Circuit Court for Anne Arundel County
Case Nos. C-02-CR-17-001098,
C-02-CR-17-001985

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2414

September Term, 2018

MICHAEL EDWARD THOMAS, II

v.

STATE OF MARYLAND

Reed,
Beachley,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: October 1, 2019

On June 1, 2018, a jury sitting in the Circuit Court for Anne Arundel County convicted appellant Michael Thomas, II, of: armed robbery, attempted armed robbery, use of a firearm in the commission of a crime of violence, possession of a regulated firearm after having committed a disqualifying crime, and other related charges. The court sentenced appellant to twenty years' imprisonment, all but ten years suspended for the convictions stemming from the armed robbery. Regarding the firearm charges, the court sentenced appellant to a consecutive five years' imprisonment. Finally, the court imposed five years of probation. Appellant timely appealed and presents the following issues for our review:

1. Did the trial court err in ruling that [appellant] failed to invoke unequivocally his right to counsel under *Miranda v. Arizona*, 384 U.S. 436 (1966), when he stated that he was "not trying to talk without a lawyer"?

2. Alternatively, even if [appellant's] request for an attorney was equivocal, did the trial court err in admitting his subsequent statements given that the police wrongly induced [appellant] to refrain from invoking his right to counsel?

3. Did the trial court err in ruling that [appellant's] statements were voluntary under Maryland common law when the police promised that he would receive much-needed drug treatment in exchange for his confession?

4. Did the trial court err in concluding that [appellant's] statements—made under the influence of drugs and because of the police's violation of *Miranda* and promises of drug treatment—were knowing and voluntary within the meaning of the Fourteenth Amendment?

5. Did the trial court abuse its discretion by disregarding the importance of [appellant's] testimony at trial and thereby permitting the State to introduce evidence of [appellant's] prior convictions for armed robbery and theft during a trial in which he was charged with armed robbery and theft?

We hold that appellant unequivocally invoked his right to counsel under *Miranda*, and that the suppression court therefore erred in admitting into evidence the portion of his interrogation video following that invocation. Because this error was not harmless, we vacate appellant's convictions. Finally, for guidance at appellant's retrial, we conclude that the trial court did not err in permitting the State to introduce evidence of appellant's prior convictions for impeachment purposes.

FACTUAL AND PROCEDURAL BACKGROUND

According to testimony and evidence from appellant's trial, on the night of April 17, 2017, Danny Bishop and his girlfriend Lori Golden were staying at a Motel 6 in Laurel, Maryland. At some point that evening, Mr. Bishop's friend Jake Basford knocked on the door and came inside the motel room to "hang out and have a couple of beers." Shortly thereafter, Mr. Bishop heard another knock on the door. Mr. Bishop looked through the peephole but did not see anyone outside. Only a few seconds later, Mr. Bishop heard a second knock on the door, but he still did not see anyone through the peephole. When Mr. Bishop heard a third knock, he assumed that someone was "playing a joke" and opened the door to find a gun pointed at his face. Despite Mr. Bishop's efforts to "kick the door closed," two males entered the motel room.

The two robbers had covered their faces with either towels or shirts, but Mr. Bishop recognized the man holding the gun as appellant. The gunman ordered Mr. Bishop, Ms. Golden, and Mr. Basford to get on the ground, demanding drugs, pills, and money. The gunman physically forced Mr. Bishop onto the ground, putting the gun to Mr. Bishop's head. Mr. Bishop then heard someone rummaging through Ms. Golden's purse while Mr.

Basford screamed for Mr. Bishop and Ms. Golden to give the robbers whatever they wanted.

The robbers apparently found Ms. Golden's money and her prescription medications. Before they left the motel room, however, the gunman threatened Mr. Bishop not to open the door until the robbers had left the premises or he would shoot him. After waiting approximately thirty seconds, Mr. Basford insisted on leaving the motel room. He pushed Mr. Bishop out of his way and ran out of the motel room.

According to Mr. Bishop, immediately after Mr. Basford left, appellant entered the motel room, unmasked, threw Mr. Bishop against the wall, and accused Ms. Golden's daughter of having lied to him. Mr. Bishop testified that appellant stated, "that's what you get for your daughter robbing me. I robbed you[,]" and then left the room.

After police interviewed Mr. Bishop and Ms. Golden, they continued investigating appellant as a suspect in the robbery. Pursuant to that investigation, officers obtained a search warrant and arrested appellant at his girlfriend's apartment. At the apartment, police recovered a .380 caliber handgun and a cigarette pack containing thirty-seven loose prescription pills. The police then brought appellant into the interrogation room, where appellant initially waived his *Miranda* rights and agreed to speak with the officers. Prior to trial, appellant unsuccessfully attempted to suppress the video of his interrogation. Following a four-day trial, a jury ultimately convicted appellant of committing armed robbery and other related charges. We shall provide additional facts as necessary to resolve the issues presented on appeal.

DISCUSSION

I. Appellant's Invocation of the Right to Counsel

Appellant first argues that the suppression court erred in denying his motion to suppress the statements he made during his police interrogation. According to appellant, he unequivocally invoked his right to counsel when he told detectives, "I'm not even trying to talk, man, without my lawyer. I just want some help. What is going to do me [sic], all this talking?"[1]

At the suppression hearing on October 16, 2017, the suppression court concluded that appellant's request for counsel was equivocal. Specifically, the suppression court found that,

> the first statement, "I ain't trying to talk without my lawyer"[2] said in the context of talk, talk, talk, talk, talk to me at least is ambiguous. So it is certainly not unequivocal request for counsel . . . . So I don't think that the police officers at that point were required to either stop the interview or to ask the clarifying questions.

As we shall explain, appellant's statement "I'm not even trying to talk, man, without my lawyer" constituted an unequivocal invocation of his right to counsel. Furthermore, the

[1] No official transcript of the police interrogation was ever created, nor did the State successfully introduce its own transcript into evidence at appellant's trial. Although the parties have transcribed various portions of the interrogation differently in each of their briefs, these discrepancies are immaterial to our analysis. Both appellant and the State agree that appellant uttered the phrase "I'm not even trying to talk, man, without my lawyer" during the interrogation.

[2] The suppression court construed appellant's statement to be "I ain't trying to talk without my lawyer." This language slightly differs from what appellant and the State used in their appellate briefs, as well as our own independent review of the interrogation. We agree with the parties that appellant stated, "I'm not even trying to talk, man, without my lawyer."

subsequent statement "What is going to do me [sic], all this talking?" did not render his invocation ambiguous.

Regarding the appropriate standard of review from the denial of a motion to suppress evidence, the Court of Appeals has stated,

> When reviewing the denial of a motion to suppress evidence, we confine ourselves to what occurred at the suppression hearing. We view the evidence and inferences that may be reasonably drawn therefrom in a light most favorable to the prevailing party on the motion, here, the State. We defer to the motions court's factual findings and uphold them unless they are shown to be clearly erroneous. The credibility of the witnesses, the weight to be given to the evidence, and the reasonable inferences that may be drawn from the evidence come within the province of the suppression court. We, however, make our own independent constitutional appraisal, by reviewing the relevant law and applying it to the facts and circumstances of this case.

Gonzalez v. State, 429 Md. 632, 647-48 (2012) (internal citations and quotation marks omitted).

In *Ballard v. State*, 420 Md. 480, 482 (2011), the Court of Appeals addressed whether, after waiving his *Miranda* rights, Ballard subsequently invoked his right to counsel. There, following a murder, police took Ballard into custody for questioning. *Id.* at 483. While in police custody, Ballard made several incriminating statements, and the State eventually indicted him on charges of first-degree murder and related offenses. *Id.*

Prior to trial, Ballard "filed a motion to suppress a portion of what he disclosed during that interrogation." *Id.* Ballard acknowledged that he was properly "Mirandized" and that he waived his *Miranda* rights before speaking to the interrogating officer. *Id.* During the interrogation, however, the following colloquy took place between Ballard and a detective:

> [Ballard]: You mind if I not say no more and just talk to an attorney about this.
>
> [Detective]: What benefit is that going to have?
>
> [Ballard]: I'd feel more comfortable with one.

Id. at 485. At his suppression hearing, Ballard argued that by uttering the words "You mind if I not say no more and just talk to an attorney about this," he unequivocally invoked his right to counsel. *Id*. at 486-87. The suppression court denied his motion. *Id*. at 487.

On appeal, the Court of Appeals began by establishing the requisite framework to determine whether Ballard successfully invoked his right to counsel:

> [i]nvocation of the *Miranda* right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.
>
> Rather, the suspect must unambiguously request counsel. As we have observed, "a statement either is such an assertion of the right to counsel or it is not." Although a suspect need not "speak with the discrimination of an Oxford don," he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, [*Edwards v. Arizona*, 451 U.S. 477 (1981)] does not require that the officers stop questioning the suspect.

Id. at 490 (quoting *Davis v. United States*, 512 U.S. 452, 459 (1994)). The Court summarized, "In short, if, from the perspective of a reasonable officer, the suspect's statement is not an unambiguous or unequivocal request for counsel, then the officers have no obligation to stop questioning him." *Id*. at 491.

Turning to Ballard's actual statement, the Court ruled that the statement "You mind if I not say no more and just talk to an attorney about this," "was a sufficiently clear articulation of his desire to have counsel present during the remainder of the interrogation, such that a reasonable police officer . . . 'would understand the statement to be a request for an attorney.'" *Id*. (quoting *Davis*, 512 U.S. at 459). In reaching this decision, the Court compared Ballard's statement to statements uttered in: *Davis v. United States*; *Matthews v. State*, 106 Md. App. 725 (1995); and *Minehan v. State*, 147 Md. App. 432 (2002). *Id*. at 491-92. In *Davis*, the Supreme Court held that the statement "Maybe I should talk to a lawyer" was an ambiguous invocation of the right to counsel. 512 U.S. at 462. In *Matthews*, our Court held that "Where's my lawyer?" was an ambiguous assertion of the right to counsel. 106 Md. App. at 737-38. Finally, in *Minehan*, our Court noted in dicta that "Should I get a lawyer?" would likely constitute an ambiguous request under *Davis*. 147 Md. App. at 443-44.

The Court distinguished Ballard's statements from those in *Davis*, *Matthews*, and *Minehan*, stating:

> None of the statements under consideration in those cases—"Where's my lawyer," "Maybe I should talk to a lawyer," or "Should I get a lawyer"—provides any indication that the suspect, at the time the statement was uttered, actually desired to have a lawyer present for the remainder of the interrogation.

Ballard, 420 Md. at 492. Assuming that Ballard's statement were phrased as a question—as the suppression court had—the Court nevertheless held that his request was unambiguous. *Id*. This was so because

> A speaker who begins a statement with the phrase, "you mind if . . ." suggests to his or her audience that the speaker is about to express a desire, whether to do something or have something occur. The phrase "you mind if . . ." in this context is a colloquialism; it is reasonably assumed that the speaker is not actually seeking permission to do the thing desired or to have the desired thing occur.

Id. at 492-93. Even if the phrase were not a colloquialism, however, the Court still would have held that Ballard unequivocally invoked his right to counsel. *Id*. at 493. The Court explained that,

> even if viewed not as a colloquialism but rather as having literal meaning, the import of the words is no different. Viewed from the perspective of a reasonable police officer in the position of [the interrogation detective], the most that could be said about [Ballard's] words, "You mind if I not say no more and just talk to an attorney about this," is that [Ballard], though undoubtedly asking for an attorney, sought to couch the request in polite or (more likely, given the context) deferential terms. In other words, to the extent that the phrase "you mind if . . ." is understood as [Ballard] genuinely posing a question, the only question he reasonably posed was whether [the detective] "mind[ed]" if [Ballard] stopped talking and got an attorney.

Id. (footnote omitted). Because the phrase "you mind if . . ." did nothing to detract from Ballard's clear desire for the assistance of an attorney, the Court held that Ballard unequivocally invoked his right to counsel. *Id*. at 494.

Appellant argues that he invoked his right to counsel when he told the police, "I'm not even trying to talk, man, without my lawyer." We agree. A literal interpretation of the phrase "I'm not even trying to talk" makes little sense. The verb "try" means "to make an attempt at" or "to put to test or trial." Try, Merriam-Webster, https://www.merriam-webster.com/dictionary/try. Synonyms for "try" include "attempt," "endeavor," and "strive." Try, Merriam-Webster, https://www.merriam-webster.com/thesaurus/try. Interpreted literally, appellant told the officers that he was not going to make an attempt to

talk without his lawyer. We do not construe appellant's language to mean that he was not going to make any attempt to talk. Indeed, he was able to—and did—talk to the police. Instead, like the Court of Appeals in *Ballard*, we construe appellant's language as a colloquialism for the phrase "I do not want to talk without my lawyer." Had appellant uttered the phrase, "I do not want to talk, man, without my lawyer," there would be no dispute that he unequivocally invoked his right to counsel. In our view, a reasonable police officer in the detective's position should have construed appellant's statement as a request not to talk further without a lawyer. Accordingly, appellant unambiguously invoked his right to counsel.[3]

Although we conclude that appellant unambiguously invoked his right to counsel, we must still determine whether the subsequent statement "What is going to do me [sic],

[3] In its brief, the State argues that, even if appellant unambiguously invoked his right to counsel, his statement was still voluntary because appellant "immediately reinitiated the conversation." We reject this contention because the police never ceased their interrogation following appellant's unambiguous invocation. In *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), the Supreme Court stated that,

> when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. . . . [He] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Here, a valid waiver cannot be established simply because appellant responded to further police-initiated interrogation following his invocation of the right to counsel. *Id.* Furthermore, even if appellant had reinitiated communication, in order for his statements to be voluntary, a knowing and voluntarily waiver of his *Miranda* rights was required. *In re Darryl P.*, 211 Md. App. 112, 155 (2013).

this talking?" rendered that invocation ambiguous. For clarity, the context in which appellant invoked his right to counsel is as follows:

> [Detective Pamer]: What did Liz take from you? You said she stole something from you, I'm just wondering what she stole.
>
> [Appellant]: At this point man, I ain't even [unintelligible]
>
> [Detective Pamer]: You're not worried about that?
>
> [Appellant]: I'm not even trying to talk, man, without my lawyer. I just want some help. What is going to do me [sic], this talking? What's gonna come–
>
> [Detective Pamer]: Obviously you have a problem that you need to have addressed. People do crazy stuff when they're dope sick, you know? We see it every day.

In its brief, the State argues (in the alternative) that even if appellant invoked his right to counsel, his request was ambiguous because "[appellant] indicated that he was not trying to talk to the officers without a lawyer while simultaneously asking the officers for information and in an apparent attempt to negotiate[.]" We disagree with the State's contention that appellant's question "What is going to do me [sic], this talking?" rendered his invocation ambiguous.

In *Williams v. State*, 219 Md. App. 295, 323 (2014), *aff'd*, 445 Md. 452 (2015), we considered whether Williams unambiguously invoked his right to remain silent during a custodial interrogation when he told police "I don't want to say nothing. I don't know[.]"[4]

[4] Although *Williams* concerned invoking the right to remain silent, rather than the right to counsel, "The right to silence is invoked in precisely the same way that the right to counsel is invoked. The right to counsel is waived in precisely the same way that the right to silence is waived." *In re Darryl P.*, 211 Md. App. at 169.

There, we held that although the initial phrase "I don't want to say nothing" constituted an unambiguous invocation, the subsequent phrase "I don't know" rendered the invocation ambiguous. *Id*. at 326. In reaching this conclusion, we explained that,

> As a classic expression of uncertainty, "I don't know" introduced a level of doubt into the message being communicated by [Williams] to [the police officers]. Indeed, the inclusion of those three words strongly suggest[ed] that [Williams] himself—let alone the police officers whom the law charges with understanding his intent—was unsure of how to proceed. At most, [Williams's] comment suggested that he *might* want to remain silent.

Id. at 327 (footnote omitted). Our Court was bolstered in this conclusion by the fact that apparently "all of the cases that we [had] found analyzing comments that include[d] the phrase 'I don't know' found such comments to be ambiguous." *Id*. at 327 n.10.

Whereas the phrase "I don't know" introduced a level of doubt into Williams's message, here the phrase "What is going to do me [sic], this talking?" arguably bolstered appellant's invocation. The phrase "What is going to do me [sic], this talking?" indicated that appellant could not perceive any benefit from talking to the police (without an attorney)—it was not an expression of doubt about invoking the right to silence like in *Williams*.

In sum, when appellant uttered the phrase "I'm not even trying to talk, man, without my lawyer," the police were required to cease their interrogation. "If the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease." *Berghuis v. Thompkins*, 560 U.S. 370, 388 (2010). Accordingly, the suppression court erred in failing to suppress all of appellant's statements subsequent to

his unambiguous invocation.[5]

II. Harmless Error

Despite our conclusion that the suppression court erred in admitting the portion of appellant's confession following his invocation of the right to counsel, we must still decide whether the error was harmless.

> [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

[5] Although we agree with appellant's argument concerning his invocation of the right to counsel, we summarily reject appellant's alternative arguments that: (1) the police improperly induced appellant's inculpatory statements by a promise of drug treatment, and (2) appellant's statements were involuntary under the totality of the circumstances.

In his brief, appellant claims that the police induced him to speak by acknowledging his heroin addiction, telling appellant that "sometimes [confessing] is the best intervention right here," and "Sounds like you need some treatment." Because none of these statements constituted a threat, promise, or inducement, we reject appellant's inducement argument. *See Hill v. State*, 418 Md. 62, 76 (2011).

In his "totality of the circumstances" argument, appellant claims that he had limited reading comprehension, was high on prescription drugs, was suffering from heroin withdrawal, and was "lethargic and sick" during the interrogation. At the suppression hearing, however, appellant agreed with the State that "throughout large portions of this interview, [appellant was] not only not nodding off, [he was] alert and [he was] basically running the show." In rejecting appellant's motion to suppress, the suppression court found that "[appellant] was communicating and in fact, he was trying to negotiate a deal with respect to giving the police the name of a drug dealer and he was constantly trying to extract promises from the police." We cannot conclude that this finding is clearly erroneous, and accordingly reject appellant's argument that his statement was involuntary under the totality of the circumstances.

Finally, we note that on his Advisement of Rights form, appellant indicated in writing that promises and/or threats had caused him to waive his *Miranda* rights and speak with the detectives. Confusingly, the video of the interrogation shows appellant orally indicating that he had received no such promises or threats. In his reply brief, appellant concedes that in the proceedings below he never relied on this discrepancy to argue that his waiver was involuntary. Because appellant failed to preserve this argument for appellate review, we decline to consider it.

> 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 v. State, 436 Md. 97, 108 (2013) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). "The harmless error standard is highly favorable to the defendant, and 'the burden is on the State to show that [the error] was harmless beyond a reasonable doubt' and did not influence the outcome of the case." *Perez v. State*, 420 Md. 57, 66 (2011) (internal citations omitted) (quoting *Denicolis v. State*, 378 Md. 646, 658-59 (2003)) (citing *Bellamy v. State*, 403 Md. 308, 333 (2008)). Additionally,

> In performing the harmless error analysis, we are not to find facts or weigh evidence. Instead, 'what evidence to believe, what weight to be given it, and what facts to flow from that evidence are for the jury . . . to determine.' 'To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record.'

Dionas, 436 Md. at 109 (internal citations omitted) (quoting *Bellamy v. State*, 403 Md. 308, 332 (2008)).

Turning to whether admission of appellant's confession constituted harmless error, we note that

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so."

Arizona v. Fulminante, 499 U.S. 279, 296 (1991) (quoting *Bruton v. United States*, 391 U.S. 123, 139-40 (1968)).

In its brief, the State does little to address the "harmless error" aspect of this case aside from noting that, prior to invoking his right to counsel, appellant "implicated himself in the robbery[.]" Prior to invocation, appellant told the detectives:

- "That was some spur of the moment thing, I'm just sick,"
- "I just wanted to scare their ass,"
- "I was getting so sick 'cause I knew they had some dope so I just did anything," and
- "I just went up there and, you know, I took their s**t."

Following his invocation, however, appellant made additional inculpatory statements, including, but not limited to:

- "I did that crazy s**t and I regretted it instantly because I know her, [Ms. Golden] is a good person,"
- "They sellin' drugs and s**t that's why we came in here and took that s**t,"
- Telling the detectives that he brought the gun "to scare them" and that he obtained the gun from his tattoo artist, and
- Offering to "get all of the players" including "the guy that was with [appellant]" and the "white boy" who "set it up."

Although appellant's pre-invocation statements were inculpatory, his post-invocation statements were much more inculpatory. Appellant's pre-invocation statements indicated that he stole from Ms. Golden and Mr. Bishop; his post-invocation confession indicated that he was armed with a gun during the robbery, that he obtained the gun from

his tattoo artist, and that he planned the robbery with others. By mentioning in his post-invocation statement that he used a gun while he was taking items from Ms. Golden and Mr. Bishop, appellant admitted that he had committed armed robbery, attempted armed robbery,[6] first-degree assault, and use of a handgun in the commission of a crime of violence. Appellant's pre-invocation statements did not specifically inculpate him in any of the charges related to the firearm.

Although the prosecution introduced evidence that Mr. Bishop believed he recognized appellant as the armed robber, that appellant appeared to admit he had just robbed Mr. Bishop and Ms. Golden when he entered the motel room unmasked, and that police recovered loose prescription medication and a loaded gun near appellant during his arrest, appellant's confession during the interrogation still presented the most damaging evidence inculpating him as the gunman in the armed robbery. We cannot conclude that the error of admitting this portion of his interrogation was "unimportant in relation to everything else the jury considered," nor can we conclude that the error "in no way influenced the verdict." *Dionas*, 436 Md. at 108-09. Accordingly, because we cannot conclude that the error was harmless beyond a reasonable doubt, appellant's convictions must be vacated.

III. Impeachment by Evidence of Prior Conviction

Finally, because the issue is likely to recur on retrial, we address whether the trial

[6] In closing argument, the State explained that it charged appellant with "attempted armed robbery" and related "attempt" crimes as against Mr. Bishop because the property stolen only belonged to Ms. Golden.

court erred in admitting evidence of appellant's prior conviction for robbery in 2012. On the second day of trial, appellant's trial counsel, aware that appellant intended to testify in his own defense, sought to exclude any mention of appellant's prior robbery conviction. In rejecting trial counsel's arguments, the trial court found that "the impeachment value of the prior crime . . . [was] high." The court acknowledged that the similarity between the prior crime and the conduct at issue in the instant case "lean[ed] in favor of not allowing the prior criminal activity." Nevertheless, the court concluded that appellant had the opportunity to make a statement when he spoke with the police, and because he planned to testify in contradiction to that statement, "his credibility [was] critical to the case." Accordingly, the trial court permitted the State to impeach appellant by introducing evidence of his prior conviction for robbery.

Maryland Rule 5-609 governs impeachment by evidence of conviction of a crime. The Rule provides in relevant part, that

> (a) **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.
>
> (b) **Time Limit.** Evidence of a conviction is not admissible under this Rule if a period of more than 15 years has elapsed since the date of the conviction, except as to a conviction for perjury for which no time limit applies.

In *Jackson v. State*, 340 Md. 705, 707 (1995), the Court of Appeals was tasked with determining whether the trial court erred in allowing the State to impeach Jackson's

credibility with evidence of a prior theft conviction. There, the State charged Jackson with theft for stealing computer equipment from the University of Maryland at Baltimore. *Id.* at 708-09. Before his trial, Jackson sought to exclude evidence of his involvement in two prior thefts which had taken place two years earlier. *Id*. at 709. Although Jackson received probation before judgment in one of the prior thefts, he was convicted in the other case. *Id*. The trial judge excluded evidence of the theft case that resulted in probation before judgment, but allowed the State to impeach Jackson using the conviction. *Id*.

On appeal, the Court of Appeals first summarized Rule 5-609 as follows:

> The Rule creates a three-part test for determining whether a conviction is admissible for impeachment purposes. First, a conviction must fall within the eligible universe to be admissible. This universe consists of two categories: (1) infamous crimes, and (2) other crimes relevant to the witness's credibility. Md.Rule 5-609(a). Second, if the crime falls within one of these two categories, the proponent must establish that the conviction is less than fifteen years old. Md.Rule 5-609(b). Finally, the trial court must weigh the probative value of the impeaching evidence against the danger of unfair prejudice to the defendant. Md.Rule 5-609(c).

Id. at 712-13 (internal citation omitted). Additionally, the Court noted that, "[w]hen the trial court exercises its discretion in these matters, [appellate courts] will give great deference to the court's opinion." *Id*. at 719 (citing *Prout v. State*, 311 Md. 348, 363-64 (1988); *Fleming v. Prince George's Cty*., 277 Md. 655, 679 (1976)).

Because Jackson conceded that the first two steps were met, the Court turned its attention to whether the probative value of the impeaching evidence outweighed the danger of unfair prejudice. *Id*. at 713. Jackson argued that "the similarity of the prior crime to the charged offense rendered the prior conviction so prejudicial as to outweigh any probative value that it may have had." *Id*. at 711. "In essence, [Jackson] propose[d] mandatory

exclusion of all prior convictions where those convictions [were] for the same type of crime as the offense that [was] charged." *Id*. at 713. The Court of Appeals rejected this argument. *Id*. at 714.

The Court explained the concern for prejudice as follows:

> The danger in admitting prior convictions as evidence to impeach the defendant stems from the risk of prejudice. The jury may improperly infer that the defendant has a history of criminal activity and therefore is not entitled to a favorable verdict. Such evidence may detract from careful attention to the facts, despite instructions from the Court, influencing the jury to conclude that if the defendant is wrongfully found guilty no real harm is done. Where the crime for which the defendant is on trial is identical or similar to the crime for which he has been previously convicted the danger is greater, as the jury may conclude that because he did it *before* he most likely has done it *again*.

Id. at 715 (quoting *Ricketts v. State*, 291 Md. 701, 703 (1981)). The Court further noted that "[t]his risk of prejudice is particularly great where the crime for which the defendant is on trial is identical or similar to the crime of which he has previously been convicted." *Id*. at 716. To aid in the balancing between probative value and unfair prejudice, the Court recognized five factors from *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir.), *cert. denied* 429 U.S. 1025 (1976): "(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." *Jackson*, 340 Md. at 717.

"Applying the *Mahone* factors to [Jackson's] case, four of the five factors weighed in favor of admitting the prior theft conviction." *Id*. at 720. First, the Court noted that "theft, because of its inherent deceitfulness, is universally recognized as conduct which

reflects adversely on a witness's honesty." *Id*. at 720-21 (citing *Beales v. State*, 329 Md. 263, 270 (1993); *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967)). Secondly, Jackson's "prior theft conviction was less than three years old." *Id*. at 721. Regarding the third factor, the Court noted that "similarity of the prior conviction to the charged offense, weighs against admission." *Id*. (citing *State v. McClure*, 692 P.2d 579, 591 n.11 (1984)).

Whereas the Court's analysis of the first three factors was somewhat perfunctory, the Court gave greater attention to factors four and five. The Court explained that "[f]actors four and five are restatements of the considerations that underlie the Rule: balancing the defendant's right to testify against the State's right to impeach the witness on cross-examination." *Id*. Rather than consider the two factors separately, the Court applied them together, stating

> Where credibility is the central issue, the probative value of the impeachment is great, and thus weighs heavily against the danger of *unfair* prejudice. [Jackson's] credibility clearly was central to this case; therefore, it was important for the State to be able to present evidence bearing on credibility. Thus, we resolve the balance between the two factors in favor of admitting [Jackson's] prior theft conviction.

Id. at 721-22. The Court concluded that the trial court did not abuse its discretion in allowing the State to impeach Jackson's testimony with evidence of his prior theft conviction.[7] *Id*. at 722.

[7] Although not dispositive to its analysis, the Court additionally noted that "the State did not overemphasize [Jackson's] prior convictions and, notably, never even mentioned the prior theft conviction in its closing argument. In addition, the trial court limited any prejudicial effect by instructing the jury to consider the evidence only in evaluating Jackson's credibility and for no other purpose." *Jackson*, 340 Md. at 722.

Like in *Jackson*, there was no dispute that appellant's 2012 robbery conviction was an infamous crime that occurred less than fifteen years prior to his trial in the instant case. Additionally, there was no dispute regarding the similarity of the prior conviction to the offenses charged. In balancing appellant's right to testify against the State's right to impeach, the trial court stated,

> So, the [c]ourt does find that the impeachment value of the prior crime, which is a robbery, is high and it is a crime that is considered high among those crimes that reflect on a person's trustworthiness, the period between the prior conviction and impeachment being six years. In one of the cases I read it was eight years, and they said it was neutral; it had no impact. So, I don't find that six years is too far removed to be relevant and probative.
>
> The similarity between the prior crime and that conduct at issue in this case, there is a similarity which would tend to lean in favor of not allowing the prior criminal activity admitted; however, I don't think that is necessarily determinative because the fourth factor, which has to do with the importance of the witness's testimony and his credibility, I agree with the State, that he had an opportunity to make a statement. So, that makes his testimony less important.
>
> He did have his shot at making a statement, and if he is now changing his mind as to what was said then and now, his credibility is critical to the case. It is the most important fact from what I know now.

The trial court did not abuse its discretion. Under the first *Mahone* factor, robbery, "because of its inherent deceitfulness, is universally recognized as conduct which reflects adversely on a witness's honesty." *Id*. at 721-22. Second, appellant's robbery conviction was six years old, which the trial court viewed as neutral. *Id*. at 722. Third, like in *Jackson*, the "similarity of the prior conviction to the charged offense, weighs against admission." *Id*.

Regarding the fourth and fifth factors, the trial court found that appellant's credibility was "critical to the case" because he was going to testify in contradiction to his

previous statement made during the police interrogation. As in *Jackson*, because "[a]ppellant's credibility clearly was central to this case . . . it was important for the State to be able to present evidence bearing on credibility." *Id*. at 721-22. Accordingly, the trial court did not abuse its discretion in allowing the State to impeach appellant with evidence of his prior conviction.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY VACATED. CASE REMANDED TO THAT COURT FOR A NEW TRIAL. COSTS TO BE PAID BY ANNE ARUNDEL COUNTY.