UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2106

September Term, 2014

MARCUS LAMAR BLACK

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Nazarian,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: January 19, 2016

We are asked to determine whether the trial court erred when it: (1) granted the State's request to advise a defense witness of his Fifth Amendment rights; (2) and limited appellant Marcus Black's cross-examination of a State's witness.

BACKGROUND

Black was convicted of three counts of first degree assault, three counts of second degree assault, and three counts of reckless endangerment, after a jury found that Black had shot three men with a shotgun in Grasonville, Maryland. The circuit court merged the second degree assault and reckless endangerment counts into the three counts of first degree assault, and sentenced Black to 28 years' imprisonment.

Three men were shot on the way to and from a barbecue on Grasonville Cemetery Road in Grasonville, Maryland. All three men suffered birdshot wounds. The three victims were unable to describe their shooter. State's witness Kiera Grembowski, however, provided the critical testimony that linked Black to the shootings.

Grembowski testified that, sometime late in the afternoon of August 29, 2013, she picked up her friend Black and two other men, Vernell McFarland and Calvin Hill, in Grasonville. She testified that, at Black's direction, she drove in a circle between Sawmill Road and Grasonville Cemetery Road multiple times. Although she didn't understand at the time, Grembowski testified that Black and McFarland kept looking in the direction of the barbecue.

After completing several circuits, Grembowski testified that she then drove to McFarland's house, where the three men got out of the vehicle and went into the house, while she waited in the car. Fifteen minutes later, Black and McFarland returned, got back into the car, and Grembowski started to drive. Grembowski testified that, as she was driving, she heard a metal "clinking" sound, looked into the backseat, and saw a long, black metallic gun laying across Black and McFarland's laps. Black was putting on a ski mask and blue rubber gloves. Upon seeing the gun, Grembowski testified that she became concerned. Black told her at the time that he was going to sell the gun.

Grembowski testified that, at Black's direction, she dropped him off at an abandoned church about a half-mile from the barbecue. Black then ran into the woods in the direction of the barbecue. After dropping off Black, Grembowski's testimony was that she drove with McFarland back to McFarland's home and waited for twenty to twenty-five minutes until Black called to be picked up. Grembowski testified that when she returned to pick up Black at the abandoned church, he no longer had the gun, ski mask, or gloves. Grembowski testified that Black told her to leave Grasonville, so Grembowski drove away. She testified that she then dropped off McFarland and Black together at a Burger King.

During Black's cross-examination of Grembowski, the trial court sustained the State's objections to three of Black's lines of questions that are relevant on appeal. *First*, Black asked Grembowski about a November 2, 2013 marijuana charge, the State's decision

to stet the charge on January 27, 2014,[1] and whether she was testifying in exchange for that stet. The State objected to Black's question about whether Grembowski was testifying without a subpoena, and the circuit court sustained the objection. Later, on re-direct, the State questioned Grembowski about the stet and whether Grembowski received the stet in exchange for her testimony. Grembowski testified that the stet was not offered in exchange for her testimony. *Second*, Black questioned Grembowski about a police statement allegedly made to her that that "if [Grembowski] didn't cooperate, [she] would be having her baby in jail." The State objected and the trial court sustained the objection. *Third*, Black asked Grembowski about a statement that she allegedly made that she "had to do what was best for [her] and [her] unborn child." The State objected and the trial court sustained the objection. At the time, Black made no argument in response to the sustained objections.

During the presentation of his defense, Black called McFarland as an alibi witness. McFarland was one of the men that Grembowski had testified was in her car on the day of the shooting. Black proffered that McFarland's testimony would be that, at the time of the shooting, Black was with McFarland at K-Mart. Upon Black calling McFarland, the State

[1] Maryland Rule 4-248 explains a stet:

> On motion of the State's Attorney, the court may indefinitely postpone trial of a charge by marking the charge "stet" on the docket. … A stetted charge may be rescheduled for trial at the request of either party within one year and thereafter only by order of court for good cause shown.

requested a bench conference. At the bench, the State suggested, based on the evidence already heard, that McFarland might have a Fifth Amendment privilege against testifying. The State also suggested that McFarland consult an attorney. Black disagreed, arguing that McFarland was "adamant that he had nothing to do with the situation" and, therefore, he had no basis to invoke the Fifth Amendment. The trial court agreed to speak with McFarland about his Fifth Amendment privilege. The court then excused the jury and called McFarland to the stand to be sworn as a witness.

The trial court advised McFarland of his Fifth Amendment privilege and listed McFarland's options—(a) McFarland could speak with independent counsel before testifying, (b) McFarland could waive his privilege and testify, or (c) McFarland could invoke his privilege and not testify. McFarland invoked his Fifth Amendment privilege and elected not to testify.

Black asked McFarland about his invocation of the privilege. Specifically, Black asked with which crimes McFarland feared being charged. The trial court barred the question. Black then stated his objection to McFarland's invocation of the privilege, on the grounds that the State was impeding the defense. The trial court disagreed and offered to have McFarland invoke in front of the jury. Black declined, but requested that McFarland speak with independent counsel about his Fifth Amendment right. McFarland agreed to speak with an attorney and the trial court called the public defender's office to provide an attorney to counsel McFarland. The public defender, after speaking with McFarland about his testimony, stated that McFarland intended to invoke his Fifth Amendment privilege

against self-incrimination and elected not to testify. McFarland confirmed that his attorney's statement was correct. The trial court again offered to have McFarland invoke the Fifth Amendment privilege in front of the jury. Black again declined.

Black was found guilty of three counts of first degree assault, three counts of second degree assault, and three counts of reckless endangerment. On October 17, 2014, prior to sentencing, Black moved for a new trial. In that motion, Black renewed his objection to the trial court's handling of McFarland's Fifth Amendment rights. Black objected to the trial court's procedure in evaluating McFarland's Fifth Amendment privilege, specifically that the trial court raised McFarland's privilege for him and that Black was barred from asking questions to determine whether McFarland had a valid Fifth Amendment privilege. Black also objected to the State raising concerns about McFarland's Fifth Amendment privilege. The trial court denied Black's motion for a new trial and sentenced Black to 28 years' imprisonment. Black noted this appeal.

DISCUSSION

Black alleges that two trial errors violated his Fifth and Sixth Amendment rights.[2] *First*, Black contends that the trial court erred by granting the State's request to advise

[2] There are provisions of the Maryland Declaration of Rights that are analogous to the Fifth and Sixth Amendment provisions that Black cites, and that are, at least in some circumstances, capable of divergent interpretations. Because Black has not directed us to those issues, we do not address them. *See infra* note 6.

McFarland of his Fifth Amendment rights,[3] in violation of Black's Sixth Amendment right to compel testimony.[4] *Second*, Black contends that the trial court erred in limiting his cross-examination of Grembowski because the trial court barred testimony that, Black suggests, would have weighed on her credibility, and, therefore, Black was denied his Sixth Amendment right to confront witnesses.[5]

We review the trial court's decisions, alleged to limit both the ability to call defense witnesses and the right to cross-examination, for abuse of discretion. *Kelly v. State*, 392 Md. 511, 531-32 (2006) (applying an abuse of discretion standard of review to trial court's refusal to allow defense witness to testify); *Pantazes v. State*, 376 Md. 661, 681-82 (2003) (applying an abuse of discretion standard of review to trial court's decision to limit cross-examination). "Abuse occurs when a trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law." *Jenkins v. State*, 375 Md. 284, 295-96 (2003).

[3] The Fifth Amendment to the United States Constitution states, in relevant part, "No person … shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

[4] The Sixth Amendment to the United States Constitution states, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right … to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI.

[5] The Sixth Amendment to the United States Constitution further states, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. Const. amend. VI.

I. Trial Court Granting State's Request to Advise McFarland

Black contends that the trial court erred in granting the State's request to advise McFarland of his Fifth Amendment privilege. Black alleges error by both (1) the trial court in granting the request, and (2) the State in making the request. We will address Black's claims of error in turn.

A. *Trial Court's Evaluation of McFarland's Invocation*

Black contends that the trial court erred in granting the State's request that McFarland be advised of his Fifth Amendment privilege and that the court failed to follow the established procedure for evaluating McFarland's Fifth Amendment invocation. In doing so, Black argues that the trial court improperly limited his Sixth Amendment right to compel McFarland's testimony. Black identifies three errors in the trial court's procedure. *First*, Black contends that because the trial court advised McFarland of his Fifth Amendment privilege, the court essentially invoked McFarland's privilege on his behalf, and, as a result, McFarland did not personally invoke his Fifth Amendment privilege. *Second*, Black contends that established Maryland procedure requires that the trial court allow Black to question McFarland about his invocation of his Fifth Amendment privilege. *Third*, Black contends that the trial court failed to perform the required inquiry into McFarland's invocation of the privilege. The State responds that the trial court followed the proper procedure.

The State's Attorney first raised the issue of McFarland's Fifth Amendment rights before trial, when it informed the trial court that it believed that McFarland had a basis to

invoke his Fifth Amendment privilege not to testify. Black disagreed with the State's suggestion that McFarland had a basis to invoke. Black responded that he was calling McFarland solely to testify as an alibi witness—he proffered that McFarland would say that he was with Black at a K-Mart at the time of the shooting—and thus, McFarland's testimony would be entirely exculpatory as to both men and McFarland would have no basis to invoke his Fifth Amendment privilege. The trial court tabled the issue until McFarland was called to the stand at trial.

When Black called McFarland to testify, the State again informed the trial court that McFarland's Fifth Amendment privilege might be an issue and requested that McFarland consult an attorney. Black again proffered that McFarland was "adamant that he had nothing to do with the situation" and had no basis for invoking his Fifth Amendment privilege. The trial court was clear that it believed that McFarland might have a basis to invoke, stating, "potentially, [McFarland is] involved because he was either there participating at the beginning or the end." The trial court then opined that "If I were him, I'd take the Fifth Amendment myself."

The trial court excused the jury and McFarland was called to the stand and sworn under oath. The trial court immediately advised McFarland of his Fifth Amendment privilege:

THE COURT:	You have been called as a defense witness.
[McFARLAND]:	Okay.

THE COURT: And potentially from what came up in the State's case, and I don't know whether this could occur or not, but, potentially, you could be charged with an offense and so you have a Fifth Amendment privilege not to testify in this case.

[McFARLAND]: Okay.

The trial court then advised McFarland of his options and McFarland invoked the privilege not to testify:

THE COURT: You also have the right to speak with independent counsel, should you choose to do so, before you testify, or you could elect to waive your right to your Fifth Amendment privilege not to present testimony and testify. So the question for us is: Do you wish to waive your Fifth Amendment privilege and testify in this case? Do you wish to speak with counsel before you do that or do you wish to simply take your Fifth Amendment privilege and not testify?

[McFARLAND]: I mean, I do wish to take my Fifth Amendment.

THE COURT: You do not wish to testify in this case?

[McFARLAND]: Not really. No, not really, sir.

The trial court then asked the attorneys if they had questions for McFarland, but barred Black from asking McFarland to speculate as to what charges he feared if he were to testify:

THE COURT: Did you have any questions you want to ask in relation to that?

[BLACK'S COUNSEL]: Can you think of anything that would lead to you having a Fifth Amendment Right? What crime can you think of that you could be charged with?

THE COURT: All right. I don't want to get too involved with that.

[McFARLAND]: Well, really –

THE COURT: I don't want to get too involved with that, so.

Black objected, arguing that the State raised McFarland's Fifth Amendment rights in an effort to impede the defense. The trial court, however, disagreed and reiterated that McFarland had a Fifth Amendment privilege that he had chosen to invoke:

[BLACK'S COUNSEL]: Your Honor, I just want to – I just would like to state my objection to the State's procedure in this matter. This whole Fifth Amendment has been, basically, a vehicle – just their own magical thing that now they've brought up as an issue. Certainly, this person has never been charged in the whole year this case has been pending and now they're doing it as a way to try to impede the defense.

THE COURT: Well, he understands that and we understand that.

[BLACK'S COUNSEL]: Thank you.

THE COURT: That doesn't mean that, potentially, from what has been testified to, that he doesn't have the Fifth Amendment privilege and from what I've heard from him today, he wishes to exercise that privilege. Is that right?

[McFARLAND]: Yes, sir.

The trial court then offered to have McFarland invoke his Fifth Amendment privilege in front of the jury. Instead, Black requested that McFarland speak with a public defender about invoking his Fifth Amendment privilege. The trial court and McFarland agreed:

[BLACK'S COUNSEL]: Your Honor, I mean, would it be possible for him to speak with someone from the public defender's office about his right before he just exercises it?

THE COURT: Would you agree to speak with somebody from the public defender's office?

[McFARLAND]: Yes, sir.

THE COURT: Go ahead and call somebody from the public defender's office to come over.

A public defender arrived and spoke privately with McFarland. Afterward, the public defender stated that McFarland would invoke his Fifth Amendment privilege not to testify:

THE COURT: [Public defender], did you have an opportunity to speak with Mr. McFarland?

[PUBLIC DEFENDER]: Your Honor, I did. … After talking with him and explaining to him what his Fifth Amendment rights are, and what he said to me, I believe he's going to invoke his Fifth Amendment not to testify.

THE COURT: Okay. Is that right, sir?

[McFARLAND]: Yes, sir.

The trial court again offered to have McFarland invoke his privilege before the jury and Black again declined:

THE COURT: Are you going to want him to do that before the jury?

[BLACK'S COUNSEL]: No, I think it should probably be – no, that's fine.

Black's counsel proffered what she believed McFarland's testimony would be:

[BLACK'S COUNSEL]: Your Honor, when I spoke to Mr. McFarland, my proffer of his testimony would be that he said he … [w]as at K-Mart at the time of the shooting with [Black] the whole time. So I fail to see how – it's not like he places himself in the car with [Grembowski] or anything like that. That's what he's going to say. He's not going to say anything having to do with driving around in a car with Keira Grembowski, so I don't see how there's this Fifth Amendment privilege. I mean, he's going to say he was just at K-Mart.

THE COURT: But he'll be questioned about it. Wasn't he in the back seat with Mr.

Black when Mr. Black had a gun and –

[BLACK'S COUNSEL]: He'll say no because he has a whole different story, just like anybody that comes in with a conflicting story, but, I mean, there's nothing he said prior, under oath, or anything.

Black then attempted to introduce a statement by McFarland that, according to Black, included the alibi. To authenticate the statement, the trial court was going to allow Black to ask McFarland whether he wrote it, but McFarland invoked his Fifth Amendment privilege as to the statement as well:

THE COURT: All right. I'll let you ask one question. No cross-examination. Ask him … whether he wrote that.

* * *

[PUBLIC DEFENDER]: Does the Court want me up here, also?

THE COURT: Yes. Did you see this statement? I would ask you whether he's going to invoke his Fifth Amendment, just for the statement, and if he is, I understand. Is he going to exercise his Fifth Amendment privilege as to that statement as well?

[PUBLIC DEFENDER]: Yes.

THE COURT: All right. Sir, you are excused. Thank you.

The Fifth Amendment of the United States Constitution protects a person from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.[6] Where a witness's Fifth Amendment privilege collides with a party's Sixth Amendment right to call witnesses to testify on one's behalf, the witness's Fifth Amendment privilege prevails, so long as the witness's invocation of the privilege is justified. *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Horne v. State*, 321 Md. 547, 553 (1991) (citing *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972)).

The trial court determines whether the witness's invocation of the Fifth Amendment privilege is justified. *Dickson v. State*, 188 Md. App. 489, 506 (2009) (citing *Hoffman*, 341 U.S. at 487-88). To make that determination, the trial court looks at: "(1) whether there is a reasonable basis for the invocation of the privilege; and (2) whether the privilege is invoked in good faith." *Bhagwat v. State*, 338 Md. 263, 272 (1995). A witness has a reasonable basis to invoke where "the witness has reasonable cause to apprehend danger from a direct answer." *Hoffman*, 341 U.S. at 486. "[I]t need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id*. at 486-87. The Fifth Amendment privilege against

[6]Article 22 of the Maryland Declaration of Rights provides a similar guarantee, stating in part, that "no man ought to be compelled to give evidence against himself in a criminal case." Black has not offered argument regarding Article 22, so we shall address this solely as a Fifth Amendment problem.

compulsory self-incrimination must be liberally construed, and therefore, for a trial court to find that the privilege does not apply, it must be "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answers cannot possibly have such tendency to incriminate." *Id.* at 488 (internal quotations omitted). Importantly, the trial court's finding "must be governed as much by [its] personal perception of the peculiarities of the case as by the facts actually in evidence." *Id.* at 486 (internal quotations omitted).

The trial court may advise a witness of his or her Fifth Amendment privilege against self-incrimination. *Royal v. State*, 236 Md. 443, 447 (1964). "It is proper in some instances [for the trial court] to advise a witness of his [or her] privilege against self-incrimination." *Id.*; *see also Midgett v. State*, 223 Md. 282, 291 (1960) (holding that the trial court properly advised the witness of his privilege against self-incrimination when the State had suggested that the court instruct the witness—who had a pending appellate case—of his constitutional rights and the court warned the witness that he might be asked questions that might incriminate him and be used against him in a retrial of his own case). The trial court may "warn[ ] the witness of his right to refuse to testify and of the necessity to tell the truth." *State v. Stanley*, 351 Md. 733, 743-44 (1998) (citing *Webb v. Texas*, 409 U.S. 95 (1972)).

The Court of Appeals has outlined two trial court procedures for determining whether a witness's invocation of the Fifth Amendment privilege is justified. First, in *Richardson v. State*, the Court of Appeals established a four-step process:

> [Step 1:][T]he witness should first be called to the stand and sworn. [Step 2:] Interrogation of the witness should then proceed to the point where he or she asserts his or her privilege against self-incrimination as a ground for not answering a question. [Step 3:] If it is a jury case, the jury should then be dismissed and the trial judge should attempt to determine whether the claim of privilege is in good faith or lacks reasonable basis. [Step 4:] If further interrogation is pursued, then the witness should either answer the questions asked or assert his or her privilege, making this decision on a question by question basis.

285 Md. 261, 265 (1979) (internal citations omitted). Then, in *Bhagwat*, the Court of Appeals provided an alternative procedure for "[w]hen there is a clear indication, reflected on the record, that the witness intends to invoke the privilege against self-incrimination if called to the witness stand." 338 Md. at 273. In that instance, the procedure is as follows. Step 1: "the witness should be called and sworn, but without the jury present." *Id.* at 273. Step 2: The witness is then "questioned before or by the court." *Id*. Step 3: The court "perform[s] its function of determining whether the privilege has been invoked in good faith or has a reasonable basis." *Id.* at 273-74.

We address, in turn, the three errors that Black alleges, which, he contends, show that the trial court failed to follow Maryland procedure for evaluating McFarland's Fifth Amendment privilege. We conclude, however, that the trial court followed the proper procedure and did not abuse its discretion in determining that McFarland's invocation was justified.

1. *The trial court advising McFarland of his Fifth Amendment privilege*

First, it was not improper for the trial court to advise McFarland of his Fifth Amendment privilege, and that it did so is not the same thing as invoking McFarland's privilege on his behalf. As the Court of Appeals has repeatedly held, a trial court may warn a witness of the Fifth Amendment privilege against compulsory self-incrimination. *Royal*, 236 Md. at 447; *State v. Stanley*, 351 Md. at 743-44.

Furthermore, the record is clear that McFarland personally invoked his Fifth Amendment privilege. McFarland invoked his Fifth Amendment privilege immediately upon being called to the stand, sworn, and advised that he had such a privilege, by stating, "I do wish to take my Fifth Amendment privilege." McFarland again invoked the privilege after speaking with a court-appointed attorney. The public defender and McFarland both told the court that McFarland was invoking his privilege. Black's contentions that the trial court improperly advised McFarland or that McFarland failed to personally assert his Fifth Amendment privilege are, therefore, without merit.

2. *The trial court barring Black's question*

Second, contrary to Black's assertion, the trial court was not required by either the *Richardson* or *Bhagwat* procedures to allow Black to question McFarland about his invocation of privilege because it is the role of the trial court, not counsel, to make the determination of whether a witness has a basis to invoke the Fifth Amendment privilege. *See Bhagwat*, 338 Md. at 273-74 ("the court is enabled to perform its function of determining whether the privilege has been invoked in good faith or has a reasonable

basis"). Black complains that he was unable to compel McFarland to answer the question "Can you think of anything that would lead to you having a Fifth Amendment Right? What crime can you think of that you could be charged with?" We conclude that the trial court's decision to prevent Black from asking this question was proper because, by that point, the trial court had already completed its function and determined that McFarland had properly invoked his Fifth Amendment privilege.

In an effort to show that the trial court failed to follow proper procedure, Black contrasts the trial court's procedure used with McFarland to the trial court's procedure used with another witness, Jonathan Messick, who also attempted to invoke his Fifth Amendment privilege against self-incrimination. With respect to Messick, the trial court stated that it didn't know whether Messick had a basis to invoke his Fifth Amendment privilege. The trial court then allowed the State to ask Messick questions about his knowledge, his potential testimony, and his desire to invoke the privilege, which allowed the court to "perform[ ] its function of determining whether the privilege has been invoked in good faith or has a reasonable basis." *Bhagwat*, 338 Md. at 273-74. And, after hearing Messick's answers, the trial court determined that Messick did not have a basis to invoke.

McFarland's invocation, however, is distinguishable from Messick's because, at the time Black attempted to question McFarland, the trial court had already determined that McFarland's invocation was justified—as required by what we call "Step 3" above in both the *Richardson* and *Bhagwat* procedures—based on its "personal perception of the peculiarities of the case" and "the facts actually in evidence." *Hoffman*, 341 U.S. at 486-

87. Before Black's question, the trial court had already stated, "I certainly think that [McFarland] would have a Fifth Amendment privilege and could consult with a lawyer about that." The trial court was not required to allow questions about McFarland's invocation—as it did with Messick—because it had already performed its function. Therefore, the trial court did not err, let alone abuse its discretion, in barring Black's question.

3. *The trial court's inquiry into McFarland's invocation*

Finally, the trial court performed the required inquiry into McFarland's invocation because, as we stated above, it performed its function of determining whether McFarland invoked the Fifth Amendment privilege in good faith and whether his invocation had a reasonable basis, and its determination was supported by more than sufficient evidence.

The trial court's finding that it was reasonable for McFarland to apprehend danger from a direct answer was supported by the record. The trial court had heard Grembowski's testimony that: (1) McFarland had been with Black on the day of the shooting; (2) Grembowski drove McFarland and Black in her vehicle while they were looking in the direction of the barbecue, (3) Grembowski dropped off both men at McFarland's house, and, when they returned to her vehicle, they had a gun; (4) McFarland was in the vehicle when Grembowski dropped off Black at the abandoned church; and (5) after picking up Black from the church, Grembowski dropped off Black and McFarland together. The trial court highlighted Grembowski's testimony and stated that, if McFarland testified, he could be questioned about all of these facts. The record suggests that McFarland had "reasonable

cause to apprehend danger from a direct answer" and that a "responsive answer to the questions or an explanation of why it cannot be answered might be dangerous because injurious disclosure might result." *Bhagwat*, 338 Md. at 272-73. Because the trial court's finding that McFarland's invocation was justified was supported by sufficient evidence on the record, we conclude that the trial court did not abuse its discretion.

None of Black's three allegations of error have merit. Therefore, we conclude that the trial court followed the proper procedure in evaluating McFarland's invocation of the Fifth Amendment privilege and did not abuse its discretion.

B. *Prosecutor's Request That McFarland Be Advised*

Black then repackages his argument about McFarland's invocation, this time alleging that the State violated Black's Fifth Amendment right to due process[7] as well as his Sixth Amendment right to compel testimony by requesting that McFarland consult with an attorney about his Fifth Amendment privilege. The State responds that it did not act improperly in suggesting to the trial court that McFarland consult with an attorney.

As described above, when Black called McFarland to the stand, the State's Attorney requested to approach the bench, where she asked that McFarland consult an attorney about his Fifth Amendment privilege, a suggestion to which Black objected:

[7] The Fifth Amendment to the United States Constitution states, in relevant part, "No person … shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

[STATE'S ATTORNEY]: Your Honor, this is the witness that I had expressed some concern about on Monday, when we were discussing the case before the jury had been called. I think there is an adequate amount of evidence out there, that is now officially on the record, that indicates that Mr. McFarland was involved in this and I do believe he has a Fifth Amendment Right. He is a fairly young man and I would like to have – I don't want to call into question his intelligence, but I do think that this is certainly a situation where he should consult an attorney.

[BLACK'S COUNSEL]: This is witness tampering at its greatest because I've talked with him and there is nothing he's going to say. He's adamant that he had nothing to do with the situation, so how can a Fifth Amendment Right accrue with that?

To support his argument that the prosecutor improperly requested that McFarland speak with attorney about his Fifth Amendment privilege, Black cites a case from the United States Court of Appeals for the Ninth Circuit, in which the Ninth Circuit stated, "Undue prosecutorial interference in a defense witness's decision to testify arises when the prosecution intimidates or harasses the witness to discourage the witness from testifying, for example, by threatening the witness with prosecution for perjury or other offenses." *Williams v. Woodford*, 384 F.3d 567, 601-02 (9th Cir. 2004). To be a violation, however,

"[t]he prosecution's conduct must amount to a substantial interference with the defense witness's free and unhampered determination to testify." *Id.* at 602.

Even if we were to adopt the Ninth Circuit's formulation, there is no evidence that the State's conduct was improper, as defined above. At the bench, the State pointed out that McFarland was young (20 years old) and suggested that he meet with an attorney. This conduct is hardly intimidating or improper. There is no evidence that the State harassed or threatened McFarland to keep him from testifying. The State simply raised an issue that it thought was appropriate (and was appropriate) under the circumstances. We conclude that, by ensuring that McFarland was aware of his right not to incriminate himself, the State did not engage in any unconstitutional intimidation.

II. Right to Cross-Examination

Black's second argument is that the trial court improperly limited Black's cross-examination of Grembowski, because the court improperly excluded, Black argues, evidence concerning Grembowski's credibility. Specifically, Black suggests that the trial court improperly barred Black from asking Grembowski about: (1) whether she was given a stet to her marijuana possession charge in exchange for her testimony; (2) police statements to Grembowski that she would have her baby in jail if she did not cooperate in the case against Black; and (3) Grembowski's statement that she had to do what was best for her and her unborn child. The State argues that Black's first allegation of error was made harmless on re-direct examination—when the prosecutor asked Grembowski whether she had the marijuana possession charges placed on the stet docket in exchange

for her testimony and Grembowski said that was never mentioned—and that the other two statements were properly excluded as hearsay, and as a result that it would have been improper to allow the questioning. [8]

At trial, Black asked Grembowski about charges against her for marijuana possession:

> [BLACK'S COUNSEL]: On November 2, 2014, you were charged with possession of marijuana?
>
> [STATE'S ATTORNEY]: Objection.
>
> THE COURT: Sustained.

Counsel then approached the bench, where Black's counsel proffered that she was asking Grembowski about her charges that had been placed on the stet docket to show bias and the trial court agreed to allow the question:

> [BLACK'S COUNSEL]: [Grembowski] had charges come up during the pendency of this case, charges that were stetted that could be brought back at any time.

[8]The State also argues that Black's allegation of error is unpreserved because Black failed to proffer the substance of the evidence that the trial court excluded. Maryland Rule 5-103, however, requires that a party either offer the substance of the evidence or that the substance be apparent from the context within which the evidence is offered. Md. Rule 5-103(a) ("Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling, and … the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered.") We conclude that the substance of the excluded evidence was apparent from the questions that Black's counsel asked Grembowski, which included the statements that were allegedly made. Therefore, concluding that the issue is preserved for our review, we will address the merits.

THE COURT: Well, that's bias …

[BLACK'S COUNSEL]: That's why I'm bringing it up. To ask her about the nature of this stet that she got during the pendency of this case, as a State's witness.

* * *

THE COURT: Okay. I'll let you ask it on a bias basis.

Black than asked Grembowski about the charges that had been placed on the stet docket:

[BLACK'S COUNSEL]: So you recall being charged with … possession of marijuana less than ten grams, correct?

[GREMBOWSKI]: Yes.

* * *

[BLACK'S COUNSEL]: That case was stetted on January 27, 2014, correct?

[GREMBOWSKI]: Yes.

[BLACK'S COUNSEL]: And that means that it can be brought back by the State at any time in the year, right?

[GREMBOWSKI]: That's correct.

[BLACK'S COUNSEL]: That's why you are here without a [s]ubpoena today, correct?

[STATE'S ATTORNEY]: Objection.

THE COURT: Sustained.

Black then attempted to ask Grembowski about two out-of-court statements. First, Black asked Grembowski about a statement attributed to the police, and the trial court sustained the State's objection to the question:

[BLACK'S COUNSEL]: You've spoken with the police about this case you said, right?

[GREMBOWSKI]: Yes.

[BLACK'S COUNSEL]: Isn't it true that they told you that if you didn't cooperate, you would be having your baby in jail?

[STATE'S ATTONEY]: Objection.

THE COURT: Sustained.

Finally, Black asked Grembowski about a statement that she had allegedly made to the mother of Black's child, and the trial court sustained the State's objection to the question:

[BLACK'S COUNSEL]: Isn't it true, you spoke with … Marcus Black's baby's mother, about this case, do you recall that?

[GREMBOWSKI]: Yes.

[BLACK'S COUNSEL]: Isn't it true, you told her that you had to do what was best for you and your unborn child?

[STATE'S ATTORNEY]: Objection.

THE COURT: Sustained.

[BLACK'S COUNSEL]: And that meant coming in to testify against [Black], didn't it?

[STATE'S ATTORNEY]: Objection.

THE COURT: Sustained.

[BLACK'S COUNSEL]: No further questions.

Re-direct examination immediately followed. During re-direct, the State asked Grembowski about the stet, specifically if the charges were placed on the stet docket in exchange for her testimony. Grembowski responded that they were not:

[STATE'S ATTORNEY]: Do you recall – [Black's counsel] asked you about a possession of marijuana, less than ten grams. Do you want to explain to the jury what you did for that stet?

[GREMBOWSKI]: I had to take a class online and there was a fine of $300, I believe. The class was $300.

[STATE'S ATTORNEY]: Do you recall who you spoke with from my office regarding this case?

[GREMBOWSKI]: I don't, I'm sorry.

[STATE'S ATTORNEY]: Were you represented by an attorney?

[GREMSBOWSKI]: I was.

[STATE'S ATTORNEY]: Do you recall who that attorney was?

[GREMBOWSKI]: I don't remember his name.

[STATE'S ATTORNEY]: Was he out of the public defender's office?

[GREMBOWSKI]: Yes.

[STATE'S ATTORNEY]: Do you recall – was it your understanding or was it ever talked

	[sic] to you, in exchange for that stet, that you would talk to police or testify against Mr. Black?
[GREMBOWSKI]:	That was never brought up in any way.
[STATE'S ATTORNEY]:	Ever, correct?
[GREMBOWSKI]:	Ever.

The opportunity to cross-examine witnesses is central to a criminal defendant's right to confront witnesses, which is guaranteed by the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. *Pantazes*, 376 Md. at 680. Generally, a witness may be cross-examined on such matters and facts as are likely to affect the witness's credibility, test the witness's memory or knowledge, show the witness's bias, show the witness's relation to the parties or cause, or the like. *Lyba v. State*, 321 Md. 564, 569 (1991) (citing *Kantor v. Ash*, 215 Md. 285, 290 (1958)).

A defendant's right to cross-examine, however, is not limitless. The trial court has broad discretion to determine the scope of cross-examination and we assign a presumption of validity to those decisions. The trial court has "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." *Smallwood v. State*, 320 Md. 300, 307 (1990) (internal quotation omitted). Accordingly, "[t]he scope of cross-examination lies within the sound discretion of the trial court." *Pantazes*, 376 Md. at 681. The trial court exercises its discretion "by balancing the probative value of an inquiry against the unfair prejudice that might inure to

the witness." *Id.* (internal quotation omitted). In doing so, the trial court keeps the cross-examination from becoming "a discussion of collateral matters [that] will obscure the issue and lead to the fact finder's confusion." *Id.* A trial court's discretionary rulings, such as rulings limiting cross examination, carry a presumption of validity." *Cox v. State*, 51 Md. App. 271, 282 (1982) (citing *Mathias v. State*, 284 Md. 22, 28 (1978)).

Black's first argument is that he was unable to determine whether Grembowski was offered the stet in exchange for her testimony. Black's complaint, however, is without merit because, as shown above, on re-direct examination, Grembowski clearly testified that there was no trade for her cooperation with police or her testimony. Therefore, even assuming the trial court erred in barring Black's question, any error was harmless. *See Conyers v. State*, 354 Md. 132, 160 (1999) ("Reversible error will be found and a new trial warranted only if the error was likely to have affected the verdict below. If the error is merely harmless error, then the judgment will stand.").

Black's second and third arguments are that the trial court improperly precluded Black from questioning Grembowski about two out-of-court statements. The trial court, however, properly excluded both statements because they were inadmissible hearsay.

Unless it falls within a recognized exception, hearsay is inadmissible.[9] Md. Rule 5-802. An attorney cannot avoid the hearsay exclusion rule by simply including the hearsay

[9] Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c).

statement in the question. *Bell v. State*, 114 Md. App. 480, 499 (1997) (holding that the trial court erred in allowing the State to indirectly present a hearsay statement by including the statement in the question to the witness).

The two statements that Black attempted to introduce on cross-examination of Grembowski were hearsay, and Black does not argue otherwise. Black asked Grembowski: (1) "Isn't it true that [the police] told you if you didn't cooperate, you would be having your baby in jail"; and (2) "Isn't it true, you told her that you had to do what was best for you and your unborn child." Black did not, and does not on appeal, indicate that these statements were being offered for any reason other than to prove the truth of the matters asserted and did not, and does not on appeal, indicate any exception to the hearsay exclusion rule under which these statements might fall. Therefore, the trial court did not abuse its discretion in excluding Grembowski's answers to these two questions about the statements.

JUDGMENTS OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.