Circuit Court for Harford County
Case No. C-12-CR-23-000795

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 456

September Term, 2024

JOSE W. ORELLANA-CEDILLOS

v.

STATE OF MARYLAND

Leahy,
Ripken,
Wright, Alexander Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: January 12, 2026

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

In February of 2024, a jury in the Circuit Court for Harford County found Jose W. Orellana-Cedillos ("Appellant") guilty of second-degree rape, fourth-degree sexual offense, and second-degree assault. The circuit court imposed an aggregate sentence of thirty-one years' incarceration, suspending all but twelve years, and allowing credit for time served.[1] Appellant noted this timely appeal and presents the following issues for our review:[2]

I. Whether the circuit court erred in allowing cross examination of Appellant regarding the possible immigration consequences of his conviction.

II. Whether the circuit court erred in denying Appellant's motion for a mistrial.

III. Whether the circuit court erred in excluding "A."[3] as a witness.

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

[1] Appellant was sentenced to twenty years, with all but twelve years suspended, for the second-degree rape; one year, consecutive and all suspended, for the fourth-degree sexual offense; and ten years, consecutive and all suspended, for the second-degree assault. The Court also sentenced Appellant to five years of supervised probation upon release from incarceration, sex offender treatment, and lifetime sex offender supervision.

[2] Rephrased and reorganized from:

1. Did the trial court err by permitting the prosecutor to inquire from [Appellant] on cross-examination whether he "could face immigration consequences, if [Appellant] were convicted[?"]

2. Did the trial court err by refusing to grant a mistrial?

3. Did the trial court err by not allowing the defense to call A[.] as a witness?

[3] We adopt the same naming conventions for anonymous parties as referenced in the briefs.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts were adduced at trial. Appellant lived in a house with his former girlfriend, her children, and her adult niece, W. On July 14, 2023, while her aunt was at work, W. was doing laundry in the basement of the house when Appellant came downstairs and joined her. W. explained that Appellant asked her for a kiss, which she refused, and then approached her from behind and started touching her breasts. According to W., Appellant proceeded to pull down his pants and forcibly rape her, despite her telling him "No" and trying to get away. Appellant only stopped when one of the children walked into the basement and screamed. W. and Appellant then went outside where Appellant texted her aunt detailing what had occurred.

Both W. and Appellant then went into the living room of the house and sat with the children. W. was waiting for her aunt to come home. Before W.'s aunt returned home, Appellant departed from the house. He later texted W. "ask[ing] . . . for forgiveness because [he] disrespected [her]." W. reported the assault to the Bel Air Police Department that night. Appellant was subsequently indicted and charged with second-degree rape, fourth-degree sexual offense, and second-degree assault.[4]

At trial, the State presented several witnesses, including two members of the Bel Air Police Department, a forensic scientist from the Maryland State Police Crime Lab, W., and the nurse who conducted W.'s SAFE examination.

[4] There where additional charges which the State *nolle prossed* prior to the completion of jury selection. Those charges included first-degree rape and third-degree sexual offense.

Following the conclusion of W.'s testimony, Appellant notified the Court that "based on [W.'s] testimony" he wished to call A., one of W.'s aunt's children who lived in the house with Appellant. Appellant did not disclose A. to the State in discovery as a potential witness. However, following the conclusion of A's testimony at trial, Appellant proffered that A. "would be a rebuttal witness" to W.'s testimony about her interactions with Appellant following the encounter. The State asked the court "to preclude [A.] from testifying as a Defense witness as not having been previously disclosed[,]"contending that the witness remained undisclosed until after the State had completed its examination of W. and hence the State was unable to adequately prepare for the testimony of the witness.

The court reserved ruling until the next day of trial. At that time, Appellant proffered that A. would "say . . . that he was at the house at the time that the alleged incident occurred. He was not in the basement. He saw [Appellant] and [W.] upstairs and then go outside talking[.]" Appellant added that A. would "buttress[]" Appellant's testimony, should he choose to testify. The State again argued that A.'s testimony would prejudice the State's case because A. was not previously disclosed as a defense witness, so its case-in-chief was prepared and presented without knowledge of A.'s proposed participation in the trial.[5] Finding that the prejudice to the State—resulting from the "troubling" timing of the disclosure—outweighed the probative value of the proffered testimony, the court granted the State's motion and excluded A. as a witness.

Following the conclusion of its evidence, the State rested.

[5] In addition, the only witness remaining in the State's case-in-chief was the SAFE nurse.

Appellant elected to testify in his own defense. He claimed that the sexual encounter was consensual. On cross examination, the following occurred:

> [STATE]: Is it accurate, sir, that there would be big consequences should you be found guilty of these offenses?
>
> [APPELLANT]: Okay.
>
> [STATE]: Do you agree?
>
> [APPELLANT]: Yes.
>
> [STATE]: You could face incarceration?
>
> [APPELLANT]: Okay.
>
> [STATE]: Is that accurate?
>
> [APPELLANT]: Yes.
>
> [STATE]: And you could face collateral consequences if you were convicted.
>
> [APPELLANT]: What is that?
>
> [STATE]: *You could potentially face immigration consequences if you're convicted.*
>
> [APPELLANT'S COUNSEL]: Objection.

(Emphasis added). Appellant's counsel asserted that the State could not ask this question regarding immigration status because it concerned national origin, "which is a protected category." The court overruled Appellant's objection, allowing the State to ask about possible immigration consequences because "every immigration consequence does not necessarily impute . . . the reason why he [i]s here[.]" The State repeated the question to Appellant, which he answered affirmatively. There was no further inquiry on the topic.

The issue resurfaced during the State's closing:

> Now, in the converse, we can also consider the credibility of [Appellant], as well. And when you consider his behavior on the stand and most importantly, whether he has a motive not to tell the truth, or whether he has an interest in the outcome of the case. *And certainly, he stands before you as someone very motivated to not tell the truth. This is a very important proceeding, of course. Depending on the outcome, there is a significant impact on him. And he admitted to you, he told you, there are immigration consequences should he be (unintelligible) of this*, as well. So you may very well believe that [Appellant] has an interest in the outcome of this case and has a motive not to tell the truth.

(Emphasis added). Appellant moved for mistrial on the basis that the State's closing reference to immigration consequences was "offensive to the Constitution and [Appellant's] rights[.]" The State responded that the possible consequences of conviction were admissible here, and likewise the argument was proper, where the evidence concerned a motivation not to be truthful and Appellant put his credibility at issue in the case. The State added that the argument was limited to the idea that Appellant "was motivated not to tell the truth because of another consequence, should he be convicted[,]" in accordance with the court's prior ruling on the issue. Finding nothing "improper in what the State said during its closing[,]" the court denied Appellant's motion.

The jury found Appellant guilty of second-degree rape, fourth-degree sexual offense, and second-degree assault. The court sentenced Appellant to thirty-one years' incarceration, with all but twelve years suspended.[6] Appellant noted this timely appeal. Additional facts are provided below as relevant.

[6] *See supra* n.1.

DISCUSSION

I. THE CIRCUIT COURT DID NOT ERR IN ALLOWING CROSS EXAMINATION OF APPELLANT REGARDING IMMIGRATION CONSEQUENCES.

A. Party Contentions

Appellant contends that the circuit court erred in allowing the State to cross examine him regarding the immigration consequences of his possible conviction because it was irrelevant. In the alternative, Appellant posits that even if the topic was relevant, the court abused its discretion in allowing the question because the question's probative value was outweighed by its risk of unfair prejudice.[7, 8] Relying largely on *Gonzalez v. State*, Appellant argues the State's question on cross examination plainly conveyed that Appellant may be deportable and this was improper because "the use of immigration evidence 'is fraught with the danger of prejudice to a defendant by introducing the possibility of invidious discrimination on the basis of alienage.'" 487 Md. 136 (2024) (quoting *Ayala v. Lee*, 215 Md. App. 457, 478 (2013)).

In response, the State asserts that the question regarding immigration consequences referred specifically to the collateral effects of a conviction as a method of impeachment. The State contends that, by electing to testify, Appellant put his credibility at issue and

[7] Additionally, at oral argument, Appellant asserted that the question was unnecessarily cumulative. We make no findings on this issue because it is unpreserved for our review. *See Small v. State*, 235 Md. App. 648, 696 (2018) (quoting Md. Rule 8-131(a)) (Appellate courts generally "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court."), *aff'd*, 464 Md. 68 (2019).

[8] Appellant also submits that, assuming the court erred, the error was not harmless. The State responds that the any error would be harmless. Because we find that the court did not err, we do not reach this issue.

therefore collateral consequences, and their effect on his motivation to testify falsely, were relevant. Additionally, the State avers that the circuit court did not abuse its discretion in holding that the potential prejudicial effect of the single question regarding immigration consequences did not substantially outweigh the probative value of the testimony as impeachment evidence.

B. Standard of Review

An appellate court reviews without deference a trial court's restriction of cross examination where the restriction is based on the court's understanding of the legal rules that limit the inquiry, applying the *de novo* standard. *Kazadi v. State*, 467 Md. 1, 49 (2020). If the restriction is instead based on the court's discretion to admit evidence at trial, an appellate court will only disturb the trial court's ruling on appeal if it was an abuse of discretion. *Ayala,* 215 Md. App. at 475 (citing *Martin v. State*, 364 Md. 692, 705 (2001)).

C. Analysis

"Immigration status alone does not reflect upon an individual's character and is thus not admissible for impeachment purposes." *Id*. at 480 (citations omitted). Immigration status may be used as impeachment evidence only if there are "additional circumstances" that make it relevant to the facts of the case or trial. *Kazadi*, 467 Md. at 52–53.

The Supreme Court of Maryland has held that "allegations of *quid pro quo* or leniency in an immigration case giving rise to a motive to testify falsely or bias" are sufficient "additional circumstances." *Gonzalez v. State*, 487 Md. at 172 (quoting *Kazadi*,

467 Md. at 52–53). In *Gonzalez*, [9] the Court found that allegations of "*quid pro quo* or leniency" are not the only bases to admit immigration status evidence. 487 Md. at 172, 179–80. Rather, the *Gonzalez* Court held that allegations that a witness's visa-based immigration status may create a motivation to testify falsely is likewise a sufficient additional circumstance to make immigration status admissible under *Kazadi*. *Id.* at 180.

This Court has also found the requisite "additional circumstances" for the type of cross examination here where the plaintiffs' interrogatory answers differed substantively from the plaintiffs' later-submitted evidence regarding the ability to work legally in the U.S., and therefore plaintiffs had opened the door to cross examination about their immigration status. *See Ayala*, 215 Md. App. at 481–82.

Here, Appellant opened the door to cross examination regarding his credibility because he testified at trial. *See Harford Mem'l Hosp., Inc. v. Jones*, 264 Md. App. 520, 554 (quoting *Hill v. Wilson*, 134 Md. App. 472, 480 (2000) ("[A] witness's credibility is always relevant.")), *cert. denied*, 490 Md. 640 (2005). As in *Ayala*, there were discrepancies in the evidence in this case—namely, W. testifying that the sexual assault was not consensual and Appellant testifying to the opposite—which made Appellant's credibility, and his motivation to lie, particularly relevant. Here, the central role of

[9] Appellant's contention that *Gonzalez* is inapplicable to this case because the question at issue in *Gonzalez* surrounded the witness's pending visa application, rather than immigration status, fails. While "[c]ross[]examination concerning a witness's immigration status and U visa application . . . involve different inquiries[,]" the question in this case was whether there were any immigration consequences—which could refer to impact on immigration status, as in lawful presence in the country, or impact on a visa application. 487 Md. at 171 n.19. Thus, the inquiry here is not so narrow as to make *Gonzalez* inapposite, instead it is dispositive to the case *sub judice*.

credibility to the facts satisfies the "additional circumstance" requirement for cross examination regarding possible immigration consequences. *See Gonzalez*, 487 Md. at 172 (citing *Kazadi*, 467 Md. at 52–53).

Our holding is narrow. We agree with Appellant that immigration evidence can be prejudicial in some cases, to the extent that its use could be grounds for reversal. *See, e.g.*, *Ayala*, 215 Md. App. at 478–79 (citing *United States v. Almeida-Perez,* 549 F.3d 1162, 1174 (8th Cir. 2008) (alterations in original) ("[T]he use of [immigration] evidence is fraught with the danger of prejudice to a defendant by introducing the possibility of invidious discrimination on the basis of alienage."); *Galaviz-Zamora v. Brady Farms, Inc.,* 230 F.R.D. 499, 502 (W.D. Mich. 2005) (emphasis and alterations in original) ("[D]amage and prejudice which would result . . . if discovery into . . . immigration status is permitted *far* outweighs whatever minimal legitimate value such material holds for Defendants.")). *See also Espina v. Prince George's County*, 215 Md. App. 611, 650 n.20 (2013) (noting that, even if evidence of a witness's immigration status had "marginal relevance" the circuit court would have been "well within its discretion" to exclude the evidence under Maryland Rule 5-403 because the evidence was "likely to cause significant unfair prejudice."); *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 213, 224–25 (2012) (finding that repeated reference to a defendant's race and immigration status by a jury member during deliberation was a valid basis to invoke an exception to the local non-impeachment rule because "there is a sound basis to treat racial bias with added precaution"). However, we find that not to be so here.

In this case, the question—"[Appellant], is it correct that you could face immigration consequences, if you were convicted of these offenses?"—sought to impeach Appellant with evidence of unidentified immigration consequences, rather than directly conveying that Appellant may be deportable if convicted. Moreso, the court limited Appellant's questions on the topic to "possible immigration consequences[,]" admonishing the State to not "go any further on that topic." The single question and the limited scope of immigration evidence at this trial drive our analysis.

As a final note, Appellant relies on *Sessoms v. State*, arguing that when the State wishes to offer evidence of "other crimes" of the defendant on trial, it must satisfy specific requirements,[10] which were not satisfied here. *See* 357 Md. 274, 283–85 (2000). The State's question regarding immigration *consequences* did not seek to illicit information about *other crimes* by the defendant, only the consequences of the crime for which he was currently on trial. *Sessoms* is thus inapplicable.

For the foregoing reasons, here the circuit court did not err in allowing the State to ask a single and narrowly phrased cross examination question of Appellant regarding the possible immigration consequences of his conviction.

[10] Appellant states that these requirements are identified in *State v. Faulkner*, 314 Md. 630 (1989).

II. THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR MISTRIAL.

A. Party Contentions

Appellant asserts that the circuit court erred in denying his motion for mistrial because the State's reference to possible immigration consequences during closing argument appealed to the passions and prejudices of the jury and therefore violated Appellant's right to due process, equal protection, and a fair trial.

The State contends that the court soundly exercised its discretion in denying the motion for mistrial because a brief mention of the collateral consequences of a conviction was permissible and did not violate Appellant's rights.

B. Standard of Review

"It is well-settled that a decision to grant a mistrial lies within the sound discretion of the trial judge and that the trial judge's determination will not be disturbed on appeal unless there is abuse of discretion." *Carter v. State*, 366 Md. 574, 589 (2001) (citations omitted). Abuse of discretion occurs when a circuit court exercises its discretion in an arbitrary or capricious manner or when the court acts beyond the letter of the law. *See Cooley v. State*, 385 Md. 165, 175–76 (2005). "We have held consistently to the principle that the grant of a mistrial is considered an extraordinary remedy and should be granted only if necessary to serve the ends of justice." *Carter*, 366 Md. at 589 (internal citation, alteration, and quotation marks omitted); *see also Klauenberg v. State*, 355 Md. 528, 555 (1999).

C. Analysis

"Notwithstanding the wide latitude afforded prosecutors in closing arguments, a defendant's right to a fair trial must be protected." *Lee v. State*, 405 Md. 148, 164 (2008) (citations omitted). Notably, "prosecutors should not appeal to the passions and prejudices of a jury." *Id.* at 167 (citations omitted). Despite this, "[n]ot every improper remark . . . necessitates reversal, and whether a prosecutor has exceeded the limits of permissible comment depends upon the facts in each case." *Id.* at 164; *Lawson v. State*, 389 Md. 570, 592 (2005); *Spain v. State*, 386 Md. 145, 158–59 (2005); *Washington v. State*, 191 Md. App. 48, 109 (2010) (citing *Clermont v. State*, 348 Md. 419, 455 (1998) and *Colvin-el v. State*, 332 Md. 144, 178–79 (1993)) ("Comments made in closing argument must be weighed in their context.").

Here, the State's argument at closing referred to the possible immigration consequences of a conviction in a limited manner. In two sentences, the State referenced that a conviction may lead to immigration consequences for Appellant and that those consequences may have motivated him to lie. The trial court, in ruling on the motion for mistrial, placed the remark into context:

> The State's closing argument did not focus on, nor did it emphasize, your client's immigration status. Again, this [j]ury had no information as to what it is, and for those reasons, I am going to deny your [r]request for [m]istrial. I don't find anything improper in what the State said during its closing.

Considering the closing argument in its entirety, and the remarks in context, it is notable that the jury was not given any evidence on Appellant's nationality or immigration status, only that there could be immigration consequences of his conviction. *See Washington*, 191

Md. App. at 109; *Clermont*, 348 Md. at 455; *Colvin-el*, 332 Md. at 178–80. As the trial court noted, this does not "appeal to the passions and prejudices of the jury[;]" hence, the circuit court did not abuse its discretion in ruling that the statement did not violate Appellant's Constitutional rights. *See Lee*, 405 Md. at 164.

Further, even if the State's remark during closing argument was improper, the trial court did not abuse its discretion in denying a motion for mistrial predicated on the remark. In Maryland, there are various factors for a reviewing court to consider in determining whether a trial court abused its discretion in denying a motion for a mistrial based upon improper closing argument, including: (1) the severity of the improper remarks, (2) the measures taken to cure any potential prejudice, and (3) the weight of the evidence against the accused. *Lee*, 405 Md. at 165 (citing *Lawson*, 389 Md. at 592); *Spain*, 386 Md. at 159; *Washington*, 191 Md. App. at 108–09.

Washington is particularly instructive. In *Washington*, a homicide case, the prosecutor repeatedly appealed to the sympathies and prejudices of the jury in closing argument by stating "[t]his is [the victims'] case." 191 Md. App. at 109, 114. During the closing the prosecutor also physically acted out the defendant shooting the gun in a manner unsupported by the evidence, referred to future crimes the defendant may have carried out if not thwarted, referenced the effect the deaths had on the victims' families, and discussed inflammatory details of the emotions of witnesses which were unsupported by the evidence. *Id.* at 109–14. The court sustained the defendant's objections to the improper statements and struck the offending statements when asked to do so. *Id.* at 119. Defendant moved for a mistrial, which was denied. *Id.* at 114–18.

On appeal, applying the appropriate factors, we found that the trial court did not abuse its discretion in denying the defendant's motion for a mistrial because the types of comments made "did not involve the sort of impropriety that traditionally requires mistrial." *Id.* at 119; *cf. Lawson*, 389 Md. at 593–95 (granting a motion for mistrial was appropriate where the prosecutor asked the jury to place themselves in the shoes of the victim in closing); *Hill v. State*, 355 Md. 206, 211, 219–20 (1999) (granting a motion for mistrial was appropriate where the prosecutor appealed to the jury's personal interests by informing the jury they were "chosen to send a message to protect the community"). The *Washington* court noted, importantly, that the comments made in that case did not

> have anything near the prejudicial impact of the prosecutor's call to the jury in *Lee* to teach the victim not to follow "the laws of the streets" (which were not specified by the prosecutor), a tactic that the [Supreme Court of Maryland] determined "could do nothing other than lead to juror speculation and decision, perhaps, on information outside the evidence."

Id. at 119 (quoting *Lee*, 405 Md. at 174). With this, and considering the court's prompt action to mitigate the prejudicial impact of the remarks as well as the strength of the State's case, the Court held that the trial court had not abused its discretion in denying the request for a mistrial. *Id.* at 119–20.

Here, as in *Washington*, the State's remark during closing "does not involve the sort of impropriety that traditionally requires mistrial." *See id.* at 119. Where we have required mistrial, the State appealed directly to the interests and prejudices of the jury or asked them to speculate using outside influences. *See Lawson*, 389 Md. at 593–95; *Hill*, 355 Md. at 219–20; *Lee*, 405 Md. at 174. Here, the State solely argued to the jury that

> [Appellant] stands before you as someone very motivated to not tell the truth. This is a very important proceeding, of course. Depending on the outcome, there is a significant impact on him. *And he admitted to you, he told you, there are immigration consequences should he be (unintelligible) of this, as well.* So you may very well believe that [Appellant] has an interest in the outcome of this case and has a motive not to tell the truth.

(Emphasis added). This single mention of immigration consequences, addressing Appellant's credibility, is not the same "sort of impropriety" as in *Lawson*, *Hill*, or *Lee*. Further, Appellant's motion for mistrial rested on only one comment in the State's closing—significantly less than the remarks in *Washington*.

Additionally, as in *Washington*, the court limited the discussion of the objected-to topic, and the State adhered to such limitations. Here, the State limited its comments to be in line with the court's ruling on the objection during Appellant's cross examination, discussed *supra*. Thus, the limiting directive was effective in minimizing any potential for prejudice that may resulted from a discussion of immigration consequences.

Finally, as to the strength of the State's case, the *Washington* court found persuasive that there was significant evidence in favor of the State and despite the central role credibility held in the case, the trial court "was in the better position to evaluate potential prejudice to the appellant." *Washington*, 191 Md. App. at 120. Likewise, the State here adduced evidence that W. had explicitly rejected Appellant's advances in the laundry room; that Appellant texted W. to apologize for "disrespecting her" after the sexual assault, and that W. had injuries to her breasts and genital areas after the incident, as demonstrated in exhibits and through the testimony of the SAFE nurse. As in *Washington*, the State here had substantial evidence and the issue of credibility affecting that strength was best suited

for the trial court, and jury, to resolve. *See Washington*, 191 Md. App. at 120. The trial court here considered all the requisite factors, which weighed in the State's favor, and did not abuse its discretion in denying Appellant's motion for a mistrial.

III. THE CIRCUIT COURT DID NOT ERR IN EXCLUDING A. AS A WITNESS.

A. Party Contentions

Appellant contends that there was no discovery violation because A. was an impeachment witness; therefore, A. need not have been disclosed as a witness prior to trial under Maryland Rule 4-263(e). Further, Appellant posits that, even if there was a discovery violation, the trial court did not properly consider the applicable factors in deciding on the appropriate sanction for the violation.[11]

The State asserts that the failure to disclose A. as a witness was a discovery violation because A. was not offered *solely* to impeach W.'s testimony but offered also to buttress Appellant's expected testimony. As to the trial court's exclusion of A. as a witness, the State avers that the court did not err in applying this sanction because the precedential guidelines for making the decision are not exhaustive, and noted the court considered the timing of the disclosure and the substantial nature of the violation.[12]

[11] Appellant also contends that, assuming the court erred, the error was not harmless. Because we find that the court did not err, we do not reach this issue.

[12] Additionally, the State asserts that Appellant's argument that A. was an impeachment witness was not presented to the trial court and is therefore waived. Md. Rule 8-131(a) ("Ordinarily, an appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]") At trial, as to the reason A. was not previously disclosed, counsel stated that he "didn't think [he] would need [A.]" to testify until he heard W.'s testimony. As to the reason A. should be allowed to testify, he then proffered that A. would "indicate what happened" when he saw W. and Appellant

B. Standard of Review

"The application of the Maryland Rules . . . to a particular situation is a question of law, and 'we exercise independent *de novo* review to determine whether a discovery violation occurred.'" *Cole v. State*, 378 Md. 42, 56 (2003) (emphasis added) (quoting *Williams v. State*, 364 Md. 160, 169 (2001)).

"Where a discovery rule has been violated, the remedy is, 'in the first instance, within the sound discretion of the trial judge.'" *Id.* (quoting *Williams*, 364 Md. at 178). Thus, we review a trial court's sanctions for discovery violations under the deferential abuse of discretion standard. *Id.*; *Williams*, 364 Md. at 178; *Thomas v. State*, 397 Md. 557, 570 (2007).

C. Analysis

Discovery Violation

Maryland Rule 4-263 governs discovery in circuit court. Under Rule 4-263(e)(1), the defense must disclose to the State, without request, each witness intended to be called

after the incident, which he asserted was different than what W. had described in her testimony. Hence, despite Appellant's references to A. as a "rebuttal witness[,]" the substance of his argument at trial was effectively that A. was an impeachment witness and, hence, should be permitted to testify. *See Johnson v. State*, 228 Md. App. 391, 436–37 (2016) (quoting Black's Law Dictionary (10th ed. 2014)) (impeachment evidence is "[e]vidence used to undermine a witness's credibility"); *see also* Md. Rule 5-616(b)(2) (stating that a witness's testimony may be impeached with extrinsic evidence on non-collateral matters). Although it ultimately fails, *infra*, this argument is preserved for our review. *But see Sifrit v. State*, 383 Md. 116, 136 (2004) (affirming the exclusion of a witness where the argument on appeal as to why she should have been allowed to testify was so far removed from the argument made at trial that reviewing it "would have to require trial courts to imagine all reasonable offshoots of the argument actually presented to them").

during trial no later than thirty days before the scheduled trial date. *See* Md. Rule 4-263(e)(1). There are two exceptions to this rule: the defense need not disclose prior to trial (1) the defendant or (2) any "person who will be called for the *sole purpose* of impeaching a State's witness[.]" *Id.* (emphasis added). "Impeachment evidence is '[e]vidence used to undermine a witness's credibility.'" *Johnson v. State*, 228 Md. App. 391, 436-37 (2016) (quoting Black's Law Dictionary (10th ed. 2014)).

Here, Appellant asserted that he intended to call A. as a witness to testify in response to W.'s earlier testimony regarding the interaction between her and Appellant following the alleged sexual assault. As addressed by the trial court, A. could not testify regarding his interpretation of the interaction between W. and Appellant, only that he saw them talking. W. did not deny being with Appellant or speaking with him following the assault; thus, the portion of A.'s testimony on this subject that was potentially otherwise admissible would not impeach W. Likewise, we note that Appellant's proffer that A. would discredit W. by offering conflicting evidence as to whether A. was outside with W. and Appellant following the incident, would likely be inadmissible as impeachment on a collateral issue. *See* Md. Rule 5-616(b)(2) ("[E]xtrinsic evidence contradicting a witness's testimony ordinarily may be admitted only on non-collateral matters.").

Even assuming *arguendo* that Appellant's proffers constituted proper, admissible, impeachment of W., counsel added that A.'s testimony would also "buttress[]" Appellant's testimony. On its face, any testimony used to support the testimony of another witness is not impeachment evidence; hence, A. was not "solely" offered as an impeachment witness. Therefore, if Appellant intended to call A. as a witness at trial, Appellant was required to

disclose A.'s identity as a witness thirty days prior to trial, which he did not do. *See* Md. Rule 4-263(e)(1); Md. Rule 4-263(h)(2). The trial court did not err in determining that Appellant failed to timely disclose A. as a witness. We now turn to whether the circuit court abused its discretion in the sanction imposed for the discovery violation.

Sanction

A defendant's failure to comply with Rule 4-263 does not require automatic disqualification of the witness's testimony. Md. Rule 4-263(n); *Thomas v. State*, 397 Md. at 570 ("[T]he presiding judge has the discretion to select an appropriate sanction [for a violation of Rule 4-263], but also has the discretion to decide whether any sanction is at all necessary."). *Joyner v. State*, 208 Md. App. 500, 529–530 (2012) ("[T]he discovery rules provide that the nature and extent of any sanction lies within the discretion of the trial court."); *Breakfield v. State*, 195 Md. App. 377, 391 (2010) ("Although preventing all witnesses from testifying was a harsh sanction for violation of the discovery rules, Rule 4-263 makes plain that defendants may not wait until trial to disclose their evidence, and if they do, the trial court has authority to exclude such evidence from the case.").

In Maryland, there are five factors (the "*Taliaferro* factors") that a circuit court must consider when exercising its discretion to exclude a witness disclosed in violation of the discovery rules: (1) whether the disclosure violation was technical or substantial; (2) the timing of the disclosure; (3) the reason for the violation; (4) the degree of prejudice to the parties respectively offering and opposing the evidence; and (5) whether any resulting prejudice from the violation might be cured by a continuance. *Joyner*, 208 Md. App. at 524–25 (citations omitted); *Taliaferro v. State*, 295 Md. 376, 390–91 (1983). These factors

often overlap and "do not lend themselves to compartmental analysis." *Storetrax.com v. Gurland*, 168 Md. App. 50, 89 (2006); *Joyner*, 208 Md. App. at 525. "When a discovery violation becomes apparent only after the trial has commenced, the potential for prejudice is greater than if the discovery violation had occurred prior to trial." *Joyner*, 208 Md. App. at 525 (citation omitted).

In *Joyner*, this Court held that the circuit court abused its discretion in excluding a defense witness who was only disclosed during trial.[13] *Id.* at 521–23, 525. In reviewing the trial court's contemplation of the sanction, we held that the trial court erred because it did not at all discuss the *Taliaferro* factors. *Id.* at 525. The Court based its reasoning on a prior decision from the Supreme Court of Maryland, *Colter v. State*, which held that a trial court abused its discretion in automatically excluding an undisclosed witness without exercising its discretion. *Id.* at 525 (citing *Colter v. State*, 295 Md. 423, 430–31 (1983)). In contrast, in *Thomas v. State*, the circuit court did not abuse its discretion in admitting late-disclosed evidence where the court considered the prejudice caused by the violation, part of the *Taliaferro* factors. 397 Md. at 570–72 .

Here, the circuit court directly referenced *Taliaferro* in ruling on the sanction to be imposed. The court continued, discussing whether the violation at hand was technical or substantial, finding that it was substantial because the disclosure was made mid-trial despite clear knowledge of A. prior to trial, thus addressing the first and second *Taliaferro* factors. The court next stated that Appellant did not provide a strong excuse for the

[13] Although the exclusion of the witness was an abuse of discretion, it was harmless error. *Joyner* at 526.

violation, the third factor, given that the request was only made after W. completed her testimony. Finally, the court addressed the prejudice to the parties, the fourth and fifth factors, finding that A.'s testimony would be highly prejudicial to the State because the State had prepared and presented most of its case, including its examination of W., without knowledge of the testimony or witness the defendant intended to call, and that that prejudice outweighed the limited probative value of the few topics A. would have been permitted to discuss.[14]

As in *Thomas*, the court here explicitly addressed the *Taliaferro* factors before ruling on the evidence. Inapposite to both *Joyner* and *Colter*, where the courts did not discuss any factors, the court here laid out the specific facts and reasonable conclusions that led to the sanction determination. Hence, the court did not abuse its discretion.

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

[14] Appellant asserts that the Court's rulings on the scope of A.'s admissible testimony, made as a part of the final factors in the *Taliaferro* analysis, were premature and therefore an improper consideration under *Kelly v. State*, 392 Md. 511 (2006). Appellant misunderstands *Kelly*'s reach. *Kelly* stands for the premise that "[t]he responsibility of the trial court to control the proceedings before it does not extend to the right to take over a party's case." 392 Md. at 543. There, the court *sua sponte* asked a defendant to proffer the subject of a defense witness's testimony before the witness would be allowed to testify; the court then ruled the testimony inadmissible based on the proffer. *Id.* at 527–29. *Kelly* did not involve a late-disclosed witness, a discovery sanction, or a request from the State to exclude evidence. *See id.* Here, the court was not inserting itself into the role of the parties in making determinations regarding prequalifying the admissibility of A.'s testimony; rather, upon discovery of a late-disclosed defense witness, the court here analyzed and ruled based upon the *Taliaferro* factors. The facts here are inapposite to *Kelly* and finding otherwise would interfere with the court's ability to properly use its discretion in sanctions rulings.