UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2738

September Term, 2011

ROBERT HARRIS

v.

STATE OF MARYLAND

Krauser, C.J.,
Kehoe,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: September 2, 2015

Following a re-trial, a jury in the Circuit Court for Baltimore City convicted Robert Harris, appellant, of the first degree murder of Teresa McLeod, conspiracy to commit first degree murder, use of a handgun in the commission of a crime of violence, and solicitation of murder. He was sentenced to life without parole for murder, a consecutive twenty years for use of a handgun in the commission of a crime of violence, and a concurrent life sentence for conspiracy to commit murder. The solicitation conviction was merged for sentencing purposes.

Appellant raises the following issues for our review:

> 1. Did the trial court err in limiting the defense's cross-examination of a police officer?
>
> 2. Did the trial court err in denying [a]ppellant's motion for a continuance after defense counsel became suddenly ill and had to be hospitalized immediately prior to trial?

Applying Maryland Rule 5-608(b) and lessons from *Fields v. State*, 432 Md. 650 (2013), we conclude that appellant should have been allowed to cross-examine former Baltimore City Police Detective Darryl Massey about his prior misconduct in submitting falsified time sheets, as reported by the Baltimore City Police Department Internal Investigation Division. Det. Massey was the lead homicide detective in this murder investigation. Based on the decision and the rationale in *Fields*, discussed in detail below as it applies to this case, we shall hold that the trial court erred in granting the State's pre-trial motion *in limine* to preclude cross-examination of Det. Massey about such prior

misconduct. Because the error was not harmless, we must reverse appellant's convictions and remand for a new trial.

FACTS AND LEGAL PROCEEDINGS

Appellant was convicted of killing his fiancee in a murder-for-hire scheme. On the evening of January 26, 1996, Teresa McLeod was shot six times with a Glock handgun registered to appellant. Five of the shots were fired at close range – less than six inches – into Ms. McLeod's back; appellant suffered only a single gunshot wound in his thigh. Although appellant reported that they were ambushed and shot by a masked robber, he was charged with Ms. McLeod's murder.

In April 1997, a jury found appellant guilty of murder and related crimes. *See Harris v. State*, 407 Md. 503, 506 (2009). Because the State did not disclose to the defense impeachment evidence relating to sentencing leniency for key prosecution witnesses, appellant obtained post-conviction relief and was granted a new trial, *id.* at 526, which took place in January 2012.

The State's prosecution theory was that appellant, who had financial troubles, hired Russell Brill as a "hit man," promised to pay him out of Ms. McLeod's life insurance proceeds, supplied Brill with a pager and the murder weapon, and drove Ms. McLeod to a pre-arranged location at Violetville Park, where Brill confronted them in a staged robbery. Appellant then either ordered the murder or committed it himself.

Appellant's defense was that the day before the shooting, Brill purchased the Glock from him on credit and arranged to pay appellant at the park, but instead robbed them. When Ms. McLeod hit back, appellant shot her and then appellant.

The State presented testimony from Russell Brill and witnesses who corroborated critical aspects of his account of appellant's murder-for-hire scheme, from Det. Massey and other police investigators, and from an inmate who claimed that appellant tried to hire him to falsely testify that Brill had confessed to him that appellant had nothing to do with the murder.

The evidence showed that when Baltimore City police officers responded to the scene of the shooting, appellant described the shooter as "a tall thin black male, wearing a camouflage jacket," a black beanie, a face mask, and black and white pants. No suspects matching that description were found. Although appellant reported that the robber took his money clip and grabbed Ms. McLeod's necklace, police recovered from Ms. McLeod's body a watch and other jewelry, as well as cash. Her purse was on the ground near her body, and a gold chain was found in the woods nearby.

Investigation led police to Russell Brill and several of his associates, who eventually directed police to a package they had buried in the cemetery next to the park. Inside were the murder weapon, a nine millimeter Glock; blood-stained jeans and a plaid flannel jacket worn by Brill; his gloves and face mask; and bullets like those that killed Ms. McLeod.

Baltimore City Police Detective Darryl Massey was the primary homicide investigator. He directed crime scene technicians, recovered bullet casings near Ms. McLeod's body, and interviewed all of the principal witnesses. He was present at the scene while appellant was still being treated by paramedics. He testified that he discovered a nurse cleaning appellant's hand and directed her to stop so that a gunshot residue test could be conducted. No gunshot residue was recovered from appellant's hands. Det. Massey authenticated and described many of the crime scene photos.

At trial, Det. Massey testified that Joseph Brill led him to the evidence buried in the cemetery. Russell Brill told him that he agreed to murder Ms. McLeod for $20,000, which was to be paid out of her life insurance proceeds.[1] The murder was supposed to look like a robbery. After Brill failed to show up for the first "hit" planned by appellant, which was supposed to have occurred at Ms. McLeod's workplace, appellant came up with the plan to

[1] Barbara Arthur, Ms. McLeod's mother, testified that the relationship between her daughter and appellant was strained due to financial trouble and that appellant did not contribute to the bills. Ms. McLeod had one insurance policy that listed Ms. Arthur as primary beneficiary and Ms. McLeod's son as the secondary beneficiary.

Adam Miller, a life insurance agent, testified that Berkshire Life Insurance Company had issued two life insurance policies on Teresa McLeod's behalf in the amount of one hundred and fifty thousand and one hundred thousand dollars, respectively. Sometime in 1994 or 1995, Ms. McLeod called to inform him that she had gotten engaged and inquired into how she would go about making a beneficiary change if she were so inclined. He thought he heard a male voice in the background asking questions like, "can it be done?" Nevertheless, Ms. McLeod never changed her beneficiary, and the proceeds of her policies were paid to Ms. Arthur.

murder her in the park. Appellant provided Brill with a pager and the gun later recovered from the cemetery.

Brill, whose race and attire did not match appellant's description of the robber, admitted to Det. Massey that after receiving a page from appellant, he waited, as planned, in Violetville Park. Brill confronted the couple, brandishing the Glock. He told Det. Massey that he snatched a gold chain from Ms. McLeod's neck; police recovered that chain where Brill said he dropped it, in a wooded area about fifty feet from where Ms. McLeod was shot. Although Brill initially told Det. Massey that he then shot Ms. McLeod, he later claimed that it was appellant who did so, because he panicked and could not do it.

Russell Brill's trial testimony was consistent with Det. Massey's account of his pre-trial statements. Brill testified that on the night of January 26, 1996, he was at the home of a friend, Nicholas Jantz, awaiting a page from appellant. Brill was equipped with the gun and pager that appellant had supplied, as well as a partial face mask, a hat, and gloves. When appellant paged him, Brill went to the parking lot of Violetville Park. As Brill waited in the trees, appellant parked, exited his vehicle, and opened his trunk to signal Brill to proceed. Brill approached appellant and asked whether "it was still a go"; appellant nodded "yes." At that point, Ms. McLeod got out of the car. Brill pointed the gun at her, demanded money, and snatched a chain from her neck, as she begged him not to hurt her.

According to Brill, when he saw that the victim was appellant's girlfriend, he "kind of freaked out," turned to appellant, and said, "I can't." Appellant wrested the gun away

from Brill and shot Ms. McLeod as she tried to run, firing five or six times. Appellant turned then the gun on Brill, who wrested it back and shot appellant in the leg. Brill ran to his brother Joseph's house, disposed of his clothing, and asked his brother to hide the gun.

Brill pleaded guilty to first degree murder, use of a handgun in a commission of a crime of violence, and conspiracy, for which he was sentenced to life with all but 50 years suspended. That sentence was subsequently reduced to life with all but 30 years suspended.

Nicholas Jantz corroborated Russell Brill's account of the murder plot, testifying that in the weeks before the murder, Brill told him that a man wanted him to "take care" of his wife for $20,000, to be paid from life insurance proceeds. Jantz repeatedly told Brill that "he was crazy" to become involved in the plot. On one occasion, Jantz was in the back seat of a car driven by appellant while he and Brill discussed their plans. Brill told appellant that Jantz was not going to be involved, and Jantz was wearing earphones so he could not hear details of their conversation.

On the night of the murder, Jantz saw appellant with the Glock and pager he got from appellant. When Brill received a page from appellant, he left Jantz's residence wearing the clothes and carrying the gun, mask, and gloves that police later found buried in the cemetery.

At the end of 1995 and the beginning of 1996, Jennifer Pettie was living with Russell Brill's brother, Joseph Brill. Russell Brill was living with them, and he told her "that a man had hired him to kill his wife." On the night of the murder, she recalled Nick Jantz and the Brill brothers discussing the plan and cleaning fingerprints off the gun. Russell Brill told her

that he was to be paid $3,000 before the job and the rest of the $20,000 when the insurance policy was paid.

Ms. Pettie was present when Russell Brill returned to their apartment from Violetville Park. "[C]rying and shaking," Brill "said that he could not believe that he did it." He explained that he shot the woman multiple times because "[h]e got trigger happy"; he then shot the man once in the leg because the man wanted it to look like a robbery. Russell Brill removed his clothes and stashed the gun. On Super Bowl Sunday, when police officers took Mr. Jantz to the police station for questioning, Russell and Joseph Brill retrieved the gun and clothing, then buried it in the cemetery next to Violetville Park.

Pursuant to an agreement with the State's Attorney regarding other offenses, Donnell Bartee testified that in April 1996, he was incarcerated for murder at the Baltimore City Jail, in the same unit as Russell Brill. Brill told him that "he was locked up for something that he didn't do" and that his co-defendant had put him there. Later, at the same facility, Bartee spoke with appellant. Appellant offered him money to tell his lawyer that Russell Brill had confessed to the crime, exonerating appellant. As a result of a plea agreement, the State dropped a first degree murder charge against Bartee, then obtained a second degree murder conviction. Although Bartee was on probation for attempted murder at the time that he was charged with new murder, drug, and weapons offenses, he served a total of only twelve years on all those charges.

Appellant denied any involvement in Ms. McLeod's murder. His defense was that Russell Brill, instead of paying appellant for the Glock he bought the day before, set appellant up for the robbery, then murdered Ms. McLeod in anger when she fought back.

Appellant testified that he met Ms. McLeod in 1993 and became engaged to her later that year. In 1995, he met Russell Brill through a mutual friend, after appellant indicated that he wanted to sell two of his guns in order to prevent them from being around Ms. McLeod's nine-year-old son. On the day before Ms. McLeod's murder, appellant sold Russell Brill his Glock. Brill promised to pay appellant after he sold the gun to another friend. Appellant gave Brill a pager so that Brill could contact him after he received the money. The next day, Brill arranged to meet appellant at Violetville Park, ostensibly to bring the money he owed.

Following dinner at a nearby restaurant, appellant and Ms. McLeod went to the park to meet Brill. After waiting about ten minutes, a man dressed in black jeans, a mask, and a plaid flannel shirt approached appellant's side of the car, demanded his wallet, ordered Ms. McLeod out of the car, and demanded her purse. According to appellant, when the robber reached for her necklaces, Ms. McLeod swung her purse at him and started fighting back. While appellant "just stood there," the robber shot her five or six times; he then shot at appellant twice, hitting him once.

Appellant testified that Donnell Bartee solicited money to testify on appellant's behalf and told him that "Brill was over there bragging about how he shot someone and then blamed the crime on them and got out of it."

DISCUSSION

Before trial, the State filed a written motion *in limine* to preclude cross-examination of Homicide Detective Darryl Massey about an Internal Investigations Division ("IID") complaint concerning his "involvement in an overtime issue" that resulted in his suspension. The trial court granted the motion. Appellant contends that this restriction on his impeachment cross-examination of Det. Massey violated his Sixth Amendment right of confrontation. Following the decision and rationale in *Fields v. State*, 432 Md. 650 (2013), we agree.

Fields v. State

The decision in *Fields*, which was filed more than a year after the ruling challenged in this appeal, was based on both a discovery violation and an improper restriction of impeachment cross-examination regarding falsified wage claims submitted by Det. Massey and another detective. Both of the overturned rulings related to a Baltimore City Police Department Internal Investigation Division investigation that, although unrelated to the crimes allegedly committed by co-defendants Fields and Colkley, indicated that Det. Massey had falsified his time sheets on multiple occasions in 2006 and 2007.

After reviewing summaries of the IID records *in camera*, the trial court refused to allow defense counsel to inspect them. *Id.* at 663. The Court of Appeals recognized that "'internal affairs records involving alleged administrative rule violations' by police officers are 'personnel records' under [the Maryland Public Information Act],'" which generally "are 'mandatorily exempt from disclosure by the custodian of records[.]'" *Id.* at 666. Judge Barbera, writing for a unanimous Court, explained that "[a] person facing criminal charges may be entitled nonetheless to discovery of confidential personnel records[,]" because even a legitimate "confidentiality interest" in such material "must yield, in the appropriate case, to the defendant's interest in having an opportunity to mount a defense and confront the witnesses against him." *Id.* at 666, 672 (citing *Robinson v. State*, 354 Md. 287, 308 (1999)). The *Fields* Court held that "the motion court, at a minimum, had the obligation to review the internal affairs files, not simply the summaries, to decide whether the files contained anything 'even arguably relevant and usable' by the defense to impeach the detectives and, *only* if the answer . . . were 'no,' then 'deny the defendant total access to the records.'" *Id.* at 670-71 (emphasis in original; citation omitted). The Court held that the trial court "committed legal error by failing to adhere" to that "protocol" in denying defense counsel the opportunity to review the IID records concerning the investigation of Det. Massey for submitting false overtime reports. *Id.* at 672-73.

The Court then addressed the trial court's impeachment ruling. Because of its strong relevance to the case *sub judice*, we set forth the Court's discussion in its entirety.

The trial court, relying on the motion court's discovery ruling, denied Petitioners the opportunity to cross-examine Detective Sergeant Massey and Detective Snead. The court assumed that the motion court's denial of discovery of the IID files automatically precluded Petitioners from seeking to impeach the detectives' credibility with the subject matter of the IID investigation. That led the trial court to deny Petitioners the opportunity to demonstrate their entitlement to cross-examine the detectives on the subject, notwithstanding that the court knew, because defense counsel made it known, that the IID investigation was based on the "sustained" allegation that the detectives had been "stealing overtime." Therein lie several errors on the part of the trial court.

"The Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant the right to confront the witnesses against him or her." *Pantazes v. State*, 376 Md. 661, 680 (2003). In exercising that right, a defendant may cross-examine a witness in order to impeach his or her credibility. *Id.* The common law rules regarding impeachment of a witness by resort to his or her prior bad acts, now codified in Maryland Rule 5-608(b), were laid out by us in *State v. Cox*, 298 Md. 173 (1983). We said in *Cox* that, although "mere accusations of crime or misconduct may not be used to impeach," we have allowed, given a proper showing, cross-examination of a witness regarding "prior bad acts which are relevant to an assessment of the witness' credibility." *Id.* at 179. To be sure, "if the bad acts are not conclusively demonstrated by a conviction, the trial judge must exercise greater care in determining the proper scope of cross-examination." *Robinson v. State*, 298 Md. 193, 200 (1983). Nevertheless, such inquiry is allowed "when the trial judge is satisfied that there is a reasonable basis for the question, that the primary purpose of the inquiry is not to harass or embarrass the witness, and that there is little likelihood of obscuring the issue on trial." *Cox*, 298 Md. at 180. In such instances, though, "the cross-examiner is bound by the witness' answer and, upon the witness' denial, may not introduce extrinsic evidence to contradict the witness or prove the discrediting act." *Id.* That said, the trial judge must be alert to the possibility of prejudice outweighing the probative value of the inquiry. *Id.*; *see* Md. Rule 5-403. Indeed, "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. A hearsay accusation of guilt has little logical relevance to the witness' credibility." *Cox*, 298 Md. at 181.

The trial court in the present case erred in assuming that, simply because Petitioners were denied any access to the IID files, they were precluded automatically even from attempting to demonstrate to the trial court a reasonable factual basis for cross-examination of the detectives. We know of no statute, rule of procedure, or case that supports the trial court's reasoning. **The trial court further erred in its application of Maryland Rule 5-608(b), given the undisputed facts that the Department's IID investigator had investigated the allegation of timesheet tampering by the detectives and found the allegation "sustained," and that finding was not challenged, must less overturned, by a Trial Board.** *See supra* note 4 and accompanying text.[2]

Based on this record, there is no doubt that, given the opportunity, Petitioners could have established a reasonable factual basis, required by Maryland Rule 5-608(b), that the asserted bad conduct by Detectives

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[2] Footnote 4 of the *Fields* opinion is as follows:

> The Law Enforcement Officers' Bill of Rights ("LEOBR"), Md. Code (2003, 2011 Repl. Vol.), §§ 3-101 *et seq*. of the Public Safety Article, describes the investigative process. The LEOBR treats differently complaints that are "sustained" from other possible findings and outcomes. Under § 3-110(a)(1), a law enforcement officer may request to have expunged the record of a formal complaint made against him or her (i) if the investigating agency exonerated the officer of the charges or "determined that the charges were unsustained or unfounded," or (ii) if "a hearing board acquitted the law enforcement officer, dismissed the action, or made a finding of not guilty." Subsection (b) adds that "[e]vidence of a formal complaint against a law enforcement officer is not admissible in an administrative or judicial proceeding if the complaint resulted in an outcome listed in subsection (a)(1) of this section." Notably, § 3-110(a) is silent as to complaints that are "sustained" by the investigating agency. Petitioners suggest that, consequently, § 3-110(b) does not prohibit introduction of evidence related to a sustained complaint. We express no opinion on that matter of statutory construction.

Fields, 432 Md. at 662 n.4.

> **Massey and Snead had occurred. There is no doubt, moreover, that such conduct would be probative of the detectives' "character for untruthfulness," as is also required by the Rule. Neither does the record suggest, on the other side of the balance, a good reason why the evidence would have been subject to exclusion on any other basis.** *See, e.g.*, Md. Rule 5-403. We therefore conclude that the trial court erred in failing to allow Petitioners, pursuant to Maryland Rule 5-608(b), the opportunity to demonstrate a reasonable factual basis for cross-examination of the detectives about the matter.

Id. at 673-75 (emphasis added).

Next, the Court of Appeals rejected the State's argument that the errors in denying Fields his rights to discovery and impeachment were "harmless to Petitioners' right to a fair trial." *Id.* at 675. The Court explained:

> Our well-established test for harmless error was adopted 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.
>
> The State maintains that the testimony of Detective Sergeant Massey and Detective Snead was relatively unimportant to the State's case, and impeachment of them using information in the IID files would have been of only marginal value to Petitioners' defense. But as our harmless error standard makes clear, it matters not that the detectives' testimony, as compared to other witnesses, was, in the State's view, less important to the State's case. Rather, in order for the State to prevail on a theory of harmless error, we must be satisfied beyond a reasonable doubt that the errors – here, the denial of access

to potentially significant impeachment evidence and the subsequent denial of an opportunity to demonstrate a reasonable factual basis for cross-examination – did not affect the outcome at trial. Our review of the testimony offered by the two detectives and the exhibits admitted through them does not persuade us, beyond a reasonable doubt, that an attack on their credibility would not have influenced the jury's verdicts.

Detective Kerry Snead was the primary detective, meaning he was assigned to lead the investigation of the shooting. In his testimony, he used a previously admitted sketch of the area that showed the lay of the land and photos of the crime scene to describe some of the physical evidence recovered in the investigation. Detective Snead also stated that he was present during the autopsy of the murder victim, James "Buck" Bowens. It was Snead who recovered from the medical examiner the fatal bullet that was removed from Bowens's body.

Detective Sergeant Darryl Massey was the supervisor of the homicide unit team (which included Detective Snead) that investigated the shooting. While describing his interviews of both Petitioners at the police station, Detective Sergeant Massey relayed to the jury statements made by Petitioner Colkley during his interview and while making a telephone call from the station. In particular, Detective Sergeant Massey testified that Petitioner Colkley stated "Yo, Pooh, what you tellin' them people?" as he walked past the window of the holding cell where Petitioner Fields was visible inside. This statement came just minutes after Colkley denied to the detective knowing anyone named "Pooh." Detective Sergeant Massey also testified about the interviews and photo arrays conducted with two witnesses who were deceased by the time of the retrial, Edwin Boyd and Qonta Waddell. The tape recordings of those interviews were played for the jury.

We agree with the State that the accounts of two other live witnesses, Eric Horsey and Jermaine Lee, were likely more compelling to the jury than the testimony of the detectives. Nevertheless, **we decline the State's invitation to speculate as to what the jury may have made of the potentially admissible impeachment evidence contained in the IID files.** "In a jury trial, judging the credibility of witnesses is entrusted solely to the jury, the trier of fact; only the jury determines whether to believe any witnesses, and which witnesses to believe." What we can say for certain is that the State has not made its case that the legal errors committed by the motion

> court and the trial court were harmless beyond a reasonable doubt. Petitioners, accordingly, are entitled to a new trial.

Id. at 675-77 (citations omitted; emphasis added).

The Record *Sub Judice*

The State filed a pre-trial motion *in limine* to preclude cross-examination of Det. Massey on what it characterized as the "unrelated issue" of "a prior Internal Investigation Division ('IID') complaint" pertaining to the detective's "involvement in an overtime issue." The State proffered the following information from the IID investigation of Det. Massey:

> The State expects to present the testimony of Detective Darryl Massey, who was employed by the Baltimore Police Department (hereinafter referred to as BPD) at the time of the alleged murder. The BCSAO [Baltimore City State's Attorney's Office], disclosed prior to the current trial that Detective Darryl Massey, had been suspended for an alleged involvement in an overtime issue. Since the first trial Detective Massey has retired from the department. **From September 2006 through January 2007, members of the Baltimore City Police Internal Investigations Division (hereinafter referred to as IID) conducted an investigation into allegations of overtime abuse by the Eastern District Detective Unit, Detective Massey was one of the officers that was investigated. Surveillance of Detective Massey was conducted on the following dates: December 11, 2006, December 12, 2006, December 14, 2006, January 3, [2]007, and January 5, 2007. The investigation compiled the following factual data:**
>
> On December 11, Detective Massey was on a scheduled day off. Surveillance of him indicated that he was home until 1:40 P.M. when he left his house to go to the Food Lion. He returned home at approximately 2:00 P.M. He submitted a daily overtime slip from 9:30 a.m. to 6:30 p.m.
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> On December 12, 2006 Detective Massey was scheduled to work from 6:00 P.M. to 2:00 A.M. Surveillance indicated he left his home between 11:00-11:45 a.m. and arrived at Eastern District at 1:45 p.m. He submitted an overtime slip from 8:30 a.m. to 5:39 p.m.

> On December 14, 2006, Detective Massey was scheduled to work from 6:00 p.m. until 2:00 a.m. Surveillance indicated that he left his residence at 9:00 a.m. and was observed driving on I-83 heading south at 9:45. He submitted an overtime slip for 4:00 a.m. to 5:39 p.m.
>
> On January 3, 2007, Detective Massey was scheduled for a P-Day (a permission day). Surveillance indic[a]ted that he left his home at 10:00 a.m. and arrived at Eastern District at 11:20 a.m. A court overtime slip punched by the Baltimore Police Department indicated he was in court from 8:47 a.m. to 5:54 p.m. The case for which Detective Massey was in court was postponed. According to the investigation, the case had concluded at 12:08 p.m.
>
> On January 5, 2008 Detective Massey was scheduled for a P-Day. Surveillance indicated that he left his residence between 8:20 a.m. and 9:30 a.m. He submitted a court overtime slip from 8:28 a.m. until 6:18 p.m. The case for which Detective Massey was in court was postponed at 10:14 a.m.
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> The overtime slips for January 3 and 5 indicated that Detective Massey was physically present in court as both slips were signed by an assistant state's attorney. The slips were punched in by a time clock which stamped Baltimore City Police Department at the top of the slip.
>
> The case concerning Detective Massey was administratively closed on June 22, 2009 by the Baltimore City Police Commissioner.

(App.1-2)

Although the IID charges against Det. Massey were initially sustained, those charges were later changed to "unsustained," because the Baltimore Police Department and the Fraternal Order of Police entered into a "Memorandum of Understanding" providing that any previously sustained IID charges would be converted to "unsustained" status upon administrative closure of a disciplinary case. In support of its motion to preclude cross-examination regarding Det. Massey's falsification of overtime reports, the State argued that

the under section 3-110(B) of the Maryland Public Safety Code, governing expungement of a record, the IID complaint against Det. Massey was inadmissible because the action was dismissed after the previously sustained IID charges were converted to "unsustained" status upon administrative closure of the case.

At a motions hearing conducted on January 10, 2012, defense counsel argued that the conduct detailed in the IID investigation satisfied the threshold requirement under Maryland Rule 5-608(b) that there must be "a reasonable factual basis for asserting that the conduct of the witness occurred." Defense counsel further argued that any *post hoc* change in the status of the IID records pursuant to confidentiality provisions of the Public Safety Article, could not defeat appellant's Sixth Amendment right to impeach Det. Massey by cross-examining him about the misconduct detailed in the IID investigation. (M1.109-11)

The following day, the trial court granted the State's motion, explaining its decision in the following bench ruling:

> The State's pending motion is State's motion in limine precluding cross examination of law enforcement witness on an unrelated issue. I have referred to the *Pantazes* case, I have also read and determined that the analysis in *Height versus Maryland*, 185 Md. App. 317, a 2009 decision, Judge Debby Eyler wrote it, is useful. I paid close attention to the implications of the right of confrontation as the defendant seeks to introduce, and well, impeach, Detective Massey with evidence of false time cards or overtime claims in 2006, 2007. I revisited Maryland rule of evidence – I don't see a rule book handy, but I have revisited the rule of evidence 5-608, subpart B. The questions posed, the analytical path, if you will, posed by that rule is whether the potential overtime fraud is probative of Detective Massey's credibility in this case, and if it is, how can the defendant establish a reasonable factual

basis for asserting the false time slips circumstances, especially where the conduct may not be proved, cannot be proved by extrinsic evidence.

On the face of the rule looking at that point in more detail, I will also note that the charges of the overtime, what was investigated, what was charged and subsequently investigated by the IID, those charges are not admissible evidence according to the Public Safety Article section 3-11 OB. That would leave the defendant only to ask Detective Massey about those 2006, 2007 time sheets to establish, quote unquote, a reasonable factual basis for the charges.

I am going to harken back to the first element of rule 5-608-B to make my decision. I cannot and will not find that lying on the detective's time sheets in 2006, 2007 even if there was a way in which to address a reasonable factual basis for that event or circumstances, the notion of lying on his time sheets in the absence of a formal finding of, or any employer discipline, is not sufficiently reliable to be considered aptly by the jury to assess his truthfulness and credibility. The time sheet issue, the overtime falsification, is not conceptually or probatively connected to Detective Massey's work in 1996 or his testimony at trial of '97, or to his testimony about the now ancient events of 16 years ago in 1996. There was no IID finding and I question whether the mere fact of overtime related charges could be relevant to his credibility as a witness describing events, his observations on the job in 1996.

Instead, I think the issue would be more likely to be distracting, confusing, and problematic to the jury's attention and assessment of Detective Massey's credibility. So I am going to grant the State's motion. I will exclude examination, cross examination of Detective Massey on the issue of falsification of overtime or other time slips in December of 2006 and January of 2007.

(Emphasis added.)

The jury convicted appellant on January 18, 2012. While this appeal was pending, the Court of Appeals issued its decision in *Fields*.

Appellant's Challenge

Appellant contends that *Fields* "made pellucidly clear" that "Detective Massey had lied on his time sheets and been investigated by IID, which ultimately filed a formal complaint against him," and that such conduct had "potential for impeachment." We agree.

The State's detailed recitation of the IID investigation data and the *Fields* Court's conclusions regarding the same evidence involving the same detective leave "no doubt that" there is a reasonable factual basis to conclude that the asserted bad conduct by Det. Massey actually occurred, as required under Rule 5-608(b), and "no doubt, moreover, that such conduct would be probative of the detective[']s 'character for untruthfulness,' as is also required by the Rule." *Fields*, 432 Md. at 674-75. The trial court's finding that such dishonesty was not relevant to impeach the detective's credibility is inconsistent with *Fields*.

We are not persuaded by the State's attempt to distinguish *Fields* based on the status of administrative proceedings stemming from the misconduct. The State posits that the trial court did not err in restricting appellant's cross-examination of Det. Massey because in this case, unlike *Fields*, the State attached administrative documentation showing that "that the charges became 'unsustained' when the cases were administratively closed, or that when the cases were administratively closed, they were 'dismissed as not viable for prosecution.'"

The State concedes that this is the same IID investigation of Det. Massey, which was conducted on the same dates "[f]rom September 2006 through January 2007," and resulted in the same compilation of "factual data" regarding the same specific instances when Det.

Massey submitted falsified time slips. As the *Fields* Court concluded, this detailed list of fraudulent claims establishes an adequate factual basis to conclude that the misconduct occurred.

Proof of disciplinary action against Det. Massey is not a prerequisite for prior misconduct impeachment under Rule 5-608(b). Just as Rule 5-608(b) does not require the cross-examiner to prove that the bad conduct resulted in a conviction, the rule does not require proof that such conduct resulted in a particular administrative action. Thus, appellant's right to cross-examine Det. Massey about his falsification of time sheets did not evaporate simply because the previously "sustained" administrative action subsequently became "unsustained" by virtue of the "administrative closure" and/or a memorandum of understanding between the Baltimore Police Department and the Fraternal Order of Police.

"[O]nly when defense counsel has been 'permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness,' is the right of confrontation satisfied." *Martinez*, 416 Md. at 428. Here, appellant was not permitted to challenge Det. Massey's character for untruthfulness by questioning him about his submission of false time sheets to the Baltimore City Police Department. The trial court erred in prohibiting appellant from cross-examining the detective about such prior misconduct.

As in *Fields*, this error was not harmless. Detective Massey was the lead homicide detective assigned to Ms. McLeod's murder investigation. His trial testimony catalogued

evidence recovered at the scene, narrated the crime scene photos, offered a reason why appellant did not have gunshot residue on his hands, and recounted corroborative statements made by appellant's accomplice, Russell Brill, thereby enhancing the credibility of the State's star witness. Although the jury likely found the testimony of Russell Brill, Jennifer Pettie, and Nicholas Jantz more compelling than Det. Massey's testimony, "we decline . . . to speculate as to what the jury may have made of" the evidence that the lead homicide detective submitted falsified time sheets to the Baltimore Police Department. *Fields*, 432 Md. at 676-77. Accordingly, we must reverse appellant's convictions and remand for a new trial.[3]

JUDGMENT REVERSED AS TO ALL COUNTS; CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

[3] In light of our holding, we do not address appellant's second assignment of error challenging the trial court's refusal to continue the scheduled trial date to accommodate one of appellant's hospitalized attorneys.