Circuit Court for Baltimore City
Case No. 118074021

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2817

September Term, 2018

QUENTIN ANTONIO HYMAN

v.

STATE OF MARYLAND

Beachley,
Gould,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Majority Opinion by Gould, J.
Dissenting Opinion by Adkins, J.

Filed: January 28, 2020

Appellant Quentin Antonio Hyman appeals from her convictions in the Circuit Court for Baltimore City for conspiracy to commit robbery, conspiracy to commit theft, and theft. The jury hung on ten other counts.

The incident can fairly be described as a drug deal gone bad. The victim, Sylvester Washington claims that instead of completing a simple sale of marijuana to Ms. Hyman, she and her friend robbed him of his marijuana stash and his cash at gunpoint. Although she downplayed her own role, Ms. Hyman acknowledged that Mr. Washington was separated from his drug stash, but denied that a gun was involved.

The trial boiled down to a credibility contest between Mr. Washington and Ms. Hyman. Mr. Washington testified at trial. Ms. Hyman did not testify, but the jury heard her side of the story through the video-recorded interview she had given to the detective assigned to the case. The only counts on which Ms. Hyman was convicted were either consistent with or supported by Ms. Hyman's account of the incident. In contrast, the ten charges on which the jury hung hinged on the veracity of Mr. Washington's testimony.

In this appeal, Ms. Hyman contends that the court erred by: (i) allowing the jury to consider multiplicitous conspiracy counts; (ii) refusing to allow her to cross-examine the State's key witness, Mr. Washington, about his alleged failure to assist the police in identifying her co-conspirator; and (iii) failing to instruct the jury that in evaluating the credibility of the victim, it could consider benefits that he expected to receive from the State in return for his testimony.

As explained below, although Ms. Hyman failed to preserve her multiplicity claim of error, we nonetheless exercise our discretion under Maryland Rule 8-131(a) to review her argument and reject it on its merits. As to the cross-examination issue, Ms. Hyman's explanation on appeal of the relevance of the subject question differs from the explanation she proffered to the trial court, and therefore her argument on appeal has not been preserved. And finally, as for her argument that the court improperly refused to give the "expected benefits" jury instruction—we find no error because that instruction was not supported by the evidence. We therefore affirm.

BACKGROUND FACTS AND PROCEEDINGS

At trial, Mr. Washington was the State's key witness. We will begin by summarizing his testimony.

MR. WASHINGTON'S VERSION OF THE EVENTS

Mr. Washington testified that on November 22, 2017, he received a phone call from Ms. Hyman asking him to go to a motel to sell her marijuana. He had previously met Ms. Hyman on a dating site and "link[ed] up [with her] sometimes." When he got to the motel, Ms. Hyman gave him the option of coming up to her room or having her come down to him. He went up to the room so that they could smoke together. Once in the room, Mr. Washington put $20 worth of marijuana on a scale to sell to Ms. Hyman. At that point, Malcolm Newman, who was later determined to be Ms. Hyman's ex-boyfriend, came out of the bathroom brandishing a gun and threatened to shoot Mr. Washington unless he

turned over his marijuana and other possessions. Mr. Washington surrendered to Mr. Newman the marijuana and the $15 or $20 that he had in his pocket.

Mr. Washington further testified that Mr. Newman suspected he had more money, and threatened to shoot him if he did not hand it over. Afraid for his life, Mr. Washington told Mr. Newman that he had more money in his car. Mr. Newman sent Ms. Hyman to Mr. Washington's car to get the money, but she returned without it, saying that she could not find it. Ms. Hyman accused Mr. Washington of playing games and told Mr. Newman to shoot him.

Mr. Washington then told them precisely where in the car he had left $250. Ms. Hyman held a gun to him while Mr. Newman went to Mr. Washington's car to retrieve the money. When Mr. Newman returned with Mr. Washington's money, he told Mr. Washington to get up, put his hoodie over his head, and that they were going to walk Mr. Washington down to his car. At some point, Mr. Newman looked at Mr. Washington's address on his ID card to see where he lived.

Mr. Washington testified that Mr. Newman held a gun to Mr. Washington's back as Mr. Newman and Ms. Hyman walked him to the parking lot. Mr. Washington was told he would be shot if he tried to run. Mr. Newman and Ms. Hyman brought Mr. Washington down to their car and put him in the back seat.

Sometime during this incident, Mr. Washington received a phone call from his supplier. That call gave Mr. Newman the idea of setting a trap for the supplier to rob him

as well, but decided against that plan after Mr. Washington convinced him that his supplier would suspect a trap.

Mr. Washington was given his car keys, phone, and wallet and told to leave. He left the parking lot and immediately reported the incident to a police officer who was across the street from the motel at that time.

MS. HYMAN'S VERSION OF EVENTS

As noted above, Ms. Hyman did not testify at the trial. But the jury saw and heard from her via her February 27, 2018 videotaped interview with the police. Ms. Hyman told the police that she was staying at a motel with Mr. Newman. She said that she wrote and posted a status on a social media and messaging platform called "Tagged,"[1] asking for 3.5 grams of marijuana in the Caton Avenue area. Mr. Washington, a man she had never spoken to or met before, responded to her post, saying he was close by. Ms. Hyman gave him a phone number to call when he was close to the motel.

Ms. Hyman further explained that when Mr. Washington arrived at the motel, Ms. Hyman gave him her room number, and he came up and started flirting with her. He then pulled out the marijuana and placed it on a scale, and Ms. Hyman went to her purse. Mr. Newman came out of the bathroom, startling Mr. Washington. Mr. Newman, attempting to blackmail Mr. Washington, pretended to record the scene by shining the camera flash on his phone and asked Mr. Washington if he knew he was in a room with a transsexual.

[1] The social media app is called "Tagged." During the trial, it was referred to as "Tag."

Mr. Newman said Ms. Hyman should get more than the 3.5 grams she had initially requested and asked Mr. Washington for more marijuana. In response, Mr. Washington produced multiple packets of marijuana which he gave to them without requesting any money in exchange. The marijuana was weighed and totaled 37 grams. Ms. Hyman told the officer there was no threat to Mr. Washington's safety, and therefore no reason for Mr. Washington to have given them anything. She did not have a weapon, never saw a weapon on Mr. Newman, and Mr. Newman did not pretend to have a weapon. She did not recall Mr. Washington receiving any phone calls.

To intimidate Mr. Washington into keeping silent, Mr. Newman wanted to know where he lived, so he demanded Mr. Washington's ID. Mr. Washington explained that his ID was in his car. Mr. Newman sent Ms. Hyman to find the ID, but she couldn't open Mr. Washington's car. When she came back without it, she said that Mr. Washington said, "I think my windows are down, you didn't think to put your hand in the window to unlock the car?" Ms. Hyman returned to the car and opened the car but did not find an ID. She returned to the room and told Mr. Newman, "I don't see his ID, go get it yourself."

Mr. Newman went to the car, leaving Ms. Hyman and Mr. Washington alone in the room. Mr. Newman found the ID and came back to the room. He took a picture of the ID and returned it to Mr. Washington. Mr. Newman then walked Mr. Washington out of the room.

LEGAL PROCEEDINGS

Based on Mr. Washington's account of the incident, Ms. Hyman was arrested and charged with robbery with a dangerous weapon (Count 1), conspiracy to commit robbery with a dangerous weapon (Count 2), robbery (Count 3), conspiracy to commit robbery (Count 4), first-degree assault (Count 5), conspiracy to commit first-degree assault (Count 6), second-degree assault (Count 7), conspiracy to commit second-degree assault (Count 8), use of a handgun in the commission of a crime of violence (Count 9), conspiracy to use a handgun in the commission of a crime of violence (Count 10), reckless endangerment (Count 11), theft of property with a value of at least $100 and less than $1,500 (Count 12), and conspiracy to commit theft of property with a value of at least $100 and less than $1,500 (Count 13).

After the State rested its case, Ms. Hyman moved for judgment of acquittal, claiming that the State had presented insufficient evidence to support each of the counts. The court disagreed and denied her motion.

The defense then rested, and Ms. Hyman renewed her motion for acquittal, which was again denied.

The jury deliberated for approximately five and one-half hours over two days. Of the thirteen counts, the jury convicted Ms. Hyman of Count 4 (conspiracy to commit robbery), Count 12 (theft of property with a value of at least $100 and less than $1,500), and Count 13 (conspiracy to commit theft of property with a value of at least $100 and less than $1,500), and hung on the other charges.

Ms. Hyman was sentenced to ten years' imprisonment on the conspiracy to commit robbery, with all but four years suspended; three months' imprisonment for the theft, with the sentence to run concurrent with the other sentence; and the conspiracy to commit theft count merged with the conspiracy to commit robbery count.

This timely appeal followed.

DISCUSSION

Ms. Hyman presents the following questions, which we have rephrased as follows:[2]

1. Did the trial court err by allowing the jury to consider six separate conspiracy counts?

2. Did the trial court improperly restrict the cross-examination of the State's key witness?

3. Did the trial court err by refusing to instruct the jury that its credibility assessment of the State's key witness could include promised benefits?

[2] The questions, as presented by Ms. Hyman, were:

1. Did the trial court err by allowing the jury to consider six conspiracy counts, even though the State presented evidence of only one agreement?

2. Did the trial court err by restricting cross-examination of the State's key witness regarding his failure to assist police in identifying Ms. Hyman's alleged co-conspirator?

3. Did the trial court err by refusing to instruct the jury that its credibility assessment of the State's key witness could include any promised benefits expected by the witness, who admitted to police he was dealing drugs but faced no consequences?

THE CONSPIRACY CHARGES

Ms. Hyman argues that the six separate conspiracy counts were multiplicitous and therefore "impermissibly prejudiced Ms. Hyman's right to a fair trial." As an initial matter, the State contends that because Ms. Hyman did not raise this objection at trial, it is waived. Ms. Hyman argues that the issue of multiple conspiracy charges was put before the court in her motion for judgment of acquittal and in the discussions about the jury instructions and verdict sheet, and therefore the issue has been preserved. Although we recognize that Ms. Hyman's arguments to the trial court related to the existence of multiple conspiracy charges, we conclude that the argument Ms. Hyman has advanced on appeal is, in substance, substantially different than the argument she made to the trial court. We will, however, exercise our discretion under Maryland Rule 8-131(a) and address the merits of Ms. Hyman's multiplicity argument.

Multiplicity Explained

We begin with a working definition of multiplicity. The Court of Appeals explained:

> Multiplicity is the charging of the same offense in more than one count. It is considered a pleading defect and thus is not fatal to an indictment or information. The vice of multiplicity is that it may lead to multiple convictions and sentences for the same offense and that "prolix pleading may have some psychological effect upon a jury by suggesting to it that [the] defendant has committed not one but several crimes." Some courts have held that an objection to a multiplicitous indictment or information is waived if not raised before trial.
>
> In *Ball v. United States*, 470 U.S. 856, 864–65, 105 S.Ct. 1668, 1674, 84 L.Ed.2d 740, 748 (1985), the Supreme Court held that both multiple convictions and multiple sentences come within the double jeopardy prohibition against multiple punishment for the same offense. Prior to *Ball*,

> a large number of courts had held that multiple convictions for the same offense could be affirmed if the underlying sentences were not cumulative.

Brown v. State, 311 Md. 426, 432 n.5 (1988) (internal citations omitted). "The rule against multiplicity is grounded in the Fifth Amendment's prohibition against double jeopardy, intending 'to prevent multiple punishments for the same act.'" United States v. Buchanan, 485 F.3d 274, 278 (5th Cir. 2007) (quoting United States v. Kimbrough, 69 F.3d 723, 729 (5th Cir. 1995)).

United States v. Clarridge, 811 F. Supp. 697 (D.D.C. 1992), cited by Ms. Hyman, illustrates the distinction between charges that are multiplicitous and those that are not. In Clarridge, the defendant was accused of giving false testimony before different congressional committees on different days. Id. at 700. The court held that multiple charges based on this testimony would not constitute the same offense for multiplicity purposes because for each separate charge, the testimony was only one of several elements. Id. at 703. The government was also required to establish that "each committee was a competent tribunal, that the testimony was material to those proceedings, and that the oath was properly administered." Id. On the other hand, where the defendant was accused of committing perjury by repeating the same lie in one proceeding, he could not be charged with multiple counts of perjury; by charging him so, "the government [wa]s artificially multiplying the charges by incorporating them in two counts rather than one." Id. at 704-05.

Maryland courts have dealt with multiplicity in the context of conspiracy counts. For example, in Mason v. State, 302 Md. 434 (1985), the Court of Appeals addressed the

double jeopardy implications with successive prosecutions for multiple conspiracy counts. After being charged with multiple offenses related to possession and distribution of cocaine, the defendant pleaded guilty to possession with intent to distribute cocaine. Id. at 437. In return, the State entered a nolle prosequi on the remaining charges, all involving cocaine, including the conspiracy to distribute controlled dangerous substances ("CDS") count. Id.

Four months later, the defendant was charged with the transport of CDS and multiple conspiracy charges based on the same events that gave rise to the previously resolved charges. Id. After the trial court denied his motion to dismiss on double jeopardy grounds, he pleaded guilty to conspiracy with intent to distribute cocaine and conspiracy with intent to distribute heroin. Id. On appeal, we vacated the conspiracy to distribute cocaine charge on the basis of double jeopardy, but not conspiracy to distribute heroin because "[c]onspiracy to distribute heroin and conspiracy to distribute cocaine are different offenses since 'each offense requires proof of a fact which the other does not.'" Id. at 438. The Court of Appeals disagreed.

Rejecting the State's position that the distribution of multiple different drugs supported separate and distinct conspiracy charges, the Court held that "a defendant who distributes a number of controlled dangerous substances in accordance with a single unlawful agreement commits but one crime: common law conspiracy. It is irrelevant that a number of controlled dangerous substances are involved in the single conspiracy." Id. at

445. The Court reversed the defendant's second conviction because it violated his "double jeopardy protection against successive prosecutions for the same offense." Id. at 447.

This Court addressed the multiplicity issue in Ezenwa v. State, 82 Md. App. 489 (1990). There, the defendants were charged with one count for conspiracy to import heroin and a separate count for conspiracy to distribute heroin. 82 Md. App. at 498. The defendants moved to dismiss the indictment on the basis that there could have been only one conspiratorial agreement. Id. The State conceded that point, but argued that both counts should be submitted to the jury because the "agreement had two distinct objectives" and, if convicted on both counts, the remedy would be that defendants would only be sentenced for one count. Id. As it turned out, the jury did convict them on both conspiracy counts, and the State's concession notwithstanding, they were sentenced on both. Id. at 499.

On appeal, we held that there was a multiplicity problem, but that "[s]uch a defect is a pleading defect and, consequently, not fatal to the indictment." Id. at 501 (citations omitted). But, we added, because the defendants were convicted and sentenced on both counts, "they were inappropriately punished" and "one of the conspiracy sentences must be vacated." Id. at 501.[3] We rejected the defendants' contention that the two conspiracy charges prejudiced the defendants by doubling the "criminal allegations" against them. Id.

[3] We determined that the "penalty should be determined by reference to the substantive offense having the greater maximum penalty." Id. at 504 (citations omitted).

In Rudder v. State, 181 Md. App. 426, 451 (2008), Judge Moylan explained multiplicity as when the "prosecution, in the charging process, safeguards itself with half a dozen fallback positions, anticipating the unreliable caprice of proof." Judge Moylan went on to explain that although an "omnibus conspiracy charge is infinitely to be preferred over a grab bag of chaotic little conspiracy charges, one shadowing each lesser included substantive count," sometimes "pleading excesses do occasionally occur." Id. Relying on Ezenwa, Judge Moylan reiterated that the "promiscuous multiplication of conspiracy charges" is a "non-fatal pleading malady that does not call for the dismissal of an indictment" and that the "saving grace is that no matter how many mini-conspiracies a defendant is convicted of, he will only be sentenced for a single maxi-conspiracy." Id. at 451-52; see also Tracy v. State, 319 Md. 452, 460 (1990) (second conspiracy conviction vacated, and one sentence imposed).

Ms. Hyman's Multiplicity Argument

Ms. Hyman argues on appeal that the multiple conspiracy charges from a single agreement "worked a profound prejudice" against her. **[AP Brief at 10.]** Quoting Brown v. State, Ms. Hyman explains that prejudice to her was derived from the "psychological effect upon a jury by suggesting to it that [the] defendant has committed not one but several crimes." **[AP Brief at 11.]** On that basis, Ms. Hyman argues that the "trial court committed reversible error by denying the defense's motion for judgment of acquittal on the multiple counts of conspiracy that the State pressed." **[AP Brief at 10.]**

We agree with the State that Ms. Hyman's multiplicity argument on appeal was not presented to the trial court and was therefore not preserved for our review under Rule 8-131(a). [4] From our review of the record, it appears that Ms. Hyman referred to the fact that she had been charged with multiple conspiracy counts on four occasions. The first was during her initial motion for judgment of acquittal, when she argued that the State's evidence only supported a single count for conspiracy to commit armed robbery, but did not support any of the lesser included conspiracy offenses. Ms. Hyman argued that "the State has to establish, for each count of conspiracy, a separate conspiracy to—to commit the completed offense that is the object of the conspiracy." Ms. Hyman contended that there was not "sufficient evidence to show four separate lesser conspiracies."

Ms. Hyman's argument was, therefore, based on the sufficiency of the evidence, not multiplicity. In fact, the case that Ms. Hyman referred to in support of her argument, McClurkin v. State, 222 Md. App. 461 (2015), does not discuss multiplicitous charges, and Ms. Hyman did not contend that it does. Rather, as Ms. Hyman's counsel argued to the

[4] Rule 8-131(a) provides:

> The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. 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, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

trial court: "in the context of McClurkin v. State, that came to the court, I think, by the way of a merger issue. But it actually is discussing sufficiency."

Ms. Hyman's trial counsel again referred to the multiple conspiracy charges (i) when she renewed the motion for judgment at the close of evidence, (ii) at the jury instruction charging conference, (iii) after the court instructed the jury, and (iv) in discussing the form of the verdict sheet. On each occasion, Ms. Hyman's counsel referred to the original argument she made in her motion for judgment of acquittal which, as discussed above, was predicated on an insufficiency of the evidence theory.

Ms. Hyman's arguments at trial regarding the multiple conspiracy counts were, therefore, very different in substance from the argument she has advanced on appeal. As such, Ms. Hyman's appellate argument has not been preserved. See Chaney v. State, 397 Md. 460, 468 (2007) (an objection that was never presented to the trial court is ordinarily waived).

Ms. Hyman argues that the preservation requirement is satisfied if the issue was raised in the trial court, even if the specific argument was not. As Ms. Hyman sees it, the issue raised in her motion for acquittal was "the number of conspiracy counts that the trial court should permit the jury to consider." Ms. Hyman argues, therefore, that the multiplicitous objections do "not present a new issue."

We disagree. Putting aside the words Ms. Hyman used to define the issues when she argued her motion for acquittal, a sufficiency of the evidence argument does not implicate the principles behind the multiplicity argument advanced on appeal. The

sufficiency argument tests whether the State adduced sufficient evidence to persuade a reasonable jury that the State has proven its claims beyond a reasonable doubt. Vuitch v. State, 10 Md. App. 389, 376 (1970) (a "motion for judgment of acquittal is essentially limited to challenging the legal sufficiency of the evidence to support a guilty verdict"). In other words, the sufficiency of the evidence goes directly to the purpose of the entire proceeding: to determine if the defendant is guilty or not guilty.

In contrast, in addition to ensuring that the defendant is punished only once for the same act, the multiplicity issue focuses on whether the sheer number of counts could create a prejudicial psychological impact on the jury. Brown, 311 Md. at 432 n.5. Thus, while sufficiency of evidence goes to the substantive finding of guilty or not guilty, the multiplicity issue goes to the fairness of the process. Here, the trial court was not asked and had no opportunity to determine whether the multiple conspiracy counts prejudiced Ms. Hyman's right to a fair trial. See Chaney, 397 Md. at 468 ("considerations of both fairness and judicial efficiency ordinarily require," *inter alia*, that "other parties and the trial judge are given an opportunity to consider and respond to the challenge."). We therefore conclude that Ms. Hyman's multiplicitous argument does indeed present a new issue. See Winston v. State, 235 Md. App. 540, 574-75 (2018) (internal citations omitted) ("a defendant may not tell the trial court that the evidence was insufficient for one reason, but then urge a different reason for the insufficiency on appeal in challenging the denial of a motion for judgment of acquittal").

We have the discretion under Rule 8-131(a) to address the multiplicity argument notwithstanding Ms. Hyman's failure to preserve it, and Ms. Hyman urges us to do so here. The exercise of such discretion is designed to "ensure fairness for all parties and to promote the orderly administration of law." Jones v. State, 379 Md. 704, 713-14 (2004). Such discretion should rarely be exercised. See Robinson v. State, 410 Md. 91, 104 (2009). Moreover, we are reminded to "review the unpreserved claim *only* where the unobjected to error can be characterized as 'compelling, extraordinary, exceptional, or fundamental to assure the defendant a fair trial' by applying the plain error standard." Abeokuto v. State, 391 Md. 289, 327 (2006) (quotation omitted) (emphasis added).

We are tempted to decline Ms. Hyman's invitation to exercise plain error review for the practical reason that, if we were to assume that her argument had merit sufficient to warrant a reversal, the failure to preserve it could conceivably result in a windfall to Ms. Hyman that would not have been possible had she timely raised the issue. In that regard, as emphasized in the case law discussed above, multiplicity is a pleading defect that is not fatal to the indictment. See Brown, 311 Md. at 432 n.5. But if we were to overlook Ms. Hyman's failure to preserve the issue and address its merits, we would be taking an issue that, if it *had* been raised at the appropriate time, would *not* have been fatal to the State's case, and turning it into an issue that, precisely because it had *not* been raised at the appropriate time, *could* be fatal to the State's case. However, there is no such risk here because we do not see merit in Ms. Hyman's multiplicity argument. We will therefore exercise our discretion under Rule 8-131(a) to explain why Ms. Hyman's multiplicity

argument on appeal lacks merit and why it makes perfect sense that Ms. Hyman's trial counsel did not argue the point in her motion for judgment of acquittal.

As discussed in Brown v. State, 311 Md. at 432 n.5, one of the dangers of multiplicity is that the defendant would be subjected to multiple punishments for a single offense. The purpose of a motion for judgment of acquittal, however, is to test the sufficiency of the evidence, not address potential sentencing issues. See Vuitch, 10 Md. at 376 (a motion for judgment of acquittal is limited to challenging the sufficiency of the evidence). It is no wonder, therefore, that Ms. Hyman's trial counsel did not raise the issue when she moved for judgment of acquittal—it would not have been appropriate to do so. Moreover, in point of fact, Ms. Hyman did not receive multiple punishments for a single offense because, at sentencing, the conspiracy to commit theft count merged with the conspiracy to commit robbery count. In that respect, therefore, Ms. Hyman's current multiplicity argument fails on its merits.

The other danger of multiplicity, and the one argued by Ms. Hyman on appeal, is the prejudicial impact that the amplification of charges could have on the jury. That, too, is not a basis for a motion for judgment of acquittal, and therefore once again, it is not surprising that Ms. Hyman's trial counsel made no such argument to the trial court.

More importantly, there is no indication in this record that the multiple conspiracy charges caused any prejudice to Ms. Hyman. The jury deliberated for over five hours. While deliberating, they sent back written questions to the court, including whether one can be guilty of conspiracy but not of the underlying crime. It is evident that the jury

carefully parsed the verdict form and applied the court's instructions because it hung on Counts 1 through 3, found Ms. Hyman guilty of Count 4, hung on Counts 5 through 11, and found her guilty of Counts 12 and 13. And, the counts on which she was convicted were the lesser included offenses.[5] In light of these results, we can find no indication that the jury was psychologically impacted to Ms. Hyman's detriment from the sheer number of conspiracy counts. For this reason as well, Ms. Hyman's multiplicity argument fails on its merits.

CROSS-EXAMINATION OF MR. WASHINGTON

Ms. Hyman argues that her right to cross-examine Mr. Washington was improperly restricted. The testimony at issue concerned Mr. Washington's apparent refusal to look at a photo array to identify Mr. Newman. After questioning Mr. Washington about some of

[5] Further, the State argued that Ms. Hyman's video-recorded statement provided sufficient corroboration of Mr. Washington's testimony to convict Ms. Hyman of robbery, conspiracy to commit robbery, assault, and theft. Specifically, the State pointed to her admission that she and Mr. Newman took Mr. Washington's property without paying for it and that they took Mr. Washington's ID, which had his address and picture on it, so that they would know where he lived—which the State argued was a threat of force sufficient to sustain the robbery charge. The State also argued that Ms. Hyman agreed to go look for Mr. Washington's ID card. In addition, we note that in explaining why they wanted a copy of Mr. Washington's ID card, Ms. Hyman implicitly acknowledged that, her protestations notwithstanding, she and Mr. Newman were up to no good. These admissions corroborated Mr. Washington's testimony that *something* bad happened to him, even if the jury couldn't fully credit Mr. Washington's testimony as to precisely *what* had happened to him. That the jury's guilty findings aligned with the admissions Ms. Hyman made in her interview suggests that the jury was far from confused about the nature and extent of the charges, and that it conducted its deliberations free of any negative psychological impact from the multiple conspiracy counts.

the details of the incident, defense counsel pivoted to the issue of the photo array, and the following colloquy ensued:

> DEFENSE COUNSEL: Now, there came a time earlier this summer when [D]etective Young contacted you to do a photo array to see if you could identify the male --
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> STATE'S COUNSEL: Objection. May we approach?
>
> THE COURT: Come up please.
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> STATE'S COUNSEL: Your Honor, I think that this is not relevant to Ms. Hyman's case.
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> DEFENSE COUNSEL: I would proffer that the answer would be -- according to the notes I received from the State, that he never showed up to do that identification of the male in the case. I think if there is some question as to his credibility and, you know, whether or not he would follow-up with that. But that is the answer that I -- that I would be anticipating. So that is what I would proffer.
>
> STATE'S COUNSEL: And the State's position is whether he was ever shown a photo array regarding the male in this case is not relevant to Ms. Hyman's case as any testimony regarding the male is -- is not --
>
> THE COURT: All right. The objection is sustained.
>
> DEFENSE COUNSEL: The only thing I would add is there are conspiracy charges. So the State is alleging that they were working together, in concert, so it is not just that he is an uncharged co-conspirator -- rather uncharged codefendant. He is a co-conspirator. I think there is relevance in inquiring whether or not he followed up to conduct a photo array.
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> STATE'S COUNSEL: But the identification --
>
> THE COURT: Sustained. I said sustained.

On appeal, Ms. Hyman argues that the court erred because it prevented her from eliciting Mr. Washington's testimony that, a few months after the incident, he declined

Detective Young's request to look at a photo array to identify Mr. Newman. Specifically, Ms. Hyman argues that: (i) Mr. Washington's credibility was "central" to the State's case; (ii) the question about the photo array probed Mr. Washington's bias and motive to testify falsely against Ms. Hyman; (iii) the line of questioning about the reasons for his failure to attend the photo array would explain why he only pressed charges against Ms. Hyman even though Mr. Newman was the one who "had the gun and took the marijuana and $250"; and (iv) the same line of questioning would have been relevant to show that the reason Mr. Washington pressed charges only against Ms. Hyman "might have included animus towards Ms. Hyman based on her gender identity."

Preserving a claim of error based on excluded trial testimony is typically accomplished by "proffer[ing] the substance and relevance of the excluded evidence." Devincentz v. State, 460 Md. App. 518, 535 (2018). The proffer gives the trial court the opportunity to "consider those grounds and decide whether to make a different ruling." Id. (quotation omitted). In that regard, the Court in Grandison v. State, 341 Md. 175 (1995) stated:

> Nevertheless, the proffer must at least be sufficient to establish that the cross-examination will likely reveal information nominally relevant to the proceeding. A simple assertion that cross-examination will reveal bias is not sufficient to establish a need for that cross-examination; it is necessary to demonstrate a relevant relationship between the expected testimony on cross-examination and the nature of the issue before the court.

Id. at 208 (internal citations omitted). The relevance of the excluded testimony must be determined by the proffer made to the trial court, and not based on arguments first raised on appeal. The Court of Appeals has stated:

> This revised theory of cross-examination . . . was not presented to the trial judge at the time [the witness] was on the stand. We are hard put to say that it was preserved as a basis for overturning [the defendant's] conviction on the ground that the trial judge failed to allow his counsel to pursue it. A trial court is not required "to imagine all reasonable offshoots of the argument actually presented to [it] before making a ruling on admissibility."

Peterson v. State, 444 Md. 105, 148 (2015) (internal citations omitted); see also Sifrit v. State, 383 Md. 116, 136 (2004) (trial judges are not required to "imagine all reasonable offshoots of the argument actually presented to them" before ruling).

The proffer must also include the "substance and importance of the expected answers" to the excluded questions. Conyers v. State, 354 Md. 132, 164 (1999).

A proffer is not, however, required in all instances. At common law, a proffer was not required if the substance and purpose of the excluded evidence was clear based on the "tenor of the questions and the replies they were designed to elicit . . ." Devincentz, 460 Md. at 535 (quoting Peregoy v. Western Md. Ry. Co., 202 Md. 203, 209 (1953)) (emphasis removed). The same concept is embodied in Maryland Rule 5-103(a)(2).[6] As we stated in Waldron v. State, 62 Md. App. 686, 698 (1985):

[6] Md. Rule 5-103(a) provides:

> Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling, and
>
> * * *
>
> (2) In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered. The court may direct the making of an offer in question and answer form.

> When no proffer is made, the questions must clearly generate the issue—what the examiner is trying to accomplish must be obvious. Thus, in the absence of a proffer, the clarity with which the issue is generated will determine whether the court's restriction of cross-examination constitutes an abuse of discretion.

For example, in Merzbacher v. State, 346 Md. 391, 416 (1997), the Court held that a proffer was necessary because the expected answer to counsel's proposed question and its relevance were not obvious because the witness "could have answered the question in any number of ways . . ."

On the other hand, in Devincentz, 460 Md. at 539, the Court of Appeals found that a proffer was not necessary because the relevance of the testimony was "apparent from the context." Similarly, in Jorgensen v. State, 80 Md. App. 595, 605-06 (1989), although the defendant did not make a proffer at trial, the Court held that a proffer was not necessary because the purpose was obvious, and the issue of improper motives was an issue in the case.

Here, Ms. Hyman *did* make a proffer: Ms. Hyman argued that Mr. Washington's failure to show up for a photo array went to his credibility. The issue, therefore, is whether that proffer sufficed. And if the proffer did not suffice, the issue is whether the anticipated testimony and its relevance to the case were obvious from the context in which the question was posed.

Quoting Grandison, 341 Md. at 208, Ms. Hyman argues that her proffer *did* suffice because it did not have to be "extremely specific, for the obvious reason that the defendant cannot know exactly how the witness will respond, especially when the cross-examination

is an attempt to show bias." Alternatively, Ms. Hyman argues that a proffer was not necessary because her "attempted cross-examination of Mr. Washington went to both his potential bias against her based on her gender identity and his overall credibility, which was clear from context."[7] We disagree for at least three reasons.

First, the above quote from Grandison on which Ms. Hyman relies related to the level of specificity with which the *substance* of the anticipated testimony should be proffered. Here, because Ms. Hyman made clear what she expected Mr. Washington to say, there was no problem with the specificity of the substance of the anticipated testimony. The problem with Ms. Hyman's proffer was the specificity in her explanation of the *relevance* of such testimony.

Second, defense counsel's relevance proffer was limited to a general assertion that Mr. Washington's failure to attend the photo array went to his "credibility." Although we agree with Ms. Hyman that extreme specificity is not required, a vague reference to "credibility" does not "demonstrate a relevant relationship" between Mr. Washington's failure to appear at a photo array and a motive to lie rooted in a gender identity bias. See

[7] As to the context in which her question about the photo array was asked, Ms. Hyman asserts that issues regarding her gender identity were "a part of the defense case" and revealed in her opening statement. In her opening statement, Ms. Hyman's counsel did not mention gender identity bias; rather, her counsel told the jury in her opening statement that "[t]he account of events that Mr. Washington presents, you're going to find after you hear the testimony, has a lot of holes in it. And there [are] going to be reasons why he might have said certain things that he said." From such a vague statement, we cannot say that gender identity bias was made an issue in the case.

Grandison, 341 Md. at 208, 209-10 (proffering merely that testimony showed "bias" was insufficient).

Third, we cannot reasonably expect the trial court to have connected Mr. Washington's failure to appear at a photo array to a motive to lie based on Ms. Hyman's gender identity. Even with the benefit of hindsight, we see no evidence in this record that Mr. Washington was biased against transgender women. And, it is not evident in this record that Mr. Washington even knew that Ms. Hyman was a transgender woman when he was testifying at trial.[8]

In sum, neither the proffer itself nor the context in which the question was posed would have alerted the trial judge to the relevance of the line of inquiry that has been advanced by Ms. Hyman on appeal. Accordingly, the trial court did not abuse its discretion in sustaining the objection to the question about the photo array.

Even if the proffer had been made, the trial court's ruling on this evidentiary issue would be reviewed for an abuse of discretion, see Gupta v. State, 227 Md. App. 718, 738

[8] Nor does there appear to be any evidence that Mr. Washington knew Ms. Hyman was a transgender woman when he immediately went to the police after the incident and committed to his version of events. As to the key areas on which Mr. Washington's and Ms. Hyman's accounts differed, Mr. Washington's trial testimony did not stray from the report he immediately made to the police. So if Mr. Washington was lying at trial, he had to have been lying to the police immediately after it happened. Thus, if gender identity bias was his motive to lie about what had happened, then he would have had to have known—at the time he first reported the incident—that Ms. Hyman was a transgender woman. From our review of the record, and from what could be understood from the video taken by Officer Sanchez's body camera, there did not appear to be any suggestion or indication that Mr. Washington knew that Ms. Hyman was a transgender woman.

(2016), and on this record we see no basis to conclude that such discretion was abused here.[9]

JURY INSTRUCTION 3:13

Ms. Hyman contends the court erred by refusing to give Maryland Criminal Pattern Jury Instruction 3:13 to inform the jury that it may consider "promised benefits" to Mr. Washington in assessing his credibility.[10]

A trial court should give a jury instruction requested by a party if it correctly states the law, has factual support in the admissible evidence, and is not adequately covered in other instructions. Ware v. State, 348 Md. 19, 58 (1997) (citing Md. Rule 4-325(c)). We review a court's refusal to give a jury instruction under the abuse of discretion standard of review. CSX Transp., Inc. v. Pitts, 430 Md. 431, 458 (2013) (citations omitted).

[9] Even if the trial court had abused its discretion by sustaining the objection, as explained above in footnote 5, it would not have mattered because the jury was not unanimously persuaded by Mr. Washington's testimony on the key areas in which his account differed from Ms. Hyman's. Accordingly, any such error would have been harmless beyond a reasonable doubt.

[10] Maryland Criminal Pattern Jury Instruction 3:13 provides:

> You may consider the testimony of a witness who [testifies] [has provided evidence] for the State as a result of [a plea agreement] [a promise that he will not be prosecuted] [a financial benefit] [a benefit] [an expectation of a benefit]. However, you should consider such testimony with caution, because the testimony may have been influenced by a desire to gain [leniency] [freedom] [a financial benefit] [a benefit] by testifying against the defendant.

If the State had an express or implied agreement with Mr. Washington, it was required to disclose it. Harris v. State, 407 Md. 503, 521 (2009). Ms. Hyman has not alleged that there was any such express or implied agreement, let alone a failure to disclose it. Ms. Hyman also does not point to any evidence that Mr. Washington actually had any expectation of a benefit in exchange for his testimony. Ms. Hyman instead argues that such an expectation can be inferred from the fact that Mr. Washington had not been charged with any criminal wrongdoing. We disagree.

We have no idea why Mr. Washington had not been charged as of August 14, 2018 with a crime from the $20 marijuana transaction. The record does not even appear to indicate when the State learned that Mr. Washington intended to sell marijuana. Certainly Mr. Washington provided no such testimony. In fact, defense counsel elicited Mr. Washington's admission on cross-examination that he had *not* disclosed to the police, when he reported the incident, that he had intended to sell marijuana to Ms. Hyman. And, the Statement of Charges, which recount in detail Mr. Washington's account of the incident, only mention that he intended to smoke with Ms. Hyman. The bottom line is we have no idea what the State knew, when it knew it, what prosecutorial decisions it made, and why.[11]

[11] The dissent concluded from Mr. Washington's trial testimony that it is "obvious" that he had "earlier" disclosed to the State the fact that he intended to sell marijuana and that he was "cooperating" with the police. We disagree that his testimony revealed any clues as to when, in relation to the trial, the State found out that he was going to sell Ms. Hyman $20 worth of marijuana. And, to the extent "cooperation" implies something more than voluntarily testifying at trial, we do not see the basis for the statement that he was "cooperating" with the police. It seems perfectly natural that a victim of a crime who immediately reports the crime would then testify at trial, and even if he had cold feet, the State could have secured his testimony with a subpoena.

For all we know, the State only learned about the marijuana sale shortly before trial, during a witness preparation session. Or, for all we know, the State in the exercise of its prosecutorial discretion—for reasons having nothing to do with this case—decided not to devote the resources necessary to prosecute a crime arising out of the sale of $20 worth of marijuana.

What we do know is this: Mr. Washington went to Ms. Hyman's motel room to sell her $20 worth of marijuana; he's not licensed to dispense marijuana;[12] he went to the police on his own volition to report the crime; he told the police that he had gone to Ms. Hyman's hotel room intending to smoke marijuana with Ms. Hyman; and he was not charged with any crime as of the trial date. Thus, from the record, we can only speculate as to why Mr. Washington had not been charged. Jury instructions must be supported by a factual predicate, not speculation. See Ware, 348 Md. at 58.

The Court of Appeals stated in Preston v. State, 444 Md. 67, 85 (2015), "[w]e interpret the word 'benefit,' in the context of Jury Instruction 3:13, to mean something akin to a plea agreement, a promise that a witness will not be prosecuted, or a monetary reward or other form of direct, *quid pro quo* compensation or inducement." Here, in the absence of any plea agreement, promise, reward, or other compensation or inducement for Mr. Washington to testify, the trial court acted well within its discretion in refusing to give the

[12] The dissent overstates the import of the evidence by contending that Mr. Washington "testified that he was a marijuana dealer," which incorrectly implies that he testified to more than the single $20 transaction with Ms. Hyman.

requested instruction. See id. at 78 (quotation omitted) ("the decision whether to give the jury a particularized credibility instruction is left to the sound discretion of the trial judge").

The dissent has reached the opposite conclusion, and in doing so appears to endorse the notion that the mere existence of a factual predicate to charge a crime, without more, is enough to justify the jury instruction on expected benefits. The dissent relies on Manchame-Guerra v. State, 457 Md. 300 (2018), but that case concerned the scope of cross-examination of a witness' bias, not a jury instruction. Id. at 311. And, the Court in Manchame-Guerra confirmed that to establish a proper foundation to cross-examine the witness about an expected benefit, the defendant must proffer evidence that the witness had an expectation of a benefit, and that the mere fact that the defendant is facing pending criminal charges is not enough. Id. at 318. In Manchame-Guerra, the "something more" was that the charges had been pending against the witness for 18 months by the time he testified at trial and that the detective involved in the investigation knew of those pending charges when he interviewed the witness. Id. at 321. Thus, the evidence was that the State had exercised its prosecutorial discretion to both charge the witness with crimes and keep the charges pending for an unusually lengthy period of time—thus, it was reasonable to infer that the witness would have expected a benefit from his testimony. Here, however,

given all of the information that we do not have, there is no basis to make any inferences from the lack of charges against Mr. Washington.[13]

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

[13] In any event, as noted above, the outcome of this case indicates that the jury was not unanimously convinced by Mr. Washington's testimony, and the guilty findings were consistent with Ms. Hyman's video statement. Therefore, any error would be harmless beyond a reasonable doubt.

Circuit Court for Baltimore City
Case No.: 118074021

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2817

September Term, 2018

QUENTIN ANTONIO HYMAN
v.
STATE OF MARYLAND

Beachley,
Gould,
Adkins, Sally D.,
(Senior Judge, Specially Assigned)

JJ.

Dissenting Opinion by Adkins, J.

Filed: January 28, 2020

Most respectfully, I dissent. The Majority has ruled that when a witness for the State admits that he has committed a felony, but has not been prosecuted for such, the defense is not entitled to Maryland Criminal Pattern Jury Instruction 3:13. This pattern instruction directs the jury—concerning testimony by a person who does so with "an expectation of a benefit"—and says that they should "consider such testimony with caution because the testimony may have been influenced by a desire to gain leniency or a benefit by testifying against the defendant." MPJI-Cr 3:13. I submit that when there is evidence that a state's witness has committed a crime—including the witness's own admission—but the state has pursued no prosecution (without explanation), a defendant is entitled to a jury instruction directing them to be *cautious about bias* from a person with "an expectation of a benefit."

The State's key witness, Mr. Washington, testified that he was a marijuana dealer and had no license to distribute marijuana. As he testified, his entire purpose for being at the scene of the crime was to sell marijuana to Ms. Hyman. He was cooperating with the police, and his testimony made it obvious that he earlier told the State that he committed the crime of distribution of marijuana (in November 2017)—but had not been prosecuted for this crime by the date of the trial in August 2018.[14] The absence of any prosecution under this circumstance is vital.

[14] The trial court denied the defense request for the instruction on grounds that "you cannot prosecute someone just based on their admission to committing a crime[.]" This was error because either Ms. Hyman or Mr. Newman could have testified about Washington's placing $20 worth of marijuana on a scale to sell to Hyman.

The Court of Appeals has recognized a defendant's fundamental right to draw out a witness's bias, and that even absent an explicit agreement with law enforcement, bias can exist when a witness expects some leniency from the state post-testimony. This topic was most recently addressed in *Manchame-Guerra v. State*, 457 Md. 300 (2018), authored by Chief Judge Barbera, which held that the defendant had the right to cross-examine the State's witness about his prior unprosecuted criminal activity *even absent an explicit agreement* by the state to afford him leniency:

> [Defendant] has the better part of the dispute. We note preliminarily that [Defendant] presented no direct evidence that [the witness] had a motive to testify falsely—that there was in place an agreement between the State and him that, in return for his testimony, he would receive a benefit in connection with his pending charges. **Such direct evidence, however, is not required, as our case law demonstrates**.
>
> **Petitioner proffered sufficient circumstantial evidence that, viewed from [the witness's] perspective, could have led him to expect or hope for a benefit in connection with his pending charges in return for his testimony.**

Id. at 320-21 (emphasis added) (cleaned up).

It is a small logical step to conclude that if a defendant has a right to elicit testimony of circumstantial evidence of a witness's hope or expectation for a benefit in the form of leniency from the State, that the witness also has the right to a jury instruction directing the jury to be cautious about such witness's testimony. The Majority misses the point in citing *Preston v. State*, 444 Md. 67, 85 (2015). *Preston* considered what should be considered a "benefit" to the witness and held that a witness protection program did not qualify. Indeed,

Preston acknowledged that Jury Instruction 3:13 includes the language "expectation of a benefit," but unequivocally did not address when to recognize such an "expectation."

Although a trial court has some discretion regarding instructions, Md. Rule 4-325(c) provides:

> The court may, and **at the request of any party shall, instruct the jury** as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

(Emphasis added.) This instruction is not fairly covered by any other instructions. To achieve convictions—police and prosecutors absolutely *must* rely on testimony of persons who themselves have committed crimes, and such use is fully legitimate. But, I strongly submit that—to balance the scales of justice—a court must grant a defendant's requested instruction that the *jury be cautious* in considering the testimony of a person with an expectation of possible leniency from the State as to their own crimes. Such an instruction is fair to the State and anything less undermines a criminal defendant's right to protect himself against conviction based on false testimony by a criminal.

Finally, this error by the trial court was not harmless because, as the Majority readily acknowledges, the "trial boiled down to a credibility contest" between the alleged victim, Sylvester Washington, and the defendant, Ms. Hyman. I would vacate the convictions and remand for a new trial.