UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0202

September Term, 2015

BRIAN E. McKENZIE

v.

STATE OF MARYLAND

Woodward,
Friedman,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: February 29, 2016

Following a successful appeal to this Court, on March 18, 2015, Brian E. McKenzie, appellant, was retried before a jury in the Circuit Court for Washington County.[1] The jury concluded that appellant was guilty of the second degree assault after hearing evidence that appellant allegedly spit on a correctional officer at Roxbury Correctional Institution in the course of an altercation precipitated by the officer's request that appellant go through a metal detector while he was walking to the evening meal. For his conviction, the court sentenced appellant to serve an additional five years in prison, consecutive to any sentence he was then serving or was obligated to serve.

In his timely filed appeal, appellant presents three questions for our consideration, which we have rephrased:

> 1. Did the circuit court abuse its discretion by restricting defense counsel's cross-examination of the victim?
>
> 2. Did the circuit court err or abuse its discretion by denying appellant's motion to dismiss the charges against him due to the State's failure to preserve evidence?
>
> 3. Did the circuit court err by failing to provide a missing evidence instruction to the jury?

Discerning no error or abuse of discretion, we shall affirm the judgment of the circuit court.

[1] Appellant was originally convicted for the same offense following a one-day jury trial in the circuit court that occurred on March 26, 2012, and was sentenced to five years in prison. *Brian McKenzie v. State of Maryland*, Court of Special Appeals, No. 0290, September Term, 2012, (unreported, filed January 24, 2014). On appeal, this Court reversed the judgment and remanded the case for a new trial. *Brian McKenzie v. State of Maryland*, Court of Special Appeals, No. 0290, September Term, 2012, (unreported, filed January 24, 2014).

DISCUSSION

I. Limitations on Cross-Examination

During defense counsel's cross-examination of Lieutenant Samuel A. Turner, the alleged victim in this case, the following exchange occurred:

> [DEFENSE COUNSEL]: Lieutenant Turner, you've been accused of, uh, assault versus inmates or excessive force on at least eight prior occasions. Is that correct?
>
> [LIEUTENANT TURNER]: If you say so.
>
> [DEFENSE COUNSEL]: And, um, are you the same Samuel Turner who was, uh, indicted on March 8, 1995 …
>
> [PROSECUTOR]: Objection, Your Honor.
>
> [DEFENSE COUNSEL]: … on charges of assaulting an inmate?
>
> [PROSECUTOR]: May we - may we approach.
>
> THE COURT: Come on up.
>
> (Whereupon both counsel and the Defendant approached the Bench, and the following occurred out of the hearing of the jury:)
>
> [DEFENSE COUNSEL]: State's objection.
>
> [PROSECUTOR]: Your Honor, you know, I let – first of all, to get into prior bad acts, I would hope that you could at least make a proffer that you have evidence of something or – or at least reliable knowledge not just sitting here going, "Well isn't this true? Isn't that true?"
>
> [DEFENSE COUNSEL]: I do, Your Honor.
>
> THE COURT: Where are we going with this?
>
> [DEFENSE COUNSEL]: Your Honor, this – I'd be offering this for impeachment purposes, um, that there was an indictment. It actually - the case actually went to trial involving an alleged assault on an inmate. It was based on - on the testimony originally of a nurse in the Division of

Corrections, who testified as to observing injuries and - and Lieutenant Turner and others having been present. The nurse was actually subjected to a polygraph exam and found not to be, uh, not truthful. But then, however, at trial, um, the nurse then was unable to recall. And the inmate was, uh, had been released and was - did not testify. I don't believe the inmate was there. The charges …

THE COURT: So.

[DEFENSE COUNSEL]: …A Motion for Judgment of Acquittal was granted. I'm not doing this as a prior conviction. However, there is a substantial basis I would argue to argue that there was a - a bad act on the part of Lieutenant Turner in that there was an indictment issued by a grand jury. Probable cause was found. And I would argue that it would be relevant in terms of impeachment because it goes to motive or to fabricate or - or motive to - to lie in order to potentially cover up another allegation of excessive force if that was the case. There would then be motive to fabricate or bias of - of a witness is always relevant. And I would argue it would - for impeachment purposes, it would - it would go to that.

* * *

[PROSECUTOR]: Your Honor, there's no …

THE COURT: Well…

[PROSECUTOR]: If this is motive, there's no testimony yet that he would have a motive to cover anything up. If after the defense case, they present something that perhaps we then have to look at this witness's motive concerning this defendant, then we could argue it then.

THE COURT: Mm-hm.

[PROSECUTOR]: But the fact that he may have been accused of something…

THE COURT: Right. I'm not…

[PROSECUTOR]: …with someone else prior is not motive for this.

THE COURT: The fact that at some point in his career there was probable cause, [Defense Counsel], you certainly know that probable cause is not enough to - not enough to - to prove that a - that a bad act has occurred. The

case from what you're telling me went nowhere. Ultimately was a - did not - did not result in a guilty finding. And I don't see the relevance of it. If it was somehow tied to this defendant or similar type situation, then perhaps. But I'm going to sustain the objection.

[DEFENSE COUNSEL]: Your Honor, I do have - I believe I - I mentioned to you I have a number of, you know, folders with reports. Now the other - the others didn't, you know, didn't end up in findings of, uh, any administrative findings or - or go to - in terms of cases. I think this is the one that went farthest along the way. And so …

[PROSECUTOR]: Well I made the mistake not objecting with your first question. If you want to ask follow-ups on that, I will object. But I am objecting to this. So whether this went further than the others has no significance whether it's admissible or not.

THE COURT: So in other words, we're talking about prior bad acts?

[DEFENSE COUNSEL]: Mm-hm.

* * *

[PROSECUTOR]: I think what - what happens at least with the prior bad act, at least this is my argument, he asked, "Have you been charged or investigated for excessive use of force at least eight time?" If the officer denied it, then I could see the argument getting into the specifics of it trying to delve it out a little.

THE COURT: Mm-hm.

[PROSECUTOR]: But he said, "Yes, I have."

THE COURT: Mm-hm.

[PROSECUTOR]: That's it. You don't get to go into the underlying facts and the underlying accusations.

THE COURT: I agree with the State. I'm going to sustain – well the objection that's before me right now is as to the case that was indicted and ultimately dismissed. So on that, that's sustained. And I don't want to anticipate what might be coming. But that line of questioning, he did – that this witness did admit to eight prior uses of force.

[DEFENSE COUNSEL]: Well his – his response, exact response was, "If you say so."

THE COURT: Which is an affirmative response.

[PROSECUTOR]: He's not denying it.

THE COURT: He's not denying it. So I think this line – I'll sustain any objection to this line of questioning.

[DEFENSE COUNSEL]: No – no – I preserve the record, note my exception or objection.

THE COURT: I understand.

[DEFENSE COUNSEL]: Thank you, Your Honor.

Appellant contends that the circuit court abused its discretion when it "sustained the prosecutor's objections regarding defense questions about prior incidents between [Turner] and other inmates." Appellant asserts that "[s]uch testimony would be probative of whether [Turner] was telling the truth" about the spitting incident and should have been admitted pursuant to Maryland Rule 5-608(b).

A criminal defendant's "right to confront the witnesses against him or her" is guaranteed by the Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. *Pantazes v. State*, 376 Md. 661, 680 (2003). Exercising that right, a defendant is entitled to cross-examine witnesses to impeach their credibility. *Id*. "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.'" *Peterson v. State*, 444 Md.

105, 122 (2015) (quoting *Martinez v. State*, 416 Md. 418, 428 (2010)) (alteration in original). So long as this constitutional threshold is satisfied, a trial court may, thereafter, impose limitations on a witness's testimony, *Martinez*, 416 Md. at 428, and those limits "lie[] within the sound discretion of the trial court." *Pantazes,* 376 Md. at 681. We, therefore, review the trial court's decisions for abuse of discretion. *Id*. "Whether there has been an abuse of discretion depends on the particular circumstances of each individual case." *Id*.

Impeaching a witness with his or her prior bad acts is permitted by Maryland Rule 5-608(b),[2] which provides:

> (b) Impeachment by examination regarding witness's own prior conduct not resulting in convictions. The court may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction but that the court finds probative of a character trait of untruthfulness. Upon objection, however, the court may permit the inquiry only if the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred. The conduct may not be proved by extrinsic evidence.

Thus, a party who chooses to utilize this method of impeachment, "is bound by the witness' answer and, upon the witness' denial, may not introduce extrinsic evidence to contradict the witness or prove the discrediting act." *State v. Cox*, 298 Md. 173, 180 (1983).

[2] Prior bad acts evidence may also be admissible under Maryland Rule 5-616, which allows impeachment of a witness' credibility by "[p]roving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely;" or by "[p]roving the character of the witness for untruthfulness by (i) establishing prior bad acts as permitted under Rule 5-608(b) or (ii) establishing prior convictions as permitted under Rule 5-609."

In *State v. Cox*, 298 Md. 173 (1983), the Court of Appeals explained that, although "mere accusations of crime or misconduct may not be used to impeach," a party is permitted, given a proper showing, to cross-examine a witness regarding "prior bad acts which are relevant to an assessment of the witness' credibility." *Id*. at 179. Of course, "not all acts of misconduct are 'prior bad acts that are relevant to assessing [the witness's] credibility[.]'" *Ellsworth v. Baltimore Police Dep't*, 438 Md. 69, 88 (2014) (citing *Robinson v. State*, 298 Md. 193, 197 (1983)). Prior bad acts are only relevant if they "logically relate to a witness's character for untruthfulness."[3] *Id*.

Moreover, "if the bad acts are not conclusively demonstrated by a conviction, the trial judge must exercise greater care in determining the proper scope of cross-examination." *Robinson v. State*, 298 Md. 193, 200 (1983). "[W]hen impeachment is the

[3] As this Court has previously explained:

> [T]he universe of convictions that can be used to impeach a witness's credibility, is limited to "infamous crimes" (common law felonies and the common law *crimen falsi*) and crimes that are relevant to the witness' credibility. Infamous crimes include treason, common law felonies, and other offenses classified generally as *crimen falsi*. *Crimen falsi* include crimes in the nature of perjury, false statement, criminal fraud, embezzlement, false pretense, or any other offense involving some element of deceitfulness, untruthfulness, or falsification bearing on the witness's propensity to testify truthfully.

Correll v. State, 215 Md. App. 483, 503-04 (2013) (considering Maryland Rule 5-609, allowing the admission of prior convictions for impeachment) (internal quotation marks and citations omitted). If a conviction of a crime is "relevant to the witness's credibility" under Rule 5–609(a), then the conduct underlying the conviction is likewise "probative of a character trait of untruthfulness" for purposes of Rule 5–608(b). *Thomas v. State*, 422 Md. 67, 76 (2011).

aim, the relevant inquiry is not whether the witness has been accused of misconduct by some other person, but whether the witness actually committed the prior bad act." *Cox*, 298 Md. at 181. Inquiries into a witness' prior bad acts should only be permitted "when the trial judge is satisfied that there is a reasonable basis for the question, that the primary purpose of the inquiry is not to harass or embarrass the witness, and that there is little likelihood of obscuring the issue on trial." *Id*. at 180. The trial judge must be alert to the possibility of prejudice outweighing the probative value of the inquiry. *Id*. *See also* Md. Rule 5–403. For example, a trial court does not err by limiting the impeachment of a witness with his or her prior bad acts where the probative value of the evidence proffered is outweighed by the danger that the jurors might use witness' bad acts to conclude that he was a "bad man" and an "unsympathetic victim of defendant's crimes." *Molter v. State*, 201 Md. App. 155, 174 (2011).

In this case, defense counsel sought to impeach the victim with evidence that on multiple prior occasions, Turner had been accused of assaulting or using excessive force in interactions with other inmates. When defense counsel questioned Turner regarding the existence of the eight prior incidents, Turner did not deny that he had, in fact, been accused of such misconduct on eight prior occasions. Defense counsel, thus, reached the limits of what impeachment was permitted under Md. Rule 5-608(b). Indeed, because of the prosecutor's belated objection, appellant received the most incriminating response to defense counsel's inquiry that was possible.[4]

[4] Had the State promptly objected to defense counsel's initial question regarding the eight prior accusations of misconduct made against Turner, the court (continued…)

The Rule expressly provides that extrinsic evidence of the prior bad acts is not admissible for impeachment purposes. Md. Rule 5-608(b) ("The conduct may not be proved by extrinsic evidence."). Defense counsel's follow-up question regarding the specifics of one of the eight prior accusations against Turner constituted improper extrinsic evidence and was, therefore, properly excluded. Moreover, the type of misconduct alleged, acting aggressively, is not misconduct that is highly probative of an individual's character for truthfulness. *Compare Fields & Colkley v. State*, 432 Md. 650, 661 (2013) (wherein the alleged misconduct included the falsification of time sheets, behavior that was probative of the witnesses' tendency to lie). In this case, it is more likely that the evidence defense counsel sought to elicit would have constituted improper propensity evidence, rather than evidence of Turner's untruthfulness or motive to lie.

Furthermore, defense counsel proffered no "reasonable factual basis" demonstrating that it was likely that Turner had actually committed the alleged misconduct. *See Pentazes*, 376 Md. at 691 ("[W]hen impeachment is the aim, the relevant inquiry is not whether the witness has been accused of misconduct by some other person, but whether the witness actually committed the prior bad act." (quoting *Cox*, 298 Md. at 181)). Unlike in *Fields & Colkley*, upon which appellant relies, there is no indication in the record that Turner ever admitted to any of the alleged bad acts, or that he was found guilty of the alleged misconduct by any court or administrative body. *See Fields*, 432 Md. at 671 (noting that

would have likely concluded that the defense was unable to provide a reasonable factual basis to support his questions regarding the prior bad acts and foreclosed this line of inquiry even sooner.

the complaints against the detectives in that case had been "sustained.") In this case, defense counsel did not offer a "detailed proffer of the alleged misconduct" underlying the accusations. *Id*. at 671. Nor did defense counsel explain how the alleged misconduct "related to the veracity of the [witnesses] and the potential value of that impeachment evidence to the defense's theory of the case." *Id*.

Under all the circumstances, we hold that the circuit court did not abuse its discretion in limiting the scope of impeachment questioning during defense counsel's cross-examination of Turner.

II. Motion to Dismiss

At appellant's trial, Turner testified that after appellant spit in his face, he took a handkerchief out of his back pocket and "wiped [his] face off to check it to make sure there was no blood in it." Then, "because of the volatile situation," Turner dropped the handkerchief on the floor and handcuffed appellant. Turner admitted that after the incident, he "[p]robably threw [the handkerchief] away 'cause it had spit on it." Immediately prior to his trial, appellant moved to dismiss the charges against him on the ground that the State's failure to produce Turner's handkerchief constituted a denial of due process. The trial court denied the motion to dismiss. Appellant now contends that the circuit court erred when it denied his motion to dismiss asserting that Turner "'destroyed highly relevant evidence' in his custody that the State 'normally would have retained and submitted to forensic examination.'" (quoting *Cost v. State*, 417 Md. 360, 382 (2010)).

Courts recognize a violation of the due process rights of a defendant if a State agent fails to properly preserve "constitutionally material evidence," *i.e.* evidence with "apparent

exculpatory value" "that might be expected to play a significant role in the suspect's defense." *California v. Trombetta*, 467 U.S. 479, 488-89 (1984). Where a State agent fails to preserve evidence that is "potentially exculpatory" as opposed to "apparently exculpatory," a defendant's due process rights are only violated if he or she can demonstrate that the State acted in bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988); *Patterson v. State*, 356 Md. 677, 694-95 (1999) (adopting the *Youngblood* "bad faith" test and holding that, in this area, Article 24 of the Maryland Declaration of Rights affords a defendant no greater due process rights than the federal constitution).

In this case, appellant does not assert that the handkerchief constituted constitutionally material evidence as it is described in *Trombetta*. *See Trombetta*, 467 U.S. at 488-89 (defining "constitutionally material" evidence). Instead, appellant claims that the evidence was "highly relevant." (citing *Cost*, 417 Md. at 382). We are persuaded that whatever evidentiary value the handkerchief might have had is speculative. The handkerchief *might* have contained measurable traces of appellant's saliva. If it did, it *could* have been subjected to forensic testing. The results of any such testing *might* have been relevant in appellant's defense. Even had the handkerchief been found not to contain traces of appellant's saliva, however, appellant would not have been absolved of his responsibility for the charged offense because his actions were observed and testified to by multiple eyewitnesses. *See Gimble v. State*, 198 Md. App. 610 (2011) (opining that, even if testing had been done and the results were favorable to the defendant, it would not negate the other relevant evidence of the defendant's guilt). Wherefore, we would conclude that appellant's due process rights were violated only if he demonstrated that Turner acted in

bad faith in failing to preserve the handkerchief. *See Youngblood*, 488 U.S. at 57-58 (establishing bad faith test); *Patterson*, 356 Md. at 694-95 (adopting bad faith test)

As Turner testified, he was acting in accordance with established protocol by discarding the handkerchief after checking to be sure that it did not contain any blood evidence. *See Patterson*, 356 Md. at 697 (discerning no bad faith where officer "testified that he dealt with the jacket according to standard police procedure"). This is not a case where the handkerchief was initially preserved and then later discarded through negligence, mistake, or malice. Instead, in this case, the handkerchief was never identified as potential evidence until after it was destroyed. Under these circumstances, we discern no bad faith in Turner's actions. We conclude, therefore, that appellant's due process rights were not violated by the State's failure to produce the evidence at his trial and the trial court did not err by denying his motion to dismiss the charges.

III. Missing Evidence Instruction

At appellant's trial, defense counsel requested that the circuit court provide a missing evidence instruction to the jury. The court declined to do so. Following the court's instructions to the jury, however, defense counsel failed to raise any objection to the lack of a missing evidence instruction. During closing argument, defense counsel was permitted to argue that the jurors should draw a negative inference from the State's failure to produce the handkerchief. Appellant now contends that the trial court erred in refusing to give a "missing evidence" jury instruction.

Maryland Rule 4-325(e) provides, in pertinent part: "No party may assign as error the giving or the failure to give an instruction unless the party objects on the record

promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." It is well established that the Rule "plainly requires an objection after the instructions are given, even though a prior request for an instruction was made and refused." *Johnson v. State*, 310 Md. 681, 687 (1987). The policy behind the renewed objection requirement is twofold: 1) it provides the trial court an opportunity to correct its charge to the jury if it deems a correction necessary; and 2) it makes clear that defense counsel has not abandoned the objection. *Sims v. State*, 319 Md. 540, 549 (1990). Because defense counsel failed to object to the trial court's failure to provide the requested missing evidence instruction in a timely manner, we must conclude that this query was not properly preserved for appellate review.

Even if this question had been properly preserved, we would conclude that the trial court properly exercised its discretion in refusing to give a missing evidence instruction. Under Maryland Rule 4-325(c), the trial court has a duty, upon request in a criminal case, to instruct the jury on the applicable law." *Patterson*, 356 Md. at 683. As the Court of Appeals has previously explained, the Rule's requirement that the court instruct the jury "as to the applicable law" does not apply to factual matters or inferences:

> Because most evidentiary inferences are questions of fact, not questions of law, missing evidence instructions can be distinguished from instructions on the elements of the crime that a defendant is charged with, instructions on the affirmative defenses that a defendant may utilize, and from evidentiary presumptions that the law recognizes but, without an instruction, a jury would not recognize. Elements, affirmative defenses and certain presumptions relate to the requirement that a party meet a burden of proof that is set by a legal standard. A trial judge must give such an instruction if the evidence generates the right to it because it sets the legal guidelines for the jury to act effectively as the trier of fact. An evidentiary inference, such as a missing evidence or missing witness inference, however, is not based on

> a legal standard but on the individual facts from which inferences can be drawn and, in many instances, several inferences may be made from the same set of facts. A determination as to the presence of such inferences does not normally support a jury instruction. While supported instructions in respect to matters of law are required upon request, instructions as to evidentiary inferences normally are not.

Id. at 684-85. Subsequently, the Court clarified that although a missing evidence instruction is generally not required absent a demonstration of bad faith by the police, in some "exceptional circumstances" Maryland evidence law may justify the provision of a missing evidence instruction even without a showing of bad faith. *Cost*, 417 Md. at 378. The Court explained that where the unpreserved evidence was strictly within the State's control, was the kind of evidence that was normally collected and preserved from other crime scenes, and was "highly relevant" to disputed questions in the case, the trial court abused its discretion by declining to provide a missing evidence instruction. *Id*. at 378, 380, 382. We do not find the circumstances of the instant case to be analogous to the exceptional circumstances presented in *Cost*.

At appellant's trial, the circuit court relied on this Court's holding in *Grymes v. State*, 202 Md. App. 70 (2011), in concluding that a missing evidence instruction was not warranted. In *Grymes*, the defendant was convicted of robbery and second-degree assault arising out of an incident where an armed man demanded that the victim hand over his coat and wallet. *Id*. at 77. The victim complied, handing over his coat, which had a cell phone in the pocket, as well as his wallet. *Id*. When the defendant was later arrested, he had a cell phone and $112 in cash on his person. *Id*. at 78. After police recovered the cell phone, identified by the victim as his and whose phone number matched the number provided by

the victim, they photographed it before returning it to the victim, but did not otherwise analyze it for evidence. *Id*. at 105. At trial, the victim testified that he had lost the phone a few days earlier. *Id*. at 106-07.

This Court upheld the trial court's denial of Grymes's request for a missing evidence instruction because (among other reasons) the cell phone "was neither central to the defense case nor of the type ordinarily subjected to forensic testing." *Id*. at 113. The Court supported its holding by noting:

> [I]t is not clear how this evidence could have exculpated the appellant. If the appellant's fingerprints were present, this would not prove that he lawfully was in possession of the phone. If his fingerprints were not present, this also would not negate the evidence that the phone was found in his jacket pocket shortly after the robbery. Similarly, the absence of [the victim]'s prints would not prove that the phone did not belong to him.

Id. at 114.

In this case, the circuit court concluded that while the evidence that might have been found on the handkerchief, spit, "is the type of evidence that's generally submitted for forensic testing," and "potentially useful" to appellant's defense, it was not "critical to the defense's case." Having drawn the same conclusion ourselves, had this issue been properly preserved, we would conclude that the circuit court did not err in declining to provide a missing evidence instruction to the jury at appellant's trial.

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