Circuit Court for Cecil County
Case No. 07-K-14-001088

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 909

September Term, 2015

MICHAEL WADE ALLEN, SR.

v.

STATE OF MARYLAND

Woodward, C.J.,
Eyler, Deborah S.,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Woodward, C.J.

Filed: May 15, 2018

A jury in the Circuit Court for Cecil County convicted Michael Wade Allen, Sr., appellant, of sexual abuse of a minor. The circuit court sentenced appellant to twenty years' incarceration, with eight years suspended and five years of supervised probation.

In this timely appeal, appellant does not challenge the sufficiency of the evidence supporting his conviction, and instead, presents four questions for our review, which we have rephrased as follows:[1]

1. Did the trial court abuse its discretion by not asking the venire whether any juror held strong feelings about sexual offenses?

2. When C.A., mother of the victim, M.A., was subpoenaed as a witness for the defense and the rule on witnesses had been laid, did the trial court abuse its discretion by permitting C.A. to be present during trial?

[1] Appellant's questions as presented in his brief are as follows:

1. Did the trial court abuse its discretion when it failed to ask during voir dire whether any juror held strong beliefs about sexual offenses?

2. Did the trial court abuse its discretion when it permitted the complaining witness's mother to stay in the courtroom for the entirety of trial, even though defense counsel had subpoenaed her as a witness and asked that she be sequestered?

3. Did the trial court abuse its discretion when it refused to permit defense counsel to cross-examine the complaining witness and to examine [appellant] about conversations between [appellant] and the complaining witness that would have revealed the complaining witness's bias and motive to lie?

4. When the complaining witness denied having conversations with [appellant] about the complaining witness's misconduct, did the trial court abuse its discretion when it refused to allow defense counsel to ask [appellant] if he had conversations with the complaining witness about the complaining witness's misconduct?

3. Did the trial court abuse its discretion by forbidding the questioning of M.A. and appellant about the underlying reason for M.A.'s request for five hundred dollars from appellant?

4. When M.A. denied having any conversations with appellant about M.A.'s prior bad acts, did the trial court abuse its discretion when it refused to allow defense counsel to ask appellant about such conversations?

For the reasons set forth below, we affirm the judgment of the circuit court.

BACKGROUND

The incidents of sexual abuse in this case first came to light in December 2013, when M.A., appellant's son, was fifteen years old. After M.A's girlfriend disclosed to him some "very sensitive" information about herself, M.A. responded by telling his girlfriend something that he "promised [he] would never tell anybody[:]" that appellant raped him when he was seven years old. Unbeknownst to M.A., his girlfriend's grandfather overheard their conversation and later made an anonymous tip to the Department of Social Services ("DSS").

After an investigation into M.A.'s allegations, a Cecil County grand jury indicted appellant on charges of child sexual abuse and related crimes. A three-day trial began on January 13, 2015. The State's case-in-chief focused on M.A.'s testimony that, when he was seven years old, appellant sexually abused him on two occasions.

At the time of the first incident in October 2005, appellant and C.A. were divorced, and M.A. was visiting appellant. According to M.A., he was sitting on his bed, and appellant sat down beside him. Among other things, appellant took his clothes off and sodomized M.A. The incident did not last long and afterward, appellant got up, pulled his

pants on, and "walked out of the room like nothing happened." Shortly thereafter, appellant walked back in, looked at M.A. and told him that, "if [he] ever told anybody, it would be the last thing that [he] said[.]" M.A. promised himself that he was never going to tell anybody what had happened to him and did not think people would believe him.

The second incident occurred about a month later in November 2005. According to M.A., it was the first time that he was alone with appellant since the first incident. M.A. was lying on his bed when appellant came in and sat down on the bed beside him. Appellant again sodomized M.A. After appellant was done, M.A. tried to run to his closet for safety. Appellant slapped M.A. across the face, looked him in the eye, and stated: "This is a reminder that if you tell, it will be the last thing you do."

M.A. never told C.A. what appellant had done to him but told her that he did not like it at appellant's house and did not want to go back. C.A. eventually received full custody of M.A. after the police responded to a physical fight between appellant and M.A. M.A. stated that he did not see appellant for a while after the custody arrangement changed, but did receive "cards and stuff on [his] birthday." M.A. testified that he received a card from appellant in 2013 that stated that appellant "was sorry for what he did to [M.A. and], that he couldn't imagine what [M.A.] was thinking, that he wished [they] could have a better relationship." According to M.A., the last time he saw appellant was Father's Day 2013 when he reached out to appellant to "put all this behind [him]."

On cross-examination, M.A. testified that he contacted appellant in 2013 by phone and by letter. M.A. stated that, when he checked in to the MeadowWood Behavioral Health System, he wrote a letter to appellant stating that he loved appellant and wanted to have a

relationship with him upon his discharge from the hospital. M.A. denied asking appellant for five hundred dollars, threatening appellant, or discussing with appellant any trouble that he had gotten into.

After M.A.'s testimony, Detective Jonathan Pruett testified that, when he received Department of Social Service's report regarding M.A., he contacted appellant who willingly came to the police station to speak with him. The interview was recorded and played for the jury at trial. Appellant denied all allegations against him. Det. Pruett also testified that because of "the timeframe[,]" he did not have M.A. undergo a medical examination.

Marion Barnett, an expert in the forensic examination of children and dynamics of child sexual abuse, testified that she was present for M.A.'s interview with Child Protective Services and observed that his demeanor was "very reserved." M.A. was also very upset, spoke with his head down, and was "tearful throughout the interview." Barnett stated that "children typically disclose child sexual abuse when they are ready," which "can be when it happens" or several years later. Additionally, Barnett stated that it is not unusual for a child to still want to have a bond with an abusive parent.

After the State's case-in-chief, appellant called his mother, K.A., to testify in his defense. K.A. testified that once during one of M.A.'s football games, she witnessed a confrontation between appellant and C.A. in which C.A. told appellant that she did not want him to come to the games. Appellant responded that he wanted to attend the games, because M.A. was "in trouble and [appellant wanted] to help him and support him." Appellant's current wife, D.A. testified that she married appellant on September 30, 2006,

and that she owned the home at 7 Mallory Way, where M.A. stated the sexual abuse occurred. She testified that M.A. never disclosed any sexual abuse to her. She also testified that she was present for an incident that occurred on December 2, 2006, when M.A. was being disrespectful and appellant "kneed" M.A. to get him in his room. As a result, the police were called, but M.A. did not make any allegations of sexual abuse to them.

Appellant testified that he did not move to 7 Mallory Way until August 2006, with week-on, week-off visitation not beginning until October 2006. Appellant testified that after he lost custody in 2007, he did not pursue visitation with M.A., because he "was afraid" of C.A. Appellant testified that in the Fall of 2013, M.A. asked appellant for five hundred dollars. Appellant stated that he declined to give him the money and told M.A. he needed to get a job and earn the money himself. According to appellant, M.A. responded by stating that, if appellant did not give him the money, appellant "would regret it" and "would be sorry." Appellant denied all the allegations of sexual abuse.

On July 15, 2015, a jury convicted appellant of sexual abuse of a minor.[2] As stated above, the circuit court sentenced appellant to twenty years of incarceration, with eight years suspended and five years of supervised probation. Appellant noted this timely appeal.

Additional facts will be set forth below as they become necessary to the resolution of the questions presented in this appeal.

[2] After the jury rendered a guilty verdict on the charge of child sexual abuse, the trial court did not take a verdict on any of the other charges.

DISCUSSION

I.

Voir Dire

Before trial, defense counsel requested, among other things, the following voir dire questions:

> 27. Does any juror hold any strong beliefs about sexual offenses or sexual conduct in general, so that he or she might not fairly judge the facts and follow the law in this particular case?
>
> 28. Will any juror feel unusually uncomfortable if he or she is chosen to sit for this trial?

Before the venire was brought in for jury selection, the trial court reviewed the proposed voir dire submitted by both the defense and State. When the court reached Question 27, the State objected, and the following colloquy ensued:

> [STATE]: State would object to Defense 27 ["Question 27"]. I imagine most people sitting in this courtroom right now and most of the jurors that will be sitting here do have strong feelings about child sexual abuse. It's whether or not they can remain impartial.
>
> THE COURT: Well, I think since we're -- [defense counsel], **I think since we're asking if they have ever been a victim or charged with that crime that that would be covered.**
>
> [DEFENSE COUNSEL]: **Well, I think we should ask this one, judge.**
>
> THE COURT: **Well, I don't think we should ask all of them.**
>
> [DEFENSE COUNSEL]: Whether you have any strong beliefs.
>
> THE COURT: They are either going to have strong feelings about it or they've been the victims or know someone who is charged with it.

[STATE]: I have strong feeling[s] about it, but I haven't been charged with anything. Most people would.

THE COURT: What I'm saying is --

[STATE]: It doesn't matter. It's whether or not they can be fair.

THE COURT: **What I'm saying is, we ought to ask it one way or the other. They either have been victims of it or they know someone who is a victim, *or* they have strong feelings.**

[DEFENSE COUNSEL]: **I appreciate that.**

THE COURT: Okay.

[STATE]: And that's already asked, I believe, judge.

[DEFENSE COUNSEL]: **Let the judge ask that.**

THE COURT: **So we will do that. Take out -- 27 --** we are already asking about -- you have to ask it in one fashion or another. I'm not going to ask 28.

[STATE]: Thank you, judge.

THE COURT: I think that's covered in 27.

[DEFENSE COUNSEL]: **I'd like you to ask 28 because I want to know if any jurors out there would be uncomfortable sitting on this type of a case, judge.**

[STATE]: Whether or not jurors are comfortable or not doesn't go to the fact as to whether or not they can be fair and impartial. It's inappropriate.

[DEFENSE COUNSEL]: Well, I disagree[ ] with that. I don't think they can be fair and impartial if they're uncomfortable with it, judge.

THE COURT: Okay. All right. **But I think we've covered it in the other questions, [defense counsel], so I'm going to not ask it.**

[STATE]: State would also --

> [DEFENSE COUNSEL]: **And I'll make an objection just to preserve the record.**

(Emphasis added).

After reviewing all of the proposed voir dire, the court posed questions to the venire. At the conclusion of the voir dire, the court asked counsel:

> THE COURT: [ ] **Is [sic] there any questions that you want me to ask that I didn't ask?**
>
> [DEFENSE COUNSEL]: **I don't think you -- you asked them all, didn't you, judge?**
>
> THE COURT: I think I did, but I'm not sure.
>
> [STATE]: **I have several that weren't asked**, and I didn't know if the court had decided they did not want to, **about whether or not they have ever been a victim or accused.**
>
> [DEFENSE COUNSEL]: Oh, yes.
>
> THE COURT: I think that's important.
>
> [STATE]: I do too.
>
> * * *
>
> THE COURT: **Okay. Any other questions?**
>
> [DEFENSE COUNSEL]: **No, your Honor. Thank you.**
>
> [STATE]: Thank you.

(Emphasis added). Defense counsel did not request Question 27 be asked to the venire or object to the court declining to ask Question 27.

The trial court then asked the venire: "Has any member of the jury panel been a victim or accused of any type of crime or offense including child abuse, sex abuse, rape,

or any other sex offense?" Six jurors responded to this question. The trial court also asked the venire: "This is a corollary of that question. Any relative or friend or close friend, I should say, of the jury panel ever been a victim or accused of any type of sexual assault, sex abuse or child abuse? Anybody have any relatives or friends?" Twenty jurors responded to this question.

In concluding, the trial court stated:

> THE COURT: All right, ladies and gentlemen. **If there's nothing further from** [defense counsel] **or [the State] on these questions, we'll go to the jury room and have follow-up questioning.**

(Emphasis added). Defense counsel again did not request that the trial court ask Question 27 regarding "strong feelings" or object to the trial court omitting Question 27.

Appellant argues that the trial court abused its discretion when it refused to ask the mandatory voir dire question of whether any juror had strong feelings about sexual offenses and therefore, this Court must reverse appellant's conviction. The State responds that the trial court's failure to ask the strong feelings question would normally result in reversal but that appellant waived this appellate argument "when [his] defense counsel first acquiesced in the trial court's denial of his request to ask [Question 27] and then later responded in the negative when the trial court asked him if he wanted the court to pose any other questions to the venire." Appellant counters that this Court should not interpret defense counsel's statement "I appreciate that" to be an acquiescence, because when read in context, the statement simply meant that defense counsel understood the court's ruling. Additionally, appellant contends that, after the court ruled that it would not ask Question 27, there was

not another opportunity to request Question 27 be asked or object to omitting Question 27, because it already had been litigated.

Instructive is this Court's opinion in *Brice v. State*, which addressed the issue of explicit waiver in the context of whether the trial court abused its discretion when it refused to ask the mandatory police voir dire questions. 225 Md. App. 666, 678 (2015), *cert. denied*, 447 Md. 298 (2016). We explained that "waiver is the intentional relinquishment of a known right, or conduct that warrants such an inference." *Id.* at 679 (internal quotation marks and citation omitted). We elaborated:

> Maryland Rule 8–131(a) states: "Ordinarily, the appellate court will not decide any [ ] issue unless it plainly appears by the record to have been raised in or decided by the trial court...." Rule 8–131(a) requires a defendant to make "'timely objections in the lower court,'" or "'he [or she] will be considered to have waived them and he cannot now raise such objections on appeal.'" *Breakfield v. State*, 195 Md. App. 377, 390, 6 A.3d 381 (2010) (quoting *Caviness v. State*, 244 Md. 575, 578, 224 A.2d 417 (1966)).
>
> Maryland Rule 4–323(c) governs, among other things, objections made during *voir dire* and jury selection. The Rule provides:
>
> > [For purposes of review by the trial court or on appeal of any other ruling or order, it] is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.
>
> Md. Rule 4–323(c). "We have held that it is sufficient to preserve an objection during the *voir dire* stage of trial simply by making known to the circuit court 'what [is] wanted done.'" *Marquardt v.*

> *State*, 164 Md. App. 95, 143, 882 A.2d 900 (quoting *Baker v. State*, 157 Md. App. 600, 610, 853 A.2d 796 (2004)), *cert. denied*, 390 Md. 91, 887 A.2d 656 (2005). "An appellant preserves the issue of omitted *voir dire* questions under Rule 4–323 by telling the trial court that he or she objects to his or her proposed questions not being asked." *Smith v. State*, 218 Md. App. 689, 700–01, 98 A.3d 444 (2014). If a defendant does not object to the court's decision to not read a proposed question, he [or she] cannot "complain about the court's refusal to ask the exact question he requested." *Gilmer v. State*, 161 Md. App. 21, 33, 866 A.2d 918, *vacated in part on other grounds*, 389 Md. 656, 887 A.2d 549 (2005).

Id. at 678-79.

In *Brice*, defense counsel made a written request for voir dire questions, including two questions pertaining to whether a juror would give more or less weight to the testimony of police officers. *Id.* at 677, 679. At the conclusion of questioning the entire jury pool, but prior to individual questioning, the trial court asked the parties if it had missed any questions. *Id.* at 677. At this point, the trial court had not asked the police voir dire questions. *Id.* at 679. Defense counsel stated "No, Your Honor." *Id.* at 677.

This Court held that, when the appellant requested the police voir dire questions and after the court intentionally omitted them, the appellant waived his right to the requested questions by responding "No" to the court's request for any further comment or objection to the voir dire questions. *Id.* at 679. Because "[d]efense counsel's response was more than the simple lack of an objection" when he "affirmatively advised the court that there was no objection[,]" his statement was an explicit waiver. *Id.* (internal quotation marks and citation omitted). Ultimately, however, we held that Brice's defense counsel retracted this waiver when he requested that the trial court ask the police questions later in the voir dire questioning. *See id.* at 688.

In the case *sub judice*, appellant first failed to preserve his right to challenge the court not asking Question 27 pursuant to Maryland Rule 4-323(c), because he did not object when the court ruled that it would not ask Question 27. Md. Rule 4-323(c) ("For purposes of review . . . on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes . . . the objection to the action of the court."). Defense counsel's failure to object, alone is sufficient to demonstrate that appellant's challenge is not preserved on appeal, because defense counsel had the opportunity to object and failed to do so. Consequently, we need not consider whether defense counsel's statement, "I appreciate that[,]" was an explicit waiver.

Appellant, however, did explicitly waive his challenge at the conclusion of voir dire when the trial court asked counsel: "Okay. Any other questions?" and defense counsel responded: "No, your honor. Thank you." The trial court's question and the response by defense counsel are virtually identical to the colloquy in *Brice*. 225 Md. App. at 677. In *Brice*, we concluded that defense counsel's response "affirmatively advised the court that there was no objection" and "[s]uch statement was an explicit waiver." *Id.* at 679 (internal quotation marks and citation omitted).

Defense counsel further failed to preserve the instant appellate challenge by failing to raise the issue of Question 27 not being asked or objecting when the trial court later stated:

> THE COURT: All right, ladies and gentlemen. **If there's nothing further from [defense counsel] or [the State] on these questions, we'll go to the jury room and have follow-up questioning.**

(Emphasis added).

In short, appellant's challenge is not properly before this Court, because (1) defense counsel failed to object when the trial court refused to ask Question 27; (2) defense counsel made an explicit waiver by responding "No, your honor[,]" when asked whether there were any additional questions that the parties wished the court to ask the venire; and (3) at no time thereafter during voir dire did defense counsel again raise the issue of Question 27 or object to the court declining to ask it. *Cf. Brice*, 225 Md. App. at 680-82. Accordingly, we will not consider appellant's argument.

II.

C.A. Remaining in the Courtroom

After C.A. was served with a subpoena by the defense, M.A.'s attorney[3] filed a motion requesting that C.A. be allowed to remain in the courtroom during the trial. On the first day of trial, M.A.'s attorney argued that C.A. should be present in the courtroom throughout trial, and the following occurred:

> [DEFENSE COUNSEL]: Well, I do object to [C.A. being present in the courtroom during trial] because of the sequestration rule, judge.
>
> THE COURT: I understand. Why, I mean, from a factual point of view?
>
> [DEFENSE COUNSEL]: Oh, yes. One, she's threatened [appellant]. She was part of this plot to frame him, set him up, judge; and she's a direct -- I'm bringing her in as a witness for the defense on her conduct through the years.
>
> * * *

[3] The attorney represented M.A. as a victim's attorney in this case.

This is a sixteen going on seventeen-year-old boy; his word against my client's word. Poisonous lies my client tells me. **He's big enough to be cross-examined, and I'm not going to let her -- we don't want her sitting in this courtroom nodding this way or talking to my -- to the so-called alleged victim --**

THE COURT: Wait. Wait. [Defense counsel], wait a minute.

[DEFENSE COUNSEL]: (Continuing) -- when they go out, judge.

THE COURT: I don't want to ruin you're [sic] train of thought in one respect; but if she's your witness --

[DEFENSE COUNSEL]: I want her out. She's sequestered.

THE COURT: Sequestering your own witness?

[DEFENSE COUNSEL]: Yes, your Honor. Why not? Sure.

THE COURT: Why would you care if they want her in then?

[DEFENSE COUNSEL]: I do care very much because --

THE COURT: She's not their witness.

[DEFENSE COUNSEL]: That's what they say. But by the time we finish, I finish my opening statement or my client testifies, she may end up being a witness. And if you look at the section of the code --

* * *

He's sixteen years old. She does not need to be in here. I'm calling her as a witness. And I don't want to divulge my whole defense, your Honor, if at [sic] pleases the court, but he's not dead and he's not disabled. She can certainly -- she's testifying on the threat that she's made to my client; and dealing with these alleged sexual allegations. It's important that she -- **I call her as a witness, your Honor, and that she remains out of the courtroom. And by keeping her here it's going to prejudice my client's case, the victim in this matter.**

THE COURT: They're not calling her. They're not calling her.

> [DEFENSE COUNSEL]: I'm calling her. I'm calling her as an adverse witness.
>
> THE COURT: Why would you call such a shady witness?
>
> [DEFENSE COUNSEL]: Well, judge --
>
> THE COURT: I mean, you don't believe a word she's going to say.
>
> * * *
>
> Well, she's -- [defense counsel], what -- **I'm going to rule that [C.A.] can stay in the courtroom. She's not the state's witness, so they are not violating any rule of sequestration or anything of that nature, so she can stay in**. . . . [T]here is nothing before me to indicate that they were going to call her.
>
> * * *
>
> I am going to rule that she can stay in. Whether she wants to or not that's going to be up to her.

(Emphasis added). Ultimately, C.A. was not called as a witness for either the State or defense.

The parties seem to disagree over whether C.A. was present in the courtroom during the testimonial portions of the trial, and our review of the record does not clearly reveal whether C.A. was present. For reasons explained *infra*, however, we will assume that C.A. was in the courtroom during the trial.

On appeal, appellant contends that the trial court erred and/or abused its discretion when it permitted C.A. to stay in the courtroom for the entire trial, where defense counsel had subpoenaed her as a witness and asked that she be sequestered until called to testify. Appellant argues that this error is not harmless beyond a reasonable doubt, because, even though C.A. was not called as a witness for the defense, this "decision . . . was undoubtedly

due to the fact that she had heard her son's testimony . . . and that she therefore would have adjusted her testimony[.]" Appellant further argues that, "if [C.A.] was indeed complicit in [M.A.'s] lies, as [appellant] alleged, common sense suggests that her presence in the courtroom made it more likely that [M.A.] would continue to perpetuate that lie during his testimony."

The State responds that reversal is not warranted, because the court properly exercised its discretion under Maryland Rule 5-615(c) in permitting C.A., as M.A.'s parent, to remain in the courtroom. Even if the court erred in permitting C.A. to remain in the courtroom, the State argues that the error was harmless beyond a reasonable doubt, because C.A. was never called as a witness and defense counsel did not set forth on the record why she was not called as a witness.

We need not determine whether the trial court erred or abused its discretion in permitting C.A. to remain in the courtroom during the trial, because we conclude that any error was harmless beyond a reasonable doubt. The Court of Appeals recently reiterated the standard applied to harmless error as follows:

> "Harmless error review is the standard of review most favorable to the defendant short of an automatic reversal." *Bellamy v. State*, 403 Md. 308, 333, 941 A.2d 1107 (2008). When we have determined that the trial court erred in a criminal case, "reversal is required unless the error did not influence the verdict." *Id.* at 332, 941 A.2d 1107 (citation omitted). "To say that an error did not contribute to the verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Id.* (citation omitted). In other words, reversal is required unless we find that the error was harmless. We have explained that an "error is harmless only if it did not play *any role* in the jury's verdict." *Id.* (emphasis added) (citation omitted). The State carries the burden of proving, beyond a reasonable doubt,

> that the error meets this high standard. *Dionas v. State*, 436 Md. 97, 108, 80 A.3d 1058 (2013) (citation omitted).

Porter v. State, 455 Md. 220, 234 (2017). In the case *sub judice*, the State has met this burden for two reasons.

First, as the State aptly noted in its brief, defense counsel failed to proffer "what questions he intended to ask [C.A.], what her anticipated responses would have been, or how C.A.[] having heard the trial testimony" would have changed or influenced her own testimony "if the defense had called her." This Court has held that the purpose of the sequestration rule "is to prevent one prospective witness from being taught by hearing another's testimony; its application avoids an artificial harmony of all the testimony; it may also avoid the outright manufacture of testimony." *See Poole v. State*, 207 Md. App. 614, 622 (2012) (quoting *Tharp v. State*, 362 Md. 77, 95 (2000)). The record in this case does not reveal that the presence of C.A. in the courtroom violated the purpose of the sequestration rule, *i.e.*, allowed any collusion of testimony or "outright manufacturing of testimony." *See id.* It was incumbent on defense counsel to make a proffer as to why C.A. was ultimately not called as a witness for the defense, and here, defense counsel failed to do so either at trial or at the hearing on appellant's motion for a new trial.

Second, the record is devoid of any indication that C.A. was influencing M.A.'s testimony or was coaching M.A. during his testimony. We decline appellant's invitation to infer that such conduct took place without support in the record. If such conduct had taken place, it was incumbent on defense counsel to make a record of the incident, and no record was made by defense counsel. For these reasons, we conclude that any error caused

by C.A. remaining in the courtroom during trial was harmless error beyond a reasonable doubt.

III.

Questioning About the Underlying Reason for M.A.'s Request for Five Hundred Dollars

Before trial, the circuit court heard several preliminary motions, one of which was the State's motion in limine seeking to prevent defense counsel from "referencing the victim's juvenile history, including but not limited to investigations and complaints/answers filed in juvenile [c]ourt . . . ." The court ultimately granted the State's motion, but during oral argument on the motion in limine, defense counsel requested that he be permitted to cross-examine M.A. about conversations M.A. and appellant had concerning M.A.'s request for five hundred dollars and the underlying reasons for the request, which was to pay M.A.'s legal fees and get off probation imposed by the juvenile court. Defense counsel appeared to argue that this evidence was relevant to establish that M.A. had motive to lie about the sexual abuse.

The trial court ruled that defense counsel was not permitted to question M.A. about the underlying reason for M.A.'s request for five hundred dollars or any conversations M.A. had with appellant concerning the reason for his request for money. The court reasoned that, "[w]anting money for legal fees does not in any way reflect on the child's credibility. It does not, by itself." The court further stated that allowing defense counsel to ask the question would be "back dooring" the court's previous ruling forbidding any reference to M.A.'s juvenile record.

On appeal, appellant contends that the trial court abused its discretion when it refused to permit defense counsel to cross-examine M.A. about conversations between appellant and M.A. regarding M.A.'s request for money, which would have revealed M.A.'s bias and motive to lie.[4] Specifically, appellant argues that his case is sufficiently similar to this Court's opinion in *Churchfield v. State*, 137 Md. App. 668, *cert. denied*, 364 Md. 536 (2001), to conclude that the trial court abused its discretion. Like *Churchfield*, appellant contends that the case against him centered on the testimony of the victim, and therefore, the ability to establish that M.A.'s request for money was related to the fact that he was on probation and needed the money for legal fees to get off probation was critical to impeaching M.A.

The State responds by appearing to concede that such testimony was relevant, but unlike *Churchfield*, M.A.'s testimony on the subject would have had little probative value. According to the State, because the little probative value of the testimony "was substantially outweighed by the danger that the jury would discount M.A.'s testimony for

[4] Appellant also argues that the trial court abused its discretion by forbidding defense counsel from asking appellant about whether M.A. requested five hundred dollars for legal fees. The trial court, however, did not make any ruling about the scope of *direct examination of appellant* during the motions hearing discussed above. Moreover, defense counsel did not ask appellant about whether he and M.A. had conversations about the underlying reason for M.A.'s request for five hundred dollars. Because the record is devoid of any court ruling or attempt by defense counsel to elicit testimony from appellant about conversations pertaining to the underlying reason for the five hundred dollar request, we conclude that the issue was not raised in the trial court, nor was the issue "decided by the trial court." *See* Md. Rule 8-131(a) ("Ordinarily, the 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, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal."). We, therefore, will not consider appellant's argument.

improper reasons[,]" the trial court did not abuse its discretion. We agree with the State.

In *Churchfield*, John Churchfield was charged with sexually abusing his daughter, C.C. 137 Md. App. at 672-73, 677 n.2. Churchfield's defense theory was that C.C. lied about the allegations of sexual abuse, because C.C. was tired of her parents restricting her ability to be involved with two boys, and she knew that sexual abuse allegations were taken seriously by the police. *See id.* at 676-77, 679. Churchfield's defense attorney was able to proffer that testimony from Churchfield and defense witnesses would show that C.C. and Churchfield had been in conflict for months, because Churchfield would not let C.C. continue to see two boys. *Id.* at 675. Moreover, the evidence would have shown that on the night of February 4, 2000, C.C. and Churchfield got into an argument, because Churchfield would not let her stay the night at an unknown friend's house in fear that she was really wishing to see one of the two boys. *See id.* That night, C.C. ran away from home and met one of the two boys that she was dating. *Id.* at 674. C.C. then told the mother of the boy that her father was sexually abusing her. *Id.*

Before trial, the State sought to limit the testimony regarding C.C.'s prior sexual relationships. *Id.* at 677. Defense counsel argued that cross-examining C.C. about her sexual relationship with the two boys would corroborate Churchfield's defense that these sexual relationships were a point of contention between C.C. and Churchfield that led to more restrictions on C.C. *See id.* at 680. Defense counsel further asserted that such testimony from C.C. was important to demonstrate that the night C.C. ran away and reported that Churchfield had sexually abused her, C.C. and Churchfield argued about C.C.'s sexual relationship with the boys. *See id.* Moreover, the nature of her relationship

with the boys would have demonstrated "the extent to which she would go to evade parental restrictions . . . ." *Id.* at 682. The trial court, however, would not allow defense counsel to cross-examine C.C. about her sexual relationship with the two boys that she was dating. *Id.* at 681. Churchfield was convicted of child abuse and filed a timely appeal. *Id.* at 672.

We began our analysis of the trial court's ruling in *Churchfield* by recognizing that "the scope of examination of witnesses at trial is left largely to the discretion of the trial judge and no error will be recognized unless there is a clear abuse of such discretion." *Id.* (internal quotation marks and citation omitted). We explained:

> The trial court, for example, may impose reasonable limits on cross-examination to protect witness safety or to prevent harassment, prejudice, confusion of the issues, or inquiry that is repetitive or marginally relevant, especially as collateral matters are concerned. Such limits, however, may not trample the constitutional rights of the accused, and the trial court's discretion begins only after constitutionally required threshold level of inquiry has been afforded the defendant to satisfy the Sixth Amendment. The Sixth Amendment requires that the defense be permitted to expose the jury to the facts from which jurors, as the sole triers of fact and of credibility, could appropriately draw inferences relating to the reliability of the witness. To determine whether the trial court abused its discretion in limiting the cross-examination of the State's witnesses, 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.

Id. at 683-84 (internal quotation marks and citation omitted).

This Court then noted that the case against Churchfield centered on weighing the testimony of C.C. against the testimony of Churchfield. *Id.* at 686. We determined that the sexual relationship between C.C. and the two boys was relevant, because "[i]f the defense had been allowed to explore the full panoply of issues related to [C.C.]'s

relationships with the two boyfriends and her running disagreement with her father, the jury may have been able to assess more readily whether she had a propensity to lie about sex." *Id.*

We next addressed the State's argument that, "even if the evidence were relevant, its probative value would be outweighed by its potential for unfair prejudice, and, thus, it would be inadmissible[.]" *Id.* at 687. We explained that the testimony concerning the sexual relationship between C.C. and the two boys was "more than marginally relevant and [went] to the heart of the accusations against [Churchfield]." *Id.* at 687-88. Finding that Churchfield "proffered more than a scintilla of proof that [C.C.'s] charges [were] motivated not by actual events but instead by her desire to evade parental supervision[,]" we concluded that the trial court abused its discretion. *Id.*

The case *sub judice* is readily distinguishable from *Churchfield*. Unlike *Churchfield*, defense counsel never proffered a cohesive theory of M.A.'s motive to lie. The glaring flaw in appellant's theory was that M.A. never reported the sexual abuse by appellant. The grandfather of M.A.'s girlfriend overheard M.A. tell his girlfriend about the sexual abuse, and then the grandfather reported the same to DSS. The failure of M.A. to report the sexual abuse severely undermines the theory that appellant's refusal to give M.A. five hundred dollars for legal fees was an action that would motivate M.A. to lie in retaliation, and thus weakens the probative nature of any testimony on the subject. When weighing the danger of the unfair prejudice of revealing M.A.'s legal troubles against the weak probative value of such testimony, we conclude that the trial court did not abuse its discretion by forbidding defense counsel from inquiring on cross-examination of M.A.

about the underlying reason for his request of five hundred dollars from appellant.

IV.

Inquiry into M.A.'s Prior Bad Acts

At trial, defense counsel asked M.A. whether he ever had any conversations with appellant concerning, among other things, his use of marijuana, misusing a credit card, and stealing a car. M.A. denied such conversations ever took place.

Later, defense counsel asked appellant on direct examination:

> [DEFENSE COUNSEL]: **Did [M.A.] discuss any of his problems with you?**
>
> [APPELLANT]: **He did.**
>
> [DEFENSE COUNSEL]: What were they?
>
> [APPELLANT]: He told me that he had been caught by [C.A.] with friends smoking marijuana, stealing the credit card --
>
> [STATE]: Objection.
>
> [DEFENSE COUNSEL]: This is his conversations with [M.A.], Judge. I'm not getting into [M.A.'s juvenile] records.
>
> [STATE]: Objection, your Honor. Can we approach on that comment, please?
>
> [DEFENSE COUNSEL]: You objected and I'm trying to address the Court, counselor.
>
> (The following occurred at the bench with the defendant present:)
>
> [DEFENSE COUNSEL]: Just his conversations. That's all I asked.
>
> [STATE]: And this is where you were going to rule on whether or not they were proper. But the last comment that [defense counsel] just made, he knows he's not allowed to refer to records, and he just did.

* * *

THE COURT: You're not allowed to get into the records.

[DEFENSE COUNSEL]: Yes, Your Honor. I'm not going to [get into M.A.'s juvenile records]. I am not going to. I'm just going to say his conversations only. That's all.

THE COURT: Well, wait a minute. What's the purpose of this? **You already went over this before to show the fact that he had the conversations. You already went into this one time.**

[DEFENSE COUNSEL]: Not with my client. Not with my client.

THE COURT: With [M.A.]

[DEFENSE COUNSEL]: **With [M.A.] but not my client.**

* * *

THE COURT: So I'm going to sustain the objection.

[STATE]: Thank you, Judge.

(End of bench conference.)

*** * ***

THE COURT: Ladies and gentlemen, I'm going to sustain the State's objection to the question, [**defense counsel], about the conversation about marijuana.** And any mention about a record, I want you to strike it. **It will be stricken from the record** and I want you to disregard that.

(Emphasis added).

Appellant contends that the trial court abused its discretion when it refused to allow defense counsel to ask appellant if he had conversations with M.A. about M.A.'s prior bad acts. Appellant claims that this ruling prevented him from impeaching the credibility of M.A. and thus was not harmless beyond a reasonable doubt. The State responds that if

preserved, appellant impeached M.A. when he testified that M.A. and appellant had discussed M.A.'s prior behavioral problems. According to the State, the substance of the conversations between M.A. and appellant were "not necessary to contradict M.A.'s testimony that no such conversations occurred." Moreover, "[b]ecause the substance of those alleged conversations was offered to prove that M.A. had committed those bad acts, as [appellant] argued in closing, the substance of the conversations was inadmissible hearsay."

We need not address whether appellant's argument is preserved, because even if it is preserved, appellant does not prevail on the merits. Maryland Rule 5-616(a)(2) states, in relevant part: "The credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at . . . [p]roving that the facts are not as testified to by the witness." Md. Rule 5-616(a)(2). Defense counsel sought to impeach M.A. by demonstrating that M.A. and appellant had *conversations* about M.A.'s prior bad acts, not that M.A. committed those prior bad acts. Despite appellant's contention on appeal, defense counsel was able to impeach M.A. when appellant testified that he and M.A. indeed had conversations about M.A.'s "problems." The content of that discussion, *i.e.*, the particular behavior problems that M.A. was having or his prior bad acts were not relevant for impeachment purposes. Accordingly, the trial court did not abuse its discretion when it limited direct examination of appellant regarding M.A.'s prior bad acts.

JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY AFFIRMED; APPELLANT TO PAY COSTS.