UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2182

September Term, 2016

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CARL FRANKLIN BURNSIDE

v.

STATE OF MARYLAND

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Meredith,
Reed,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

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Opinion by Davis, J.

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Filed: August 25, 2017

Appellant, Carl Franklin Burnside, Jr., was convicted of possession with intent to distribute heroin and simple possession of cocaine by a jury in the Circuit Court for Washington County (Long, J.). Appellant was sentenced to 15 years under the jurisdiction of the Commissioner of Correction, the first 10 years to be served without the possibility of parole. From these convictions, Appellant filed the instant appeal in which he posits the following questions for our review:

> 1. Did the trial court err in permitting the State to impeach the credibility of a defense witness with charges not resulting in convictions?
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> 2. Did the trial court fail to properly exercise discretion, and abuse its discretion, in refusing to rule in advance upon whether Appellant could be impeached with a prior conviction for possession with intent to distribute?
>
> 3. Was the evidence legally insufficient to sustain a mandatory sentence without parole?
>
> 4. Did the trial court err in refusing to propound the defense proposed *voir dire* question number 10?
>
> 5. Did the trial court err in denying Appellant's motion to suppress?

## FACTS AND LEGAL PROCEEDINGS

The trial was held on September 15 and 16, 2016. The first witness to testify on behalf of the State, was Deputy Kyle Snodderly of the Washington County Sherriff's Office. He testified that, at 12:25 a.m., on April 4, 2016, he stopped a black Toyota Avalon for driving with a defective headlight. Appellant was aware that the headlight was defective. The driver produced a license identifying himself as Nicholas Vincent Knight, but authorizing him to drive only to and from his place of employment. Knight would subsequently testify that he had twice been convicted of driving under the influence of

alcohol.

Appellant was in the front passenger seat. The vehicle's registration reflected that it was owned by Joey Jones of Philadelphia, who is identified at various points in the record as a "cousin" or "friend" of Appellant. When Deputy Snodderly asked Appellant if he was Joey Jones, Appellant replied in the negative, but provided an I.D. card identifying him as Carl Burnside. According to Deputy Snodderly, Appellant informed him that he may have pending traffic warrants, explaining that "he thought he had them taken care of but then he wasn't—wasn't sure, thought there may still be paperwork pending."

Knight told the deputy that he was helping Appellant move to Hagerstown from Philadelphia, but, because the Deputy observed no items other than a large fish tank in the vehicle, he did not believe Knight's explanation that he was assisting Appellant in moving from Philadelphia to Hagerstown.

Deputy Snodderly ran a check which confirmed that Appellant "had an active warrant" for driving without a license. The Deputy placed Appellant into custody for the active warrant, at which point Deputy Jasen Logsdon arrived as backup. Deputy Snodderly searched Appellant, incident to the arrest, and discovered folded currency in various pockets in predominantly $20.00 denominations totaling $5,169.69.

Deputy Snodderly testified that, based on the large amount recovered from Appellant, Deputy Logsdon requested a police K-9 unit. While Deputy Snodderly was still completing the traffic stop, *i.e.*, issuing Knight a traffic citation, Officer Curtis Kelley arrived on the scene at 12:36 a.m., 11 minutes after the stop, and directed his K-9 partner,

Jackie, to conduct a "free air sniff" of the vehicle. The dog signaled a positive alert at the trunk. Deputy Snodderly testified that Appellant, now located in the rear of the patrol vehicle, mentioned that there was a "marijuana roach" in the ashtray. In response to Appellant's statement and the dog's positive alert for the presence of drugs, Knight was requested to exit the vehicle and it was searched. Incident to the search were recovered, *inter alia*, a partially-smoked marijuana cigarette, cell phones, three hypodermic syringes, a metal spoon with white residue, 79 storage bags ("baggies"**)** containing wax paper imprinted with the word "gold" and containing a tan powder substance, a sampling of which was tested and found to contain heroin, 6 baggies containing cocaine, a duffle bag and shower bag in the trunk which contained both legitimate as well as narcotics-related items, *i.e*., a digital scale with residue and numerous unused baggies.

On cross-examination, the Deputy testified that he had not observed any actual drug transaction and that Appellant told him that the money was partially for rent on his new residence and**,** in part**,** derived from casino winnings. Deputy Snodderly acknowledged that he did not investigate the truth of this claim.

Although there were no drugs or paraphernalia on Appellant's person, the drugs**,** which were recovered**,** were largely in a "key-box" and clothing bags. Appellant told Deputy Logsdon that he had the cash with him because he was moving from Philadelphia to Hagerstown, that he had won the money at a casino and that the vehicle had been borrowed from a friend in Philadelphia. Deputy Logsdon testified that Appellant stated that the items in the car were his, but later qualified his testimony, asserting that he meant that

he claimed ownership of the "innocent" personal items, which the officers had separated from the drugs, as his own. Deputy Logsdon reiterated Deputy Snodderly's account of the recovery of the baggies, some of which were tested and found to contain heroin or cocaine.

On cross-examination, the witness agreed that he did not investigate the casino account or contact Joey Jones, but he did write down casino gambling tips that he acquired from Appellant. Although no drugs or paraphernalia were found on Appellant's person, three syringe caps were recovered from Knight.

Nicholas Knight testified, pursuant to a plea bargain, that he drove Appellant to a friend's house for the purpose of picking up a fish tank. According to Knight, Appellant stated that the vehicle belonged to him; however, Knight claimed that, of all the items in the vehicle, only the spoon, syringes and one cell phone belong to him.

Knight further testified that, in consideration of the two felony drug counts charged against him as well as other charges, he expected probation after completing an in-jail substance abuse program, while the State was seeking 18 months of active incarceration. Two prior convictions for driving while intoxicated and Knight's admission that he is a drug addict were further adduced as impeachment evidence.

Jessica Shaffer testified that she tested a sampling of the items recovered by the deputies, finding that several contained heroin and cocaine and that marijuana was found in others.

Agent Jay Mills, who qualified as an expert in drug trafficking, testified, over objection by Appellant's counsel, that the facts of this case are indicative of an individual

buying heroin and cocaine at a low price in another state, such as Pennsylvania, and transporting the drugs to Hagerstown to be distributed where the prices are higher. In addition to the 79 bags of heroin and 6 bags of cocaine, Agent Mills relied, *inter alia*, upon the digital scale and the cash found on Appellant's person as indicia of an intent to distribute. Agent Mills confirmed the testimony of prior State's witnesses that Halfway Manor, the community from which the Avalon was traveling when he was stopped, is known by police to be a "high-crime, high-drug" area.

The first of three witnesses**,** who testified on Appellant's behalf, Jason Marshall, stated that he has purchased drugs from Nicholas Knight and has observed him selling to others as well. Marshall admitted that he is a drug addict and has been convicted of theft.

William Bucklew, testified that he bought heroin from Knight during the period between February to March, 2016.

Scott Dorman testified that he has purchased heroin and what he thought was crack cocaine from Knight, but the substances turned out to be soap. Dorman, however, acknowledged that he does not know Appellant.

At the conclusion of the evidence, Appellant was acquitted of possession of intent to distribute cocaine and the State filed a *nolle pros* to the charge of possession of drug paraphernalia.

## DISCUSSION

### I.

Appellant's first contention is that the trial court erred by permitting the State to rely

on charges not resulting in convictions to impeach the credibility of a defense witness. Appellant asserts that the court "simply failed to comply with the dictates" of the Maryland Rules. The State responds that, to the extent Appellant preserved the issue for our review, the trial court properly exercised its discretion in permitting a defense witness to be questioned about pending charges in a separate case. Alternatively, the State's contends that, to the extent Appellant's argument has been preserved, the court did not abuse its discretion in permitting the defense witness to testify about pending charges.

*Preservation*

As a preliminary matter, we address the State's contention that Appellant failed to preserve the issue for our review. "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" MD. RULE 8–131(a). "An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." MD. RULE 4-323(a).

> [A] contemporaneous general objection to the admission of evidence ordinarily preserves for appellate review all grounds which may exist for the inadmissibility of the evidence . . . . [T]he only exceptions . . . are where a rule requires the ground to be stated, where the trial court requests that the ground be stated, and where the objector, although not requested by the court, voluntarily offers specific reasons for objecting to certain evidence[.]

*Bazzle v. State*, 426 Md. 541, 560–61 (2012) (quoting *Boyd v. State*, 399 Md. 457, 476 (2007)).

During the State's cross-examination of Mr. Bucklew, the following colloquy occurred:

> [Assistant State's Attorney]: Mr. Bucklew, is it true that you are now at the Washington County Detention Center?
>
> [Witness]: Yes, ma'am.
>
> [Assistant State's Attorney]: Why are you there?
>
> [Witness]: U'm—
>
> [Defense Counsel]: Objection.
>
> [Witness]: Is that relevant?
>
> [The Court]: Overruled. Answer the Question.
>
> [Witness]: U'm armed robbery and first and third degree burglary.
>
> [Assistant State's Attorney]: When did you come into the detention center?
>
> [Witness]: U'm April 13, 2016.
>
> [Assistant State's Attorney]: April 13th, okay. And how many of those cases that you just mentioned—[h]ow many cases are pending total against you?
>
> [Witness]: All three.

The thrust of the State's argument is that Appellant is "making a claim of error that is purely procedural in nature . . . it was incumbent on him to make clear the action that he wanted the trial court to take." The State further asserts that Appellant raised an objection to the question, "Why are you there?" But the State points out that the objection was not renewed after Mr. Bucklew answered. The failure to renew the objection, in the State's view, precludes Appellant from having this Court review this issue. We disagree.

Appellant's objection to Mr. Bucklew's testimony concerning his pending charges was made at the time the evidence was introduced *via* the witness's testimony in response to the Prosecution's question. Requiring counsel to object again after the witness answered is duplicative and goes above and beyond what is required by Rule 4–323(a).

Furthermore, the State incorrectly asserts that, because Appellant made a claim of error that was "purely procedural in nature," he was required to "make clear the action that he wanted the trial court to take." The State provides no citation to authority to support its contention. Appellant raised a contemporaneous objection and was not required to provide the grounds for said objection. Accordingly, the objection was sufficient and preserved all grounds for review on appeal.

*Analysis*

"[A]s a general rule, [] a witness may be cross-examined 'on such matters and facts as are likely to affect his credibility, test his memory or knowledge, show his relation to the parties or cause, his bias, or the like.'" *State v. Cox*, 298 Md. 173, 178 (1983) (quoting *Kantor v. Ash*, 215 Md. 285, 290 (1958)). Md. Rule 5–609 permits the impeachment of a witness by evidence of prior criminal convictions and Md. Rule 5–608 permits the impeachment of a witness's character for truthfulness or untruthfulness, from prior conduct that did not result in criminal conviction.

Rule 5–608(b) provides the following:

> 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.

As the Court of Appeals summarized in *Pantazes v. State*, 376 Md. 661, 686–87 (2003),

> the right to cross-examine witnesses regarding the witness' own prior conduct not resulting in a criminal conviction is limited by Rule 5-608(b) in several ways. First, the trial judge must find that the conduct is relevant, *i.e.*, probative of untruthfulness. Second, upon objection, the court must hold a hearing outside the presence of the jury, and the questioner must establish a reasonable factual basis for asserting that the conduct of the witness occurred. Third, the questioner is bound by the witness' answer and may not introduce extrinsic evidence of the asserted conduct. Finally, as with all evidence, the court has the discretion to limit the examination, under Rule 5–403, if the court finds that the probative value of the evidence is outweighed by unfair prejudice.

Furthermore, the Court, in *Thomas v. State*, 422 Md. 67, 78–79 (2011), emphasized that, "when 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." (Emphasis supplied) (citations omitted). Otherwise, the evidence constitutes a "hearsay accusation of guilt [which] has little logical relevance to the witness' credibility." *Id.* The reason it has little relevance is that "accusations of misconduct are still clothed with the presumption of innocence" and using accusations for impeachment purposes "would be tantamount to accepting someone else's assertion of the witness' guilt and pure hearsay." *State v. Cox*, 298 Md. 173, 180 (1983)).

Accordingly, and as the *Thomas* Court noted, Rule 5–608(b) requires that, before the evidence of prior bad conduct can be used to impeach the witness, a "reasonable factual

basis" must be "established to show that the witness's prior conduct actually occurred." *Thomas*, 422 Md. at 78. In *Pantazes*, *supra*, the Court of Appeals examined what constitutes a "reasonable factual basis" for purposes of Rule 5–608(b). 376 Md. at 687. The Court noted:

> Rule 5-608(b) provides no specific guidance as to what constitutes 'a reasonable factual basis,' and this Court has not addressed its meaning in any depth, although the *Cox* Court indicated that a 'hearsay accusation of guilt' was not sufficient. Many courts that have considered this requirement, or a similar one, have concluded that its purpose is to ensure that the questions are propounded in good faith and are not aimed to put before the jury unfairly prejudicial and unfounded information supported only by unreliable rumors or innuendo.

(Citations omitted). It is within the trial court's discretion to determine whether a reasonable factual basis has been established. *Id.*

In *Pantazes*, *supra*, the Court held that the trial court properly ruled that a reasonable factual basis had not been established. *Id.* In support of its holding, the Court noted that "the trial court properly held a hearing outside of the presence of the jury" to determine whether a reasonable factual basis had been established. *Id.* In that case, the Defense attempted to impeach the State's witness by questioning her about a prior incident where she was alleged to have participated in a robbery, which later resulted in a murder, and where she was also alleged to have "falsely identified an innocent man as the killer." *Id.* at 667–69. When the Defense attempted to introduce the testimony, the trial court noted that the testimony may be important, "but reserved ruling on the issue because the court wanted to see 'something besides . . . mere allegations.' The judge then said: 'In other words you have to show me that there is [an] actual predicate for this testimony.'" *Id.* at 688. Then,

during a hearing outside of the jury's presence, the Defense presented two affidavits, made by police officers, in order to establish a reasonable factual basis that the witness "was involved in the robbery-turned-murder and that [the witness] lied in identifying [the individual] as the killer." *Id.*

In holding that the two affidavits did not sufficiently support a reasonable factual basis for the impeachment evidence of the witness's prior conduct, the Court reasoned that the first affidavit "[did] not establish that [the witness] lied in identifying the [individual] nor does it say that [the witness] 'set up' the robbery. Appellant never indicated to the trial court that he could present any competent evidence to establish that [the witness] had set up the robbery and falsely accused another of a crime." *Id.* at 690. The Court also noted that, regarding the first affidavit, there wasn't enough evidence or any other corroboration to support that the witness had actually engaged in the prior conduct. *Id.* Similarly, the Court noted that the second affidavit "did not fare any better." *Id.* It also failed to establish that the witness lied about the identification and "[i]t contained no facts to support an allegation that [the witness] lied when identifying [the individual] as the killer." *Id.* In conclusion, the Court held that, "[w]ith no factual support, appellant's proffer of evidence amounted to little more than mere accusations[.]"

In *Thomas, supra*, the Court distinguished the facts of the case from *Pantazes, supra*, holding that there was a reasonable factual basis to admit the evidence for impeachment purposes:

Unlike the affidavits in *Pantazes*, which merely established that the witness in that

> case was claimed to have been involved in prior criminal conduct, the State's undisputed proffer established that Ms. Williams pleaded guilty to the crime of motor vehicle theft, thereby formally 'admitting' in open court to having committed that offense. We are satisfied that the State's proffer of Ms. Williams's formal admission of guilt provided for Petitioner the 'reasonable factual basis' required by Rule 5–608(b).

*Thomas*, 422 Md. at 79.

In the instant case, Mr. Bucklew testified, over objection, that three cases were pending against him. Other than mere accusations, there was no reasonable factual basis to establish that the three instances of prior conduct actually occurred. At the time the testimony was admitted, the cases were still pending; there were no convictions against Mr. Bucklew and he had not pled guilty in open court to any of the charges. There was a clear objection, on the record, to the testimony; yet, there was no hearing held outside the presence of the jury to establish a predicate for the testimony. Moreover, there is no record of the lower court's reasoning for admitting the testimony. Accordingly, the trial court violated Rule 5–608(b) and abused its discretion by permitting Mr. Bucklew to be questioned and impeached by the testimony of the pending charges.

However, the State asserts that "[a]ny error was harmless beyond a reasonable doubt in light of other testimony by [Mr.] Bucklew, admitted without objection, that he had committed crimes at least 21 times before." Appellant demands reversal.

"Because the right to cross-examine a witness on matters and facts that are likely to affect his or her credibility is a fundamental concept in our system of jurisprudence, we employ the harmless error analysis when reviewing its violation." ***Dionas, v. State***, 436

Md. 97, 107 (2013). The State bears the burden for showing that its benefit of the error was not harmful. *Id.* at 108.

The harmless error test is well established, and relatively stringent. We stated in *Dorsey v. State*, [276 Md. 638 (1976)]:

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

*Dionas*, 436 Md. at 108 (quoting *Dorsey*, 276 Md. at 659).

In reviewing a claim for harmless error, the appellate court does not "find facts or weigh evidence"; rather, we must determine whether the error contributed to the verdict or whether the "error [is] unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Id.* at 109.

> Harmless error factors must be considered with a focus on the effect of erroneously admitted, or excluded, evidence on the jury. As we have explained, in a harmless error analysis, the issue is not what evidence was available to the jury, but rather what evidence the jury, in fact, used to reach its verdict.

*Id.* at 109.

Where the State's case is largely based upon the testimony of a witness or if the verdict turns upon whom the jury will believe, "[w]e have stated frequently that, where credibility is an issue and, thus, the jury's assessment of who is telling the truth is critical, an error affecting the jury's ability to assess a witness' credibility is not harmless error."

*Id.* at 110.

In the instant case, Mr. Bucklew was a witness for the Defense. For its case-in-chief, the State relied upon several other witnesses and physical evidence: 79 bags of heroin, six bags of cocaine, marijuana, digital scale, baggies, cell phones, three hypodermic syringes and metal spoon with white residue found in the car and the $5,170 cash found on Appellant's person, in addition to testimony from arresting officers and expert witnesses. Accordingly, Mr. Bucklew's testimony was not the lynchpin for the State's case, nor was it in competition with another witness' testimony where whomever the jury would believe would be the final factor for its verdict. That is to say, if Mr. Bucklew's testimony regarding his three pending cases had not been admitted, the jury would still have had sufficient evidence to support its verdict. Therefore, upon an independent review of the record, we hold that, beyond a reasonable doubt, the erroneously admitted testimony did not influence the jury's verdict.

**II.**

Appellant's next contention is that the trial court failed to properly exercise discretion when it refused to rule in advance on whether Appellant could be impeached by introduction of a prior conviction for possession with intent to distribute. Specifically, Appellant cites the court's failure to give "apparent consideration to any rationale at all" for the delay as a failure to exercise discretion. Appellant also contends that this failure to exercise discretion constitutes an abuse of the trial court's discretion "given the vital need of the defense for an advance ruling and the absence of any apparent reason for the delay."

The State's response is that Appellant has failed to preserve his claim for appeal. The State maintains that, although Appellant's counsel argued that his prior conviction for possession with intent to distribute was more prejudicial than probative, counsel nevertheless failed to ask the trial court to rule on the objection prior to Appellant commencing his testimony. The State also asserts that Appellant failed to object when the court announced, "I don't think I need to make the balancing decision before [Appellant] testifies" and "I'm not going to preliminarily make that decision." Finally, the State asserts that Appellant did not provide the trial court with any "countervailing considerations" when the trial judge "evidently believed that he needed more information before conducting the [5–609] balancing [.]" Therefore, according to the State, Appellant has failed to preserve his claim for our review. Alternatively, the State responds that, if preserved, the trial court properly exercised its discretion. The State argues that Appellant is not alleging, in the instant case, the presence of any of the "factors" that may prompt a trial court to engage in the 5–609 balancing test before a defendant testifies. Accordingly, the State maintains that the trial court properly exercised its discretion.

> Where the trial court's decision reflects an exercise of the discretion vested under Rule 5–609, it is well established that the balancing of the probative value of a prior conviction against its prejudicial effect is a matter left to the court's sound discretion. When the trial court exercises its discretion in these matters, we 'will give great deference to the court's opinion' and appellate courts 'will not disturb that discretion unless it is clearly abused.'

*Brewer*, 220 Md. App. at 107 (quoting *Jackson v. State*, 340 Md. 705, 719 (1995)) (some citations omitted).

Rule 5–609 governs the admission of evidence of a prior criminal conviction for impeachment purposes. Subpart (a) provides, generally:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.

Subparts (b) and (c) also require that the conviction is no more than 15 years old and the conviction cannot have been reversed, vacated, pardoned or currently on appeal. In sum, "if the conviction is final and occurred within fifteen years, and if the crime was an infamous crime or a crime relevant to the witness's credibility, the trial judge must weigh the probative value of the evidence against the danger of unfair prejudice." *Williams v. State*, 110 Md. App. 1, 23 (1996).

Regarding the balancing test, "[t]here is no requirement that the trial court's exercise of discretion be detailed for the record, so long as the record reflects that the discretion was in fact exercised." *State v. Woodland*, 337 Md. 519, 526 (1995).

> The Court of Appeals has identified five factors that judges may consider when weighing the probative value of a prior conviction against its prejudicial effect, which 'should not be considered mechanically or exclusively,' but should be treated as a 'useful aid to trial courts in performing the balancing exercise' established by Rule 5–609.
>
> > These factors are (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility.

'Where credibility is the central issue, the probative value of the impeachment is

> great, and thus weighs heavily against the danger of *unfair* prejudice.' Similarity between the past and current offenses weighs against admission, but does not serve to automatically exclude such evidence.

*Brewer*, 220 Md. App. at 107–08 (second emphasis supplied) (quoting *Jackson*, 340 Md. at 717, 721). "The *Jackson* Court was quick to point out that those 'factors should not be considered mechanically or exclusively . . . they may be a useful aid to trial courts in performing the balancing exercise mandated by the [Maryland] Rule.'" *Williams,* 110 Md. App. at 24 (quoting *Jackson*, 340 Md. at 717). However, "[t]he weighing process must be done prior to ruling on admissibility and, if the trial judge is presiding over a jury, out of the presence of the jury." *Id.* at 25 (citing *Jackson*, 340 Md. at 717).

In *Woodward*, *supra*, the Court of Appeals held that the trial judge had adequately balanced the probative value of evidence sought to be admitted for impeachment purposes against any prejudicial effect to the defendant, despite not expressly making those findings on the record. The Court noted that

> [b]y the time defense counsel requested that the court balance probativeness and prejudice, the trial judge had already mentioned 'outweighing' and recognized that she had the discretion to exclude the conviction (interruptions from defense counsel prevented her from fully explicating these thoughts). The discussion concluded with the judge referring to 'balancing it.' In light of these remarks and the 'strong presumption that judges properly perform their duties,' we are persuaded that the trial court adequately conducted the balancing of probative value and potential prejudice required by Maryland Rule 1–502.
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> ***
>
> Moreover, we think the record supports the trial judge's ruling. The conviction was only two years old at the time of trial. Furthermore, the impeached witness was not the defendant, and the conviction offered to impeach the witness was for a different offense from those charged in the pending information.

*Woodland*, 337 Md. at 526–27 (quoting *Beales*, 329 Md. at 273).

In the instant case, when confronted with the decision whether to testify on his own behalf, Appellant responded: "I just know that, if my past is going to be used against me, then I would not like to be testifying because it would be bias, [sic] it would bias me charges [sic] I'm facing now."

Responding to Defense counsel's request that the court conduct a Rule 5–609 balancing test that, the judge responded:

> That's—it is a balancing test but I don't think I need to make the balancing decision before he testifies. I think it's his decision whether he wants to testify or doesn't want to testify. If he takes the stand and the State attempts to bring up his prior conviction then we will have to have a determination, at that time, but I'm not going to preliminarily make that decision.

In the instant case, we are not concerned with whether the trial court failed to engage in the balancing test before the impeachment evidence was admitted; rather, we are concerned with whether the trial court abused its discretion by failing to engage in a balancing test before Appellant decided to testify. Appellant argues that the trial court failed to exercise its discretion. Citing *Dallas v. State*, 413 Md. 569 (2010), Appellant states that "[t]he *Dallas* Court listed reasons why a judge might (but usually should not) defer ruling, and countervailing reasons why he or she should rule in advance." Appellant asserts that, in the case *sub judice*, the trial court "gave no apparent consideration to any rationale at all, but simply announced a refusal to rule."

In *Dallas*, the Court of Appeals held that the trial court did not abuse its discretion by deferring its ruling on a defense motion *in limine* to exclude impeachment evidence of

a prior conviction until after the defendant testified. The Court noted:

> Many are the times when a trial court can and, therefore, should decide a motion *in limine* involving a Rule 5–609 issue before the defendant makes the election. For example, when it is clear that a prior conviction is ineligible for impeachment under Rule 5–609, the court need not hear the defendant's testimony to know how to rule on a motion to exclude that proposed impeachment evidence. Similarly, the trial court certainly can recognize when the risk of unfair prejudice of the proposed impeachment evidence far outweighs its probative value, no matter how the defendant might testify. Moreover, the court may be satisfied that it has a sufficient basis upon which to make an *in limine* ruling without hearing the defendant's direct testimony if the court has learned, through other means, how the defendant is likely to testify. For example, a court may hear admissions that the defense makes during the defense's opening statement, or the court may accept a proffer of the defendant's direct testimony. In any of these circumstances, fairness to the defendant augurs in favor of the trial court's ruling on the motion before the defendant elects whether to testify or remain silent.

*Id.* at 586. Furthermore, the Court of Appeals held that a trial court's deferral of a ruling, in such an instance, until after a defendant's testimony "does not impermissibly chill the defendant's right to testify" and is not "a question of constitutional dimension." *Id.* at 584.

In the instant case, Appellant concedes that the prior conviction was within 15 years, *i.e.*, 2012, and the conviction concerned a crime of dishonesty, *i.e.*, possession of a controlled dangerous substance with the intent to distribute, thereby rendering the prior conviction facially admissible. Significantly, Appellant did not assert in his request before the trial judge and does not assert in his brief before this Court that the trial judge had some idea as to the content and scope of Appellant's potential trial testimony. Without more, it would be premature for a trial judge to engage in a balancing test. Indeed, the trial judge echoed the spirit of the Court of Appeals in *Dallas* when he stated, "If he takes the stand and the State attempts to bring up his prior conviction, then we will have to have a

determination, at that time." A prior conviction is not *per se* unfairly prejudicial; therefore, more information, *e.g.*, Appellant's testimony, would have been required in order for the judge to determine whether the evidence of the prior conviction is more unfairly prejudicial than probative against the Appellant. Accordingly, the trial court did not abuse its discretion by deferring its ruling on the prior conviction as impeachment evidence.

**III.**

Appellant next contends that the evidence is legally insufficient to sustain a mandatory sentence without parole. Citing Criminal Law Article, Sec. 5–608(b)(1)**,** Appellant contends that a prerequisite is that the prosecution prove "that the sentence for the predicate offense" was committed or, alternatively, that it was committed by the party under review, *i.e*., Carl Franklin Burnside.

The State responds that it filed a subsequent-offender notice at trial and at sentencing in which the State referred to the prior conviction. The State maintains that the pre-sentence investigation was sufficient to establish the prior conviction and that Appellant's "skepticism about a 'nexus' and disagreement with case law did not render it insufficient." The State also asserts that Appellant did not claim that the pre-sentence investigation was erroneous,[1] that Appellant did not refute he had previously been

[1] Upon our reading of the record, we note that Appellant makes no claims that the pre-sentence investigation report was substantively erroneous. We do note that Appellant raised two inaccuracies: (1) Appellant had not attended the TAMAR program (Trauma, Addition, Mental Health and Recovery), as reported, and (2) Appellant was not a recipient of public housing or the Food Supplementation Program, as reported.

convicted of possession with intent to distribute and that Appellant provided no evidence beyond mere assertion that "Carl Franklin Burnside, Sr." is a "particularly common name."

"[T]he burden is on the State to prove, by competent evidence and beyond a reasonable doubt, the existence of all the statutory conditions precedent for the imposition of enhanced punishment." *Testerman v. State,* 170 Md. App. 324, 333 (2006) (quoting *Jones v. State*, 324 Md. 32, 37 (1991)). An "unchallenged presentence investigation report [is] sufficient in itself to sustain the State's burden[.]" *Id.* at 334 (quoting *Sutton v. State*, 128 Md. App. 308, 330 (1999)).

In the instant case, the State referred to the pre-sentence investigation at Appellant's sentencing:

> [PROSECUTOR]: There is one final document the State has and this was received by the Philadelphia Police Department certification by the custodian of records that the 2012 conviction, September 7, 2012, which is notice of a 10 year mandatory sentence, is in fact the defendant who is here in the courtroom. I would offer this—
>
> THE COURT: I think because it is contained in the pre-sentence investigation I think it comes in by virtue of that.
>
> [PROSECUTOR]: As an admission?
>
> [DEFENSE COUNSEL]: But I would object because I don't see the nexus between—first of all I haven't seen any certified copies of any conviction out in Philadelphia that she is talking about.
>
> THE COURT: Okay. You've got your objection.
>
> [DEFENSE COUNSEL]: And I would also object because there is no nexus between his identify and proof beyond a reasonable doubt that that conviction is actually tied to this person.
>
> ***

> THE COURT: The record is clear. But I think when it's included in the pre-sentence investigation, I'm able to use it at that point.
>
> [DEFENSE COUNSEL]: I'm aware of courts doing that, I still think it is improper.
>
> THE COURT: Okay.
>
> ***
>
> [PROSECUTION]: And Your Honor I do believe that's correct. It's the *Sutton* [*v. State*, 128 Md. App. 308 (1999)] case that would advise that the PSI [pre-sentence investigation] is presumptive proof . . . .

Appellant acknowledges that the *Sutton* Court held that a demand for certified copies of the conviction does not raise a question as to the accuracy of a pre-sentence investigation report. Appellant asserts, however, that trial counsel "specifically challenged the State to prove that the Carl Burnside mentioned in the Pennsylvania records was the same individual who was about to be sentenced," citing *McDonald v. State*, 314 Md. 271 (1988). Appellant also maintains that, "assuming**,** *arguendo*, that the State proved that a person named Carl Burnside had incurred a conviction for possession with intent to distribute in Pennsylvania, it failed to carry its burden of proof, beyond a reasonable doubt, that Appellant is that person."

In *McDonald*, the defendant had been found in violation of probation, based upon two urinalysis reports indicating that she had been using cocaine. In holding that the State failed to prove adequate chain of custody, the Court of Appeals noted that the two laboratory technicians who testified on behalf of the State only established delivery.

> Neither he, nor anyone else, testified about how urine samples were obtained,

> labeled, and stored at ASP, [the lab,] or how they were delivered to the MML courier. Neither he, nor anyone else, testified that on any dates close to 1 April and 17 April, the Kathleen McDonald then on trial delivered samples of her urine to ASP. Indeed, the record contains no evidence that any Kathleen McDonald ever gave urine samples to ASP. We have nothing more than the delivery, to MML, of urine samples labelled with the not uncommon name of Kathleen McDonald and the subsequent processing of those samples. That is simply not enough to authenticate the urine samples with the requisite degree of certainty.

*McDonald,* 314 Md. at 281.

In the instant case, we are confronted with a very different set of circumstances. Appellant did not claim, at trial, nor does he claim, on appeal, that the pre-sentence investigation report was inaccurate, *vis-à-vis*, his prior conviction. Logically, if there were no objections to the accuracy of the report itself, one would not be able to claim that the State failed to prove beyond a reasonable doubt that Appellant is the same Carl Burnside, in the report, convicted in 2012 for possession with intent to distribute. Appellant also did not provide evidence that his name was so particularly common as to raise doubts regarding the identity of the Carl Burnside in the pre-sentence investigation. Accordingly, we hold that the evidence presented, *i.e.*, the pre-sentence investigation report, was sufficient to sustain the subsequent-offender sentence.

**IV.**

Appellant next contends that the trial court erred in refusing to propound *voir dire* question No. 10, proposed by the State, which read, "Is there any member of the prospective jury who believes that, because a charge is brought by the police and prosecuted by the State's Attorney's Office, the defendant is probably guilty?" Citing

*Collins v. State*, 452 Md. 614 (2017), Appellant contends that "parties are entitled to have propounded questions designed to ferret out grounds for disqualification of a prospective juror." However, Appellant also acknowledges, citing *Baker v. State*, 157 Md. App. 600 (2004) and *Twining v. State*, 234 Md. 97 (1964), that Maryland Courts have held that "*voir dire* questions which track the subject-matter of jury instructions need not be propounded." Appellant states that he respectfully finds this reasoning unsound. Specifically, Appellant argues that, "[i]f a juror is unable to apply the presumption of innocence, or to honor the State's burden, it is likely a result of ingrained attitudes or experiences which are not likely to be washed away by a brief instruction from a trial judge." Therefore, Appellant maintains that such "attitudes and experiences" should be addressed during *voir dire.*

The State responds that, "[i]n light of controlling case law, the *voir dire* question and the jury instruction, the trial court did not err in declining to ask the question."

"The scope of *voir dire* and the form of the questions propounded rest firmly within the discretion of the trial judge. 'The overriding principle or purpose' of *voir dire* is to ascertain 'the existence of cause for disqualification.'" *Baker v. State*, 157 Md. App. 600, 610–11, 853 A.2d 796, 802 (2004) (some citations omitted) (quoting *Hill v. State*, 339 Md. 275, 279 (1995)). *Voir dire* "questions should focus on issues particular to the defendant's case so that biases directly related to the crime, the witnesses, or the defendant may be uncovered." *Dingle v. State*, 361 Md. 1, 10 (2000). "Questions which are not directed towards a specific ground for disqualification, but instead are speculative, inquisitorial, catechising, or fishing, asked in the aid of deciding on peremptory challenges, may be

refused in the discretion of the court, even though it would not have been error to have asked them." *Curtin v. State*, 165 Md. App. 60, 67 (2005) (citations omitted).

Recent case law has emphasized the limited scope of *voir dire* in Maryland.

> Maryland employs 'limited *voir dire*.' That is, in Maryland, the sole purpose of *voir dire* 'is to ensure a fair and impartial jury by determining the existence of [specific] cause for disqualification[.]' Unlike in many other jurisdictions, facilitating 'the intelligent exercise of peremptory challenges' is not a purpose of *voir dire* in Maryland. Thus, a trial court need not ask a *voir dire* question that is 'not directed at a specific [cause] for disqualification [or is] merely 'fishing' for information to assist in the exercise of peremptory challenges[.]' On request, a trial court must ask a *voir dire* question if and only if the *voir dire* question is 'reasonably likely to reveal [specific] cause for disqualification[.]'

*Pearson v. State*, 437 Md. 350, 356–57 (2014) (citations omitted).

However, this should not suggest that a defendant's right to a fair and impartial jury yields to the limited *voir dire* process. On the contrary, "[t]he broad discretion that we accord judges in the conduct of *voir dire* 'and the rigidity of the limited *voir dire* process are tempered by the importance and preeminence of the right to a fair and impartial jury and the need to ensure that one is empaneled.'" *Collins v. State*, 452 Md. 614, 623 (2017) (quoting Dingle v. State, 361 Md. 1, 14 (2000)).

In the case *sub judice*, although the court declined to propound Appellant's requested *voir dire* question No. 10, the trial court did ask the following *voir dire* question:

> The State's Attorney has an affirmative obligation to prove the defendant guilty of these charges beyond a reasonable doubt. If the State's Attorney fails to do that then it is the jury's duty to find the defendant not guilty. Is there any member of the jury panel who disagrees with that proposition?

The trial court also asked the potential jurors if any thought "a defendant should be

required to prove his innocence," if any "would be more likely to believe a witness for the prosecution merely because that person is a witness for the prosecution," and if anyone "would tend to view the testimony of a witness called by the Defense with more skepticism than a witness called by the State."

The trial court also instructed the jury that the "charging document is the formal method of accusing the defendant of a crime. It is not evidence of guilt and must not create any inference of guilt."

In the instant case, Appellant's proposed *voir dire* question No. 10 did not inquire about specific causes for disqualification, as Maryland's limited *voir dire* doctrine requires. If the question had been tailored specifically to the offense at issue, ***i.e.***, possession with intent to distribute, then it may have been more reasonably likely to reveal a cause for disqualification specific to the case. *See Dingle, supra.*

The formulation of Appellant's question No. 10, which inquired generally about the legal concept of "innocent until proven guilty," was not designed to uncover specific causes of discrimination directly relating to Appellant, witnesses or the crime for which Appellant was charged. Furthermore, there is no abuse of discretion to not give *voir dire* questions that inquire about whether a juror "would give the accused the benefit of the presumption of innocence and the burden of proof . . . [if] [t]e rules of law stated in the proposed questions were fully and fairly covered in subsequent instructions to the jury. It is generally recognized that it is inappropriate to instruct on the law at this stage of the case[.]" *Twining*, 234 Md. at 100.

The other *voir dire* questions asked and the jury instruction that was given covered the State's burden, *i.e.*, beyond a reasonable doubt, that witnesses should not be attributed a bias upon if they were called by the State or the defense and that a charging document is a formal accusation, not evidence of guilt. Accordingly, we hold that the trial court did not abuse its discretion.

**V.**

Appellant's final contention is that the trial court erred in denying his Motion to Suppress. Appellant asserts that "the seizure of identification from Appellant was unlawful and that the officers executed a "second stop," initiating a drug investigation after the traffic aspect of the stop should have been completed." Specifically, Appellant argues that the traffic portion was "put on hold" and then resumed after the drugs were discovered.

The State responds that the court properly denied Appellant's Motion to Suppress.

We held, in *Stokeling v. State*, 189 Md. App. 653, 661–62 (2009), that

> [i]n reviewing the denial of a motion to suppress evidence, we look exclusively to the record of the suppression hearing. We extend great deference to the fact-finding of the suppression hearing judge with respect to determining the credibilities of contradicting witnesses and to weighing and determining first-level facts. When conflicting evidence was presented, we must accept the facts as found by the hearing judge unless those findings are shown to be clearly erroneous. Furthermore, when the motion to suppress is denied, the evidence is to be reviewed in the light most favorable to the State. Nevertheless, as to the ultimate, conclusory fact, we must make our own independent, constitutional appraisal by reviewing the law and applying it to the facts.

(Citations omitted).

> The Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention . . . . The Supreme Court has

> made clear that a traffic stop involving a motorist is a detention which implicates the Fourth Amendment . . . . It is equally clear, however, that ordinarily such a stop does not initially violate the federal Constitution if police have probable cause to believe that the driver has committed a traffic violation . . . . Nonetheless, the Supreme Court has also made clear that the detention of a person 'must be temporary and last no longer than is necessary to effectuate the purpose of the stop.'

*Russell v. State*, 138 Md. App. 638, 647 (2001) (quoting *Ferris v. State*, 355 Md. 356, 369 (1999)).

> Once the purpose of [the traffic] stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention. Thus, once the underlying basis for the initial traffic stop has concluded, a police-driver encounter which implicates the Fourth Amendment is constitutionally permissible only if either (1) the driver consents to the continuing intrusion or (2) the officer has, at a minimum, a reasonable articulable suspicion that criminal activity is afoot.

*Wilkes v. State*, 364 Md. 554, 572–73 (2001) (quoting *Ferris*, 355 Md. at 372).

Regarding passengers in a vehicle during a traffic stop, the *Ferris* Court held that

> [m]ere police questioning does not constitute a seizure . . . . If the engagement between the Petitioner and the officer was merely a 'consensual encounter,' no privacy interests were invaded and thus the Fourth Amendment is not implicated. Even when the officers have no basis for suspecting criminal involvement, they may generally ask questions of an individual 'so long as the police do not convey a message that compliance with their request is required.'

*Id.* at 647–48 (quoting *Ferris*, 355 Md. at 374–75).

In the case *sub judice*, the circuit court, in denying Appellant's Motion to Suppress, stated:

> Well, these officers were faced with a situation where the—the driver knew second hand apparently [who] the car belonged to, at least he said he did. He—it was through this Defendant that he was driving the car. There's no evidence that the owner of the car, Mr. Jones of Philadelphia, gave either of these people the right to dispose of the car or to use it. And the officers had a right to arrest the driver. It's discretionary. And at that time, they hadn't concluded their investigation regarding

> the car as to who could drive it away or couldn't. And the officers had a right to require proof from either—from someone other than Mr. Knight that he could help out by driving. The officers found that there was no one there who could legally drive the car. And, therefore, the car could be held depending [upon] the arrival of the owner or somebody else with permission. And the—the inventory search of that car would have revealed all the things that were ultimately found by search and by the [K-9] dog sniffing that car. In addition, it's somewhat ambiguous as to whether or not—there's no evidence that he felt intimidated, that this defendant did, by being requested to produce identification. Upon the production of it, it was almost immediately discovered that there was an active warrant for his arrest. And according[ly] . . . for that reason and for the inevitability of the search, ultimate inventory search, revealing the contents, I deny the—the motion.

The court found that, upon request, Appellant produced his identification and informed the officer that he had an outstanding warrant. The evidence supports the "consensual encounter" described in *Ferris, supra*, and not a situation where compliance with a police request was conveyed as a requirement.

The court also found that the investigation did not cease; there was no evidence to support a "second stop" as Appellant suggests. Detective Snodderly testified at the August 9, 2016 Suppression Hearing that before he concluded the traffic stop and issued the citations, a K-9 unit arrived and scanned the vehicle, resulting in a positive alert for the controlled dangerous substances. *See Wilkes,* 364 Md. at 570 (holding that a K-9 scan of the vehicle was not an improper extension of the traffic stop where the K-9 scan occurred while the purpose of the initial stop is still unfulfilled). In the instant case, the purpose for the initial stop had not been fulfilled, as evinced by the traffic citations having not been issued at the time of the K-9 scan. Accordingly, we hold that the trial court, supported by the record of the suppression hearing, properly denied Appellant's Motion to Suppress.

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