *at the conclusion of all the evidence* and

before closing arguments." (Emphasis added). Therefore, we look only to the instruction as given to the jury at the close of the evidence to determine if plain error exists.

In *Ruffin v. State*, 394 Md. 355 (2006), the Court of Appeals changed Maryland common law principles regarding toleration of deviations from the pattern jury instruction on the reasonable doubt standard.[12] The *Ruffin* Court reiterated that the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights guarantee that an accused be convicted only upon proof beyond a reasonable doubt. *Id*. at 363 (citing *In Re Winship*, 397 U.S. 358, 361-364 (1970)). Therefore, the Court explained, a jury instruction on that standard is "an essential component in every criminal proceeding." *Id.* (citations omitted). Thus,

[12] Maryland Criminal Pattern Jury Instruction 2:02 (2013 Supp.) provides:

> The defendant is presumed to be innocent of the charges. This presumption remains throughout every stage of the trial and is not overcome unless you are convinced beyond a reasonable doubt that the defendant is guilty. The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. This means that the State has the burden of proving, beyond a reasonable doubt, each and every element of the crime [crimes] charged. The elements of a crime are the component parts of the crime about which I will instruct you shortly. This burden remains on the State throughout the trial. The defendant is not required to prove [his] [her] innocence. However, the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty. Nor is the State required to negate every conceivable circumstance of innocence. A reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs. If you are not satisfied of the defendant's guilt to that extent for each and every element of a [the] crime charged, then reasonable doubt exists and the defendant must be found not guilty of that [the] crime.

to minimize errors in the reasonable doubt instruction, the *Ruffin* Court held that circuit courts must "instruct the jury on the presumption of innocence and the reasonable doubt standard of proof which closely adheres to MPJI-CR 2:02. Deviations in substance will not be tolerated." *Id*. at 373. The prohibition against deviations in substance from the pattern jury instruction does not, however, require a trial court to provide a verbatim recitation of MPJI-CR 2:02—it need only "closely adhere" to the language used therein. *Turner v. State*, 181 Md. App. 477, 485 (2008).

Here, the circuit court's reasonable doubt instruction was virtually identical to the pattern instruction, with the exception of the court's omission of the phrase "without reservation" in the portion of the pattern jury instruction that states: "Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief *without reservation* in an important matter in your own business or personal affairs." (Emphasis added).

In *Himple v. State*, 101 Md. App. 579, 583 (1994), although we advised that it is the language "without reservation" that "tends to impart to the jury the degree of certainty that elevates the comparison in the direction of the reasonable doubt standard," we pointed out that the failure of a trial court to include the "without reservation" language, *by itself*, would not necessarily constitute plain error. The Court of Appeals held similarly in *Merzbacher v. State*, 346 Md. 391, 403 (1997), when considering the court's failure to include the "without reservation" language as well as the concept that the jurors' decision to act "in an important matter in [their] own business or personal affairs." Considering these omissions in context of the entire instruction, the Court was satisfied

that the instruction "adequately conveyed the concept of reasonable doubt to the jury and impressed upon them the heavy burden borne by the State." *Id.* at 401; accord *Savoy v. State*, 420 Md. 232, 254 (2011) ("[T]he omission of the 'without reservation' language is alone not fatal.").

Thus, "we must consider the absence of th[e] language in light of the entire instruction given in [the defendant's] case." *Savoy*, 420 Md. at 254. In doing so, and aware that the trial court substantially adhered to the current version of the pattern jury instruction on reasonable doubt and provided the jury with a written copy of the instructions that contained the "without reservation" language omitted from the verbal instruction, we find no "'reasonable likelihood that the jury had applied the challenged instruction in a way that violates the Constitution.'" *Id*. (quoting *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)) (internal quotation mark omitted). Because the instruction as given complied with the principles set forth in *Ruffin*, we do not deem the omission of the phrase "without reservation" from the instruction as given to rise to the level of *plain* error. We affirm.

JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.