Circuit Court for Anne Arundel County
Case No. C-02-CR-18-002039

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 189

September Term, 2019

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OTAGWYN KAMBON

v.

STATE OF MARYLAND

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Berger,
Arthur,
Gould,

JJ.

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Opinion by Arthur, J.

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Filed: May 21, 2020

Otagwyn Sengbe Kambon was charged with first- and second-degree assault and reckless endangerment after his former girlfriend, Katia Butler, accused him of beating her. During Kambon's trial, the State moved to block the defense from questioning Butler about prior criminal charges brought against her and about her failure to appear as a witness in a previous assault case against her son's father. Kambon concurrently requested a continuance to review the prosecutors' notes on the prior charges brought against Butler, claiming that the State violated the discovery rules by failing to produce them to the defense. The Circuit Court for Anne Arundel County granted the State's motion and denied Kambon's request. The jury found Kambon guilty of reckless endangerment, but acquitted him of first- and second-degree assault. The court sentenced Kambon to five years of imprisonment.

Kambon appealed the circuit court's decisions to limit the cross-examination of Butler and to deny the request for the continuance. We affirm.

## FACTUAL AND PROCEDURAL HISTORY

On August 3, 2018, paramedics and police officers arrived at the apartment of Katia Butler in Severn, Maryland, after a neighbor called for emergency services. Butler, who was accompanied by Otagwyn Kambon, her boyfriend, and Daveen Green, her aunt, exhibited injuries to her face, head, and arms. She was conscious but lethargic and unable to answer basic questions such as "the time or year." She told the emergency personnel that a group of women had assaulted her in the nearby Freetown community.

The paramedics transported Butler to the University of Maryland Shock Trauma Center to treat her injuries. After Butler received her initial treatment, a police officer

spoke with her about the cause of her injuries. Butler reiterated that she had been attacked in Freetown, though she was still largely unresponsive at the time.

Butler was hospitalized for a week with severe lacerations to her face, head, and upper body. She testified that she suffered kidney failure because of the swelling in her body. She also testified that she suffered damage to an ear, which has impaired her hearing. According to Butler, her hearing loss will increase as she gets older.

On August 13, 2018, Butler spoke with Detective Latasha Hubbard of the Anne Arundel Police Department regarding the assault. At that time, Butler changed her story about the cause of her injuries. She informed Detective Hubbard that Kambon had assaulted her at her apartment after Kambon looked through her phone and discovered that she was maintaining a romantic relationship with her son's father. Detective Hubbard took photos of Butler's injuries and filed first- and second-degree assault and reckless endangerment charges against Kambon.

Butler testified at trial that she had been involved with Kambon for a few months and also had renewed a romantic relationship with her son's father several weeks before the incident. Butler stated that she and Kambon had consumed the drug "Molly" on the night of the incident and that, upon discovering Butler's other relationship, Kambon became aggravated and assaulted her "until the next morning." She explained that she and Kambon agreed to lie about the cause of her injuries and devised a story about a group of women attacking her in Freetown.

Butler's aunt, Daveen Green, testified that on the morning of August 3, 2018, Kambon called her and said that Butler needed to go to the hospital. After Green told

Kambon to bring Butler to the hospital, Kambon told her that the couple would wait until Green came to Butler's apartment before leaving. When Green arrived at the apartment, she found Butler and Kambon waiting together in the living room. An ambulance was called, and Green took pictures of Butler's injuries while they waited for help to arrive.

Green testified that she had several interactions with Kambon after that morning. On August 4, 2018, Kambon told Green that he would meet her at the hospital and then said, "I'm sorry," and hung up. A few days later, Kambon told Green that, on the night of the incident, he and Butler had consumed Molly and "got into it" after Butler admitted that she was seeing her son's father. Green informed Detective Hubbard about the confession and apology.

Butler had previously been charged with theft and with third-degree burglary, but the State dismissed both cases. At trial, the State moved to exclude any testimony regarding the prior criminal charges brought against Butler.[1] The State also moved to

[1] As authority for the exclusion of evidence of the criminal charges against Butler, the State relied on Md. Rule 5-404(b), which states that "[e]vidence of other crimes, wrongs, or other acts . . . is not admissible to prove the character of a person in order to show action in the conformity therewith." The parties appear not to have realized that Rule 5-404(b) applies only to evidence of the "other crimes, wrongs, or other acts" of a criminal defendant, and not to evidence of the "other crimes, wrongs, or other acts" of a witness, like Butler. *See Sessoms v. State*, 357 Md. 274, 281 (2000). "'[E]vidence that someone other than the defendant committed other crimes or bad acts, is governed by Md. Rule 5-403.'" *Allen v. State*, 440 Md. 643, 664 (2014) (quoting *Gray v. State*, 137 Md. App. 460, 487, *rev'd on other grounds*, 389 Md. 529 (2002)). Under Rule 5-403, a court may exclude relevant evidence "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." Kambon does not make an issue of the State's reliance on Md. Rule 5-404(b), and the court did not base its decisions on that rule.

exclude evidence of Butler's failure to appear as a witness in a criminal case against her son's father, whom she had accused of assaulting her.

In questioning outside the presence of the jury, just before her cross-examination was set to begin, Butler denied that she had committed a theft or a burglary. She also denied that she had even been charged with those offenses. She testified that she did not appear as a witness in the assault case because she was concerned about being arrested on an outstanding warrant relating to her failure to pay traffic tickets. She claimed not to remember whether her son's father had assaulted her.

After hearing from Butler, the trial court granted the State's motion. In so doing, the court remarked that there was no "reasonable factual basis" to conclude that Butler had committed the offenses.

During the discussion on the State's motion, the defense argued that the State had failed to disclose information about the charges against Butler and requested a continuance to review the district court prosecutors' notes. The trial court denied the defense's request, stating that "[w]e're in the middle of a trial."

After defense counsel announced that he had no more questions for Butler and the court had allowed her to step down, defense counsel asked to approach the bench. At that point, defense counsel apparently claimed to have just learned that Butler was still in a relationship with her son's father.[2] Counsel requested an opportunity to question her

[2] We say "apparently" because the transcript is less than clear. According to the transcript, defense counsel told the court: "[S]he lied in that situation." He added, ungrammatically: "Her and [the child's father] were together, I didn't know that." We have no idea how or when counsel learned that Butler and the child's father supposedly

further about her assault charge against the father. The court also denied this request.

The jury found Kambon guilty of reckless endangerment, but acquitted him of first- and second-degree assault. Kambon noted his timely appeal.

## QUESTIONS PRESENTED

Kambon presents one question for our review, which we have rephrased for concision: Did the trial court violate Mr. Kambon's right to confront witnesses against him when it restricted defense counsel's cross-examination of the State's key witness, Katia Butler?[3]

For the reasons stated herein, we answer in the negative.

## DISCUSSION

The Confrontation Clause of the Sixth Amendment to the United States

"were together." Kambon's brief asserts that, "during her cross-examination before the jury, Ms. Butler revealed that she was still in a romantic relationship with [the child's father] at the time of trial." That assertion is not supported by the transcript or by the citation that Kambon supplied.

[3] Kambon formulated his principal question as follows: "Did the trial court violate Mr. Kambon's right to confront witnesses against him when it restricted defense counsel's cross-examination of the State's key witness, Katia Butler?" Kambon included two sub-questions with this question:

a. Did the trial court err when it prevented defense counsel from questioning Ms. Butler about her history with her son's father, Andrew Brown, including prior charges filed against him and her failure to appear in court as a witness?

b. Did the trial court err when it prevented defense counsel from questioning Ms. Butler about her prior criminal charges without first allowing the defense access to evidence that it should have received under Md. Rule 4-263?

Constitution and Article 21 of the Maryland Declaration of Rights both guarantee a criminal defendant the right to confront adverse witnesses. *Simmons v. State*, 333 Md. 547, 554-55 (1994); *Taylor v. State*, 226 Md. App. 317, 332-33 (2016). This right "includes the right to cross-examine a witness about matters which affect the witness's bias, interest or motive to testify falsely." *Marshall v. State*, 346 Md. 186, 192 (1997). This right, however, "is not boundless" and is "'subject to reasonable restrictions.'" *Pantazes v. State*, 376 Md. 661, 680-81 (2003) (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998)). Trial court judges "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' safety, or interrogation that is repetitive or only marginally relevant." *Id.* at 680.

The trial court's discretion to restrict cross-examination is not boundless either. *Marshall v. State*, 346 Md. at 194. A court's decision to limit cross-examination is reviewed under the abuse of discretion standard. *Pantazes v. State*, 376 Md. at 681. In determining whether a trial court abused its discretion, appellate courts ask "whether the trial judge imposed limitations upon cross-examination that inhibited the ability of the defendant to receive a fair trial." *Id.* at 681-82 (citing *Merzbacher v. State*, 346 Md. 391, 413 (1997)).

**A. Butler's Failure to Appear as a Witness**

Kambon argues that the trial court impermissibly prevented his counsel from questioning Butler about her "history" with her son's father, including her failure to appear as a witness in connection with the assault charges that she brought against him.

Kambon claims, on appeal, that the court's ruling inhibited his ability to show that Butler had falsely accused him in order to protect her son's father, who (he suggests) was the true assailant. Kambon has not preserved that argument for appellate review. But even if he had, the circuit court would not have abused its discretion in limiting defense counsel's questioning on this matter.

Kambon bases his argument on three rules relating to impeachment of witnesses and the conduct of cross-examination: Rule 5-616(a)(4), Rule 5-616(a)(6), and Rule 5-608(b).

Rule 5-616(a)(4) permits a party to attack the credibility of a witness by asking "questions that are directed at . . . [p]roving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely . . . ." Similarly, Rule 5-616(a)(6) permits a party to attack the credibility of a witness by asking "questions that are directed at . . . [p]roving the character of the witness for untruthfulness." Questioning under Rule 5-616(a) "'should be prohibited only if (1) there is no factual foundation for such an inquiry in the presence of the jury, or (2) the probative value of such an inquiry is **substantially** outweighed by the danger of undue prejudice or confusion.'" *Calloway v. State*, 414 Md. 616, 638 (2010) (emphasis in original) (quoting *Leeks v. State*, 110 Md. App. 543, 557-58 (1996)).

Rule 5-608(b) addresses the situation where a party wishes to question a witness about prior conduct that did not result in a conviction. Under the rule, a court may permit that form of impeachment if "the court finds [the conduct] probative of a character trait of untruthfulness." Md. Rule 5-608(b). "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." *Id.* The questioning party may not prove the conduct "by extrinsic evidence." *Id.*

Kambon claims that Butler's failure to appear as a witness demonstrates a character trait of untruthfulness or motive to testify falsely. This argument is not preserved for our review.

In responding to the State's motion to exclude the testimony that she failed to appear in court in connection with her assault charges against her child's father, Kambon explained the basis for introducing the evidence by saying that, "It's sort of like, that's how she does." Unhelpfully, he added: "She doesn't show up for Court. She fails to appear." Translated into a less informal mode of expression, Kambon's assertion appears to be that Butler habitually disregards her civic obligation to participate in judicial proceedings. It is not immediately apparent how that conduct evidences a motive to testify falsely or a character trait of untruthfulness.

On appeal, Kambon argues that Butler's failure to appear amounted to a "recantation" of the charges that she initiated and was probative of her untruthfulness. Kambon further argues that Butler's failure to appear could have shown that Butler had a motive to testify falsely against Kambon in order to protect her son's father, who may have been the actual perpetrator of the August 2018 assault.[4] But because Kambon already "raised [a] specific contention[] as to why the testimony was []admissible,"

[4] It is unclear how Butler was protecting her son's father from criminal charges by initiating criminal charges against him.

which appears to be that it would demonstrate that Butler is someone who fails to appear for court proceedings, "he is foreclosed from raising that issue for the first time on appeal." *Washington v. State*, 191 Md. App. 48, 91 (2010); *accord State v. Jones*, 138 Md. App. 178, 218 (2001) (quoting *Leuschner v. State*, 41 Md. App. 423, 436 (1979)) (stating that "when particular grounds for an objection are volunteered or requested by the court, 'that party will be limited on appeal to a review of those grounds and will be deemed to have waived any ground not stated[]'").

Even if his arguments were preserved, Kambon fails to demonstrate that the limitations on cross-examination warrant reversal. Kambon claims that Butler's failure to appear amounts to a recantation of her charges against her son's father and thus demonstrates "dishonesty or deceit." Butler, however, never admitted to lying about the charges or gave any similar reason as to why she failed to show as a witness. Rather, Butler explained that she "didn't go" to court because she "had a warrant out for [her] arrest for a traffic charge" at the time of the trial.[5] Based on Butler's explanation and the lack of any affirmative evidence demonstrating that her failure to appear was due to dishonesty, it was well within the scope of the trial court's discretion to conclude that her conduct was not probative of a character trait of untruthfulness. *See United States v. Vasquez*, 840 F. Supp. 2d 564, 575 (E.D.N.Y. 2011) (stating that, "without any showing

[5] A person in Butler's position may have also failed to appear at trial for a variety of reasons related to being a victim of domestic violence, "including fear of retaliation, economic dependence on the batterer, and concern about the possibility that the state would remove children from a household that has experienced domestic violence." Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va. L. Rev. 747, 751 (2005).

that defendant's failures to appear in court involved any dishonesty or falsification, . . . bench warrants are not 'probative of truthfulness or untruthfulness[]'").

Kambon goes on to argue that the court erred in not allowing him to reopen his cross-examination of Butler after he had announced that he had no more questions for her and the court had allowed her to step down. The premise for his argument is that defense counsel claimed to have just learned, through means that are less than entirely clear (*see supra* n.2), that Butler was still in a romantic relationship with her son's father and, hence, had a motive to conceal his alleged responsibility for the assault. Kambon's argument has no merit. "Trial judges have broad discretion in determining the order of presentation of evidence." *Ware v. State*, 360 Md. 650, 684 (2000) (citing Md. Rule 5-611(a)). The court did not abuse its broad discretion in prohibiting Kambon from recalling Butler, after she had been excused, to permit him to question her about something that he had been free to explore while she was on the stand.

Finally, as the State argues, "[i]n assessing whether the trial court has abused its discretion in the limitation of cross-examination of a State's witness, 'the test is whether the jury was already in possession of sufficient information to make a discriminating appraisal of the particular witness's possible motives for testifying falsely in favor of the government.'" *Marshall v. State*, 346 Md. at 194 (quoting *United States v. Christian*, 786 F.2d 203, 213 (6th Cir. 1986)). Here, Butler's credibility had already been seriously damaged without Kambon's desired testimony. In front of the jury, Butler admitted to lying to the police and to her aunt about the cause of her injuries and making up a cover story with Kambon. She also admitted to lying to Kambon about whether she was in a

sexual relationship with her son's father. In closing, the defense stressed these falsehoods and characterized Butler as a liar. The attack on her credibility may have had an impact, because the jury appears to have discredited her testimony about the seriousness of her injuries in convicting Kambon only of reckless endangerment.

In these circumstances, the jury had sufficient information to make a discriminating appraisal of Butler's possible motives for testifying falsely. The circuit court, therefore, did not abuse its discretion in restricting cross-examination of Butler on this issue.

**B. Butler's Prior Criminal Charges**

Kambon claims that the State failed to furnish the files of the district court prosecutors who handled the theft case against Butler, resulting in a discovery violation that should have been remedied by a continuance. He argues that the trial court erred when it declined to grant a continuance to allow him additional time to review information regarding the criminal charges against Butler.

"The decision whether to grant a request for continuance is committed to the sound discretion of the court." *Abeokuto v. State*, 391 Md. 289, 329 (2006). "A trial court's ruling on a continuance will not be disturbed absent an abuse of discretion, which was prejudicial to the party requesting the continuance." *Davis v. State*, 207 Md. App. 298, 308 (2012).

Maryland Rule 4-263(d)(6)(A) requires a prosecutor, "[w]ithout the necessity of a request," to provide to a criminal defendant "[a]ll material or information in any form, whether or not admissible, that tends to impeach a State's witness," including "evidence

of prior conduct to show the character of the witness for untruthfulness pursuant to Rule 5-608(b)." The State, however, is not required to disclose "the mental impressions, trial strategy, personal beliefs, or other privileged attorney work product" to the defense. Md. Rule 4-263(g)(1).

Here, in the middle of trial, during the discussion of the State's motion in limine concerning Butler's testimony, the defense asserted that it was entitled to the "notes" or "files"[6] of the district court prosecutors in the theft case brought against Butler. Defense counsel expressly recognized that the notes or files might not even exist. If they did exist, however, they would almost certainly contain "mental impressions, trial strategy, personal beliefs, or other privileged attorney work product," which the State is not obligated to disclose. Md. Rule 4-263(g)(1). The court did not abuse its discretion in declining to grant a mid-trial request for a continuance to require the State to search for and produce information that it had no obligation to disclose, if the information even existed.

Even if the information existed and even if the State had an obligation to disclose part of it, "the question of whether any sanction is to be imposed for a discovery

[6] During the discussion about the motion in limine, Kambon's counsel stated: "[T]he District Court people who handled this case [should] try to find their file," so that he could "see what's in their files with regard to their notes." A moment later, counsel added: "I know from experience the District Court prosecutors who prosecuted these cases on behalf of this young lady, they have notes, they've dealt with her, they know her character." Counsel told the court that he "would like to have an opportunity to identify those people, get the files, if the State's Attorney still has those files, and then come back with those additional witnesses." Counsel suggested that he might call Butler's former boss, who, he suggested, had initiated the theft charges against her.

violation, and if so what sanction," was committed to the circuit court's discretion. *Evans v. State*, 304 Md. 487, 500 (1985). In exercising its discretion, a trial court considers whether the violation caused prejudice to the defendant.[7] *Thomas v. State*, 397 Md. 557, 572 (2007). "In assessing prejudice, the facts are significant." *Id.*

Here, Kambon was attempting to impeach Butler regarding the previous criminal charges brought against her. Under Md. Rule 5-608(b), if a party wishes to question a witness about prior conduct that did not result in a conviction, a court may permit the impeachment upon objection "only if the questioner, outside the hearing of the jury establishes a reasonable factual basis for asserting that the conduct of the witness occurred." *Id.* The questioning party may not prove the conduct "by extrinsic evidence." *Id.*

When asked by Kambon's counsel, Butler flatly denied that she had committed a theft or a burglary. Because Butler's alleged misconduct cannot be proven by extrinsic evidence and because Butler "denied the prior misconduct," Kambon is "bound by her answer." *State v. Cox*, 298 Md. 173, 183 (1983). In these circumstances, the prosecutors' notes and files were of no use to the defense.

[7] Kambon claims that the trial court never considered whether the State's actions prejudiced him because the court told him "[w]e're in the middle of a trial" when it denied his request for a continuance. The "most fundamental principle of appellate review," however, "is that the action of a trial court is presumed to have been correct," and appellate courts will "not draw negative inferences from [a] silent record." *State v. Chaney*, 375 Md. 168, 183-84 (2003). The experienced trial judge was not required to spell out every step in his reasoning in order to assure a reviewing court that he considered the potential prejudice to Kambon when he denied the request for the continuance.

Kambon claims that the prosecutors' files would have enabled the defense to conduct a more informed line of questioning and thus establish a reasonable factual basis that the alleged conduct occurred. We are unconvinced by this argument. Kambon already had the statement of charges for the cases against Butler, which his counsel admitted was "out there for a great period of time." Furthermore, from the colloquy with the court, it is apparent that his counsel knew that the theft charges had been brought by Butler's former employer. Indeed, counsel knew the name of the employer and the name of Butler's supervisor, he knew that Butler had allegedly fled from the employer's premises when she was confronted about the alleged theft, and he knew that 17 months had passed between the commencement of the case and the dismissal of the charges. In these circumstances, there is simply no reason to believe that Butler would have backed off her adamant denial of criminal conduct had the court granted Kambon a continuance to review documents that might not even exist and that would probably be privileged if they did. Kambon, therefore, was not prejudiced, and the circuit court did not abuse its discretion in denying the defense's request for a continuance.

**JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**