Circuit Court for Prince George's County
Case No. CT160845X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1242

September Term, 2017

ANTONIO BARNETT

v.

STATE OF MARYLAND

Nazarian,
Leahy,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: December 14, 2018

The appellant, Antonio Barnett, was convicted in the Circuit Court for Prince George's County by a jury, presided over by Judge Robin D. Gill Bright, of involuntary manslaughter, the use of a firearm in the commission of a felony or crime of violence, and the possession of a regulated firearm. The appellant was sentenced to an aggregate sentence of imprisonment for 35 years.

The Contentions

On this appeal, the appellant raises three contentions. The first is an omnibus or collective one. The second is more specific. The third contention is a dual one.

> 1. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE THAT APPELLANT ACTED IN SELF-DEFENSE AND THAT MARSHALL MAY HAVE BEEN KILLED BY SOMEONE ELSE.
>
> 2. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE THAT THE DETECTIVE INTERVIEWING WOODEN THREATENED TO CHARGE HIM WITH MURDER AND CONSPIRACY TO COMMIT MURDER.
>
> 3. THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON SELF-DEFENSE AND INVOLUNTARY MANSLAUGHTER.

A Wild Party

The contentions only make sense against the backdrop of a cookout held in Clinton, Maryland on the evening of April 16, 2016. The attendees were described as a "big crowd" of about 150 people. At the time of the shooting in this case, the party had been in progress for approximately five hours and "everybody seemed a little drunk." Because it was cool outside, numerous people wore jackets and hoods. The lighting was described as poor.

The homicide victim was one Carl Marshall. He had attended the cookout, along with two close friends, Antonio Kave and Larry Smith. With respect to the fatal shooting itself, apparently nobody at the cookout really saw anything and/or nobody at the cookout really remembered anything.

The best description came from two neighbors who were not attendees. One was sitting on his front porch when he saw someone walking toward the party. He was moving faster than everyone else, wearing a coat with a hood. Shortly after that, this neighbor heard four gunshots or a "bunch of shots." A second neighbor also observed someone in a dark hoodie walking toward the party. Shortly thereafter, that neighbor heard what sounded like an exchange of fire between two different guns. He described a loud "boom" followed by a "pop, pop," followed by a "boom, boom." One witness who had attended the party testified, "It was like somebody let go a whole clip . . . the shots kept ringing." The shooting was followed by chaos, as a large number of people fled from the area.

Carl Marshall was killed by a single gunshot to the head. The bullet that killed him was a .38 special or .357 magnum caliber. The gun that fired that bullet was not recovered. As we now focus in on the contentions, it is as if the two separate and unrelated trials emerged from the common set of facts.

The State's Case Establishing The Appellant's Guilt

The State's case establishing the appellant's guilt is essentially not challenged by any of the appellant's contentions. No one in attendance at the cookout identified the appellant, or anyone else for that matter, as the man who shot Carl Marshall. None of the

other attendees, moreover, even identified the appellant as having been present at the cookout. It was the appellant himself and statements that he made to friends that established his homicidal agency. None of these statements, statements 1) that he made to the police; 2) that he made to his ex-girlfriend, Johnel Harris; and 3) that he made to Dijuan Wooden, are challenged in any way by the appellant.

Johnel Harris testified that she and the appellant, though no longer romantically involved, are still close friends. On April 16, 2016, he arrived at her house in Clinton at about 10:00 p.m. He handed her a black jacket that he had been wearing. He was limping and explained to Harris that he had been shot. He told her that "some n_____s were shooting. He got into it and he got hit." He elaborated to her that "somebody reached and he shot back." At that point, she drove him to the hospital. Harris told the police that the appellant at one point had handed her a gun, which she initially hid and later turned over to one of the appellant's family members. The appellant does not now challenge any of his admissions to Johnel Harris.

At the hospital, the appellant was treated for a gunshot wound to his thigh. After abandoning a palpably false story, the appellant ultimately admitted to the police that he had been at the cookout in Clinton with his brother, Ricardo. He further told the police that a man he did not recognize ran up to him and started shooting and that he was hit. The appellant challenges neither his statements to the police nor his treatment for the gunshot wound to his thigh.

The appellant also made incriminating admissions to Dijuan Wooden. Wooden testified that he had tried to go to the Clinton cookout himself but gave up because it was too "congested." He parked a few blocks away and ran into Ricardo, the appellant's brother, and a man named Regis. All three of them went to Regis's house, which was about 10 minutes away from the party scene. Wooden testified that he heard "a couple" gunshots. Shortly thereafter, Johnel Harris arrived, had a short conversation with Ricardo, and handed him something.

Wooden saw the appellant himself at the appellant's mother's house the day after he was released from the hospital. The appellant told Wooden that he had been shot in the leg and that he had shot a man who died. When questioned by the police, Wooden told them that the appellant had committed the shooting. He also told the police that the appellant had shot Marshall "over drugs." The appellant does not now challenge the statements he made to Wooden.

This was the Alpha and Omega of the State's case against the appellant. Even at the lesser level of guilt of involuntary manslaughter, the key element that the State needed to establish was that of the appellant's homicidal agency. In his statements to the police, to Johnel Harris, and to Dijuan Wooden, the appellant fully acknowledged that homicidal agency. He does not now challenge, moreover, the admissibility of those acknowledgments. That was the case that actually took place at the trial table.

The Omnibus Contention

The case the appellant seeks to try on appeal is something else again. The appellant is scrounging for a plausible complaint. In his omnibus contention, the appellant challenges five separate evidentiary rulings that he claims were erroneous. This collection of sub-contentions, however, is quintessentially trivial.

A bit unsurely, moreover, the appellant equivocates as to the effect of these rulings, alleging that "alone and in combination" they cannot be held harmless. Even a clearly erroneous ruling, of course, is meaningless unless it produces measurable prejudice. He does not boldly claim that any one of them alone constitutes reversible error. How then might they do so "in combination"? The alleged errors ironically do not even comfortably combine to produce any semblance of a syncretic prejudicial effect. Several of the claimed errors allegedly compromised a possible defense of self-defense. Several, by diametric contrast, allegedly compromised a possible defense that someone else other than the appellant actually committed the homicide. Those self-contradictory defenses, of course, are squarely incompatible with each other. The Introduction to the omnibus contention alleges:

> Throughout the trial, the court precluded the defense from introducing evidence that could have established that if Appellant shot Marshall, he acted in self-defense; that someone other than Appellant may have shot Marshall; or both.[1] The evidence should have been admitted. The court's numerous errors, alone and in combination, cannot be held harmless. Reversal is required.

(Emphasis supplied). We will look at the alleged errors one by one.

[1] It could not be "both," of course. It would have to be one or the other.

A. Cross-Examination of Kave: Did Marshall "Have A Gun On Him?"

Antonio Kave was a close friend of Carl Marshall's. On cross-examination by defense counsel, he was asked whether Marshall, at the cookout that night, "ha[d] a gun on him?" The State's objection was sustained. At the ensuing bench conference, the State made it clear that if and when the defense actually generated the issue of self-defense, the question of whether Carl Marshall was armed might become relevant but that such an issue had not yet been generated in the case at hand and, therefore, had not yet ripened for further consideration.

> There has been no indication that—from any witness at this point that [the appellant] was there, that he has any knowledge of there being a gun; and there's no self-defense claim. So the notion that he had a gun would simply be prejudicial. It would be for, I assume, the propensity [sic] of showing that Mr. Marshall had the propensity to carry a gun or the propensity to be violent, which would not be appropriate at this juncture.

(Emphasis supplied).

The defense maintained that self-defense was an issue in the case:

> . . . I disagree that there's not a self-defense argument . . . . So that Mr. Marshall had a gun and whether he was the initial aggressor is very pertinent to this case.

(Emphasis supplied).

Judge Bright ruled that no issue of self-defense had, indeed, been generated and that any evidence bearing on Carl Marshall's character or reputation for violence was not admissible at that point.

> The Court has to first determine whether evidence is relevant; and if it is relevant, its probative value. At this juncture, the testimony thus far regarding any property that the victim had was a cell phone that the witness took in

> order to contact the victim's mother. So although the pattern jury instructions do allow, [sic] a self-defense can be generated by any type of evidence and not necessarily directly through the defendant, the Court has had an opportunity to read [Thomas] v. State, along with a series of other cases that are similar and on point where when there's no foundation laid for the introduction of this evidence during cross-examination of the State's witnesses . . . .
>
> At this juncture, there is no foundation that there was some self-defense or a weapon used by the victim in this case. There was a cell phone. That doesn't lead you to a handgun. And while you can generate a self-defense instruction without the defendant testifying, that has not been generated at this point.

(Emphasis supplied).

In Thomas v. State, 301 Md. 294, 306–07, 483 A.2d 6 (1984), Chief Judge Robert Murphy clearly set out for the Court of Appeals the threshold requirement that a genuine jury issue of self-defense must be generated by the evidence before evidence bearing on the character of the victim becomes relevant.

> When the issue of self-defense has been properly raised in a homicide case, the character of the victim is admissible for two purposes. First, it may be introduced to prove the defendant's state of mind when the victim was killed. Specifically, the character evidence may be used to prove that defendant had reasonable grounds to believe that he was in danger. The accused may introduce evidence of the deceased's previous violent acts to prove that he had reason to perceive a deadly motive and purpose in the overt acts of the victim. To use character evidence in this way, the defendant first must prove: (1) his knowledge of the victim's prior acts of violence; and (2) an overt act demonstrating the victim's deadly intent toward the defendant. Second, the violent character of the victim may be introduced to corroborate evidence that the victim was the initial aggressor. It is not necessary to prove that the defendant had knowledge of the victim's reputation. To use character evidence for this second purpose, however, the proponent must first establish an evidentiary foundation tending to prove that the defendant acted in self-defense.

(Emphasis supplied; citations omitted).

In the Thomas case, the issue of self-defense had not been generated and the objection to the evidence was properly sustained.

> [Thomas] acknowledges that no evidence supporting his self-defense claim was introduced until he took the stand in his own defense. Thus, no foundation was laid for the introduction of character evidence during the cross-examination of the State's witnesses. Consequently, the trial court did not err in sustaining the State's objection to his line of questioning.

301 Md. at 307 (emphasis supplied; footnote omitted).

In the present case, there was no evidence, from the appellant or from anyone else, even suggesting an issue of self-defense. Although it is conceivably possible that an issue of self-defense could be generated by evidence from other sources than the defendant himself, it realistically is extremely unlikely. In this case, there was no evidence from the appellant or from anyone else that self-defense was a possible reason for the killing of Carl Marshall. The appellant himself did not testify.

There was no evidence of any confrontational history between the appellant and Carl Marshall. There was no evidence that Carl Marshall made any aggressive or threatening move toward the appellant. There was no evidence that the appellant, subjectively, feared that he was in danger of death or serious bodily harm at the hands of Carl Marshall. There was no evidence that such a fear, if it existed, would have been objectively reasonable. There was no evidence that there was no avenue of retreat available to the appellant or that the appellant believed there was no avenue of retreat. There was no evidence that the appellant subjectively believed that, when he shot Carl Marshall, the

amount of force he used was no more than was necessary. There was no evidence that such a belief, if it existed, would have been reasonable.

This sub-contention fails for two separate reasons. Because no issue of self-defense was generated, the State's objection to the admission of the evidence was properly sustained in the first place. It was a proper ruling on the merits. Even if, arguendo, the evidence was improperly excluded, the appellant's defense of self-defense was not in any way prejudiced or compromised for the obvious reason that the appellant had no defense of self-defense vulnerable to being prejudiced or compromised. You cannot damage or compromise that which does not exist.

B. Examination of Kave During Defense Case: Déjà Vu All Over Again

Initially, we are at a loss to appreciate how this sub-contention has independent viability. To be sure, the first sub-contention concerned Judge Bright's sustaining of the State's objections to questions asked of Kave on cross-examination during the State's case in chief and this sub-contention concerns questions asked of Kave on direct examination during the defense case. Substantively, however, strong echoes reverberate.

The questions, on this sub-contention, concerned whether Carl Marshall was armed and whether Kave himself was armed. When asked whether Carl Marshall "ha[d] a gun on him?" Kave responded, "I don't know." Defense counsel then asked Kave point-blank, "Did you see Carl Marshall with a gun on the 16th of April?" Kave answered directly, "I did not." With respect to whether Carl Marshall was armed, the defense of self-defense had no more been generated during the defense case than it had been earlier generated during

the State's case. As with the first sub-contention, moreover, even if, arguendo, there was error, there was no possible prejudice because there was no defense of self-defense to be compromised.

There is an alternative prong to this sub-contention. Judge Bright also sustained the State's objection when Kave was asked, "You had a gun on you that night?" If the jury never got an answer to that question, what was the possible prejudice? The appellant tells us:

> Again, for the reasons discussed supra, the trial court erred. Evidence that Kave was armed would demonstrate that he, rather than Appellant, may have killed Marshall.

(Emphasis supplied).

Ignoring the fact that Carl Marshall was Kave's close friend, such an assertion is outrageous speculation. In the course of an earlier discussion as to whether Kave needed the assistance of counsel prior to testifying, defense counsel assured the court, "I'm not alleging that he was the shooter." Defense counsel went on that she "had no reason to believe he would have a valid Fifth Amendment [right] because he would not be acknowledging he was committing any crime." There was simply no genuine jury issue generated that the killer of Carl Marshall was Antonio Kave rather than the appellant. What viable defense then was arguably compromised? None!

C. Larry Smith's Statements To The Police

As we move out from the core of the appellant's omnibus contention, to wit, his claim that certain evidentiary rulings damaged his alternative defenses (either self-defense

or the claim that someone else killed Carl Marshall), the sub-contentions seem to be becoming progressively more peripheral.

Larry Smith, like Antonio Kave, was a close friend of Carl Marshall's. When Smith first heard gunshots, he initially ran from the scene but then turned around, drew his own gun, and then fired back in the general direction of the sound of the gunshots. When he then returned to the scene of the shooting, he saw Carl Marshall's prostrate body on the ground. The issue before us concerns whether he also saw a gun lying next to Marshall's body. During the defense cross-examination of Smith, the following exchange took place:

> Q Mr. Smith, back on April 16, 2016, Mr. Marshall had a gun on him, did he?
>
> [ASSISTANT STATE'S ATTORNEY]: Objection.
>
> THE COURT: Overruled. You can answer the question.
>
> THE WITNESS: No.
>
> . . . .
>
> Q Isn't it a fact that you saw Mr. Marshall with a gun?
>
> A No.
>
> Q Isn't it a fact that after the shooting, the gun was still right beside Mr. Marshall?
>
> A Not that I can remember.
>
> Q Do you recall telling the police that you saw Mr. Marshall with a gun?
>
> A I mean, I said a lot of stuff. I was so—my mind was gone.
>
> Q As a part of that lot of stuff, you talked to the police the next day after the shooting, correct?

A Correct.

(Emphasis supplied).

At this point, the wheels are coming off the sub-contention, as the issue is about to go spinning off in three separate legal directions with all parties talking across each other in a total breakdown of communication. At that point in the defense examination of Smith, defense counsel asked for and received permission to show Smith two snippets of the video recording of his "oral statement" to a detective, which counsel characterized as a statement that "Marshall did have a gun, that [Smith] saw the gun directly beside his body after he was shot" along with another statement that "the gun was black."

Judge Bright treated the defense's use of the statements as prior inconsistent statements pursuant to Maryland Rule 5–613 and 5–616 offered to impeach Smith's trial testimony that he had not seen or could not remember seeing a gun lying beside Marshall's body. When counsel identified for the court the earlier statements to the police in issue, the court ruled that it could only be used for impeachment purposes.

THE COURT: What oral statement?

[DEFENSE COUNSEL]: That Mr. Kave – I'm sorry – Mr. Marshall did have a gun, that he saw the gun directly beside his body after he was shot.

THE COURT: That would be for impeachment.

(Emphasis supplied).

The appellant did not contradict the court or note an objection at that point. If the defense wanted something other than impeachment, it never said so. The defense now proposes, however, that the statements should have been received as substantive evidence

pursuant to Maryland Rule 5–802.1. That was not before the trial court. Indeed, the State now points out that it appears that the oral statements were being used for yet a third purpose that was neither as substantive evidence nor for impeachment but rather as an instance of Present Recollection Refreshed. The statements were played for Smith alone as he wore headphones. The jury could not hear the statements. Defense counsel kept probing Smith as to whether hearing his earlier statements served to refresh his recollection.

> [DEFENSE COUNSEL]: Does this refresh your recollection as to whether or not Mr. Marshall had a gun?
>
> THE WITNESS: I don't even remember saying this. I was kind of still intoxicated. Like my mind was gone. I was trying to just answer the question. As you can see—
>
> [ASSISTANT STATE'S ATTORNEY]: Objection.
>
> THE COURT: Overruled.
>
> BY [DEFENSE COUNSEL]:
>
> . . . .
>
> Q After you listened to what you stated at the time of the interview, did it refresh your recollection now as to whether you saw Mr. Marshall with a gun?

(Emphasis supplied).

The appellant then asked that the statements to the police be admitted in evidence. The State objected. Judge Bright ruled that the statements could be used for impeachment purposes but not "for any other purpose."

Mercifully, we are spared the burden of attempting to deconstruct and then to analyze closely every thorn and spur of this legal briar patch, a tangle that could

legitimately consume half a semester of Evidence 101. The only legal issue actually raised by this sub-contention is that of whether Judge Bright erroneously failed to receive Smith's statements to the police as substantive evidence pursuant to Maryland Rule 5–802.1. The short answer is that Judge Bright was never asked to do any such thing and the issue is not preserved for appellate review.

Under the circumstances, it would be carrying coals to Newcastle to point out that even evidence that a gun was observed lying next to the lifeless body of Carl Marshall would have had no tendency to prove 1) that someone other than the appellant shot and killed Carl Marshall or 2) that the circumstances placed the appellant in a possible posture of self-defense.

D. Carl Marshall's Criminal Record

This contention is a real stretch. The appellant offered into evidence, apparently as a self-authenticating exhibit, a true test copy of documents from a court file in a criminal case in Prince George's County showing that Carl Marshall had been charged with attempted murder and related offenses. In offering the documents, defense counsel proffered that the pending charge was relevant

> for two reasons . . . [o]ne, as proof that there were people in the community that may not have felt favorably towards him . . . there were people that could have been another shooter. Secondly, I'm admitting it potentially, depending on if I go into self-defense, to show the lack of peacefulness . . . .

(Emphasis supplied).

In his appellate brief, the appellant argues that the charge was not hearsay because it was not offered for its truth but for its effect on the listener.

> [H]is pending charge was not hearsay. That is because it was not offered for its truth, but to show its "effect on the listener." It was immaterial whether or not Marshall actually attempted to murder his alleged Victim. What mattered was that the alleged victim or their associates may have believed that Marshall had done so (and retaliated against Marshall based upon that belief).

(Emphasis supplied).

The effect upon the listener. What listener? Had self-defense been generated as an issue (it had not), Marshall's reputation for violence might plausibly have had an effect on the appellant, if Marshall's reputation in that respect had been known to him. The law speaks of "general reputation," of course, not of charges. In any event, even if self-defense had been generated as a defense in this case, the victim's general reputation for violence (or even the attempted murder charge per se) would still only have been relevant if it had been known by the defendant. There was no evidence of any such knowledge in this case. Self-defense, moreover, as we have already held in resolving several of the sub-contentions, was simply not an issue in this case.

The notion that the charge against Marshall gave unknown persons a motive and/or a desire to kill him and, therefore, constituted evidence that one of those unknown persons may, indeed, have killed him simply merits no further comment. There is a point at which a contention may outrun the caselaw.

E. A Sub-Contention Without Any Factual Foundation

The final sub-contention of the appellant's omnibus contention is weirdly ethereal. The sub-contention is unreal. The appellant has chosen Larry Smith as the culprit, with no apparent basis for having done so. At least, he does not tell us what his basis might be. The

thesis of the sub-contention is that friends of Larry Smith made the witness Darius Jefferson feel intimidated about appearing as a witness. From that, the sub-contention infers that Larry Smith was behind this intimidating behavior of his friends. From that, the sub-contention infers that Larry Smith has a consciousness of guilt. From that, in turn, the sub-contention finally infers that it was Larry Smith, and not the appellant, who killed Carl Marshall. The appellant's argument concludes:

> A jury could reasonably infer that Smith intimidated Jefferson to prevent him from testifying; that his desire to conceal evidence reflected a consciousness of guilt—specifically, of shooting Marshall; and that he may [have] done so.

(Emphasis supplied).

Such an argument does not even justify refutation, but the obvious refutation is irresistible.

It is the State, not the appellant, who tells us that two days before Darius Jefferson took the stand, when the witnesses first showed up for trial, defense counsel informed the court that "when the witnesses showed up, some of the family members showed up, they had some sort of exchange and now he fears for his life." The proffer stopped there. Defense counsel did not specify what was said in the course of the "exchange" or which "witnesses" or "family members" participated in the "exchange."

When two days later Darius Jefferson took the stand, the following took place in the course of his direct examination. Defense counsel asked, "Did you see Mr. Smith?" The following ensued:

> A Yes.

Q How did you feel after seeing Mr. Smith?

THE COURT: Mr. Smith?

[ASSISTANT STATE'S ATTORNEY]: Objection.

THE COURT: Sustained.

At a subsequent bench conference, defense counsel proffered:

> Mr. Jefferson would have testified that he was being intimidated by the other witnesses and being called a snitch for coming to testify here in court regarding what he saw. And I believe that would have been relevant to the case.

In arguing this sub-contention, the appellant cites the two cases of Wagner v. State, 213 Md. App. 419, 464–66, 74 A.3d 765 (2013), and Copeland v. State, 196 Md. App. 309, 315, 9 A.3d 155 (2010). Both cases stand for the proposition that a criminal defendant's intimidation of witnesses may be evidence of that criminal defendant's consciousness of guilt. Larry Smith (even assuming, arguendo, that he could be connected to the conduct in issue), of course, was not the criminal defendant. He was a State's witness. The two cases are not remotely apposite. More directly on point, the appellant never so much as suggested anything that would have connected Larry Smith to whoever the allegedly intimidating witnesses were or to whatever such intimidating witnesses did. The Larry Smith connection comes out of thin air.

The ultimate inconsequentiality of the sub-contention is that the testimony of Darius Jefferson did not amount to anything, one way or the other. In narrating the course of the trial in their respective briefs, neither the State nor the appellant had occasion even to mention the existence of Darius Jefferson, let alone a shred of testimony from him. He

added absolutely nothing to the case, for or against the appellant. There is not so much as a proffer, moreover, that Darius Jefferson's testimony would have been in any way different if he had not felt "intimidated" by someone. In the last analysis, the appellant's omnibus contention, in the words of T. S. Eliot, ends "not with a bang, but a whimper."[2]

Police Behavior In Interviewing Wooden

The appellant's second contention is that a police detective used threatening language when interviewing State's witness Dijuan Wooden. As we have already described, Dijuan Wooden was a key witness for the State. During defense counsel's cross-examination of Wooden, the following exchange took place.

> Q At the beginning when you were first there, Detective Dougherty also indicated he was going to charge you with conspiracy or an accessory to murder, correct?
>
> [ASSISTANT STATE'S ATTORNEY]: Objection.
>
> THE COURT: Sustained.
>
> Q Isn't it a fact that Detective Dougherty kept yelling that this was going to be a murder on you, correct?
>
> [ASSISTANT STATE'S ATTORNEY]: Objection.
>
> THE COURT: Sustained.

The objection and the sustaining of the objection in that case have nothing to do with the Hearsay Rule and its exceptions. The issue implicates Maryland Rule of Procedure 5–616 which provides in pertinent part:

[2] The Hollow Men.

> (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[.]

At that initial point, however, the appellant did not make it clear to the court that the behavior of Detective Dougherty was being offered to show the effect on the witness Wooden, to wit, to raise the possibility that he was being threatened or coerced to testify falsely.

As Judge McDonald carefully explained for the Court of Appeals in Peterson v. State, 444 Md. 105, 122–23, 118 A.3d 925 (2015), both the Confrontation Clause of the Sixth Amendment and Maryland Rule 5–616(a)(4), which implements it, call for balancing.

> That principle is incorporated in Maryland Rule 5–616(a)(4), which provides that "The credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at: . . . Proving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely." To comply with the Confrontation Clause, a trial court must allow a defendant a "threshold level of inquiry" that "expose[s] to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witnesses."
>
> Once the constitutional threshold is met, trial courts may limit the scope of cross-examination "when necessary for witness safety or to prevent harassment, prejudice, confusion of the issues, and inquiry that is repetitive or only marginally relevant."

(Emphasis supplied; citations omitted).

In the present case, we hold that that balance was fairly accommodated. Following discussion about the purpose of the inquiry, Judge Bright ruled that Wooden could be asked whether Detective Dougherty had "threatened" him. Wooden replied that he had not done so. Wooden was asked and did admit, however, that the detective at one point told him that he would get Wooden's wife and girlfriend together in the same room. Wooden also acknowledged that the detective had "yelled and screamed" and told him "to get on the same page." Wooden admitted that his "story changed several times." Although Judge Bright would not allow the question of whether Detective Dougherty had threatened to charge Wooden with murder, he did allow Wooden to be asked if he was "fearful with being charged with murder or some variation thereof." Wooden ultimately testified, however, that his trial testimony was truthful and accurate and that it had not been influenced by Detective Dougherty's manner. An excerpt of the video of the Dougherty-Wooden interview was also played for the jury for Rule 5–616(a)(4) purposes.

The appellant does not argue that Wooden's testimony should have been excluded. He argues only that he should have been allowed to explore that possibly adverse influence on Wooden's credibility. We are fully persuaded that, on balance, Judge Bright very liberally permitted the appellant to pursue the subject of Detective Dougherty's at-times aggressive manner in questioning him. The limitations imposed on that inquiry were modest and limited. We see no abuse of Judge Bright's discretion in that regard.

The Jury Instructions

The appellant's final contention is that Judge Bright erroneously instructed the jury on two subjects that did not justify jury instructions. Those subjects were self-defense and involuntary manslaughter. We do not agree with the contention. In the first place, both of the instructions were absolutely correct statements of the law, and the appellant does not contend otherwise. In no sense was the jury misled.

If justification for giving the instructions were required (it is not), there was good reason in this case for Judge Bright to have given both instructions. With respect to involuntary manslaughter, it was the most likely form of criminal homicide for which the appellant, on the evidence of this case, could have been convicted. The evidence was legally sufficient to permit a finding that the appellant was the homicidal agent. He fired the bullet that killed Carl Marshall. That is simply the actus reus of criminal homicide (murder or manslaughter).

As to the accompanying mens rea, there was little to guide the jury. In looking at both the degree of the criminal homicide and the type of the criminal homicide, there is a matrix of twelve possibilities available (three possible levels of guilt times four varieties of murder/manslaughter). With his conviction for involuntary manslaughter, the appellant received the benefit of the least blameworthy of the possibilities. As Judge Bright instructed, involuntary manslaughter may be based on the commission of an unlawful act or upon gross criminal negligence. In assaulting Carl Marshall (with no known motive or intent), the appellant would have qualified for unlawful-act involuntary manslaughter. The

unlawful use of a handgun would also qualify as an unlawful act. The instruction, therefore, was right on point and it would have been a dereliction not to have given it.

With respect to self-defense, that instruction also served a salutary purpose. For the appellant even to raise this sub-contention, moreover, strikes us as highly ironical. In saying that he, at the end of the case, abandoned his defense of self-defense, is the appellant thereby abandoning the sub-contentions that permeate this appeal, to wit, his claim that various evidentiary rulings compromised his defense of self-defense? Throughout the trial, the appellant was attempting to inject a layman's half-baked notion of self-defense into the case even if the defense was not properly there. The attempt to show that Carl Marshall was armed and the attempt to introduce the fact that Carl Marshall was charged with attempted murder were demonstrably efforts to coax the jury into insinuating that the appellant, vis-à-vis Carl Marshall, may have been acting in necessary self-defense. By instructing the jury about what self-defense legally requires, the court properly precluded counsel from improperly insinuating that self-defense may actually have been present in the case.

With respect to both instructions, moreover, the appellant misinterprets the controlling law. He now claims that neither involuntary manslaughter nor self-defense was generated as an issue and that the instructions, therefore, were erroneously given. The appellant properly cites cases for the proposition that if an issue has been properly generated, then it would be error not to give an instruction dealing with that issue. That proposition, however, does not support its converse, that if an issue has not been generated,

it would likewise be error to instruct with respect to such an issue. The converse, however, is not the law.

In Perry v. State, 150 Md. App. 403, 425, 822 A.2d 434 (2002), cert. denied, 376 Md. 545, 831 A.2d 4 (2003), this Court dealt with precisely the same legal argument.

> What the appellant is attempting to do, perhaps subconsciously, is not to invoke Rule 4–325(c) as written but to create a new rule which would be a converse to Rule 4–325(c). If, all other conditions being satisfied, the present rule makes it error **NOT TO INSTRUCT WHEN THE ISSUE IS GENERATED,** the converse rule would make it error **TO INSTRUCT WHEN THE ISSUE IS NOT GENERATED.** Whatever the virtues of such a hypothetical new rule might be, it is not a rule that the Rules Committee or the Court of Appeals has ever promulgated.

(Emphasis in original; footnote omitted).

Even if the issue covered by one or both of the instructions had not been generated by the evidence, the giving of the instructions would have been an incidental excess and not a fatal deficit. It would have been a case of over-inclusion and not of under-inclusion. We conclude in the present case precisely what we concluded in Perry.

> A rule requiring a necessary instruction does not forbid an unnecessary instruction. It is under-inclusion that runs the risk of error. Over-inclusion only runs the risk of boredom.

150 Md. App. at 427 (emphasis supplied).

JUDGMENTS AFFIRMED; COSTS TO BE PAID BY APPELLANT