Circuit Court for Montgomery County
Case No. 135226C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1533

September Term, 2019

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ELIJAH BELL

v.

STATE OF MARYLAND

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Nazarian,
Reed,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Nazarian, J.

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Filed: November 12, 2020

Elijah Bell was convicted in the Circuit Court for Montgomery County of unlawful distribution of cocaine. Mr. Bell argues on appeal that he was improperly restricted from cross-examining a witness about that witness's pending charges, which flowed from the same drug transaction at issue. We disagree and affirm his conviction.

## I. BACKGROUND

Mr. Bell was charged with unlawfully distributing cocaine, a controlled and dangerous substance, in violation of Maryland Code (2002, 2012 Repl. Vol.), § 5-602 of the Criminal Law Article ("CR"). The State called five witnesses at trial: a customer of Mr. Bell's, Young Yoo, and four police officers.

On December 13, 2018, police stopped Mr. Yoo in his luxury sedan after he left a hotel. Mr. Yoo testified that he had gone to the hotel to purchase cocaine from a man he knew as "Dude." Mr. Yoo identified Mr. Bell as "Dude" and the person who sold him cocaine on December 13, 2018. Mr. Yoo testified that he had known Mr. Bell for several months, potentially as long as eight months.

Mr. Yoo testified that he waited in his car in the hotel parking lot for twenty to thirty minutes to purchase eighty dollars of cocaine. Mr. Bell came to the parking lot and sat in Mr. Yoo's car. Mr. Yoo gave Mr. Bell seventy-nine dollars, and Mr. Bell gave him the cocaine. Mr. Yoo rolled some of the cocaine into a cigar and smoked it before he began to drive home.

Officer Lisa Killen testified that the First District Special Assignment Team of the Montgomery County Police Department observed Mr. Yoo's arrival and departure from

the hotel, the arrival of Mr. Bell, and their interactions. Officer Killen testified that a sport-utility vehicle registered to Mr. Bell entered the hotel parking lot twenty minutes after Mr. Yoo arrived. Officer Killen watched the interaction between Mr. Yoo and Mr. Bell, and she testified that, based on her training and experience, she believed she had witnessed a controlled dangerous substance transaction.

Officer Wilbert Morgan arrested Mr. Bell at the hotel. Mr. Bell did not have any cocaine when he was arrested, but he did possess a cell phone and thirty-two dollars in cash. Officer Killen obtained consent to search Mr. Bell's hotel room from Vanessa Wilson, who was staying in the same room. The nightstand in Mr. Bell's hotel room contained $1,830 in cash, and sandwich-sized baggie were found on the desk. No cocaine or scales were found in the hotel room.

After Officer Killen told the First District Special Assignment Team that she believed she had observed a controlled dangerous substances transaction, Officer Jarrett King arrived at the hotel, followed Mr. Yoo when he left, and stopped Mr. Yoo after observing him speeding. During the stop, Officer King noticed a plastic bag was sticking out of the center console of Mr. Yoo's car.

Officers Allan Leo, Abraham Groveman, and Nicholas Bonturi arrived on the scene, and Mr. Yoo refused to allow the officers to search his vehicle. Officer Groveman called a K-9 officer to do a scan of the vehicle, and the K-9 detected the presence of drugs. Officer Groveman retrieved a white powdery substance from the center console that later tested positive for cocaine and weighed 0.52 grams. Officer Groveman arrested Mr. Yoo and

interviewed him later. According to Officer Groveman's testimony, Mr. Yoo gave a statement identifying Mr. Bell as the person who sold him cocaine.

The State subpoenaed Mr. Yoo to testify, but he asserted his Fifth Amendment right to remain silent. The State filed a motion to compel pursuant to Maryland Code (1973, 2020 Repl. Vol.), § 9-123 of the Courts and Judicial Proceedings Article ("CJ"). The court granted the motion and issued an order granting Mr. Yoo immunity for his testimony at trial.[1] The court ordered Mr. Yoo to testify, and he complied. There was no written agreement giving Mr. Yoo a benefit in exchange for his testimony. The charges against Mr. Yoo for possession of cocaine were assigned to a stet docket and remained pending while he participated in a diversion program.

On cross-examination, defense counsel tried to question Mr. Yoo about his possession charge. The State objected, and the court held a bench conference on whether the line of questioning was appropriate:

> [DEFENSE COUNSEL]: You went to District Court on the charge of possession of --
>
> [THE STATE]: Objection. May we approach?
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> ***
>
> (Bench conference follows:)

[1] Under CJ § 9-123, a court is authorized to compel testimony under a grant of use and derivative use immunity. A prosecutor may make a motion in "accordance with subsection (d)" for an order requiring a witness to give testimony if the witness has invoked their Fifth Amendment privilege against self-incrimination, and the court "shall" grant the motion. CJ § 9-123(c)(1). Any information "directly or indirectly" derived from the witness's testimony may not be used against them in any criminal case, "except in a prosecution for perjury, obstruction of justice, or otherwise failing to comply with the order." CJ § 9-123(b)(2).

THE COURT: Yes, ma'am?

[THE STATE]: That's not an impeachable offense, so I don't know where this line of questioning is going.

[DEFENSE COUNSEL]: Credibility, Your Honor. He got a stet out of this, so I think [] outside a dismissal, that's as good as it gets. I think the stet alone, I should be able to go after him on it. He got a major benefit. I should be able to challenge him whether or not there's some kind of --

THE COURT: I'm going to ask you to keep your voice down so everybody doesn't hear you, [defense counsel].

[DEFENSE COUNSEL]: I'm sorry. But there's some kind of incentive for the State. I think that --

[THE STATE]: There is absolutely zero basis for that. He was not given a benefit. It's not proper cross-examination. There's no good faith basis to believe that he got a benefit. His case was resolved before this was even handled. I don't even know who handled that case. If he wants to ask him outside the presence of the jury . . . . If he wants to ask him outside the presence of the jury if he received benefit, but that is improper cross-examination to taint the jury.

[DEFENSE COUNSEL]: I, again, it goes to credibility, Your Honor. He received -- I had a case very recently, Your Honor, where there was charges against my client --

THE COURT: Do you have authority?

[DEFENSE COUNSEL]: What?

THE COURT: I'm not interested in a trial you might have. If you have authority, I'll hear it.

[DEFENSE COUNSEL]: Just lots of prior trial experience where this was, because there was what could be viewed as a benefit, I was permitted to go down that path. And I see a state as an absolute benefit. A PBJ --

THE COURT: Do you have authority --

[DEFENSE COUNSEL]: would be something very different. . . .

THE COURT: Do you have authority with regard to this fact pattern?

[DEFENSE COUNSEL]: No. . . .

> THE COURT: Do you have any evidence at all that there were negotiations between the State and the defendant?
>
> [DEFENSE COUNSEL]: I have not spoken with Mr. Yoo, so I have, and I haven't received anything from the State that indicates other than the fact that, again, I looked online, I noticed that a stet had been offered and received by him [] and that benefit given to Mr. Yoo. And I think, again, that is a significant benefit.
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> THE COURT: All right. And you're not aware of anything --
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> [THE STATE]: No. And I'll actually --
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> THE COURT: -- what the negotiations are?
>
> [THE STATE]: -- tell the Court that there were e-mails back and forth between [defense counsel] and I, and he said, what did Mr. Yoo receive. I said, I don't even know. I didn't handle it. And then I looked it up on Case Search and told him it looks like he got IPSA, which is not uncommon for a first-time offender who has a possession. And there was no benefit received. If that were the case, there wouldn't be a motion to compel; there'd be an immunity letter and a agreement between the State and the witness, and it's --
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> THE COURT: All right.
>
> [THE STATE]: -- there's no good faith basis to go down this line.
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> [THE STATE]: It's just --
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> THE COURT: Well, we're going to find out.
>
> [THE STATE]: -- to taint the jury.
>
> THE COURT: I'm going to inquire of the witness with, out of the presence of the jury with regard to anything. Okay?

The trial court then questioned Mr. Yoo about his charges and his motive for testifying:

> THE COURT: All right. Mr. Yoo, were you charged criminally as a result of being stopped by the police that evening?
>
> [MR. YOO]: I was charged with possession of illegal substance.

THE COURT: Okay. You keep your voice up.

[MR. YOO]: Okay.

THE COURT: And what was the disposition?

[MR. YOO]: The outcome was they would put me on a, like a stet docket.

THE COURT: Stet docket?

[MR. YOO]: Yeah, for me to complete a program.

THE COURT: Okay. And prior to the case being placed on the stet docket, did you have any conversations with the State's Attorney handling the case?

[MR. YOO]: State Attorney? No. I had a conversation with the public defender.

THE COURT: With the public defender?

[MR. YOO]: Yes.

THE COURT: And was there any agreement between you and the State that they would put the case on the stet docket in return for you testifying today?

[MR. YOO]: No. I did not supposed to testify until I got a letter that, telling me to come to court. That was, I was compelled to, which I did not. Then the second one, I got a summons, so before that, I didn't know I had to testify.

THE COURT: Okay. All right. All right. [Defense counsel], there doesn't seem to be any basis for that line of questioning.

[DEFENSE COUNSEL]: Okay.

Mr. Bell was convicted of distribution of a controlled dangerous substance. He was sentenced to fifteen years incarceration (seven years suspended).

## II. DISCUSSION

The issue on appeal is whether the trial court abused its discretion when it declined to allow Mr. Bell to cross-examine Mr. Yoo about his pending charges, and specifically, whether Mr. Yoo had received a benefit or had an expectation of receiving a benefit for

testifying. Mr. Bell argues that he had the right to explore that line of inquiry under the Confrontation Clauses of United States Constitution and the Maryland Declaration of Rights, both of which guarantee a criminal defendant's right to confront witnesses against them. U.S. Const. amend. VI; Md. Const. art. 21.

Maryland Rule 5-611(a) gives trial courts considerable latitude in controlling witness interrogation at trial:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses . . . so as to (1) make the interrogation . . . effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Trial courts make "judgment calls under Maryland Rule 5-611 as to whether particular questions are repetitive, probative, harassing, confusing, or the like." *Peterson v. State*, 444 Md. 105, 124 (2015). Trial judges have discretion to restrict cross-examination within the limits of the law and the Maryland Rules, and we review their decisions for abuse of discretion since "the trial court has its finger on the pulse of the trial while an appellate court does not." *Id.* Here, the trial court found that defense counsel's inquiry into Mr. Yoo's charges and motive for testifying lacked probative value and that there was an insufficient factual foundation for the inquiry.

### A. Mr. Bell Preserved The Issue Of Whether He Could Pursue The "Actual Benefit" Line Of Questioning But Not The "Expected Benefit" Inquiry.

Mr. Bell contends that the trial court erred by not permitting him to cross-examine Mr. Yoo about his possession charge and immunity. The State counters these arguments by contending that Mr. Bell did not preserve them for appeal. As a general matter, we only

consider issues that "plainly appear[] by the record to have been raised in or decided by the trial court." *Peterson*, 444 Md. at 125 (*quoting* Maryland Rule 8-131(a)). Mr. Bell argues that he preserved both arguments. Each side is half-right.

On cross-examination, the defense sought to question Mr. Yoo about the charges pending against him, which arise from this same drug transaction. The State objected to the questions, the trial court brought the parties to the bench, and then sustained the objection. The issue now is the scope of the questioning the defense attempted, and it breaks down into two potential inquiries: whether Mr. Yoo received a benefit in exchange for his testimony, and whether Mr. Yoo expected a benefit in exchange for his testimony.

The first is easier. In questioning outside the presence of the jury, defense counsel asked specifically about whether Mr. Yoo had received a benefit in exchange for testifying against Mr. Bell:

> THE COURT: All right. Mr. Yoo, were you charged criminally as a result of being stopped by the police that evening?
>
> [MR. YOO]: I was charged with possession of illegal substance.
>
> THE COURT: Okay. You keep your voice up.
>
> [MR. YOO]: Okay.
>
> THE COURT: And what was the disposition?
>
> [MR. YOO]: The outcome was they would put me on a, like a stet docket.
>
> THE COURT: Stet docket?
>
> [MR. YOO]: Yeah, for me to complete a program.
>
> THE COURT: Okay. *And prior to the case being placed on the stet docket, did you have any conversations with the State's Attorney handling the case*?
>
> [MR. YOO]: State Attorney? No. I had a conversation with the

> public defender.
>
> THE COURT: With the public defender?
>
> [MR. YOO]: Yes.
>
> THE COURT: *And was there any agreement between you and the State that they would put the case on the stet docket in return for you testifying today*?
>
> [MR. YOO]: *No. I did not supposed to testify until I got a letter that, telling me to come to court. That was, I was compelled to, which I did not. Then the second one, I got a summons, so before that, I didn't know I had to testify*.
>
> THE COURT: Okay. All right. All right. [Defense counsel], there doesn't seem to be any basis for that line of questioning.
>
> [DEFENSE COUNSEL]: Okay.

(emphasis added).

The court found no factual foundation for the inquiry and didn't allow the defense to question Mr. Yoo about an expected benefit in front of the jury. But the defense raised the issue, and the trial court decided it.

Even so, the State argues that defense counsel's response to the court's ruling—"Okay"—acquiesced to the ruling and waived appellate review. It's true that "when a party acquiesces in the court's ruling, there is no basis to appeal from that ruling." *Green v. State*, 127 Md. App. 758, 769 (1999). But that's not what happened here. Saying "okay" to the trial court's ruling immediately after the court made it doesn't acquiesce to the decision without objection but merely acknowledges the fact that the court made a ruling. Unlike *Whittington v. State*, where the defense counsel never disputed the court's ruling, 147 Md. App. 496, 537 (2002) ("Appellant never disputed the trial court's understanding of the scope of [the witness's] expert testimony."), the defense in this case had just finished

disputing the State's objection. An "okay" right after the ruling doesn't signal any abandonment of the argument counsel just finished making, and we decline to read greater meaning into it or to turn a moment of normal courtroom politeness into a game of litigation "gotcha."

From there, Mr. Bell argues that he also should have been allowed to question Mr. Yoo about whether he had an *expectation* of a benefit for testifying. But that line of questioning was not included in counsel's proffer, and so it is not preserved for appellate review. *See Jones v. State*, 213 Md. App. 483, 493 (2013) ("The failure to raise a particular argument in support of a request to exclude evidence acts as a waiver of the argument for the purposes of appellate review." (*citing Stone v. State*, 178 Md. App. 428, 445 (2008))). At most, defense counsel alleged that the State had "some kind of incentive" to elicit Mr. Yoo's testimony, a claim that relates to a benefit received rather than a benefit expected. And although we don't read the transcript woodenly, we don't see a way to infer an inquiry into expected benefits from the questions proffered. The questions emphasized that the stet, the benefit he did receive, was a "significant benefit" or an "absolute benefit," and did not create an expectation that anything additional would flow from it. And given the undisputed representation that Mr. Yoo's charges went onto the stet docket so he could complete a diversion program, we see no way to infer an intent to question on prospective benefits from the questions actually proffered.

### B. The Trial Court Did Not Abuse Its Discretion By Refusing To Allow Mr. Bell To Question Mr. Yoo About Whether He Received A Benefit For Testifying.

A defendant's right to confront witnesses includes the right to cross-examine about "possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Questions about a witness's partiality are relevant because responses may discredit the witness or affect the weight the jury gives the witness's testimony. *Id.* Trial courts must give defendants "wide latitude to cross-examine [witnesses] as to bias or prejudices." *Martinez v. State*, 416 Md. 418, 428 (2010) (*quoting Smallwood v. State*, 320 Md. 300, 307–08 (1990)). When reviewing an alleged violation of a defendant's right to confront witnesses, we evaluate whether the trial court allowed the defendant to reach the "threshold level of inquiry":

> [W]hen an appellant alleges a violation of the Confrontation Clause, an appellate court must consider whether the cumulative result of those decisions, some of which are judgment calls and some of which are legal decisions, denied the appellant the opportunity to reach the "threshold level of inquiry" required by the Confrontation Clause.

*Peterson*, 444 Md. at 124.

The 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." *Id.* at 122 (alteration in original) (*quoting Martinez*, 416 Md. at 428). But to trigger a defendant's right to a particular area of inquiry, trial courts must first determine if there is a factual basis for it:

> 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.

*Calloway v. State*, 414 Md. 616, 638 (2010) (emphasis in original) (*quoting Leeks v. State*, 110 Md. App. 543, 557–58 (1996)).

The trial court determined that there was no factual foundation for the inquiry into Mr. Yoo's charges for the purpose of establishing a motive to testify falsely:

> THE COURT: And was there any agreement between you and the State that they would put the case on the stet docket in return for you testifying today?
>
> [MR. YOO]: No. I did not supposed to testify until I got a letter that, telling me to come to court. That was, I was compelled to, which I did not. Then the second one, I got a summons, so before that, I didn't know I had to testify.
>
> THE COURT: Okay. All right. All right. [Defense counsel], there doesn't seem to be any basis for that line of questioning.
>
> [DEFENSE COUNSEL]: Okay.

"[W]hen challenged, counsel must be able to describe the relevance of, and factual foundation for, a line of questioning." *Peterson*, 444 Md. at 125 (*citing Grandison v. State*, 341 Md. 175, 206–11 (1995)). Here, defense counsel relied solely on the fact that Mr. Yoo's charges had been placed on the stet docket:

> [DEFENSE COUNSEL]: Credibility, Your Honor. He got a stet out of this, so I think that's, outside a dismissal, that's as good as it gets. I think the stet alone, I should be able to go after him on it. He got a major benefit. I should be able to challenge him whether or not there's some kind of –
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> THE COURT: I'm going to ask you to keep your voice down so everybody doesn't hear you, [defense counsel].
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> [DEFENSE COUNSEL]: I'm sorry. But there's some kind of

> incentive for the State.
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> ***
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> THE COURT: Do you have any evidence at all that there were negotiations between the State and the defendant?
>
> [DEFENSE COUNSEL]: I have not spoken with Mr. Yoo, so I have, and I haven't received anything from the State that indicates other than the fact that, again, I looked online, I noticed that a stet had been offered and received by him, that, and that benefit given to Mr. Yoo. And I think, again, that is a significant benefit.

But the State and Mr. Yoo did not make an agreement about a benefit Mr. Yoo may receive for testifying. The State described, and no one disputes that, the diversion[2] opportunity offered to Mr. Yoo as "not uncommon for a first-time offender who has a possession" charge. Mr. Yoo told the court that he was unaware that he would be called to testify before he was compelled by the State; indeed, the State had to seek and obtain an order granting him immunity before he would testify. Mr. Yoo did not have conversations with the State's Attorney, and the decision to offer him the diversion program was made well before he was compelled to testify.

On this record, the trial court was correct in finding that there was no factual foundation for the inquiry into whether Mr. Yoo received a benefit and did not abuse its discretion in limiting Mr. Bell's cross-examination. The questioning would not have raised

[2] *Intervention Program for Substance Abusers (IPSA)*, Dep't Correction & Rehabilitation, https://www.montgomerycountymd.gov/COR/PTS/IPSA.html [https://perma.cc/WT2B-XB9T] (last visited Nov. 4, 2020) (describing "a substance abuse and intervention strategy that provides diversion from prosecution for some individuals charged with minor crimes involving substance abuse").

legitimate questions about Mr. Yoo's credibility as much as invited the jury to speculate about an inducement to testify that, so far as the record reflects, didn't exist.

**JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. APPELLANT TO PAY COSTS.**