Circuit Court for Baltimore City
Case No. 118024003

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3438

September Term, 2018

DONOVAN FAUST

v.

STATE OF MARYLAND

Graeff,
Nazarian,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: June 2, 2020

Appellant, Donovan Faust, was convicted by a jury, in the Circuit Court for Baltimore City, of murder in the first degree; use of a firearm in the commission of a crime of violence; possession of a regulated firearm after previously having been convicted of a crime of violence; and wearing, carrying, and transporting a handgun on his person. After the court sentenced him to life imprisonment for first-degree murder and additional terms on the other charges, Faust noted this appeal, raising three issues for our review:

> I. Whether the circuit court erred in admitting a statement that had been made by Anton Harris, a State's witness;
>
> II. Whether the circuit court erred in restricting the defense's cross-examination of Harris; and
>
> III. Whether the circuit court erred in preventing the defense from impeaching Harris with two of his prior convictions.

Perceiving no error, we shall affirm.

BACKGROUND

At approximately 7:30 p.m., on January 10, 2018, Eric Staton was shot and killed, just outside the entrance of the Family Dollar store, in the 1400 block of East Cold Spring Lane, in Baltimore City. There was a single eyewitness to the crime: Anton Harris.

Earlier that evening, at approximately 7:00 p.m., Harris and Staton (who lived across the street from him) had walked several blocks from their residences to the Family Dollar store. The two men entered the store, and Harris shoplifted several items, putting them into a black-and-silver bag he was carrying. Harris left the store, while Staton remained inside, looking for small Valentine's Day gifts for his mother and daughter, as

well as several items for Harris (who had given Staton money with which to purchase them).[1]

While Harris waited outside for Staton, he observed a man, hiding in some nearby trees. As the man emerged, Harris recognized him as Faust,[2] who lived a block away from him, and they briefly engaged in small talk.

At approximately 7:23 p.m., Staton emerged from the store, and Faust shot him five times. As soon as gunfire rang out, Harris fled and ultimately returned home. He did not, at that time, call "911" or otherwise notify the police what had happened.

Police officers responding to the scene observed Staton, slumped against the wall of the store, suffering from multiple gunshot wounds. The first responding officer, Baltimore City Police Officer Gary Klado, administered cardio-pulmonary resuscitation ("CPR"), and, soon thereafter, paramedics arrived to continue administering CPR. Staton was transported to Johns Hopkins Hospital and pronounced dead at 7:54 p.m.

After paramedics had taken over the duty of attending to the victim, Officer Klado turned his attention to investigating the crime. One of the first things he observed was that the Family Dollar store had a video surveillance system, with both interior and exterior cameras. Officer Klado reviewed surveillance footage and obtained a description of the

[1] Harris had asked Staton to buy a pack of cigarettes and a bottle of hydrogen peroxide.

[2] Harris identified Faust by his nickname, "Tip."

suspect, who was wearing "a puffy jacket" with "a hood" as well as "dark colored pants," and he notified the Homicide Division and the Crime Lab.[3]

Detective Frank Miller, of the Baltimore City Homicide Unit, responded to the crime scene. Detective Miller identified the victim from an Independence Card, in the name of Eric Staton, recovered from the victim's pocket. No weapon was recovered, and no shell casings were found at the crime scene, leading Detective Miller to conclude that the murder weapon was, most likely, a revolver. After ensuring that Crime Lab personnel had collected evidence, Detective Miller drove to the hospital "to verify the identification."

The following day, Detective Miller notified Staton's next of kin, and he was informed that, on the night of the murder, Staton had been accompanied by Harris. In addition, because Harris previously had been a confidential informant, he contacted his handler, Detective Kevin Fassl (who worked in the Homicide Unit), to inform him that "he knew about the murder."

That evening, Harris was transported to the Homicide Unit, where he was interrogated by detectives. Because he "was afraid," the detectives had to "convinc[e]" him "to give a [recorded] statement," and he ultimately did so. From that interrogation, Detective Miller learned that Faust was the shooter, and Harris further informed the detectives where Faust lived. Harris also identified Faust from a double-blind photographic array.

[3] That surveillance video subsequently was introduced into evidence at Faust's trial.

An arrest warrant was issued for Faust, and a search and seizure warrant was issued for his residence. On January 12, 2018, Faust was seen, walking in the neighborhood where he lived, and was taken into custody. Among the items seized from his residence were a winter coat, adorned with a "buckle on the top," and a pair of shoes, both of which matched the clothing worn by the shooter, as seen on the surveillance video. Inside the coat was a ski mask, matching the mask worn by the shooter.

On January 24, 2018, a five-count indictment was returned, in the Circuit Court for Baltimore City, charging Faust with murder in the first degree; assault in the first degree; use of a firearm in the commission of a crime of violence; possession of a firearm after previously having been convicted of a crime of violence; and wearing, carrying, and transporting a handgun on his person. The matter proceeded to a jury trial, and Faust was found guilty of all charges except first-degree assault, which was not submitted to the jury.

The court thereafter sentenced Faust to life imprisonment for first-degree murder; a consecutive term of twenty years' imprisonment, the first five without the possibility of parole, for use of a firearm in the commission of a crime of violence; and fifteen years' imprisonment for possession of a firearm after previously having been convicted of a crime of violence, to run concurrently with the other firearm offense.[4] Faust then noted this timely appeal. Additional facts will be noted where pertinent to the discussion of the issues.

[4] The conviction for wearing, carrying, and transporting a handgun on the person was merged into that for illegal possession of a firearm.

DISCUSSION

I.

After the defense had cross-examined Harris, the circuit court allowed the State to introduce into evidence, for rehabilitation, the recorded out-of-court statement that Harris had made to police officers. Faust claims that it was error to do so but that, even if it were assumed that he had opened the door "to some evidence of" Harris's demeanor and "his willingness to speak to the police," the court's decision to admit the recorded prior consistent statement was "a wildly disproportionate response to what was elicited" on cross-examination and was therefore an abuse of discretion.[5]

The State counters that this claim is not preserved; that Harris's prior consistent statement was admissible for a non-hearsay purpose; and that any purported error was harmless.

A.

Initially, we find no merit in the State's non-preservation argument. The defense objected, twice, to the State's attempt to introduce the recorded statement and, once it was clear that the court intended to overrule its objection, the parties engaged in a protracted discussion concerning redactions of irrelevant or unfairly prejudicial portions of that

[5] Faust also contends that the prior statement was inadmissible as substantive evidence, under Maryland Rule 5-802.1. As the State observes in its brief, the prior statement at issue was not admitted as substantive evidence, and we therefore shall not address Faust's argument as to its admissibility vel non on that basis.

statement. Finally, just before the redacted statement was broadcast to the jury, the following exchange took place:

> THE COURT: **Other than your major objection**, is there any objection to it?
>
> [DEFENSE COUNSEL]: **Other than those previously addressed.**
>
> THE COURT: Okay. Thanks.

(Emphasis added.)

The court then instructed the jury that the redacted transcripts, which were being distributed at that time, were simply "a tool to aid" them "while listening to the testimony" and were not, themselves, evidence. The 59-minute-long statement then was played before the jury.

Short of standing on top of the defense table and yelling, "Stop!", we cannot imagine what else the defense could have done that it did not do to make its objection known. Moreover, the circuit court obviously was aware of the objection, clearly overruled it, and decided the matter. This claim is preserved for our review, Md. Rule 8-131(a), and we turn to address it on the merits.

B.

We begin by setting forth the background. Harris was, understandably, a reluctant witness, having witnessed the murder of his friend, who was standing right next to him. Prior to Faust's trial, he fled Maryland, and, to secure his appearance, a body attachment was issued.

After he had been returned to Maryland, a bail review hearing was held. The State, believing that Harris was a flight risk, asked that he be held without bail until Faust's trial, some two weeks later. The court agreed, finding that, given that Harris recently had fled the jurisdiction and announced his unwillingness to appear as a witness at Faust's trial, he was indeed a flight risk, and it ordered him held without bail until trial.

During opening statement at Faust's trial, the defense launched into an attack against Harris's credibility:

> But the reality is that this entire case comes down to the word of one single witness, one. And that is very dangerous, ladies and gentlemen, because the State is asking you to convict a man of murder not based on a single shred of forensic evidence. Not based on a thorough investigation but based on the word of one single witness.
>
> And look maybe, maybe that wouldn't be such a huge problem if the State's star witness was an honest law abiding person who didn't have anything to gain out of being here, but as the evidence will show, that is not who Mr. Harris is.

Defense counsel expounded on that point, asking the jury "whether [Harris] is someone who you can trust"; urging the jury to "look at his track record" and to consider whether Harris "has been honest in the past"; questioning Harris's motives based upon the State's dismissal of pending charges against him in return for his testimony; and suggesting that Harris, not Faust, was the person "actually responsible for this shooting."

During direct examination, Harris initially refused to answer any questions.[6] That prompted the court to warn him, outside the jury's presence, that further refusal to answer questions could lead to a charge of contempt of court. To ensure that Harris's constitutional rights were protected, the court then called the duty Public Defender, who arrived at the courtroom to advise Harris of his options (in the court's words): to "refuse to testify" and thereby "be subject to contempt proceedings"; or to "testify and be subject to cross-examination." After the Public Defender conferred privately with Harris, he agreed to testify, provided that she remain in the courtroom with him. After a lunch recess, the jury was summoned, and direct examination proceeded.

The State first elicited that Harris previously had been convicted of "felony drug charges," and the questioning then turned to the events of January 10, 2018, the night of the murder. Harris testified, among other things, that he had observed Faust shoot Staton "in the back" as Staton was walking out of the Family Dollar,[7] and he confirmed that testimony while the State played surveillance video, taken at the time and place of the killing.

The State also examined Harris about the circumstances surrounding the statement he had given police the day after the murder. Harris acknowledged that he "really didn't

[6] Harris subsequently would acknowledge that the reason he was reluctant to testify at Faust's trial was "fear for [his] life" and the lives of his family.

[7] At the moment Faust fired the fatal shots, he was wearing a black ski mask. Harris was certain that Faust was the shooter, however, because he knew Faust from the neighborhood where they both lived, and he had engaged Faust in a brief conversation just minutes earlier.

want to talk to them about it" and that the police forced him to accompany them to the Homicide Unit at Police Headquarters. Harris ultimately gave a statement, inculpating Faust, once he "started thinking about Eric['s] mother and his father and his daughter."

During that interrogation, Harris identified Faust from a photographic array "[b]ecause that's the person who shot Eric." He refused, however, to sign the array because he "didn't want [his] name on nothing."

During cross-examination, the defense probed further into the circumstances surrounding Harris's interrogation by homicide detectives on the day after the murder, strongly suggesting that Harris's statement was not voluntary:

> [DEFENSE COUNSEL]: Okay. And, um, basically this was not a matter of your choice, correct?
>
> [HARRIS]: Correct.
>
> [DEFENSE COUNSEL]: They grabbed you up and they brought you in, correct?
>
> [HARRIS]: Correct.
>
> [DEFENSE COUNSEL]: Okay. Um, from there you're driven to the police station, right?
>
> [HARRIS]: Correct.
>
> * * *
>
> [DEFENSE COUNSEL]: Okay. Now, um, there came a time when they threatened you, didn't they?
>
> [HARRIS]: Yes.
>
> [DEFENSE COUNSEL]: In fact, what they told you that if you don't talk they're going to charge you with this murder, correct?

[HARRIS]: Correct.

[DEFENSE COUNSEL]: So you had a choice to make. On one hand you talk to the police, on the other hand you get charged with murder, right?

[HARRIS]: Correct.

After impeaching Harris on other grounds,[8] defense counsel returned to this line of questioning:

[DEFENSE COUNSEL]: Okay. Um, one other question. Going back to the day when you were brought into the police station, um, we talked about how you were essentially threatened with charges, right?

[HARRIS]: Correct.

[DEFENSE COUNSEL]: Um, you asked for a lawyer then, didn't you?

[HARRIS]: Correct.

[DEFENSE COUNSEL]: You told the detectives, you looked them in the eyes and said "I want a lawyer", right?

[HARRIS]: Correct.

[DEFENSE COUNSEL]: Um, did they provide you with a lawyer?

[HARRIS]: No.

[8] The defense impeached Harris with two prior convictions for possession of CDS with intent to distribute, and with his prior work as a confidential informant, pointing out that Harris had received thousands of dollars for that work, which entailed hiding his role as an informant from the targets of police investigations so that he could obtain information from them.

[DEFENSE COUNSEL]: Did they let you reach out to a lawyer?

[HARRIS]: No.

* * *

[DEFENSE COUNSEL]: Okay. And in that conversation that we talked about, there was a part -- there was a part of your conversation that was taped, right, you knew that? Taped in the interview room?

[HARRIS]: Not at the time I didn't.

[DEFENSE COUNSEL]: Right. But -- well, were there parts of it that were not taped?

[HARRIS]: I'm not -- I don't know.

And then, a third time:

[DEFENSE COUNSEL]: All right. Um, now, you -- you told the ladies of the jury that -- that Eric was a friend of yours?

[HARRIS]: Correct.

[DEFENSE COUNSEL]: Um, you didn't -- you didn't call the police or anything like that, did you?

[HARRIS]: When I got home.

[DEFENSE COUNSEL]: Did you ever --

[HARRIS]: I went straight home after the shooting.

[DEFENSE COUNSEL]: -- call -- right. And -- and you have a phone at home, right?

[HARRIS]: Correct.

[DEFENSE COUNSEL]: You carry a cellphone. Do you carry a cellphone?

> [HARRIS]: Correct.
>
> [DEFENSE COUNSEL]: Um, you never called the police to tell them what happened or what you knew, isn't that correct?
>
> [HARRIS]: Correct.
>
> [DEFENSE COUNSEL]: It wasn't until a day later when they forced you to the station, when they threatened you that you started talking?
>
> [HARRIS]: Correct.

On re-direct, the State moved to introduce Harris's recorded statement to the police, contending that Faust's cross-examination sought to portray Harris as having lied "during his taped statement because he was being threatened by the police" but that his "demeanor" and "the officers' demeanor" throughout the recorded statement "contradict[]" the cross-examination, and, therefore, the recorded statement was admissible for rehabilitation. The defense countered that the State should be limited to questioning the police detectives about the circumstances surrounding Harris's interrogation but that the statement itself was inadmissible. The circuit court overruled the defense objection, observing that Harris's demeanor during the statement "tells a lot of what occurred there," including "whether or not he acts afraid, like he has been threatened." Subsequently, during the direct examination of Detective Miller, the lead detective in the case, who had interrogated Harris, the State played the recorded statement in open court.

Maryland Rule 5-616(c)(2) provides that a "witness whose credibility has been attacked may be rehabilitated by . . . evidence of the witness's prior statements that are consistent with the witness's present testimony, when their having been made detracts from

the impeachment[.]" "This rule applies when 'the defendant's opening statement and/or cross-examination of a State's witness has "opened the door" to evidence that is relevant (and *now* admissible) for the purpose of rehabilitation.'" *Quansah v. State*, 207 Md. App. 636, 663 (2012) (quoting *Johnson v. State*, 408 Md. 204, 226 (2009)) (cleaned up). To be admissible under this rule, a "prior consistent statement 'must meet at least the standard of having some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony.'" *Thomas v. State*, 429 Md. 85, 107 (2012) (quoting *United States v. Simonelli*, 237 F.3d 19, 27 (1st Cir. 2001)).

"Prior consistent statements used for rehabilitation of a witness whose credibility is attacked are relevant not for their truth since they are repetitions of the witness's trial testimony." *Holmes v. State*, 350 Md. 412, 427 (1998). Rather, such statements, admitted under Rule 5-616(c)(2), "are relevant because the circumstances under which they are made rebut an attack on the witness's credibility," and, "by definition," they "are not offered as hearsay and logically do not have to meet the same requirements as hearsay statements falling within an exception to the hearsay rule[.]" *Id.* Accordingly, if a trial court admits a prior consistent statement for rehabilitation, an opposing party is entitled, upon request, to a limiting instruction "to advise the jury not to consider the statement for the truth of the matters asserted therein," but, if no request is made, the trial court,

ordinarily, does not abuse its discretion in failing, *sua sponte*, to do so.[9] *Quansah*, 207 Md. App. at 664 (citing *Holmes*, 350 Md. at 429).

During cross-examination of Harris, Faust repeatedly attacked Harris's credibility. With respect to the disputed statement, that cross-examination plainly attempted to portray Harris as a self-interested liar, who had given the statement only because the police had threatened to charge him with the murder. That cross-examination further emphasized the defense allegation that Harris had been denied the right to consult an attorney and that his statement had been coerced. In challenging the voluntariness of Harris's statement, Faust opened the door to admit the statement, under Rule 5-616(c)(2), to rehabilitate Harris by demonstrating that his demeanor, throughout the time he was interrogated, was entirely inconsistent with the defense theory and, specifically, that he had not been coerced into making the recorded statement.

We are unpersuaded that admitting Harris's statement was a "disproportionate" response to the defense impeachment. Given the centrality of Harris's testimony to the State's case, the jury was entitled to see for itself whether there was any visual indication to support the defense theory that he had been coerced into making the statement. Any prejudice that Faust may have suffered was "legitimate," not unfair. *Newman v. State*, 236 Md. App. 533, 549 (2018).

[9] No such instruction was requested in this case, and none was given. Faust does not claim that the circuit court abused its discretion in failing, *sua sponte*, to give a limiting instruction.

As for Faust's contention that the State improperly relied upon Harris's statement as substantive evidence, both in closing argument and rebuttal, we note that Faust raised no objection at either time, nor did he request the limiting instruction to which he was entitled. We decline Faust's request to circumvent the contemporaneous objection rule under the guise of a purported error in admitting Harris's statement for rehabilitation.

II.

Faust claims that the circuit court improperly restricted his cross-examination of Harris, thereby precluding him from delving into a motive Harris may have had to testify falsely. The State counters that, because Faust did not proffer what the anticipated response to his query would have been, this claim is unpreserved. As for the merits, the State contends that the court properly exercised its discretion in limiting Faust's cross-examination regarding a collateral matter and that any purported error was harmless.

During direct examination, the State elicited that Harris, at the time he was questioned by police about the murder, faced pending drug charges and that, after he gave police a statement identifying Faust as the murderer, those charges were nol prossed. When Harris was asked whether he had been promised a favorable disposition in that case in exchange for his statement, he replied, "No, ma'am."

During cross-examination, Faust sought to inquire further into the matter:

> [DEFENSE COUNSEL]: Now, there was a mention before that, um, in October of 2017, um, that's before -- before this murder occurred, right, um, were you living with your aunt at that time?
>
> [HARRIS]: Correct.

[DEFENSE COUNSEL]: And there was a house raid?

[HARRIS]: Correct.

* * *

[DEFENSE COUNSEL]: Did the police come in and search your house?

[THE STATE]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Did the police find drugs in your house?

[THE STATE]: Objection.

THE COURT: Sustained.

A bench conference ensued. Defense counsel maintained that his questions were "relevant to motive," but the court ruled otherwise, concluding that the defense could "ask him if he was arrested" but that "the details" of that event were "not relevant."

Whereupon, cross-examination resumed:

[DEFENSE COUNSEL]: Okay. We're talking about this case from 2017. Do you remember that you were charged with, possession of a controlled substance -- controlled dangerous substance a Schedule 2, to-wit, cocaine?

[HARRIS]: Correct.

[DEFENSE COUNSEL]: Um, do you remember you were charged with possessed with intent to use drug paraphernalia, to-wit, scale, used to prepare controlled dangerous substance --

[THE STATE]: Objection.

[DEFENSE COUNSEL]: -- a Schedule 2 --

THE COURT: Overruled. If that's the charge.

* * *

[HARRIS]: Correct.

[DEFENSE COUNSEL]: Do you recall that? Do you recall being charged with possessed with intent to use drug paraphernalia, to-wit, grinder used to prepare controlled dangerous substance a Schedule 1, to-wit, marijuana?

[HARRIS]: Correct.

[DEFENSE COUNSEL]: Okay. Um, so those -- those were your -- those were your charges. Um, and eventually, um -- so just to get the sequence right, you go in, you meet with these detectives, um, and then less than a month after meeting with the detectives in this case, those charges get nol prossed, correct?

[HARRIS]: The police was under investigation that's why the case was processed.

[DEFENSE COUNSEL]: The police were under -- under investigation?

[HARRIS]: Yes, sir.

[DEFENSE COUNSEL]: And that's why it was nol prossed?

Tell -- tell me about that. What do you mean "the police were under investigation"?

[THE STATE]: Objection.

THE COURT: Sustained.

With that, the defense's cross-examination of Harris concluded.

A.

Preliminarily, we assume without deciding that the issue is preserved for review. Maryland Rule 5-103(a)(2) provides that, if a party wishes to challenge a court's ruling that excludes evidence, it is sufficient, for purposes of preservation, that "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." Whether "the substance" of the excluded evidence "was apparent from the context within which" it was offered is, admittedly, debatable. Defense counsel did, however, contend that the precluded line of cross-examination was "relevant to motive," presumably motive to testify falsely. Under the circumstances, we shall exercise our discretion to reach the merits of the issue. Md. Rule 8-131(a). *Cf. Devincentz v. State*, 460 Md. 518, 534-39 (2018) (applying Rule 5-103(a)(2) to conclude that a claim of error concerning excluded testimony had been preserved in the absence of a proffer).

B.

The Sixth Amendment provides that, in "all criminal prosecutions," the accused shall enjoy the right to be "confronted with the witnesses against him." Article 21 of the Maryland Declaration of Rights is to similar effect. "The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination, . . .* which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (citation and quotation omitted) (emphasis in original). Included within the right of confrontation is "the

opportunity to cross-examine witnesses about matters relating to their biases, interests, or motives to testify falsely." *Martinez v. State*, 416 Md. 418, 428 (2010).

"The ability to cross-examine witnesses, however, is not unrestricted." *Id.* (citations omitted). Accordingly, a trial court "may impose reasonable limits on cross-examination when necessary for witness safety or to prevent harassment, prejudice, confusion of the issues, and inquiry that is repetitive or only marginally relevant." *Id.* (citation omitted). "Only 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." *Id.* (quoting *Davis*, 415 U.S. at 318). Thus, limitation of cross-examination "should not occur . . . until after the defendant has reached his constitutionally required threshold level of inquiry." *Smallwood v. State*, 320 Md. 300, 307 (1990) (citation and quotation omitted).

Maryland Rule 5-616 governs, among other things, impeachment of witnesses and states in relevant part:

> **(a) Impeachment by Inquiry of the Witness.** The credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at:
>
> * * *
>
> (4) Proving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely;
>
> * * *
>
> **(b) Extrinsic Impeaching Evidence.**
>
> * * *

> (3) Extrinsic evidence of bias, prejudice, interest, or other motive to testify falsely may be admitted whether or not the witness has been examined about the impeaching fact and has failed to admit it.
>
> * * *

"When the trier of fact is a jury, questions permitted by Rule 5-616(a)(4) should be prohibited only if (1) there is no factual foundation for such an inquiry in the presence of the jury, or (2) the probative value of such an inquiry is **substantially** outweighed by the danger of undue prejudice or confusion." *Calloway v. State*, 414 Md. 616, 638 (2010) (citation and quotation omitted).

In the instant case, Faust *was* permitted to cross-examine Harris about the fact that he had been charged with CDS violations, several months before he witnessed the murder and gave an inculpatory statement to the police and that, shortly thereafter, those charges were nol prossed. In other words, "defense counsel [was] '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[.]'" *Martinez*, 416 Md. at 428 (quoting *Davis*, 415 U.S. at 318). That, we think, was more than sufficient to satisfy Faust's "constitutionally required threshold level of inquiry." *Smallwood*, 320 Md. at 307.

Decisions holding to the contrary generally involve a trial court's decision to preclude entirely a permitted line of inquiry. *See, e.g.*, *Martinez*, 416 Md. at 423 (defense, in seeking to uncover potential bias of a State's witness, was precluded from cross-examining that witness about unrelated charges against him, which had been nol prossed shortly before Martinez's trial); *Calloway*, 414 Md. at 619 (defense prohibited

from cross-examining a State's witness "about whether he had volunteered to testify for the State in the hope that he would receive some benefit in the cases that were pending against him" and which subsequently were nol prossed); *Carrero-Vasquez v. State*, 210 Md. App. 504, 527 (2013) (defense prohibited from cross-examining a State's witness about a motive to testify falsely, despite having established a legitimate factual basis for pursuing that inquiry). That simply was not the case here.[10]

We hold that the circuit court could, in its discretion, properly conclude that the probative value of any additional inquiry into the details surrounding Harris's 2017 CDS charges was "substantially outweighed by the danger of undue prejudice or confusion." *Calloway*, 414 Md. at 638. The court properly exercised its discretion to limit further inquiry into a collateral issue, which was, at most, "only marginally relevant" and, moreover, presented a danger of "confusion of the issues[.]" *Martinez*, 416 Md. at 428.

[10] We think the State's analogy to cases involving impeachment of a witness with prior crimes is apt. In that context, the Court of Appeals has noted:

> Strong policy reasons support the principle that ordinarily one may not go into the details of the crime by which the witness is being impeached. Such details unduly distract the jury from the issues properly before it, harass the witness and inject confusion into the trial of the case.

Foster v. State, 304 Md. 439, 470 (1985) (quoting *State v. Finch*, 235 S.E.2d 819, 824 (N.C. 1977)), *cert. denied*, 478 U.S. 1010 (1986).

III.

The defense wished to impeach Harris with four prior convictions, all, apparently, for possession of CDS[11] with intent to distribute. The circuit court allowed the defense to impeach Harris with the two more recent convictions but not the two older ones, and Faust contends that it erred in doing so. As we shall explain, we do not think the circuit court erred or abused its discretion in limiting the number of prior convictions the defense could use for impeachment, but even were we to assume otherwise, any error was harmless.

The use of prior convictions to impeach a witness is provided under both statute and rule. Maryland Code (1974, 2013 Repl. Vol.), Courts & Judicial Proceedings Article ("CJP"), § 10-905(a)(1) provides that "[e]vidence is admissible to prove the interest of a witness in any proceeding, or the fact of the witness's conviction of an infamous crime." Maryland Rule 5-609 provides:

> **(a) Generally.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.
>
> **(b) Time Limit.** Evidence of a conviction is not admissible under this Rule if a period of more than 15 years has elapsed

[11] The State's discovery disclosure included Harris's criminal record, but the record before us does not contain true test copies (or case numbers, or even the offenses) for those convictions. Because no issue has been raised as to whether the offenses were eligible, we presume that all of them were.

> since the date of the conviction, except as to a conviction for perjury for which no time limit applies.
>
> **(c) Other Limitations.** Evidence of a conviction otherwise admissible under section (a) of this Rule shall be excluded if:
>
> (1) the conviction has been reversed or vacated;
>
> (2) the conviction has been the subject of a pardon; or
>
> (3) an appeal or application for leave to appeal from the judgment of conviction is pending, or the time for noting an appeal or filing an application for leave to appeal has not expired.
>
> **(d) Effect of Plea of Nolo Contendere.** For purposes of this Rule, "conviction" includes a plea of nolo contendere followed by a sentence, whether or not the sentence is suspended.

Maryland courts apply a three-part test in "determining whether a witness may be impeached with evidence of a prior conviction under Rule 5-609[.]" *King v. State*, 407 Md. 682, 698 (2009). First, a court must determine, "as a matter of law," whether the conviction is for an offense that qualifies, either as "an infamous crime" or as an "other crime relevant to the witness's credibility[.]" *Id.* at 698-99 (citations and quotations omitted). Second, if the conviction is eligible, under the rule, the proponent must "establish that the conviction was not more than 15 years old, that it was not reversed on appeal, and that it was not the subject of a pardon or a pending appeal." *Id.* at 699 (citation and quotation omitted). And finally, if these conditions are satisfied, the court then, exercising its discretion, "must determine that the probative value of the prior conviction outweighs the danger of unfair prejudice to the witness or objecting party." *Id.* (citation and quotation omitted). *Accord State v. Westpoint*, 404 Md. 455, 477-78 (2008); *State v. Giddens*, 335

Md. 205, 213-14 (1994) (interpreting predecessor Rule 1-502). The only disagreement in the instant case concerns whether the circuit court abused its discretion in performing the last, weighing step.

The Court of Appeals has adopted a non-exclusive, factors-based test, in determining whether a circuit court has appropriately exercised discretion under the rule. *King*, 407 Md. at 700-01. Those factors include:

> (1) the impeachment value of the prior crime; (2) the time that has elapsed since the conviction and the witness's history subsequent to the conviction; (3) the similarity between the prior crime and the conduct at issue in the instant case; (4) the importance of the witness's testimony; and (5) the centrality of the witness's credibility.

Id. (citing *Jackson v. State*, 340 Md. 705, 717 (1995)). "Appellate review of a trial court's application of the balancing test of Rule 5-609 is deferential." *Id.* at 696 (citing *Jackson*, 340 Md. at 719). In conducting such review, we "'accord every reasonable presumption of correctness' and will not 'disturb that discretion unless it is clearly abused.'" *Burnside v. State*, 459 Md. 657, 671 (2018) (quoting *Cure v. State*, 195 Md. App. 557, 576 (2010), *aff'd*, 421 Md. 300 (2011)) (cleaned up).

A court abuses its discretion where its ruling is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *King*, 407 Md. at 697 (quoting *North v. North*, 102 Md. App. 1, 14 (1994) (in banc). "So long as the trial judge applies the proper legal standards and reaches a reasonable conclusion based on the facts before it, an appellate court should not reverse a decision vested in the trial court's discretion merely because the appellate court reaches a

different conclusion." *Burnside*, 459 Md. at 676 (quoting *Univ. of Maryland Med. Sys. Corp. v. Kerrigan*, 456 Md. 393, 402 (2017)) (cleaned up).

Although the text of the rule uses the term "witness," which includes both defendants and any others who may be called to testify, application of the factors differs, depending upon whether the witness is a criminal defendant or not. Thus, the "potential for unfair prejudice is less where the witness to be impeached with evidence of a prior conviction is not the defendant," *Rosales v. State*, 463 Md. 552, 581 (2019) (quoting *King*, 407 Md. at 704) (cleaned up), and, accordingly, all other things being equal, the balance of factors will weigh more heavily in favor of admissibility where the witness to be impeached is not the defendant.

In the instant case, it is clear that the circuit court weighed the factors in arriving at its decision to restrict impeachment. It began by recognizing, as the defense had argued, that Harris's "testimony [was] definitely central to the case." It further recognized that, because Harris was not a defendant in the case, whether the impeachable convictions were for crimes similar to those being tried was inapplicable. Then, after pronouncing its decision to allow only the two newer convictions for impeachment, defense counsel objected, claiming that he was "aware of no prejudice" that "arises from questioning" a witness "about these old convictions," and the court replied:

> So, the rule says, and it refers to the witness not defendant, "the Court determines that the probative value of admitting . . . this evidence outweighs the danger of unfair prejudice to the witness or the objecting party." I find that -- the two are fine, they don't outweigh the, um, danger of unfair prejudice to the witness or the State, but I do find that the two older ones do.

In our view, the circuit court carefully weighed the factors and properly exercised its discretion in limiting the defense impeachment of Harris to the two more recent convictions. It is not our role to second-guess that decision. Viewing the circuit court's decision through the appropriate deferential lens, we certainly do not find an abuse of discretion, let alone a "clear" abuse. *Burnside*, 459 Md. at 671 (citation and quotation omitted) (cleaned up).

Even were we to find a clear abuse of discretion here, we would, nonetheless, conclude that any resulting error was harmless beyond a reasonable doubt. Two decisions of the Court of Appeals, both of which involved, as here, limitation of the defense's ability to impeach a State's witness with prior convictions, help to illustrate why that is so: *King*, 407 Md. 682, and *Rosales*, 463 Md. 552.

In both of those cases, the trial courts flatly prohibited the defense from impeaching State's witnesses with eligible prior convictions, unlike here, where the defense was permitted to impeach Harris with some, but not all, eligible convictions. Moreover, only one of those decisions, *King*, held that the trial court's error was not harmless. In *Rosales*, the Court of Appeals held that, despite the trial court's flat prohibition against impeachment of the witness with his prior convictions, the defendant suffered no prejudice because the jury otherwise was made aware of information, similar to the disallowed prior convictions, from which the jury could "evaluate and determine the [witness's] credibility." *Rosales*, 463 Md. at 583.

In the instant case, the defense was permitted to impeach Harris with two prior CDS convictions. Furthermore, it was able to impeach him with the fact that, shortly before the

murder, he had been charged with new CDS offenses and that, after he had cooperated with police in this case, those charges were dropped. Moreover, the jury was presented with surveillance video, recorded at the time and place of the murder, that corroborated the State's version of events. And finally, the jury reached its verdict after only a few hours of deliberations, suggesting that it was not deadlocked at any time.[12] *See Dionas v. State*, 436 Md. 97, 112 (2013) (observing that "the length of jury deliberations is a relevant factor in the harmless error analysis"). Under these circumstances, any error would be harmless.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS ASSESSED TO APPELLANT.

[12] During deliberations, the jury sent a single note to the court, asking whether Faust is right-handed or left-handed. The court observed that it "always get[s] this question" and, with the concurrence of the parties, instructed the jury that it must rely only "upon that evidence which has been already received[.]"