Circuit Court for Baltimore City
Case No. 823139004

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1694

September Term, 2023

ANTHONY FLOOD

v.

STATE OF MARYLAND

Graeff,
Tang,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: July 17, 2025

*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).

Following a jury trial in the Circuit Court for Baltimore City, Anthony Flood, the appellant, was convicted of distribution of a visual representation of another which exposes intimate parts or sexual activity—otherwise known as "revenge porn."[1] On appeal, the appellant presents one question, which we have organized into two for clarity:[2]

1. Did the trial court err in excluding the defense witness from testifying?

2. Did the trial court err in limiting cross-examination of the complaining witness?

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

BACKGROUND

The complainant and the appellant dated for about three months in the summer of 2022. In September, the complainant ended the relationship.

In February 2023, the complainant and her friend were at the complainant's house when the friend called the complainant into the living room and showed her a Facebook message from "Floody Dat" containing a Dropbox link. The friend asked the complainant if the sender was the person that the complainant had dated the previous summer. The complainant confirmed that it was, and together they viewed the content of the link. The

[1] Under Md. Code Ann., Crim. Law § 3-809, it is a misdemeanor to knowingly distribute a visual representation of another person's exposed intimate parts with the intent to harm, harass, intimidate, threaten, or coerce that person, if the distributor knows—or recklessly disregarded knowing—whether the other person consented to distribution, when the other person reasonably expected that the image would remain private.

[2] The question presented in the appellant's brief is: "Did the trial court err in refusing to allow the sole defense witness to testify and in limiting cross-examination of the complaining witness?"

link contained a video of the complainant and the appellant in a bathtub "performing sexual acts." The complainant remembered that the appellant had recorded the video with his phone. He never sent her the video, and she did not have a copy of it.

The friend took a screenshot of Floody Dat's Facebook message, which contained the Dropbox link, and sent the screenshot to the complainant through Instagram. That same day, the complainant visited Floody Dat's Facebook page, which showed a photo of the appellant as the profile picture. At trial, the complainant authenticated the screenshot that she had given to the prosecutor to use as evidence.[3] She identified Floody Dat and the associated Facebook page as belonging to the appellant.

Pre-Trial Exclusion of Defense Witness

The defense theorized that the complainant possessed the video and that she created a fake profile impersonating the appellant to falsely accuse him of distributing revenge porn. To support his defense, the appellant, represented by counsel from the Office of the Public Defender ("OPD"), sought to call a law clerk from that office as his sole witness.

Before jury selection, the prosecutor raised an "issue" with the defense's intention to call the law clerk to testify. After defense counsel confirmed the plan to call the law

[3] In addition to the screenshot of the message, the complainant gave the prosecutor a screenshot of the title of the Dropbox link, a screenshot of the video contained in the link, a copy of the video itself sent via the Dropbox link, and a screenshot of the post on Floody Dat's Facebook page that read, "Hit my inbox. I got a link to a Baltimore freak b****. Shorty a crummy dummy. I need all my fellas in Baltimore, anywhere else to be extra safe around this b****." All these items were admitted into evidence.

clerk as a witness, the court asked, "For what purpose?" The prosecutor also sought clarification on what the defense intended to present regarding the law clerk's testimony.

The defense had previously disclosed to the prosecutor "images of screenshots of different things" that the law clerk created. Counsel proffered what the law clerk would testify to, but the court questioned the relevance of such testimony:

> [DEFENSE COUNSEL]: [The law clerk] created a Facebook profile with [the appellant's] photo and name, also Instagram with his photo, also. Showing a link sent by Dropbox with his name. I'm showing how she did that . . . just basically to show how easy it is for just anyone without expert knowledge . . . [to] create a Facebook or Instagram [profile, and] to what she has personal knowledge of creating.
>
> THE COURT: *How's that relevant?*
>
> [DEFENSE COUNSEL]: Because . . . my client did not send these posts[4] and we're saying that this account was not him and it's so easy to create false accounts as evidenced by this of catfishing[5] everything else that we can't say 100% for sure beyond a reasonable doubt even that he even did this. So it's extremely relevant that someone can just do it like that. It's really easy in 20 minutes to just create. Take somebody's photo, put it on a Facebook, and create a Facebook with that name, also Instagram, and change your name on Dropbox to show a link that says Floody Dat shared this with you.

(emphasis added).

Defense counsel maintained that the law clerk would "simply testify[ ] to things that she has personal knowledge of that she created" and that such testimony was "extremely relevant in this case."

[4] The term "post(s)" as used by the parties and the court here and throughout the record appears to include the private message with the Dropbox link sent from Floody Dat's Facebook account to the complainant's friend.

[5] "Catfishing" means "to deceive (someone) by creating a false personal profile online." *Catfish*, MERRIAM-WEBSTER, www.merriam-webster.com/dictionary/catfish.

The court excluded the law clerk's testimony, concluding it was not relevant. It explained:

> The question is not whether or not they know *a* Facebook can be created, it's whether or not *this* Facebook post was created *by the witness or someone else*. That's what makes it, tends to make something relevant not whether one can create *a* Facebook post.

(emphasis added). In addition, the court suggested that allowing the admission of this evidence would result in a mini-trial on a collateral issue: whether it was easy to create a fake social media profile or post. The court stated that if it were to allow this witness to testify, then the State might wish to call someone who can testify that these posts cannot be easily created.

After a recess and before selecting a jury, defense counsel indicated it wanted to preserve the record "a little further" regarding the exclusion of the law clerk's testimony about what she had created. Counsel explained that the law clerk's testimony related to the appellant's defense and that the court's exclusion of the witness "inhibits my ability to provide a defense" for the appellant. Counsel reiterated that the testimony was relevant because "it goes to prove that a fact is more or less probable."

The court stated that its earlier ruling "stands." It reiterated its earlier ruling:

> The court does not believe that calling a law clerk to talk about *a* Facebook post or how easy it would be to create *a* Facebook post makes it anymore likely or not that *this* Facebook post was created *by someone else*. Until and unless there's a witness that the defense intends to call to testify . . . that *this* Facebook page was not created by the [appellant,] [t]he [c]ourt does not believe that it is appropriate to call the [law clerk as a] witness.

(emphasis added).

Defense counsel clarified that the law clerk would testify about creating "something that looks exactly like" the screenshot of the message containing the Dropbox link that the complainant had previously given to the prosecutor to as evidence. However, the court indicated that the law clerk's testimony was still not relevant. It explained:

> The question is whether or not *this* Facebook post, *not something that looks like this Facebook post*, the question is whether or not the witness will be able to testify that *this* Facebook post was created *by someone else*. Thank you. The ruling of the [c]ourt stands.

(emphasis added).

Cross-Examination of Complainant

During cross-examination, the complainant testified that she was unaware of how easy it was to create a new Facebook profile. She also stated that she believed changing the name of a Facebook profile would be difficult but acknowledged that it was easy to change both the profile and banner photos.

Defense counsel presented the complainant with three defense exhibits. The complainant identified the first exhibit as an unaltered "screenshot of the [D]ropbox that [the appellant] sent to [her friend]." She testified that the second exhibit was "a screenshot of the [D]ropbox that was sent to [her friend] with his Floody Dat name on it and the coding from the message[,]" which she recognized because "of the numbers listed . . . that shows up on the message that [the appellant] sent to [her friend]."

Defense counsel presented the complainant with the third exhibit, which was a screenshot of a Dropbox link sent from a Facebook account named "Floody Dat." This account had been created by the OPD law clerk. The complainant, unaware of this

information, testified that the screenshot was the same as one previously shown to her in an earlier exhibit:

> [DEFENSE COUNSEL]: I'm approaching you with what's marked as Defense Exhibit 3. Can you take a look at that?
>
> [COMPLAINANT]: Uhm-hum.
>
> [DEFENSE COUNSEL]: Do you recognize that?
>
> [COMPLAINANT]: Yes.
>
> [DEFENSE COUNSEL]: How do you recognize that?
>
> [COMPLAINANT]: It's the same screenshot that you just showed me.
>
> [DEFENSE COUNSEL]: And how do you know that?
>
> [COMPLAINANT]: Because it has Floody Dat on it and the numbers linked to the video.
>
> [DEFENSE COUNSEL]: And that's a fair and accurate representation of that Dropbox link?
>
> [COMPLAINANT]: Yes.
>
> [DEFENSE COUNSEL]: Has this been altered in anyway if you know?
>
> [COMPLAINANT]: No.
>
> [DEFENSE COUNSEL]: No? Okay. *Would it surprise you if I told you that this image was created by my law clerk from my office?*

(emphasis added). The State objected.

During the bench conference, defense counsel argued that the last question was intended to impeach the complainant. The court reminded counsel that it had already ruled the law clerk's testimony as irrelevant. The court explained that the defense was attempting to introduce this excluded evidence through the complainant's cross-examination. It reiterated the reasons for excluding the evidence in the first place.

> Yesterday, you did - there was a motion before this [c]ourt to exclude the testimony of your law clerk based on the fact that your law clerk had created a Facebook post, a Facebook profile with the [appellant's] name and likeness.

> The reason why the court excluded the witness is because it's not relevant as to whether or not she could create *a* Facebook profile with the [appellant's] name and likeness. The issue here is whether or not *this* Facebook profile associated with the videos that were sent in this case belong to the [appellant]. Therefore, because the law clerk cannot testify about *a* Facebook profile, *the [c]ourt questions why you believe it's relevant to assume the fact that[] it's not in evidence, meaning a Facebook profile that is not the subject here. . . . It's the same thing just asking the witness instead of your law clerk about the Facebook profile that was not, is not being subject of the case today.* It's a random Facebook. That's just like if the State says well, we're gonna call a witness or we're gonna show a witness another picture that did the same thing, has changed or has another Facebook profile. It doesn't matter because it's not the one here. The only thing that's an issue here is whether that *this* Facebook profile that was sent or created on [the day of the incident] is associated with the [appellant].

(emphasis added).

In response, defense counsel argued that "the defense in this case is that it's so easy for anyone, any folks off the street, to create a fake profile and if someone is able to do that in a span of 20 minutes they still could've done it, created a fake profile in this case using Floody Dat's name." Counsel explained that it was necessary for the appellant's defense "to be able to say hey we're saying it's easy for you to create a fake profile, and here's proof that there is a fake profile and it has the exact same information indistinguishable from that. That is his defense[.]"

The court reiterated that the issue was not whether the defense's third exhibit was "fake," but whether "the one in evidence is fake." It emphasized that the question was not about how "these are easy to create," but rather whether "the one that is in evidence was created by somebody else." The court reinforced this point by stating that "[y]ou can put in 30,000 of these," but that would not make them relevant.

Defense counsel added an argument about impeachment that was separate from the law clerk's creation of the defense's third exhibit. Counsel stated that the Dropbox link in the third exhibit "goes to impeach [the complainant] because she doesn't recognize her own evidence," which she provided to the prosecutor and that was admitted into evidence.

Ultimately, the court concluded that the defense's third exhibit was not admissible and could not be used to cross-examine the complainant regarding its creation by the OPD law clerk. However, the court did allow the defense to use it to cross-examine the complainant about its content, specifically her ability to recognize it as evidence that she had previously authenticated as coming from the appellant's account.

Defense counsel then asked the complainant questions to establish that the name and numbers depicted on the third exhibit matched those depicted in the second exhibit, which the complainant previously identified as "a screenshot of the [D]ropbox that was sent to [her friend]."

Renewed Request to Call Defense Witness

After the State rested its case, the defense moved for judgment of acquittal, which was denied. The appellant elected not to testify. Before the court instructed the jury, defense counsel renewed her request to call the OPD law clerk to testify. The following colloquy ensued:

> [DEFENSE COUNSEL]: . . . I know that the [c]ourt has ruled on this and I wasn't sure if you wanted to do this in the presence of the jury or outside, *but I would recall [the OPD law clerk] and if Your Honor was not allowing that testimony, then I would ask to do a proffer to the [c]ourt outside the jury with testimony from [the law clerk]*.

> THE COURT: The [c]ourt has previously ruled on this request. The request . . . for [the law clerk] to testify is denied. . . .
>
> *Is there anything different* that, that counsel, . . . *[w]ill [the law clerk] proffer to any fact that she has personal knowledge of involving this witness, any of the posts that the witness has identified as the Facebook post, will she be testifying to that?*
>
> [DEFENSE COUNSEL]: She will not be testifying to personal knowledge of [the appellant] sending the message or whether or not [the complainant's friend] received the message or sent that message to [the complainant]. She would be testifying to the fact that in relating to the fact that the State is alleging that my client is the one that sent the message via Floody Dat because the testimony and exhibits that I have go to that fact and whether it's more or less probable that it is in fact true. And she has created exact images that the State has presented, which goes directly to my client's defense of and the relevance is; therefore, you know that I can put forward the defense for my client, if I cannot do so. I cannot effectively represent my client and give him every defense that he is open to and available for and the State has been given all these documents ahead of time. If the [c]ourt would just like to view them to make a determination and or I can mark them and have them in the file if, Your Honor, is not inclined to allow testimony.

(emphasis added). The court responded that it was not inclined to allow testimony because, as it previously ruled:

> [T]he issue is not whether or not *a* Facebook profile can be created, that was not created by the [appellant]; the question is whether or not the Facebook profile *that was testified to by the witness was the one created by the [appellant]*. . . . [T]he witness in this particular case was able to authenticate the Dropbox link, the Facebook profile, and otherwise. There is no testimony, has been no testimony from any other witness identifying the Facebook post that counsel is seeking to introduce through her law clerk in this case. And therefore, the [c]ourt, as it said yesterday is reiterating, does not believe that any additional, any outside Facebook posts make it more or less likely that the Facebook post identified by the [complainant] as having been made by the [appellant] is relevant in this case and the ruling of the court stands.

(emphasis added).

The court permitted counsel to put the unadmitted exhibits in the file "for purposes of appeal because I assume that's the reason why you're making the record." Defense counsel confirmed that it was. The court asked if there was "anything else" before instructing the jury, to which defense counsel said, "No[.]" The defense then rested.

We shall include additional facts as necessary in the discussion.

DISCUSSION

I.

EXCLUSION OF LAW CLERK'S TESTIMONY

The appellant argues that the circuit court's exclusion of the law clerk's testimony was erroneous for two reasons. First, the testimony was relevant. Second, the court's refusal to allow defense counsel to present the law clerk's testimony, even outside the jury's presence, violated his constitutional right to present a defense.

A.

Relevance of Law Clerk's Testimony

The appellant argues that the law clerk's testimony about creating a fake social media account in Floody Dat's name was relevant to the defense theory that the complainant created a fake Facebook account and Dropbox link masquerading as the appellant and sent the message herself to her friend to frame the appellant. The State responds that the court properly excluded the testimony because nothing in the proffered testimony would make it more probable that the complainant made the fake profile for the

appellant and used it to send explicit videos of herself to her friend. We agree that the law clerk's testimony is not relevant, and the court did not err in excluding it.

"Although the right of a defendant in a criminal trial to present witnesses in his defense is a critical right, it is not absolute." *Taneja v. State*, 231 Md. App. 1, 10 (2016). "The accused may not offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Harris v. State*, 242 Md. App. 655, 663 (2019) (internal quotations and citation omitted). The use of other crimes or bad acts evidence by the defendant "as a shield" has been referred to as "reverse other crimes evidence." *Allen v. State*, 440 Md. 643, 664 (2014) (citation omitted). "The admissibility of evidence that someone other than the defendant committed other crimes or bad acts, is subject . . . to two paramount rules of evidence, embodied both in case law and in Maryland Rules 5-402 and 5-403." *Harris*, 242 Md. App. at 663–64 (cleaned up).

"Relevant evidence" is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. "[E]vidence can be relevant only when, through proper analysis and reasoning, it is related logically to a matter at issue in the case, *i.e.*, one that is *properly provable* in the case." *Taneja*, 231 Md. App. at 11 (emphasis added) (citation omitted). Relevant evidence is generally admissible, while evidence that is not relevant is not admissible. Md. Rule 5-402. Although relevant, a trial judge may exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by

considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403.

To establish the evidentiary relevance of crimes committed by another, "the defendant must show that the proffered evidence exculpates the defendant or gives credence to the theory that someone else other than the defendant committed the crime." *Allen*, 440 Md. at 665 n.16 (internal quotations and citation omitted). "If relevant, the proffered evidence must also, then, pass the Rule 5-403 balancing test—that is, its probative value must not be outweighed by the danger of unfair prejudice." *Harris*, 242 Md. App. at 664 (internal quotations and citation omitted).

> An accused may "introduce any legal evidence tending to prove that another person may have committed the crime with which the defendant is charged," but, *such evidence "may be excluded where it does not sufficiently connect the other person to the crime*, as, for example, *where the evidence is speculative or remote*, *or does not tend to prove or disprove a material fact* in issue at the defendant's trial."

Id. at 664–65 (emphasis added) (quoting *Holmes v. South Carolina*, 547 U.S. 319, 327 (2006)). This assessment is approached on a case-by-case basis. *Moore v. State*, 154 Md. App. 578, 603 (2004). We review a trial court's decision to exclude such evidence for an abuse of discretion. *Harris*, 242 Md. App. at 665.

In *Allen v. State*, 440 Md. 643 (2014), the Supreme Court of Maryland held that a defendant's constitutional right to present a fair defense at trial was not violated when the trial court excluded evidence related to an alternative suspect. *Id.* at 658. This evidence included the fact that the alternative suspect's DNA was found at the scene of the crime for which Allen had been charged, along with the suspect's recent guilty plea to a similar

offense committed in the same county. *Id.* at 651–62, 657. The Court held that the prejudicial effect of the DNA evidence and the alternative suspect's recent conviction outweighed any minimal probative value regarding the alternative suspect's alleged involvement in the crimes for which Allen was on trial. *Id.* at 665. The Court held that admitting the DNA evidence would have led to a "mini-trial," as the State would have introduced gang evidence and information about robbery kits to counter the suggestion that the alternative suspect committed the robbery and assaults in question. *Id.* The Court explained that this would have misled and confused the jury. *Id.*; *accord Worthington v. State*, 38 Md. App. 487, 498 (1978) (affirming trial judge's refusal to permit a delving into victim's gambling debts to support defendant's alternate perpetrator theory because such a connection was "totally speculative and tenuous"; allowing such questioning into "any and every matter calculated only to raise remote inferences" would obfuscate issues "well beyond the point of recognition").

In *Taneja v. State*, 231 Md. App. 1 (2016), this Court held that the trial court properly exercised its discretion in excluding evidence that someone other than Taneja murdered the victim. *Id.* at 4, 27. During trial, Taneja attempted to suggest that his stepson committed the murder for which he was charged. *Id.* at 13. He did this by questioning his stepson about various matters, including a replevin lawsuit the stepson filed against the victim in 2010. *Id.* Taneja also referenced a statement the stepson made around that time that "someone should kill that b[****.]" *Id.* at 18. In addition, Taneja sought to introduce evidence that his stepson lived near the location of the murder, was familiar with weapons,

sold Taneja's home after being granted power of attorney following Taneja's arrest, and had told Taneja in late 2011 or early 2012 that Taneja should go to a shooting range. *Id.*

The trial court excluded the proffered testimony on the ground that it would not "make more probative the defense in this case, that [Taneja] was not directly involved in" the criminal activity for which he was being prosecuted. *Id.* at 16–17. We affirmed the trial court's decision, explaining that the proffered testimony "would have been, at best, only tangentially relevant and had a high probability of confusing, distracting, and misleading the jury." *Id.* at 18. We concluded that such evidence was "disconnected and remote," with "no other effect than to raise the barest of suspicion" that Taneja's stepson might have murdered the victim. *Id.*

In *Harris v. State*, 242 Md. App. 655 (2019), we held that the trial court properly precluded evidence about an alternative suspect. *Id.* at 660, 666. This suspect had been convicted of first-degree assault that occurred a few days after the rape and murder for which Harris was on trial. *Id.* at 661. Harris attempted to present several pieces of evidence to support his theory of an alternate perpetrator, including testimony from an officer about the suspect's arrest, a police report concerning the offense committed by the suspect, a newspaper article suggesting the suspect as a potential individual responsible for the rape and murder Harris was charged with, and an official copy of the suspect's court case. *Id.* We agreed that the evidence did not give credence to the theory that someone other than Harris committed the crime. *Id.* at 666.

In this case, the proffered testimony that the OPD law clerk created a Facebook profile and Dropbox link, and that these were easy to create, did not give "credence to the theory" that the complainant or another individual created the Facebook profile and Dropbox link in question to send explicit videos of the complainant to her friend. *See Allen*, 440 Md. at 665 n.16. There was no "real evidence pointing toward" this theory, making the connection "totally speculative and tenuous." *Worthington*, 38 Md. App. at 498. Even if the testimony were relevant, it would not pass the balancing test under Rule 5-403, since it "had a high probability of confusing, distracting, and misleading the jury." *Taneja*, 231 Md. App. at 18. As the court signaled in its ruling, admitting the law clerk's proffered testimony would likely have resulted in a mini-trial regarding how easily the profile and related message with the Dropbox link could be created. *See Allen*, 440 Md. at 665. Accordingly, the court did not err in excluding the law clerk's testimony.

B.

Kelly v. State

The appellant contends that, despite the relevance determination, the circuit court abused its discretion by refusing to allow him to present the testimony of the OPD law clerk, who was his only witness and was present in court ready to testify, even outside the jury's presence. Citing primarily *Kelly v. State*, 392 Md. 511 (2006), he argues that the court's denial of his right to call this sole witness based on a brief proffer violated his constitutional right to present a witness in his defense.

In *Kelly*, the defendant was charged with two counts of attempted first-degree murder and related charges. *Id.* at 515. The State presented evidence that three friends engaged in a heated verbal exchange with Kelly while riding a public bus. *Id.* at 517–18. After the argument, the friends exited the bus and went to a nearby 7-Eleven. *Id.* at 518. Shortly thereafter, while waiting for the next bus, a man appeared with a gun and shot at them. *Id.* Two of the three friends identified Kelly as the shooter. *Id.* at 519.

After the State rested and the defendant's motion for judgment of acquittal was denied, defense counsel informed the trial court that she intended to call two police officers as witnesses for the defense. *Id.* One officer had been subpoenaed and was present and ready to testify, but the other had neither been served nor was present. *Id.* For the officer who was present, the State requested a proffer of the officer's testimony, and the court asked defense counsel what the officer would testify about. *Id.* at 522.

Defense counsel stated that she wished to elicit two pieces of evidence from this officer: first, the bus schedule, which would impeach the victims' testimony regarding how long they had been waiting for the bus; and second, that the bus driver had no recollection of the altercation on the bus. *Id.* at 522–23. The court ruled that the proffered evidence was inadmissible hearsay. *Id.* at 524. When the State questioned what defense counsel could ask of the witness that would not be inadmissible hearsay, defense counsel responded: "I think that I can ask it without eliciting hearsay." *Id.* at 524–25.

Defense counsel stated that she also wanted to ask the officer about a bus surveillance videotape. *Id.* at 524–25. The court, however, opined that the tape was

irrelevant because it was inoperable. *Id.* at 526. When defense counsel again asked if she could elicit the bus schedule from the officer to show that the police might have interviewed the wrong bus driver, the court denied this request, stating that the officer lacked personal knowledge of the schedule. *Id.* Concluding that the officer would not be able to provide any admissible testimony, the court dismissed the officer and adjourned for the day. *Id.* at 526–27.

The next day, defense counsel stated she wished to call a civilian witness who was also present in the courthouse. *Id.* at 527. The court asked for a proffer of that witness's testimony, and defense counsel objected to having "to proffer what witnesses are going to testify to. I mean, [the State] can make objections just like I have to." *Id.* (alteration in original) (emphasis omitted). Nonetheless, defense counsel made a proffer. *Id.* at 528–29. The court ultimately ruled that it would not permit defense counsel to call the civilian witness. *Id.* at 529–30. When the court then asked if the defense rested, defense counsel stated, "I guess so, since I am not allowed to call any witnesses." *Id.* at 530 (emphasis omitted). The jury found Kelly guilty of all charges. *Id.*

The Supreme Court of Maryland reversed Kelly's conviction, holding that the trial court abused its discretion by denying him "his constitutional right to present a defense by not allowing the witnesses who were present to even be presented." *Id.* at 543. The Court began its analysis by recognizing the right of an accused in a criminal trial to a fair opportunity to defend against the State's accusations, including the right to call witnesses. *Id.* at 535. The Court further recognized that this right is not without limitations. *Id.* at 536.

"The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Id.* at 537 (citing *Taylor v. Illinois*, 484 U.S. 400, 410 (1988)). In addition, "to establish a violation of the compulsory process clause, the defendant 'must at least make some plausible showing of how [the] testimony would have been *both material and favorable* to his defense.'" *Id.* (alteration in original) (emphasis added) (citation omitted).

The Court explained that "[i]n cases where the witnesses have been in the courtroom and are immediately available to testify[,] we have held that exclusion of testimony *can* constitute error." *Id.* at 540 (emphasis added). It elaborated:

> While the right to elicit certain types of testimony by opposing counsel, upon proper objection, may be denied, the right to present the witnesses in the first instance should not be. That is especially so when defense counsel specifically informs the court that she only knows what questions she will ask of a witness, *but not the answers*.

Id. at 535 (emphasis added).

The Court emphasized the trial judge's role as a neutral arbiter in an adversarial system in which the parties are charged with objecting to the propriety of the evidence presented at trial. *Id.* at 540. It cautioned:

> When the trial court makes a ruling as to the admissibility of evidence on its own without a prior objection by any of the parties, the court leaves its role as an arbiter and assumes another role as a party to the proceeding, placing into question the defendant's right to a fair trial.

Id. at 541. However, the Court clarified that this does not mean "the defendant will be allowed to present properly objected to testimony that violates the rules of evidence or procedure." *Id.* at 543. "It merely requires that exclusion take place at the appropriate time

and in the appropriate manner." *Id.* In other words, while the trial court has a responsibility to control the proceedings before it, that responsibility "does not extend to the right to take over a party's case." *Id.* When this happens, "the court risks denying to a defendant the fair trial guaranteed to him by both the United State[s] Constitution and Maryland's Constitution." *Id.*

In applying these principles, the Court concluded that the trial court erred in prematurely excluding the officer's testimony *sua sponte* on hearsay grounds because "[t]his testimony presumably could have been favorable to [Kelly]." *Id.* at 538. The Court likened the situation to that in *Void v. State*, 325 Md. 386 (1992). In *Void*, the defense intended to call three officers as witnesses to testify regarding the State's witness's character for truth and veracity. *Id.* at 387. The State moved to quash the defense's subpoenas, which the trial court granted. *Id.* at 388–89. In granting the motion to quash, the trial court relied on the witnesses' affidavits and proffers by counsel. *Id.* at 388–89. The Supreme Court of Maryland reversed, explaining that the trial court should have heard from the subpoenaed witnesses, either at a pretrial hearing or at the trial out of the presence of the jury. *Id.* at 394. The trial court could have, at that time, determined whether the witnesses had admissible testimony to offer. *Id.* at 392. The Court concluded that the trial court "erred in short-circuiting the common law and statutory rights of Void by quashing the subpoenas." *Id.* at 394.

In applying the rationale in *Void*, the Court concluded that the trial court should have allowed the witnesses to testify in Kelly's case and ruled on the admissibility of their

testimony, if proper objections were made, during questioning by the defense and not before. 392 Md. at 539. Although it agreed that "proffers are helpful, they are not a substitute for the witnesses' testimony when the witnesses are present and able to testify." *Id.* at 532. The Court noted that "if there were concerns as to the admissibility of their testimony, the judge could have allowed the petitioner to question the witnesses out of the presence of the jury." *Id.* at 539–40. The Court explained that the trial court's ruling upon that testimony "based upon [Kelly's] proffer was premature, [e]specially in light of the fact that two witnesses were present, ready, and able to testify." *Id.* at 539.

The Court further held that the trial court's conduct exceeded that of a neutral arbiter, and it became an advocate for the State when it "*sua sponte* opted to require [Kelly's] counsel to proffer the questions she was going to ask" but "never required a preexamination proffer" as to the State's witnesses. *Id.* at 540, 541. The trial court "then decided that, because such questions would only elicit hearsay testimony, the [defense] witnesses would not be allowed to testify. In doing so, the judge went beyond being an impartial officer in dismissing testimony which, had the State failed to timely object, might have been admitted." *Id.* at 540. The Court concluded that "[u]nder the circumstances here present," the trial court's refusal to allow the defense to present its witnesses constituted an abuse of discretion, requiring that Kelly be granted a new trial. *Id.* at 543.

We return to the instant case. The appellant argues that the circuit court should have permitted the OPD law clerk to testify that creating a fake Facebook profile and Dropbox link was easy to do and that such testimony would have been relevant to show that the

complainant created the fake Facebook profile and Dropbox link herself to frame him. He asserts that, like in *Kelly*, the court's refusal to permit the defense to present testimony from the law clerk—even outside the presence of the jury—was premature, as the ruling was based solely on counsel's proffer of the testimony. By excluding this witness, he claims that the court denied him the right to call his only witness.

Additionally, he argues that similar to the situation in *Kelly*, the court failed to act as an impartial arbiter. He claims that the court required a proffer of the law clerk's testimony without asking the same of the State's witnesses. Furthermore, he contends that the court "anticipated and further invited an objection" from the prosecutor concerning the relevance of the law clerk's testimony.

Preliminarily, we note that these contentions are not preserved. During pre-trial discussions regarding the law clerk's testimony, and after the State rested its case, the defense counsel did not object to the proffer of the law clerk's testimony, nor did counsel suggest that the court had deviated from its role as a neutral arbiter. It was only after the State rested that the counsel requested to call the law clerk as a witness to testify outside the jury's presence.

However, a careful review of the record shows that defense counsel's request for the law clerk's testimony to be given outside the jury's presence was not intended to address the concerns outlined in *Kelly*. Counsel did not argue that the appropriate approach was to have the law clerk testify outside the jury's presence so the court could rule on any objections to testimony on a question-by-question basis. Instead, the request was made only

as an alternative—if the court's prior ruling to exclude the law clerk's testimony stood, the defense wished to place "the proffer" in the form of the law clerk's testimony on the record for appeal purposes. This was like the subsequent request for the court to include unadmitted exhibits in the court file for appeal purposes if the court was "not inclined to allow testimony."

As stated, the court reaffirmed its previous decision. In response to counsel's alternative request "*to do a proffer* to the [c]ourt outside the jury *with testimony* from [the law clerk]," the court asked if there was "anything different" that the law clerk would say other than what counsel had previously proffered. (emphasis added). Counsel proffered what the law clerk would say, which was essentially the same as what counsel had proffered earlier during the pre-trial discussion.

Even if preserved, we are not persuaded by the parallels the appellant tries to draw between this case and *Kelly*. Unlike in *Kelly*, the court did not prematurely exclude testimony based on anticipated and assumed hearsay. In addition, the testimony that was excluded was neither material nor favorable to the defense, unlike the officer's testimony in *Kelly*.

Furthermore, this case does not involve a situation where defense counsel sought to pose questions to which she did not know the answers. Counsel was aware of what the law clerk would testify to, specifically that she created a fake Facebook profile in Floody Dat's name and sent a message containing a Dropbox link from that account. Counsel proffered the testimony twice, the second time after the court allowed her to further develop and

expand on the initial proffer. This was not like *Void*, where the court lacked sufficient information to exercise sound discretion in determining the relevance of the proffered testimony.

Our review of the record does not support the appellant's claim that the court exceeded the boundaries of a neutral arbiter. We disagree with the characterization that the court anticipated or invited the State to take any action. Additionally, we are not convinced that the court's request for a proffer from one defense witness (albeit the only one) was a deviation from its neutral role. The circumstance in this case differs vastly from the one in *Kelly*, in which the trial court requested *sua sponte* proffers for defense witnesses without requiring the State to do the same for its witnesses. This, as well as the trial court's premature rulings on hearsay, ultimately led the Court in *Kelly* to conclude that the trial court "t[ook] over a party's case and abandoned its role as a neutral arbiter." 392 Md. at 543.

In contrast, the State here raised an "issue" regarding the law clerk's inclusion on the witness list. This prompted the court to question the relevance of the law clerk's testimony. Such an inquiry was reasonable, as the law clerk was associated with the OPD and, at first glance, seemed unlikely to possess personal knowledge about the transmission of the revenge porn. The court's rulings and conduct did not demonstrate that it took over a party's case and abandoned its role as a neutral arbiter. Instead, the court consistently focused its analysis on the relevance of the proposed testimony, as outlined above.

Finally, the fact that the law clerk was the appellant's only witness is not dispositive. In *Kelly*, the Court primarily focused on the trial court's premature hearsay rulings and its failure to act as a neutral arbiter due to other conduct. The circumstances in *Kelly* resulted in no defense witnesses being called. In other words, it was not merely the absence of defense witnesses that led to the conclusion that the defendant's rights were violated; rather, it was the culmination of various factors that led to that conclusion.

The Court in *Kelly* did not hold that the defense having only one witness necessitates that this sole witness must be allowed to testify under constitutional protections. On the contrary, the Court explicitly stated that the "accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible" and that the accused "must at least make some plausible showing of how [the] testimony would have been both material and favorable to [the] defense." *Id.* at 537 (citation omitted). Permitting a defense witness to testify on irrelevant matters that the defense deems beneficial, solely because she is the only defense witness, is inconsistent with the principles set forth in *Kelly*. For the reasons stated, the circuit court did not abuse its discretion when it excluded the OPD law clerk from testifying, even outside the presence of the jury.

II.

SCOPE OF COMPLAINANT'S CROSS-EXAMINATION

The appellant argues that the circuit court violated his right of confrontation by preventing defense counsel from asking the complainant about the defense's third exhibit: "Would it surprise you if I told you that this image was created by my law clerk from my

office?" First, he argues that cross-examination of the complainant was relevant to counter her assertion that she did not know how to create a fake social media profile and her denial of knowledge that fake profiles are easy to create. Second, he maintains that this question was important in casting doubt on the complainant's ability to authenticate the screenshot she provided to the prosecutor as originating from the appellant's Facebook account. He contends that the jury should have been able to hear the complainant's response to the question, observe her demeanor, and assess her credibility in response to the question.

"The Confrontation Clause of the Sixth Amendment to 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[.]" *Pantazes v. State*, 376 Md. 661, 680 (2003). Critical to the right of confrontation is the opportunity to cross-examine witnesses, as cross-examination is one of the most effective means of attacking the witnesses' credibility. *Id.* A cross-examiner "must be given wide latitude in attempting to establish a witness' bias or motivation to testify falsely." *Merzbacher v. State*, 346 Md. 391, 413 (1997).

However, a defendant's constitutional right to cross-examine witnesses is not boundless, and managing the scope of cross-examination is a matter that lies within the sound discretion of the trial court. *Simmons v. State*, 392 Md. 279, 296 (2006). Trial courts have "wide latitude to establish reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or *only marginally relevant*." *Pantazes*, 376 Md.

at 680 (emphasis added). A trial court does not abuse its discretion when it excludes irrelevant cross-examination. *Simmons*, 392 Md. at 296. "The appropriate test to determine abuse of discretion in limiting cross-examination is whether, under the particular circumstances of the case, the limitation inhibited the ability of the defendant to receive a fair trial." *Martin v. State*, 364 Md. 692, 698 (2001). Whether there has been an abuse of discretion depends on the circumstances of each case. *Pantazes*, 376 Md. at 681.

Regarding the first contention, the court limited the scope of cross-examination and did not allow defense counsel to question the complainant about the creation of the defense's third exhibit. We agree with the court that evidence regarding the ease of creating a fake Facebook profile was not relevant. We also agree with the court that defense counsel attempted to introduce inadmissible evidence of its creation through the complainant's cross-examination. *See Holmes v. State*, 236 Md. App. 636, 670–71 (2018) (affirming the court's restriction on defense examination into "marginally relevant evidence that would have confused the jury" through the proverbial "backdoor" questioning of the State's witness). We are satisfied that the court did not err or abuse its discretion in restricting the defense examination on this point.

Regarding the second contention, the court ultimately allowed defense counsel to cross-examine the complainant regarding the defense's third exhibit, without reference to how it was created. Counsel proceeded to ask the complainant about the contents of the defense's third exhibit, specifically, whether the "numbers" in this exhibit "were the same" as those in the previously shown exhibit and whether that information, including Floody

Dat's name, was "correct." Following this, counsel asked about the evidence the complainant initially provided to the prosecutor and the different screenshots she had taken.

In our view, the court appropriately managed the scope of cross-examination by limiting it to appropriate issues, i.e., the complainant's ability to recognize the screenshot of the Dropbox link that she had earlier authenticated as coming from the appellant's Facebook account. This approach allowed the defense counsel to adequately test the complainant's credibility without delving into irrelevant topics, such as the ease of creating the exhibit, the role of the OPD law clerk in its creation, and the method by which it was made. We conclude that the court did not err or violate the appellant's right to confrontation by limiting the scope of the complainant's cross-examination in this way.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.