Circuit Court for Montgomery County
Case No. 138036C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1075

September Term, 2022

ANTONIO E. GONZALEZ

v.

STATE OF MARYLAND

Friedman,
Ripken,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: August 8, 2023

* 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 Md. Rule 1-104(a)(2)(B).

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

In June of 2022, a jury in the Circuit Court for Montgomery County found Appellant, Antonio E. Gonzalez ("Gonzalez"), guilty of two counts of second-degree assault against his then-wife, M.,[1] and one count of second-degree assault against F.,[2] their teenage son. The jury also found Gonzalez not guilty of first-degree assault against M. and second-degree physical child abuse against F. The court imposed a sentence of four years with all but six months suspended on each of two counts of second-degree assault on M., those counts to run concurrently, and an additional four years with all but 60 days suspended to run consecutively on the third count of second-degree assault on F. Each count included three years' supervised probation. Gonzalez noted this timely appeal. For the reasons to follow, we shall affirm.

ISSUES PRESENTED FOR REVIEW

Gonzalez presents the following issues for review:[3]

I. Whether the circuit court abused its discretion by prohibiting Gonzalez from cross-examining a witness regarding that witness' immigration status.

II. Whether the circuit court abused its discretion by denying Gonzalez's motion

[1] To protect the child's identity, we refer to the child's mother as "M."

[2] To protect the child's identity, we refer to the child as "F."

[3] Rephrased from:

I. Did the circuit court err by preventing defense counsel from cross-examining one of the complaining witnesses about her pending application for a "U Visa" arising from the allegations against Appellant?

II. Did the circuit court err by denying defense counsel's motion to strike juror #224 for cause and by depriving defense counsel of the full exercise of his peremptory challenges?

III. Did the circuit court err by impermissibly limiting defense counsel's closing argument?

to strike a prospective juror.

III. Whether the circuit court abused its discretion by limiting Gonzalez's closing argument.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of March 13, 2020, Gonzalez committed assaults on his then-wife, M., and their 13-year-old son, F. which ultimately lead to the convictions herein. Gonzalez and M. lived in a single-family home with their three children and a tenant. Prior to the altercation, on the day of the incident, Gonzalez was at home while M. was out of the house. When M. returned home, she observed that Gonzalez had been drinking beer. According to M., Gonzalez was "very aggressive" and told M. that his drinking was "[n]one of [her] business." M. then gathered Gonzalez's beers and poured them down the sink. Gonzalez became angry, demanded that M. either give him money or replace the beer, and then pushed M. against a wall. M. and Gonzalez went to their bedroom, where they were joined by F., who was able to calm Gonzalez and persuade him to sit down. However, Gonzalez subsequently stood up and pushed F. Gonzalez then grabbed M.'s neck from behind and placed her in a chokehold, causing her to have trouble breathing. F. tried to intervene, but Gonzalez grabbed him by the neck, until F. was able to remove Gonzalez's hands from his neck. The tenant, who overheard the altercation, entered the bedroom and freed Gonzalez's hands from M.'s neck. M. then called 911, and police officers responded to their home. An ambulance subsequently transported M. to the hospital for treatment of

her injuries.[4] According to the police report, which was admitted into evidence, Gonzalez was intoxicated and hit M. and F. Similarly, the Montgomery County Fire and Rescue Service team's ("MCFRS") report, also admitted into evidence, stated that Gonzalez physically assaulted M. and F. and choked M. We describe additional testimony and evidence presented at trial where relevant in our discussion of the issues.

DISCUSSION

"Trial courts retain wide latitude in determining what evidence is material and relevant, and to that end, may limit, in their discretion, the extent to which a witness may be cross-examined for the purpose of showing bias." *Wagner v. State*, 213 Md. App. 419, 468 (2013) (quoting *Parker v. State*, 185 Md. App. 399, 426 (2009)). Additionally, "[a]n appellate court reviews without deference a trial court's restriction of cross-examination where that restriction is based on the trial court's, 'understanding of the legal rules that may limit particular questions or areas of inquiry.'" *Kazadi v. State*, 467 Md. 1, 49 (2020) (quoting *Peterson v. State*, 444 Md. 105, 124 (2015)). With respect to decisions affecting the composition of the jury, "we will reverse a trial court's ruling on the composition of the jury only if the trial court abused its discretion." *Burdette v. Rockville Crane Rental, Inc.*, 130 Md. App. 193, 203 (2000). Furthermore, "unless there is a clear abuse of

[4] Gonzalez claimed that M. attempted to hit him in the face after she poured out Gonzalez's beers. According to Gonzalez, he grabbed M.'s wrists to prevent her from hurting him. When F. tried to intervene, Gonzalez claimed he grabbed F. by the neck "for a quick period of time" to prevent him from hurting Gonzalez. Gonzalez testified that he was able to get away from M. and F. but then encountered M. in the hallway as he tried to leave their home. Gonzalez claimed that M. tried to hit him in the face, and in response, he pushed M. because he "wanted to get out [of the house]."

discretion that likely injured a party[,]" we shall not disturb the trial court's decision to limit a party's closing argument. *Ingram v. State*, 427 Md. 717, 726 (2012). "[A] court's decision is an abuse of discretion when it is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Wheeler v. State*, 459 Md. 555, 561 (2018) (internal quotation marks omitted) (quoting *Alexis v. State*, 437 Md. 457, 478 (2014)).

I. THE CIRCUIT COURT DID NOT ERR BY PROHIBITING GONZALEZ FROM CROSS-EXAMINING A WITNESS REGARDING THAT WITNESS' IMMIGRATION STATUS.

Prior to trial, the State disclosed to Gonzalez a letter addressed to the Montgomery County State's Attorney's Office from M.'s immigration attorney, requesting the completion of a relevant section of M.'s application for a U-Visa. The letter was dated April 23, 2021, over one year after the events that led to the charges.[5] The letter asked the State to certify that M. was "the victim of a crime" and that she was "helpful to law enforcement in the investigation or prosecution of the crime."[6] The State was provided a

[5] A U-Visa "provides a set of immigration protections and privileges (including work authorization)" for "eligible aliens who are victims of serious crime and who cooperate with law enforcement." *Gonzalez v. Cuccinelli*, 985 F.3d 357, 362 (4th Cir. 2021).

[6] The letter read, in relevant part:

> My office represents [M.] in certain immigration matters. We are currently pursuing a U-visa for crime victims for [M.] based on the crimes of domestic violence and assault. She was a victim of these crimes on March 13, 2020. [M.] worked together with law enforcement in the investigation and prosecution of these cases. As a result of her cooperation, the suspect was apprehended.
>
> To qualify for a U-visa, [M.] requires a certification from a law enforcement agency corroborating that she was the victim of a crime and that she was helpful to law enforcement in the investigation or prosecution of the crime.

form that listed the criminal charges against Gonzalez, provided M.'s account of the incident, and asserted that M. was "cooperating with the State Attorney's Office."[7] On August 4, 2021, the State signed the "Certification" section of the form, certifying that M. was a victim of the listed crimes, that the State "ma[d]e no promises regarding [M.]'s ability to obtain a visa," and "that if [M.] unreasonably refuse[d] to assist in the investigation or prosecution of the qualifying criminal activity of which . . . she [was] a victim, [the State] [would] notify [U.S. Citizenship and Immigration Services]."

At trial, Gonzalez sought the court's permission to cross-examine M. about her

---

***

> Please note that by processing the certification, the Montgomery County State's Attorney's Office is not making any decision with regards to [M.'s] eligibility for the U-visa.
> The certification only states that she was a victim of the crime described in Form I-918B and that she was helpful to Montgomery County Police Department. . . .

[7] The certification form also included a section titled "Helpfulness Of The Victim," which was filled out as follows:

> 1. Does the victim possess information concerning the criminal activity listed [as Domestic Violence and Felonious Assault]? ["Yes" box was checked.]
> 2. Has the victim been helpful, is the victim being helpful, or is the victim likely to be helpful in the investigation or prosecution of the criminal activity detailed above? ["Yes" box was checked.]
> 3. Since the initiation of cooperation, has the victim refused or failed to provide assistance reasonably requested in the investigation or prosecution of the criminal activity detailed above? ["Yes" box was checked.]
>
> If you answer "Yes" to Item Numbers 1.–3., provide an explanation in the space below. . . .
> [The following information was additionally provided:] [M.] is currently cooperating with the State Attorney's Office.

immigration status and U-Visa application. Gonzalez claimed that the U-Visa application could impact M.'s credibility as a witness by creating a *quid pro quo* relationship between M. and the State. In order to establish the relevance of M.'s immigration status, the court permitted Gonzalez to question M. at length outside of the jury's presence. Gonzalez's questioning consisted of the following:

Q: Ms. [M.], is it fair that you were not born in the United States?

[M.]: Correct. I wasn't born here.

***

Q: Okay. Is it fair that [your immigration attorney] is assisting you with that U visa application?

[M.]: Correct.

Q: You have had conversations about the [immigration] case. Right?

[M.]: Of course. What's the reason for asking?

Q: I'll get [t]here. You have discussed how to get [a] U visa. Right?

[M.]: Well, they are immigration attorneys. They know about the law. I don't.

Q: Right. I would agree with that. And they discussed the steps essentially that need to happen for you to get U visa application. Right?

[M.]: Of course. They've given me and told me what the steps are. Yes.

Q: Okay. So you are aware that, if you are helpful to the prosecutor, you and your family might be able to obtain a special immigration status and eventually a green card. Right?

[M.]: I'm not doing this by myself. I'm doing what the attorney is telling me to.

Q: I understand that. My question is you understand that you need to be helpful to the prosecutor for you to be able to get this U visa immigration status. Right?

[M.]: With the attorney, yes. If the attorney tells me. Yes. Of course. Yes.

Q: And on the flip of that, you also understand that if you don't – if you refuse to cooperate with the prosecutor's office, you will not be able to get a special immigration visa?

[M.]: I'm telling you the truth. I don't know what you're saying.

Q: Okay. Let me rephrase it then. You also know that if you don't cooperate with the State's Attorney's Office, you will not be able to get – excuse me. You will not be able to get a green card to stay in the United States?

[M.]: I'm sorry. I don't understand. I don't understand what you want me to say.

Q: I don't want you to say anything that you don't know. I'm simply asking if you know that if you don't cooperate you won't be able to get your U visa?

[M.]: I feel like you are – well, I don't know what you want me to answer.

Q: Do you know that if you do not cooperate you will not be able to get your U visa?

[M.]: I have no idea but if you want more information about that get in contact with my immigration attorney.

***

Q: You are afraid of being deported. Correct?

[M.]: Like everybody else because I have my children here.

Q: Is that a yes?

[M.]: Like every other person, I'm not afraid. I haven't done anything . . . either there or here. I'm not scared.

***

Q: . . . [W]as [your immigration attorney] representing you on or about April 23, 2021?

[M.]: He [was] in charge of my case since 2013.

Q: So is it fair to say that he was still representing you in April 2021?

[M.]: He has my case. Yes. And, if you have questions of course, talk with him.

***

Q: Do you know if [your immigration attorney] was in communication with the State's Attorney's Office in April 2021?

[Gonzalez]: Objection.

[The court]: . . . Overruled. . . .

[M.]: Yes.

Gonzalez subsequently produced a copy of M.'s signed U-Visa application and continued to question M.:

Q: . . . [I]s it fair to say that this is a U visa certification?

[M.]: I imagine so. As I have been telling you, I just do what the attorney tells me to do.

Q: And your name is on this document. Right?

[M.]: Of course.

***

Q: And you filled out this paper?

[M.]: Of course. With my attorney.

Q: And so you had an opportunity to review this document after it was filled out by you and your attorney. Right?

[M.]: Of course. What is normally done.

Q: And if you wanted to add more information or correct any information, you have the opportunity to do that. Right?

[M.]: I'm not going to make up things. I'm going to say what have been experiencing of course.

***

Q: Did you get a response from the State's Attorney's Office with respect to your U visa application?

[M.]: Of course. It has been accepted and approved.

Q: Do you know if your attorney is using that information to present to the Immigration Court or to the immigration agency?

[M.]: Well, he is doing his work. He is doing my work. . . . the case of what happened on March 13 [is] [n]ot about my immigration situation because [Gonzalez] all the time has been telling me that he is going to take my children away. I am an illegal person. They are going to deport me and I'm going to lose everything and that has been his will as a father.[8]

Given M.'s responses to Gonzalez, the court found that "[M.] doesn't understand or doesn't know if there are any negative consequences for her failure to cooperate" with the

[8] The record does not indicate, nor did the questioning of M. clarify, precisely when M. began the process to obtain a U-Visa. Additionally, aside from M.'s responses to Gonzalez, there is no clarity of the process, in addition to the U-Visa application, used by M.'s immigration attorney to manage M.'s immigration case.

State. The court noted:

> The nexus essentially in this case arises from an alleged assault that occurred on March 13 of 2020. The motivation to lie would have had to beg[i]n at that point in time essentially and I have not seen anything at this point with the evidence which indicates a[] motivation to lie on [M.'s] part was generated on March 13, 2020 that led to [sending] her U visa subsequently in a letter to the State's Attorney's Office more than a year later in April 2021.
>
> ***
>
> [I]n this case, I think [it] is just a bit too attenuated in time. . . . I don't believe there is [a] sufficient showing of any motivation to lie which began on March 13, 2020 such that any testimony or questioning regarding [M.'s] immigration status would . . . address her credibility.

Ultimately, the court found that a proper foundation had not been presented, that there was no showing of a *quid pro quo*, and that questioning M. about her immigration status would not "be probative of her character trait for truthfulness in this case." Accordingly, the court prohibited Gonzalez from cross-examining M. about her immigration status or U-Visa application in the presence of the jury.

A. Parties' Contentions

Gonzalez argues that the court erred by preventing him from cross-examining M. regarding her U-Visa application. Gonzalez emphasizes that the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights provide a right to confront witnesses in a criminal prosecution by cross-examining them about matters that affect their credibility. Gonzalez additionally notes that Maryland Rule 5-616 safeguards the right to cross-examine a witness to "[p]rov[e] that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify

falsely[.]"[9] Md. Rule 5-616(a)(4). Gonzalez contends that the trial court substituted its own interpretation of the evidence for that of the jury's. In addition, Gonzalez claims that there need not be direct evidence of a *quid pro quo* relationship to provide a reasonable basis to cross-examine a witness under Rule 5-616(a)(4). Gonzalez also asserts that the timing of M.'s U-Visa application was immaterial because the application could have been construed by the jury to be relevant to the credibility of her trial testimony.

Gonzalez relies on *Calloway v. State*, 414 Md. 616 (2010), and *Kazadi v. State*, 467 Md. 1 (2020), in arguing that the jury should have decided whether M. had a motive to testify favorably for the State, even if M. denied being influenced by the U-Visa application. In particular, Gonzalez contends that the State's certification of M.'s U-Visa application coupled with the State's ongoing prosecution of Gonzalez, provided reasonable grounds to believe that M. could be tailoring her testimony to favor the State.

In response, the State emphasizes the trial court's conclusion that the "big leap" in time between M.'s allegations of abuse and application for a U-Visa made the events "too attenuated" to evidence a *quid pro quo* relationship between M. and the State. Comparing this case to *Kazadi,* the State contends that absent evidence of a *quid pro quo* relationship, M.'s immigration status did not bear on her credibility as a witness.

[9] Maryland Rule 5-616(a)(4) provides, in pertinent part:

> (a) Impeachment by Inquiry of the Witness. The credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at:
>
> ***
>
> (4) Proving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely[.]

B. Analysis

Maryland Rule 5-616(a) governs the questioning of witnesses for impeachment purposes.[10] In particular, "questions permitted by Rule 5–616(a)(4) 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*, 414 Md. at 638 (quoting *Leeks v. State*, 110 Md. App. 543, 557–58 (1996)).

In *Calloway*, Watson, a former cellmate of the defendant, contacted the State and offered to testify about inculpatory statements that the defendant had allegedly made to him. 414 Md. at 619. At the time, Watson was incarcerated, awaiting trial, unable to post bail, and expecting a violation of probation charge due to a guilty plea he had entered. *Id.* Three days after Watson contacted the State, during a disposition conference before a judge, the State discussed dropping Watson's pending charges and releasing him on a personal bond. *Id.* at 629–31. Prior to the defendant's trial, Watson was released, his pending charges were *nolle prossed*, and no violation of probation charge was filed against him. *Id.* at 637. The court prohibited the defense from cross-examining Watson about "whether he had volunteered to testify for the State in the hope that he would receive some benefit in the cases that were pending against him when he contacted the prosecutor's office." *Id.* at 619. However, the Supreme Court of Maryland (at the time named the Court

[10] For the relevant text of Maryland Rule 5-616(a)(4), see *supra* note 9.

of Appeals of Maryland)[11] reversed. *Id.* at 639. The Court explained that, under the circumstances, "there was a solid factual foundation for an inquiry into Watson's self interest, and the circumstantial evidence of Watson's self interest was not outweighed—substantially or otherwise—by the danger of confusion and/or unfair prejudice to the State." *Id.* (emphasis omitted).

In *Kazadi*, the circuit court precluded the defendant, Kazadi, from cross-examining two witnesses about their immigration status. 467 Md. at 53–54. According to Kazadi, who was on trial for murder and other charges, one of the witnesses, S.L., "was an undocumented immigrant subject to a deportation order." *Id.* at 8. "Kazadi contended that the deportation order gave [the witnesses] a motive to testify against Kazadi, in that their testimony could make them eligible for relief from deportation." *Id.* at 11. On appeal, this Court explained:

> With nothing to link the deportation order or the witnesses' immigration status, to either their identification of appellant as Mr. Smith's killer or their trial testimony, the motion court did not err or abuse its discretion in denying the defense motion to compel disclosure of immigration material.
>
> ***
>
> [T]his record is devoid of any evidence that [the witnesses] received or expected an immigration-related benefit as a result of either their [pretrial] identification of [Kazadi] or their testimony against him. . . . To the contrary, the prosecutor insisted she had never discussed immigration status with S.L. . . . [S.L.] maintained that she did not expect any benefit for coming forward to identify [Kazadi] or testify against him. Her trial testimony was consistent on that point.

[11] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

Kazadi v. State, 240 Md. App. 156, 183, 186–87 (2019), *rev'd on other grounds*, 467 Md. 1 (2020). Upon review, the Supreme Court of Maryland also upheld the trial court's decision to prohibit Kazadi's requested line of questioning:

> [W]e conclude that absent additional circumstances—such as allegations of *quid pro quo* or leniency in an immigration case giving rise to a motive to testify falsely or bias—a State's witness's status as an undocumented immigrant, or the existence of a deportation order to which the witness may be subject does not "show the character of the witness for untruthfulness[,]" Md. R. 4-263(d)(6)(A), is not "probative of a character trait of untruthfulness[,]" Md. R. 5-608(b), and does not show that the witness "has a motive to testify falsely[.]" Md. R. 5-616(a)(4).

Kazadi, 467 Md. at 52–53.

1. Factual foundation

Turning to the present case, we agree with the trial court that there was an insufficient factual foundation upon which to cross-examine M. about her U-Visa application and immigration status in the presence of the jury. At the outset, we note that, by itself, M.'s immigration status was not relevant to her credibility as a witness because "absent additional circumstances," such as evidence of a *quid pro quo* relationship with the State, "a witness's immigration status is not relevant to his or her credibility." *See Kazadi*, 467 Md. at 53 ("[A] witness's status as an undocumented immigrant . . . does not make the witness any more likely to falsely testify than any person would be."). Whether such "additional circumstances" or *quid pro quo* relationship existed, warranting inquiry as to bias, depends upon a review of the surrounding facts and circumstances available to the trial court. For the reasons below, we conclude that M.'s U-Visa application failed to provide aid in assessing M.'s credibility as a witness.

We agree with the trial court that there was no evidence presented to suggest that when M. reported Gonzalez to law enforcement, she anticipated applying for a U-Visa more than a year later. Thus, there were no "additional circumstances" warranting cross-examination of M. about her U-Visa status. As the court aptly stated, because "this case arises from an alleged assault that occurred on March 13 of 2020," M.'s "motivation to lie would have had to have begun at that point in time," and there was no evidence indicating a "motivation to lie on [M.'s] part was generated on March 13, 2020 that led to her [sending her] U-Visa subsequently in a letter to the State's Attorney's Office . . . in April 2021." Notably, M.'s initial descriptions to the police and MCFRS, and her testimony over two years later at trial, were consistent.[12] As such, absent a nexus between M.'s initial statements at the scene and the timing of her knowledge or expectation regarding a U-Visa, there was no showing that reflected on credibility. *See Peterson*, 444 Md. at 136 ("The factual predicate for the question [of bias] becomes attenuated when the charges [giving rise to potential bias] . . . arose after the witness had provided the prosecution with the same information as contained in [the] testimony.").

In contrast, discussions about dropping Watson's pending charges in *Calloway* began a mere three days after Watson voluntarily contacted the State to offer information. 414 Md. at 619, 629–31, 637 (describing the potential bias as "whether Watson had a hope that he would benefit from volunteering to testify against Petitioner"). Here, M. requested

[12] While discussing Gonzalez's request to question M. about her U-Visa application, Gonzalez informed the court of some "arguable inconsistencies" between M.'s description of the incident in her application for U-Visa and her testimony before the court. However, the court found that the differences did not "rise to the level of material inconsistences."

the State to certify her U-Visa application on April 23, 2021, more than a full year after the incident at issue, inclusive of her initial statement, which occurred on March 13, 2020. Given the large gap in time between when M. reported Gonzalez to the police and later applied for a U-Visa, any suggestion that M. was motivated to report Gonzalez in anticipation of applying for a U-Visa was highly speculative and minimally probative. The same is true of her trial testimony which the trial judge found to be consistent with her initial report.

Furthermore, Gonzalez's extensive questioning of M. outside of the jury's presence failed to establish a timeline connecting the U-Visa application to the initial statements of M. to law enforcement and paramedics. M. acknowledged that her immigration attorney had been representing her since 2013 and that her attorney communicated with the State in April of 2021. Even so, no evidence was presented to suggest that the attorney's representation had contemplated or discussed pursuing a U-Visa in close proximity or prior to the time of the incident in March of 2020. Gonzalez's questioning of M. also failed to demonstrate that M. knew or understood there could be any negatives consequences to any pending U-Visa if she failed to cooperate with the State's prosecution. When, for example, Gonzalez asked M. whether she understood that "if [she did not] cooperate with the State's Attorney's Office, [she] [would] not be able to get . . . a green card,"[13] M. replied, "I'm

[13] We note that Gonzalez's question to M. was not premised upon an entirely accurate statement of the law. Even if M.'s U-Visa application were rejected, M. could still be eligible to apply for a green card, *i.e.*, to become a lawful permanent resident of the United States, upon meeting certain eligibility requirements. *See* 8 CFR § 245.1.

sorry. I don't understand. I don't understand what you want me to say." Even after Gonzalez rephrased and repeated his line of questioning, M. answered, "I don't know what you want me to answer" and "I have no idea[.]"

Moreover, in contrast to the third party witness in *Calloway*, who had no prior involvement in the case and volunteered to testify against a former cellmate, 414 Md. at 619, here, M. was the victim of a domestic assault, who testified consistently with her report at the time, the other witnesses, and the collective evidence,[14] that Gonzalez had assaulted her and her son. M.'s U-Visa application was more akin to the deportation order at issue in *Kazadi*. 467 Md. at 8. The chance to forestall or withdraw a deportation order, like the opportunity to attain a U-Visa, could act as a motivator to testify falsely. Nevertheless, in *Kazadi*, because "[t]here [was] no evidence of any *quid pro quo* or leniency in any immigration matter involving [the witnesses,] [t]here [was] no indication that any of the immigration-related information that Kazadi requested would 'show the character of [S.L.] for untruthfulness[.]'" *Id.* at 53–54 (quoting Md. Rule 4-263(d)(6)(A)). As in *Kazadi*, here, there was no evidence that M. expected or hoped for an immigration-related benefit as a result of initially reporting Gonzalez or later testifying against him. To the contrary, M. applied for a U-Visa more than a year after the incident and denied any knowledge or understanding of her U-Visa application's potential connection to the case.

Accordingly, absent additional circumstances evidencing that M.'s application for a U-Visa and her immigration status provided a motive to report and then testify consistent

[14] See *infra* "Harmless Error" section, for a description of additional evidence included at trial.

with that initial report, but falsely, at trial over a year later, there was not a showing that M. was "biased, prejudiced, interested in the outcome of the proceeding, or ha[d] a motive to testify falsely," and the court did not err by limiting Gonzalez's cross-examination of M. in the presence of the jury. Md. Rule 5-616(a)(4).[15]

2. Probative vs. prejudicial value

Furthermore, even if there had been a factual foundation to question M. about her U-Visa application and immigration status, the court did not abuse its discretion in implicitly determining that the probative value of such questioning would have been substantially outweighed by the danger of unfair prejudice. In opposition to Gonzalez's line of questioning, the State noted that "typically Courts tend to err on the side of not permitting" inquiry into "immigration status for an individual and a U-Visa status . . . because they don't believe that it's probative for dishonesty." The State requested the court "to make a determination on whether or not it [was] probative and relevant" to this case. In response to the party's arguments, the court plainly stated, "I don't believe that any inquiry regarding [M.'s] immigration status would be probative of her character trait for

[15] The concurrence argues that M. may have been motived to testify falsely, given the substantial benefits conferred by a U-Visa and the risk of negative consequences if her testimony was not helpful to the State. Eyler op. at 4. We believe, however, for the reasons given, any potential connection between M.'s U-Visa application and her testimony was too attenuated. The cases cited by the concurrence are factually distinguishable. *See State of South Dakota v. Dickerson*, 973 N.W.2d 249 (S. Ct. S. Dak. 2022) (witness sought advice of immigration attorney one week after incident and there were disparities in witness's initial and subsequent descriptions); *Romero-Perez v. Commonwealth of Kentucky*, 492 S.W.3d 902 (Ky. App. 2016) (witness acknowledged receiving a benefit for testifying and the court informed parties that it was waiting until after witness testified to certify witness's U-Visa application).

truthfulness in this case" and determined that "any further inquiry into [M.'s] immigration status" should not be permitted.[16]

As previously noted, by itself, M.'s immigration status would have been of little, if any, use in assessing her credibility as a witness. *See Kazadi*, 467 Md. at 53; *see also Ayala v. Lee*, 215 Md. App. 457, 479 (2013) ("[C]ourts that have balanced the relevance and prejudice inquiries have frequently come down on the side of 'prejudicial' because of the low probative value of evidence of immigration status."). Additionally, we agree with the trial court that raising M.'s U-Visa application would have been of little probative value. *See Kazadi*, 240 Md. App. at 187 ("Absent any link between the witnesses' immigration status and their credibility, . . . evidence of [the witness's] immigration status – if relevant at all to her bias and partiality – would have had very little probative value."), *rev'd on other grounds*, 467 Md. 1 (2020).

Whereas raising M.'s immigration status would have been of little probative value, the potential prejudicial effect would have been high. As this Court has explained:

> Immigration status is prejudicial in that it "introduces a factor into the case that might encourage the jury to dislike or disapprove of [a party] independent of the merits." *United States v. Amaya–Manzanares*, 377 F.3d 39, 45 (1st Cir.2004). *See also United States v. Almeida–Perez*, 549 F.3d 1162, 1174 (8th Cir.2008) ("[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) ("[D]amage and prejudice which would result . . . if discovery into . . . immigration status is permitted *far* outweighs whatever minimal legitimate value such material

[16] Although the court did not explicitly balance the probative value of Gonzalez's requested line of questioning against the risk of unfair prejudice, it is implicit in the record, and "we will presume that the trial judge kn[ew] the law and applie[d] it properly." *Mobuary v. State*, 435 Md. 417, 441 (2013).

holds for Defendants.") (emphasis in original) . . . .

Ayala, 215 Md. App. at 478–79 (footnote omitted); s*ee Kazadi*, 240 Md. App. at 187 ("[Q]uestioning [the witnesses] about their immigration status and/or the deportation order . . . had a significant potential both to prejudice jurors against the [State's] witnesses and to confuse jurors by injecting unrelated immigration issues involving mere bystanders into this murder trial against [Kazadi]."), *rev'd on other grounds*, 467 Md. 1 (2020). In the present case, raising M.'s U-Visa application would have introduced the possibility of jurors assessing M.'s testimony on the impermissible basis of immigration status. Hence, had there been a factual foundation for Gonzalez's questioning of M.'s U-Visa application and immigration status, the court did not abuse its discretion in implicitly determining that the probative value of Gonzalez's inquiry would have been substantially outweighed by its prejudicial effect.

C. Harmless Error

Based on our review of the full record, we conclude beyond a reasonable doubt that, even if the court abused its discretion in prohibiting Gonzalez from questioning M. about her U-Visa application and immigration status, such error was harmless. Gonzalez argues that, assuming error, the State has failed to prove that limiting Gonzalez's cross-examination of M. was harmless error. In contrast, the State asserts that, if the court erred, the error was harmless because cross-examining M. about her immigration status would not have influenced the jury's verdict given the strength of the collective evidence against Gonzalez.

The test for harmless error is "well established, and relatively stringent." *Belton v.*

State, 483 Md. 523, 542 (2023) (quoting *Dionas v. State*, 436 Md. 97, 108 (2013)). As first established in *Dorsey v. State*, 276 Md. 638 (1976), an error is harmless when "a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict[.]" *Id.* at 659. In engaging in a harmless error analysis, "[t]o say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Dionas*, 436 Md. at 117 (quoting *Taylor v. State*, 407 Md. 137, 165 (2009)). Additionally, the Supreme Court of Maryland "recently reaffirmed the importance of cumulativeness in determining whether an evidentiary error is harmless." *Belton*, 483 Md. at 542; *see Dove v. State*, 415 Md. 727, 744 (2010) ("[C]umulative evidence tends to prove the same point as other evidence presented during the trial or sentencing hearing. For example, witness testimony is cumulative when it repeats the testimony of other witnesses[.]").

The jury found Gonzalez guilty of two counts of second degree assault against M. and one count of second degree assault against F. Under Maryland law, second degree assault encompasses battery, defined as "intend[ing] a harmful or offensive contact with another without that person's consent." *See White Pine Ins. Co. vs. Taylor*, 233 Md. App. 479, 505 (2017) (quoting *Nelson v. Carroll*, 355 Md. 593, 600 (1999)). Gonzalez himself testified to committing acts constituting second degree assault when he admitted to pushing M. and grabbing F.'s neck. *See White Pine Ins. Co.*, 233 Md. App. at 505. During his closing argument, Gonzalez argued that M. and F. consented to contact by taking "steps to get involved"; however, Gonzalez never testified to being fearful of M. or F. or believing

that he was taking part in a mutual affray with them. Given that the jury acquitted Gonzalez of the offenses that he did not admit to, we are unable to see how the limitation on cross examination of M. would have had any impact on the verdict. Having given Gonzalez the benefit of the doubt on all that he did not admit to, we conclude that had the cross examination regarding the U-Visa been permitted and had the jury determined it gave M. a motive to testify falsely, it would not have changed the conclusion reached by the jury that Gonzalez was guilty of the acts that he testified he committed. Accordingly, we are convinced beyond a reasonable doubt that, regardless of whether M.'s credibility was impeached, the jury would have still found Gonzalez guilty of the acts he testified to committing.

Additionally, in light of the collective evidence against Gonzalez, M.'s testimony was cumulative. F. testified to the same material events.[17] F. explained that Gonzalez was drinking on the day of the incident and becoming "more aggressive." Per F., after M. poured Gonzalez's beers out, Gonzalez "grabbed [F.] by the arms," until F. was able to "push [Gonzalez] off of [him]." Thereafter, F. testified that he heard "scuffling" and M. "shouting" from his parent's bedroom. F. saw Gonzalez "handling" M. with his "arms [] around her." F. explained that, when he tried to intervene, Gonzalez grabbed F. "by the neck." Therefore, even if Gonzalez was permitted to question M. about her immigration status in the presence of the jury, it is also unlikely that a juror would then doubt F.'s testimony covering the same material elements of the incident.

[17] Although F. and M.'s testimonies were not identical, we note that F. provided the jury with a materially similar description of the assault.

Additional evidence at trial included photographs taken the day of the incident which showed marks on F.'s neck, and a forensic nurse examiner, who examined M. at the hospital, testified that she observed redness on M.'s neck and concluded that M.'s symptoms were consistent with strangulation. Furthermore, a police officer, who responded to the scene, witnessed M. grimacing when she touched her neck. In addition, the clinical director of a forensic medical unit, who was accepted as an expert in strangulation, testified that M.'s injuries and symptoms were consistent with strangulation. M.'s testimony before the court matched her initial descriptions of the incident to the police and MCFRS. M.'s testimony therefore "tend[ed] to prove the same point as other evidence presented during the trial." *Dove*, 415 Md. at 744. Hence, we are convinced beyond a reasonable doubt that, had the court abused its discretion in barring Gonzalez from raising M.'s U-Visa application and immigration status, the error would not have influenced the jury's verdict.

II. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO REMOVE A PROSPECTIVE JUROR.

During the *voir dire* process of jury selection, the court questioned the venire as a group regarding their ability to remain fair and impartial as jurors. The prospective jurors were instructed to respond if they had an affirmative answer to a question. Prospective Juror 224 responded affirmatively to multiple *voir dire* questions and the court subsequently invited the juror to the bench for additional questioning. At the bench, the court began by asking Juror 224 why she had responded in the affirmative to whether any prospective juror would "allow pity, anger, sympathy, or other emotions to influence [their]

verdict in any way." Juror 224 replied that she "would probably feel a strong emotion to the [] woman in this case." When asked by the court if she could "listen to the evidence and return a verdict based solely on the evidence presented," Juror 224 replied, "Yes." The court then acknowledged Juror 224's affirmative response to "having strong feelings about first degree assault, and physical child abuse, and second degree assault," and the court asked the prospective juror if she would "be able to listen to the evidence in this case fairly and impartially and return a verdict based solely on the evidence presented in the courtroom[.]" Juror 224 replied, "Yes."

Juror 224 also indicated that her daughter was a victim of sexual abuse and that sentencing was pending in the resulting criminal prosecution case. When the court inquired of the prospective juror whether her daughter's involvement as a victim of a crime would impact her ability to remain fair and impartial, Juror 224 replied, "It would make it tough. Tougher than normal, I would say." The court then asked Juror 224 why she had responded in the affirmative to "hav[ing] preconceived notions about domestic violence that would cause [her] to be unfair to the defendant or unfair to the State." Juror 224 explained that she had been involved in "one incident of domestic abuse with [her] partner[.]" When the court asked Juror 224 whether, in light of her personal experiences, she could remain fair and impartial and "return a verdict based solely on the evidence in this case[,]" Juror 224 answered, "Probably, yes" and "Mm-hm." The court subsequently asked Juror 224 why she had responded in the affirmative to "believ[ing] the testimony of children over that of any other witness solely because they are children[.]" Juror 224 replied, "I just feel like it's very difficult to get children to not tell the truth, even if they've been, sort of, coached to

say something, I feel that when it came to it, they would want to tell the truth on the stand." When the court asked Juror 224 if she could "listen to the testimony and weigh [a child's] credibility . . . as [she] would any other witness[,]" Juror 224 replied, "Probably, yes" and then "Yeah."

Gonzalez then moved to strike Juror 224 for cause, arguing that the prospective juror could not be fair and impartial. The court found Juror 224 to be "candid" in telling "the Court that it would be difficult and emotional [serving as a juror] in light of her personal situation with her daughter[,]" but that "she indicated [] she could be fair and impartial in this case[.]" Accordingly, the court declined to strike the juror for cause. Before the remaining jurors were sworn in, Gonzalez used a peremptory challenge to excuse Juror 224.

A. Parties' Contentions

Gonzalez argues that Juror 224 should have been stricken for cause given the "legitimate questions" about the prospective juror's ability to be fair and impartial. In particular, Gonzalez emphasizes that Juror 224 acknowledged sitting as a juror would be "tougher than normal" given her daughter's victimization. Gonzalez additionally contends that Juror 224 only provided ambiguous assurances, such as that she could "probably" be fair, despite having personally been a domestic abuse victim and tending to believe that children would not testify falsely. Gonzalez further claims that this court should presume prejudice, because he had to use one of his limited and otherwise exhausted peremptory challenges to remove Juror 224.

In response, the State argues that the court effectively questioned Juror 224

regarding possible biases and properly concluded that the juror could be impartial. According to the State, Juror 224's responses regarding domestic violence and her daughter's sexual abuse did not render her unable to be fair and impartial. The State emphasizes Juror 224's assurances: that she could listen to the evidence "fairly and impartially," that she could "return a verdict based solely on the evidence in this case," and that she would not allow "any personal experience to be the determining factor." Viewing the record as a whole, the State contends that the court acted within its discretion by concluding that Juror 224 would be fair and impartial and by denying the motion to strike the prospective juror for cause. Hence, the State contends that Gonzalez's use of peremptory strikes was not impaired and Gonzalez was not prejudiced.

B. Analysis

During *voir dire*, "[b]ias on the part of prospective jurors will never be presumed[.]" *Kegarise v. State*, 211 Md. App. 473, 485 (2013) (quoting *Owens v. State*, 170 Md. App. 35, 75 (2006)). Therefore, "a juror may be struck for cause only where he or she displays a predisposition against innocence or guilt because of bias extrinsic to the evidence to be presented." *Burdette*, 130 Md. App. at 204 (internal quotation marks omitted) (quoting *Adams v. Owens-Illinois, Inc.*, 119 Md. App. 395, 402 (1998)). However, though "a trial court *may* excuse a juror even if the juror purports to be able to render a fair and impartial verdict[,] [] [t]he trial court is not required to excuse such a juror." *Id.* at 205 (citing *Wyatt v. Johnson*, 103 Md. App. 250 (1995)*; see Morris v. State*, 153 Md. App. 480, 497, 499 (2003) (affirming the trial court's decision to decline striking jurors who displayed a "tentative bias," because each juror "ultimately stated that he or she would be able to render

a fair and impartial verdict" and "there was not, as a matter of law, actual bias").

To be sure, Juror 224 had personal experiences that might have made it difficult to act as a juror in this case. However, Juror 224 repeatedly assured the court that she could remain fair and impartial. For example, despite acknowledging "having strong feelings about first degree assault, and physical child abuse, and second degree assault," Juror 224 agreed that she could "listen to the evidence in this case fairly and impartially and return a verdict based solely on the evidence presented in the courtroom[.]" Juror 224 also agreed she would not "allow[] any personal experience to be the determining factor" and she would "listen to the testimony and weigh [a child's] credibility . . . as [she] would any other witness." The court observed Juror 224, heard the tone and inflection of the juror's responses, and found Juror 224's assurances credible. There is nothing in the record indicating that the court's evaluation of Juror 224 was off the mark. *See Adams*, 119 Md. App. at 402 ("We defer to the trial judge's unique opportunity to observe the demeanor and suitability of potential jurors."). Accordingly, the court's conclusion was not an abuse of discretion.

III. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY LIMITING GONZALEZ'S CLOSING ARGUMENT.

As part of his closing argument, Gonzalez informed the jurors that the "State is charged with []proving each and every element beyond a reasonable doubt." Gonzalez then compared the reasonable doubt standard with other legal standards used in the criminal context:

> You all may have heard about reasonable articulable suspicion, probable cause, preponderance of the evidence, [and] clear and convincing. All those

> legal standards that, you know, are tossed around in today's world. Beyond a reasonable doubt is the highest standard in our legal system. *To put it in perspective, it takes a lesser standard to remove a child from a family.*

(Emphasis added). The State subsequently objected and the court sustained the objection with respect to Gonzalez's argument related to the requisite standard for removing a child from a family.

A. Parties' Contentions

Gonzalez argues that the circuit court abused its discretion by preventing him from emphasizing the reasonable doubt standard's importance relative to other legal standards. Gonzalez points out that the preponderance of the evidence standard, used in the child custody context, is, in fact, "lesser" in comparison to the reasonable doubt standard. Gonzalez asserts that, because his attempted comparison was concise, this case is distinguishable from similar Maryland cases. In particular, Gonzalez relies on *Drake & Charles v. State*, 186 Md. App. 570 (2009), *rev'd on other grounds*, 414 Md. 726 (2010), and *Ingram v. State*, 427 Md. 717 (2012). According to Gonzalez, in both cases, the trial court limited the defense's comparison of legal standards while still giving "wide latitude" to the defense to present their closing argument. In contrast, Gonzalez claims, the circuit court did not even permit Gonzalez to convey an accurate example of the preponderance of the evidence standard or impress the significance of the reasonable doubt standard.

In response, the State contends that the circuit court acted within its discretion by restricting Gonzalez's closing argument. According to the State, the rulings in *Drake* and *Ingram*, as well as that of the trial court in this case, were not based on the length of the defense's closing argument. The State notes that, as in *Drake* and *Ingram*, Gonzalez's

reference to extraneous legal standards risked confusing the jury and, regardless, Gonzalez was given wide latitude to discuss the reasonable doubt standard. Additionally, the State emphasizes that Gonzalez was on trial for assaulting F. and that F. had testified that he had not seen his father "since th[e] incident . . . in a while[.]" Therefore, the State asserts that raising the standard "to remove a child from a family" risked confusing the jury as to the relevant law and inserting custody issues into Gonzalez's criminal trial. The State also contends that Gonzalez was not prejudiced by the court's ruling regarding his closing argument, because the jury was instructed that the reasonable doubt standard applied and further provided an accurate definition of that standard. *See Dillard v. State*, 415 Md. 445, 465 (2010) ("Jurors generally are presumed to follow the court's instructions[.]").

B. Analysis

"[A]ttorneys are afforded great leeway in presenting closing arguments to the jury." *Anderson v. State*, 227 Md. App. 584, 589 (2016) (quoting *Degren v. State*, 352 Md. 400, 429 (1999)). "At the same time, a trial judge has broad discretion to control the scope and duration of counsel's closing argument in order to ensure fairness." *Ingram*, 427 Md. at 727. "In commenting on the State's burden of proof, counsel's closing argument must not undermine the judicially approved pattern definition of reasonable doubt." *Anderson*, 227 Md. App. at 590.

In *Drake*, as part of closing argument, the defense sought to compare the reasonable doubt standard with other legal standards of proof. 186 Md. App. at 594. The circuit court permitted the defense "to argue from the pattern jury instruction on the reasonable doubt standard; to point out that it is the highest measure of proof recognized in the law; to

compare the reasonable doubt standard with the preponderance of the evidence standard; and to exhort the jurors not to convict based on rumor or suspicion." *Id.* However, the court barred the defense from explaining other standards of proof, such as probable cause and clear and convincing evidence. *Id.* at 597–98. In affirming, this Court explained that the "[o]ther evidentiary standards counsel wished to discuss . . . were not generated by the evidence and were not relevant to the case[,]" and the "court reasonably sought to minimize the possibility of juror confusion." *Id.* The Court also noted that the defense "was given wide latitude to discuss the pattern jury instruction on the State's burden of proof, and to contrast that high burden with the preponderance of evidence standard, and with mere rumor." *Id.* at 598.

Similarly, in *Ingram*, the trial court barred the defense from presenting to the jury "arguments about suspicion, reasonable articulable suspicion, probable cause, and a 'tie'" during closing argument. 427 Md. at 723. "The judge did permit, however, Ingram's counsel to discuss preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt in his closing argument." *Id.* The Supreme Court concluded "that the trial judge's refusal to allow a discussion of the extraneous, extrinsic, and largely irrelevant legal standards in this criminal trial was not an abuse of his broad discretion to control the scope of closing argument" in order "to reduce the potential for juror confusion." *Id.* at 726. The Court cautioned that "allowing counsel to expand too far afield upon the trial court's binding [reasonable doubt] jury instructions during closing argument carries with it a [] danger that the jury may misapply the law." *Id.* at 729; *see also Anderson*, 227 Md. App. at 591 (holding that the "trial court did not abuse its discretion in curtailing

defense counsel's invitation to jurors to use [an] alternative concept of reasonable doubt[,]" because counsel "improperly suggested a different standard of proof" and "counsel was otherwise afforded wide latitude during closing argument to discuss the reasonable doubt standard").

In the instant case, Gonzalez sought to compare the reasonable doubt standard to other legal standards as part of his closing argument. It was within the court's discretion to preclude Gonzalez from including that "it takes a lesser standard to remove a child from a family." Despite Gonzalez's desire to discuss the requisite standard for "remov[ing] a child from a family," the jury was not tasked with considering child custody issues. Notably, during cross-examination, F. shared that "since th[e] incident," he had not seen his father, Gonzalez, "in a while[.]" Given Gonzalez's assault on F. and Gonzalez's diminished contact with F., permitting Gonzalez to raise the specter of the standard necessary to remove a child from a family, even for comparative purposes, risked confusing jurors as to the pertinent issues and legal standard.

Furthermore, Gonzalez "was otherwise afforded wide latitude during closing argument to discuss the reasonable doubt standard." *See Anderson*, 227 Md. App. at 591. Gonzalez referenced other legal standards "tossed around in today's world" and explained that the "[b]eyond a reasonable doubt [standard] is the highest standard in our legal system." Hence, as in *Ingram,* where the defense was properly barred from discussing "extraneous, extrinsic, and largely irrelevant legal standards . . . to reduce the potential for juror confusion," the court acted within its discretion by barring Gonzalez from raising a largely superfluous comparison of legal standards and risk confusing jurors. 427 Md. at

726; *see also Drake*, 186 Md. App. at 598.

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

Circuit Court for Montgomery County
Case No. 138036C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1075

September Term, 2022

ANTONIO E. GONZALEZ

v.

STATE OF MARYLAND

Friedman,
Ripken,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.
Concurring Opinion by Eyler, Deborah S.

Filed: August 8, 2023

* 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).

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Respectfully, I concur. In my view, the trial court erred by precluding defense counsel from cross-examining M. about her U-Visa status for impeachment purposes, specifically, to show motive to testify falsely under Rule 5-616(4). [1] However, I agree with Judge Ripken that this error was harmless beyond a reasonable doubt and therefore the judgments should be affirmed.[2]

In *Kazadi v. State*, 467 Md. 1, 53 (2020), the Supreme Court of Maryland admonished that the mere status of a State's witness as an undocumented immigrant "does not show that the witness 'has a motive to testify falsely[.]'" "[A]bsent additional circumstances[,]" for example "a *quid pro quo"* arrangement, immigration status "is not a proper subject of cross-examination." *Id.* at 52-53. As I see it, the case at bar illustrates a "*quid pro quo*" arrangement relevant to a motive to testify falsely, as envisioned by the *Kazadi* Court.

The U-Visa program allows an "alien"[3] to petition for "U nonimmigrant" status if she satisfies the eligibility requirements.[4] 8 U.S.C.A. § 1101(a)(15)(U). *See also* 8 CFR §

[1] Rule 5-616(4) states: "The credibility of a witness may be attacked through questions asked of the witness, including 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[.]"

[2] I agree with Judge Ripken's analysis of Issues II and III.

[3] An "alien" is "any person not a citizen of the United States." 8 U.S.C.A. § 1101(a)(3).

[4] "The term 'immigrant' means every alien except an alien who is within [enumerated] classes of nonimmigrant aliens," which includes those who have obtained a U-Visa. 8 U.S.C.A. § 1101 (a)(15).

214.14 (implementing 8 U.S.C.A. § 1101(a)(15)(U)). The petitioner must have "suffered substantial physical or mental abuse" from being the victim of a crime identified in that subsection; must "possess information concerning" that criminal activity; and must "ha[ve] been helpful, is being helpful, or is likely to be helpful" to law enforcement or prosecuting officials investigating or prosecuting that criminal activity. 8 U.S.C.A. § 1101(a)(15)(U)(i) (I), (II), and (III), respectively. A petitioner who is 21 years of age or older may include in the petition, among others, children under the age of 18 on the date of the petition. *Id*. at (U)(ii).

To petition for U-Visa status, the alien submits Form I-918 (Supplement B, U Nonimmigrant Status Certification) to the United States Citizenship and Immigration Service ("USCIS"), a division of the Department of Homeland Security. That form includes a certification by law enforcement or prosecuting government officials "which confirms that the petitioner has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim." 8 CFR § 214.14(a)(12). An alien must satisfy several eligibility requirements to obtain a U-Visa, including that "since the initiation of the cooperation, [the alien] has not refused or failed to provide information or assistance reasonably requested." *Id*. at (b)(3). The USCIS decides whether to approve the U-Visa. *Id*. at (c) (5). After a U-Visa has been approved, the USCIS may revoke it, with notice, if, among other reasons, "[t]he certifying official withdraws the U nonimmigrant status certification…. or disavows the contents in writing." *Id*. at (h)(2)(i)(A).

A U-Visa confers substantial benefits. It protects the alien from deportation for up

to four years, with the opportunity to extend that period. 8 CFR § 214.14(g). It also opens the door for the alien to obtain a green card, *i.e.*, become a lawful permanent resident of the United States, upon meeting certain eligibility requirements. *See* 8 CFR § 245.24(b).

In *State v. Dickerson*, 973 N.W. 2d 249 (S. Ct. S. Dak. 2022), the court recognized that the benefits a complaining witness can receive in exchange for the cooperation necessary to obtain a U-Visa make the witness's U-Visa status a proper subject for impeachment. In an *in limine* hearing, the complaining witness, who was an illegal immigrant, testified that an attorney he consulted about a week after the incident told him that if he cooperated, then at some time in the future he could apply for a U-Visa. He had not yet applied but expected to do so in the future. The trial court precluded cross-examination of the witness on that topic. The appellate court reversed the defendant's conviction for aggravated assault against the witness. It emphasized the "constitutional right to probe into the possible motives influencing [the witness's] testimony," including that, even though the witness had not yet applied for a U-Visa, "he had an incentive to embellish or exaggerate his testimony…in order to be perceived as the victim in the events in question." *Id*. at 261 (footnote omitted). It also found significant that the witness's testimony was "critical." *Id*.at 262.

The *Dickerson* court favorably cited *Romero-Perez v. Commonwealth*, 492 S.W. 3d 902 (Ky. App. 2016). In that case, the appellate court held that the trial court had erred by precluding defense counsel from cross-examining a complaining witness about her pending U-Visa application. It observed that the success of her U-Visa application depended upon her obtaining a certification that she was helpful to the prosecution.

> One can readily see how the U-Visa program's requirements of "helpfulness" and "assistance" by the victim to the prosecution could create an incentive to victims hoping to have their U-Visas granted. Even if the victim did not outright fabricate the allegations against the defendant, the structure of the program could cause a victim to embellish her testimony in the hopes of being as "helpful" as possible to the prosecution.

Id. at 906. The court concluded that the defendant's right to confront and cross-examine the complaining witness on matters affecting her credibility prevailed over whatever prejudice might result from putting the witness's immigration status before the jury. (Ultimately, the court affirmed, finding that the error was harmless beyond a reasonable doubt.)

In this case, defense counsel was not seeking to put M.'s immigration status before the jury gratuitously, in an improper effort to impugn her character for the truth. His objective was to impeach her by showing that she had a motive to testify falsely. It is not clear to me whether M.'s petition for a U-Visa had been granted or still was pending.[5] In either situation, she risked negative consequences - - either not obtaining the U-Visa or having her U-Visa revoked - - if her testimony were not helpful to the prosecution. If she did not obtain the U-Visa or her U-Visa were revoked, she would lose the opportunity to remain in the United States as a nonimmigrant and to become a lawful permanent resident (green card holder). *See* 8 CFR § 245.24(c). Given that incentive, she might testify falsely - - or embellish or exaggerate her testimony - - to keep the benefits a U-Visa confers.

There was ample foundation for this impeachment evidence. M.'s immigration

[5] Although M. testified that the U-Visa had been approved, no documentary evidence of an approved U-Visa was introduced.

lawyer wrote to the Montgomery County State's Attorney's Office (SAO) a little over a year after the alleged incident, seeking assistance in obtaining a U-Visa for M. His letter stated that on March 13, 2020, M. had been a victim of the crimes of domestic violence and assault; and she had cooperated with law enforcement; and as a result, the suspect (the appellant) was apprehended. The lawyer asked the State's Attorney's Office to provide the certification, on attached Form I-918, necessary for M. to petition for and obtain a U-Visa. The form listed the criminal charges pending against the appellant, described M.'s version of the events of March 13, 2020, and stated, among other things, that M. "is currently cooperating with the State's Attorney's Office."

In response to that letter, an Assistant State's Attorney (ASA) completed the "Certification" section of the form. The ASA certified that M. was a victim of one of the crimes identified on the form, that the information provided on the form was true, and that the ASA was making no promises about M.'s ability to obtain a visa based on the certification. Finally, the ASA certified, "if [M.] unreasonably refuses to assist in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim, I will notify the [USCIS]."

At trial, defense counsel produced the letter by M.'s lawyer and the Form I-918 Certification as the foundation for impeaching M. by showing she had a motive to testify falsely. That is, to succeed in obtaining and keeping a U-Visa, which would be to M.'s benefit, she would have to cooperate in the prosecution of the case against the appellant, which only could happen if she testified against him. Therefore, she had a motive to testify that the appellant committed the acts underlying the criminal charges, even if he did not.

Because the State objected, the court held a hearing outside the presence of the jury to determine whether it would be allowed. M. testified, in effect, that she did not know that any benefit would come to her, with respect to her immigration status, from testifying against the defendant. The court found M.'s testimony credible and on that basis precluded defense counsel from impeaching M. with the u-visa material.

The majority holds that the court's ruling was not in error, and even if it was, a probative value versus undue prejudice weighing would result in the evidence being precluded. I disagree.

M. may or may not have been telling the truth when she testified that she did not know she would benefit from testifying against the appellant. Her credibility on this point, like other credibility determinations regarding her testimony, was a demeanor-based assessment for the jury, not the court, to make. *Calloway v. State*, 414 Md. 616 (2010), is analogous. Before trial, Calloway's cellmate contacted the prosecutor in Calloway's case, saying that Calloway had made inculpatory statements to him and offering to testify against him. At the time, the cellmate was facing several pending charges. Soon thereafter, the cellmate was released on bond and the charges against him were *nol prossed.* Also, as of the time of trial, he had entered a guilty plea that ordinarily would be the basis for a violation of probation, but no violation charge had been filed against him.

The State moved *in limine* to preclude Calloway's counsel from questioning the cellmate about any benefit he may have received from agreeing to testify against Calloway. The court held an *in limine* hearing at which the cellmate testified that he had no agreement with the State, had not benefitted from cooperating, did not expect to benefit, and merely

was testifying against Calloway because it was the right thing to do. The prosecutor assigned to the charges against the cellmate also testified that there was no deal to benefit the cellmate in exchange for his testimony. The court ruled that the cellmate's testimony was credible and granted the motion *in limine*.

The Supreme Court of Maryland reversed Calloway's convictions, holding that the trial court had erred by itself deciding the credibility of the cellmate's testimony instead of allowing the jury to make that credibility assessment.

> …whether [the cellmate] placed the …phone call [to the ASA] in the hope of being released from detention, and whether he was testifying at trial in the hope of avoiding a violation of probation charge, should have been decided by the jury rather than by the Circuit Court.

Id. at 637. Quoting *Leeks v. State*, 110 Md. App. 543, 557-58 (1996), the Court continued:

> "The issue of bias is often generated by circumstantial evidence, and does not disappear merely because the witness denies any reason to be biased. If such circumstantial evidence exists, the trier of fact is entitled to observe the witness's demeanor as he or she responds to questions permitted by Rule 5-616(a)(4)."

Id. at 638.

As in *Calloway*, here it was for the jury to decide whether M. actually believed she would not receive an immigration benefit from testifying against the appellant and simply was telling the truth for truth's sake or was claiming ignorance to enhance the likelihood of being found credible. Accordingly, the trial court erred by making that decision itself.

The Court in *Calloway* also said, with respect to impeachment:

> "When the trier of fact is a jury, questions permitted by Rule 5-616(a)(4) 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."

Id. at 623-24 (quoting *Leeks*, at 557-58). As noted, here there was an adequate factual foundation for cross-examination of M. about her U-Visa. Due to its error, the trial court did not determine whether "the probative value" of the cross-examination would be "substantially outweighed by the danger of undue prejudice or confusion." In my view, had the court determined that the probative value of the U-Visa evidence for impeachment was substantially outweighed by the danger of undue prejudice or confusion, it would have abused its discretion.

I note, further, that the one year that passed between March 13, 2020 and the date M.'s immigration attorney's letter is not dispositive of foundation or admissibility generally. It simply is another fact for the jury to consider in assessing M.'s credibility. Jurors reasonably could infer, to M.'s credit, that her initial motivation in reporting the appellant to the police was not to obtain a U-Visa. They also reasonably could infer, to her detriment, that the benefits she could obtain (or retain) from a U-Visa were motivating her to embellish, overstate, or distort the events of March 13, 2020, a point made clear in the *Dickerson* and *Romero-Perez* cases, discussed *supra*.

"The Confrontation Clause of the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant the right to confront the witnesses against him[,] *Martinez v. State*, 416 Md 418, 428 (2010), including the right to cross-examine witnesses on matters affecting motive to testify falsely. *Pantazes v. State*, 376 Md. 661, 680 (2003). Given the fundamental importance of cross-examination in a

criminal trial, I agree with the court in *Romero-Perez* that when the credibility of the complaining witness is at issue, the right of the defendant to impeach that witness with evidence that she was benefitting from testifying against the defendant generally will prevail over the relatively small risk of prejudice that could result from bringing the complaining witness's immigration status before the jury. Here, whether M. was telling the truth in her testimony against the appellant was a central issue in the case, and her U-Visa immigration status was a proper avenue of impeachment. Thus, the impeachment evidence should not have been precluded by the trial court.

I agree with Judge Ripken that the judgments should be affirmed, however, because the trial court's error was harmless beyond a reasonable doubt. The jury acquitted the appellant of the most serious charges: first-degree assault against M. and second-degree child abuse against F. It convicted him of three counts of second-degree assault, two against M. and one against F. In his testimony, the appellant admitted to committing the very acts against M. and F. on which all the second-degree assault charges were premised. Given the appellant's admissions, I have no doubt that the jury would have convicted him of those crimes regardless of whether M. had been impeached regarding her U-Visa. And although her impeachment may have affected the jury's assessment of whether the appellant committed first-degree assault and second-degree child abuse, the jurors found the appellant not guilty of those crimes anyway. Accordingly, the trial court's error was harmless beyond a reasonable doubt.

Circuit Court for Montgomery County
Case No. 138036C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1075

September Term, 2022

ANTONIO E. GONZALEZ

v.

STATE OF MARYLAND

Friedman,
Ripken,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.
Concurring Opinion by Friedman, J.

Filed:

* 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).

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

I concur. As to Section I of the majority opinion, I agree with Judge Ripken that Gonzalez failed to establish a sufficient factual foundation upon which to cross-examine M. about her U-Visa application. In *Kazadi*, the Supreme Court made clear that a witness' immigration status, without more, does not create a factual basis on which to cross-examine. *Kazadi v. State*, 467 Md. 1, 53-54 (2020). I agree with Gonzalez that, in many cases, a witness' application for a U-Visa, requiring certification from the state's attorney, can make the difference and, by itself, create a basis for cross-examination. In Gonzalez's case, however, M.'s statements to police came before she sought certification from the state's attorney for her U-Visa application, and those statements were completely consistent with her trial testimony. If she was tailoring her testimony, she started on the date of the assault, not at the instigation of the state's attorney. I hasten to note that a different trial judge may have permitted the cross-examination and that judge would not have abused their discretion either. That is the nature of a deferential review.

Having so found, I would not reach the question of whether the proposed line of questioning was more probative than prejudicial. I would also not reach the question of whether the error was a harmless error, especially because I do not agree that the credibility of the complaining witness was "unimportant in relation to everything else the jury considered." *Belton v. State*, 483 Md. 523, 543 (2023) (quoting *Bellamy v. State*, 403 Md. 308, 332-33 (2008)). I agree with Sections II and III of Judge Ripken's opinion.