UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1510

September Term, 2013

FRANKLIN MEDINA

v.

STATE OF MARYLAND

Meredith,
Graeff,
Leahy,

JJ.

Opinion by: Leahy, J.

Filed: June 8, 2015

Appellant Franklin Medina seeks our review of his conviction by a jury for attempted first-degree rape and associated offenses in the Circuit Court for Baltimore County. In his timely appeal, Appellant presents the following question for our review:

> Did the trial court err in limiting the cross-examination of [M.C., the victim and] the State's key witness?

For the reasons that follow, we shall affirm.

BACKGROUND

Although Appellant does not challenge the sufficiency of the evidence, we nevertheless review the facts presented at trial to provide context for our examination of Appellant's contentions of error. *See Goldstein v. State*, 220 Md. 39, 42 (1959) (noting that "[t]o understand the contentions made, it is necessary to relate some of the background of the case"); *Washington v. State*, 180 Md. App. 458, 462 n.2 (2008).

On August 6, 2006, the complainant in this case, M.C., was then employed as a manager at a massage center on York Road in Baltimore County.[1] At Appellant's trial, M.C.

[1] We have, in recent cases, avoided naming minor victims of sexual assaults. *See Smith v. State*, 220 Md. App. 256, 261 n.1 (2014); *In re James R.*, 220 Md. App. 132, 134 n.1 (2014). We likewise decline to further victimize the adult complainant in this case by providing her full name. We consider the following observation by a federal district court to be appropriate:

> [C]ourts have granted anonymity to protect against disclosure of a wide range of issues involving matters of the utmost intimacy, including sexual assault. . . . "[S]exual assault victims have unfortunately had to endure a terrible invasion of their physical privacy. They have a right to expect that this violation will not be compounded by a further invasion of their privacy.

(Continued…)

testified that although she was licensed as a massage therapist, her primary responsibilities at the time were as a cook, custodian, greeter, and manager, while three other women who worked there conducted the massages.[2]

M.C. spent each night at the business and was in her first floor bedroom at the time of the incident in question. It was after 3:00 a.m., and M.C. had retired for the night. She awoke when she "felt like somebody was staring at [her.]" M.C. continued:

> So, I just cracked open my eyes. Then a man suddenly asked me, "Do you want to f[. .]k?" So I just instantly answered, "No."
>
> * * *
>
> After then he put his knees here and pressing here and pressed my neck with his both hands, then bit my face here [on the cheek]. Then I felt in just a very short moment, I pray to God thinking I'm gonna die now.

M.C. testified that she passed out and was in a state of unconsciousness for several hours. She denied any consensual contact. After she awoke, M.C. went across the street to a gas station and called the police. When asked whether she could see her assailant, M.C. responded: "As [far] as I can remember, even though I cannot [sic] clearly saw [sic] him, he was medium height, little long hair, and a little chubby."

Officer Brian Goetz responded to the call and met M.C. at the gas station. He recalled that M.C. appeared to be confused and incoherent. He testified that M.C. "appeared to be

(…continued)
Doe No. 2 v. Kolko, 242 F.R.D. 193, 196 (E.D.N.Y. 2006) (quoting Gov. Mario Cuomo, 1991 McKinney's Sessions Laws of N.Y.).

[2] M.C.'s testimony was taken through an interpreter.

badly beaten. She was bleeding from her nose, her eyes, and her mouth. Her face was very swollen and black and blue. It also appeared as though she had red marks around her neck on each side." When Officer Goetz spoke with M.C. at the hospital, M.C. appeared to be "unsure about a lot," but could nevertheless recall that the assailant wore a white T-shirt and that he "could have been [w]hite." Officer Zachary Slenker testified that, during the investigation in the immediate aftermath of the assault, police recovered M.C.'s wallet next to a dumpster of a nearby supermarket. Near the same shopping center, police found a white T-shirt lying close to the sidewalk.

Detective Dan Kuhns with the Special Victims Unit of the Baltimore County Police Department testified that he met with M.C. at Sinai Hospital. According to the detective,

> [M.C.'s] face was extremely swollen. She had bruising around her neck, she had bruising on her face, and she had what appeared to be a bruise consistent with a bite mark on the left side of her face near her eye. Her eyes were swollen shut, and there was a cut near her right eye as well.

Ms. Linda Kelly, a SAFE nurse, examined M.C.[3] Ms. Kelly testified that, as part of the assessment, she photographed M.C.'s injuries, and then collected swabs of the injured places on her body. She identified two vaginal tears. Ms. Laura Pawlowski testified to the serological and DNA tests performed by Ms. Jodine Zane on the fluid samples collected by Ms. Kelly. Tests on vaginal and cervical swabs gave negative results for blood and semen. However, tests on the facial bite mark swab indicated the presence of blood and saliva. DNA

[3] SAFE is an acronym for sexual assault forensic examination—a type of forensic examination that collects potential biological evidence on the victim's body. SAFE nurses also document any injuries and bruises that the victim may have experienced.

profiles were obtained from bite mark swab, which indicated the presence of more than one individual's DNA in the sample. These DNA testing results were entered into the CODIS database on December 21, 2006.[4]

Detective Kuhns testified that in the months following the assault, the police considered several suspects who had been implicated because of their respective roles in unrelated police investigations. Appellant was not, at the time, considered a suspect. A comparison of the suspects' DNA samples with the DNA sample obtained from the bite mark on M.C.'s cheek did not produce a match.[5] With their leads exhausted, the Baltimore County police put the investigation on hold. No further progress was made for five years.

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[4] The Combined DNA Index System ("CODIS") is a database maintained by the Federal Bureau of Investigation for the "storage and exchange of DNA records submitted by federal, state, and local forensic DNA laboratories." Md. Code (2003 & 2011 Repl. Vol), Public Safety Article ("PS") § 2-501(c)(1). The Public Safety Article requires submission of DNA samples from individuals who are convicted of a felony or a violation of § 6-205 or § 6-206 of the Criminal Law Article and from those charged with a crime of violence or burglary or an attempt to commit a crime of violence or burglary. PS § 2-504(a)(1), (3).

> [By using the CODIS database,] law enforcement authorities can compare and contrast the DNA records stored in these collections—i.e., compare and contrast the DNA records of crime scene evidence against the DNA records of convicted or arrested individuals. . . . "In short, CODIS sets uniform national standards for DNA matching and then facilitates connections between local law enforcement agencies who can share more specific information about matched STR profiles."

Diggs & Allen v. State, 213 Md. App. 28, 52 & n.4 (2013) (quoting *Maryland v. King*, 133 S. Ct. 1958, 1968 (2013)), *aff'd*, 440 Md. 643 (2014).

[5] DNA and the presence of sperm were also found on a white comforter in the massage center. M.C., the 2006 suspects, and Appellant were excluded as sources of the DNA on the comforter.

A break came in August 2011, when Detective Kuhns was notified that a male DNA profile recently entered into CODIS matched the DNA profile from the bite mark licking swab taken from M.C. in 2006. The matching DNA profile belonged to Appellant.[6] Detective Kuhns then applied for a statement of charges and an arrest warrant on August 10, 2011 for Appellant for the rape and robbery of M.C., and police arrested Appellant the same day. Detective Kuhns also obtained search and seizure warrants on September 26, 2011 and August 13, 2012 to collect additional DNA samples from Appellant in the form of buccal swabs. The purpose of these additional swabs was to compare his saliva and DNA taken directly from Appellant's mouth and to confirm that he was the contributor of the DNA that was found in the bite mark that M.C. received in 2006.

Ms. Pawlowski described the DNA comparison process that implicated Appellant in the 2006 assault. Appellant's DNA could not be excluded as the source of saliva present in the bite mark swab, although 99.9% of the African-American, Caucasian, Southwest Hispanic, and Southeast Hispanic populations could be excluded. Ms. Pawlowski explained her testing and its results:

> [PROSECUTOR:] When you compared the bite mark licking swabs from the cheek of [M.C.] with the buccal swabs from [Appellant] . . . what were the conclusions of your examination?
>
> [MS. PAWLOWSKI:] For . . . the bite mark licking swab, I compared my swab to the mixture that Ms. Jodi[n]e Zane had originally detected in her analysis. My conclusion was that neither [M.C.] or [Appellant] could be excluded from the mixture of DNA that she had in that sample. I further said

[6] The State agreed not to mention at trial that Appellant's DNA profile was initially entered into CODIS as a result of an unrelated criminal matter.

> that if there were only two people present in that mixture, it is consistent with being a mixture of [M.C.] and [Appellant].
>
> Making that statement means that I looked at that mixture, I felt it was a two person mixture. Looking across the profiles from [M.C.] and [Appellant], every allele is accounted for in that mixture. There are no extra alleles, there's nothing that is missing. I then went on and did a statistical analysis of that profile.[7]
>
> * * *
>
> If there are only two people present in that mixture, it's consistent with being a mixture of the DNA profile of [M.C.] and Mr. Medina.

Detective Kuhns testified that an investigation revealed that in 2006 Appellant resided on Cranbrook Road, approximately 1.1 miles from the crime scene. The State introduced transcripts of jailhouse telephone conversations between Appellant and his mother and girlfriend. Appellant told them that the house was a massage place, and intimated that the goings on there were for more than a massage. He disclosed that he had been to the massage center around the time of the assault in 2006 but was not there on the day of the assault. He avowed that he had not entered the business without permission.

Prior to trial, Appellant moved for the issuance of a subpoena *duces tecum* seeking disclosure from the Maryland State Board of Chiropractic and Massage Therapy Examiners of any records pertaining to M.C.'s application for a license as a massage therapist. The defense theory was that M.C. lied on her license application in 2000 by misrepresenting that

[7] Ms. Pawlowski used the terminology of inclusion and exclusion—and would not use the word "match"—in her testimony because the samples contained a mixture of two DNA profiles with no profile being "primary."

she did not have a prior conviction, when in fact she had been convicted of prostitution in Rhode Island in 1997. The Maryland State Board of Chiropractic and Massage Therapy Examiners moved to quash the subpoena. On the morning of July 15, just before jury selection, the trial court granted the motion to quash in part by denying access to the investigative files but denied the motion with respect to M.C.'s license application.

After a four-day trial and four hours of deliberation, on July 19, 2013, the jury found Appellant guilty of first- and second-degree assault and of attempted first- and second-degree rape. Appellant was acquitted of first- and second-degree rape, as well as first-degree burglary and robbery.[8] On September 18, 2013, the trial court imposed a sentence of life imprisonment and required him to register as a Tier III sex offender. Appellant noticed this appeal on the day of his sentencing. Additional facts will be discussed as necessary to our resolution of the issues.

DISCUSSION

Appellant argues that the trial court improperly limited cross-examination of M.C. in two instances. First, Appellant contends he should have been allowed to cross-examine M.C. regarding the State's decision in 2012 to enter a *nolle prosequi*[9] ("nol pros") of a prostitution

[8] The State entered a *nolle prosequi* with respect to theft, burglary and third degree sexual offense charges.

[9] "A nolle prosequi, or nol pros, is an action taken by the State to dismiss pending charges when it determines that it does not intend to prosecute the defendant under a particular indictment." *State v. Huntley*, 411 Md. 288, 291 n.4 (2009) (citing *Ward v. State*, 290 Md. 76, 83 (1981)).

charge. Second, Appellant asserts that the trial court abused its discretion by precluding further cross-examination about a falsehood on M.C.'s 2000 application for a massage therapy license. The State counters that, as to the first ruling, the trial court's refusal to permit cross-examination was well within the court's discretion and should be affirmed. The State reasons that there was no circumstantial evidence of bias, that M.C.'s "motive to testify falsely was established by a substantial body of other evidence[,]" and that any error in the trial court's ruling on this issue was harmless beyond a reasonable doubt. As to the trial court's decision to prevent the defense from questioning M.C. about her false answer to a question on her massage license application, the State avers that the trial court's limitation on Appellant's cross-examination was a proper exercise of its discretion under Rule 5-616(a)(4). We address Appellant's arguments in turn.

A. Nolle Prosequi of Prostitution Charge

Appellant filed a motion *in limine* on April 8, 2013, seeking leave to cross-examine M.C. on the nol prossed prostitution charge. Approximately five years after the assault, M.C. was charged with prostitution after a different massage center was the target of a police sting; that prostitution charge was nol prossed on June 8, 2012. Appellant argued that cross-examination relating to the prostitution charge was permissible because it would bear on the victim's bias and motive to lie to the police about the actual events that occurred back in 2006. Appellant further argued that the nol pros of M.C.'s prostitution charge suggests an ulterior motive for falsely accusing Appellant of rape; specifically, that M.C. subjectively believed that she would receive favorable treatment from the State for her testimony.

At the motions hearing held on June 20, 2013, defense counsel elaborated on his argument:

> [DEFENSE COUNSEL]: . . . [T]here's an arrest of the victim, [M.C.] for prostitution that was [nol prossed], I think maybe six months ago or maybe a little bit longer, but during the pendency of this trial.[10] It is my position and under *Brown* [*v. State*, 74 Md. App. 414 (1988)] and *Johnson* [*v. State*, 332 Md. 456 (1993)] which I provided in my brief, that bias evidence is always relevant, never collateral, and always provable by extrinsic evidence.

Counsel maintained that M.C., "for lack of a better term, [is a] madam and a prostitute and she had a number of young Asian women working at that residence." Counsel added:

> [DEFENSE COUNSEL]: [M.C.'s ...] lie or story in the [emergency room in 2006] was based on her ongoing criminal activity [conducting a house of prostitution] and was unrelated to [the nol pros in 2012].
>
> * * *
>
> I plan through cross-examination, I'm gonna ask her about it and see what she says. You're running a massage parlor? No. Okay, there's the answer but the jury has to get a chance to hear that. They're gonna hear from the State that my client has told everyone that it's a massage parlor and there are Asian women there, they bathe you, they do this, they do that. So, in order to test the reliability o[r veracity] of those jail house calls, I intend to cross-examine [M.C.].
>
> I don't have other extrinsic evidence that I plan to present on that issue today, but the law is clear, I submit, I have a right to cross-examine her as to the day of the incident, especially where the State is introducing it as substantive evidence.
>
> * * *
>
> THE COURT: She didn't say anything about a massage parlor?

[10] The charge against M.C. was resolved slightly over one year before the hearing and 13 months before the commencement of the trial in this case.

> [DEFENSE COUNSEL]: No, instead all she said was, "I was asleep there by the door when someone came in and raped me." When, in fact, the Government's own substantive evidence, the jail house calls of my client prove differently . . .

Defense counsel argued further that the nol pros of the 2012 charge would be relevant to M.C.'s state of mind, regardless of whether the State had offered any agreement, and that as a result she would be disposed to testify in favor the State and perpetuate the long standing lie that concealed the true nature of her "massage" enterprise.

> [DEFENSE COUNSEL]: Once again the crux of the inquiry is the witness'[s] state of mind. It does not matter whether or not an actual agreement exist[s] between the witness and the Government. The Defense is constitutionally entitled to explore by cross-examination what the witness believes, he or she, would receive in exchange for their testimony.
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> * * *
>
> [DEFENSE COUNSEL]: Cross-examination as to [M.C.'s] prostitution enterprise on August 6, 2006, is inherently relevant and directly linked to [M.C.] initial statement to the police alleging rape. Cross-examination and extrinsic evidence as to [M.C.'s] prostitution arrest [and] subsequent nolle prosequi in 2012 is directly linked to her motive to testify falsely at the trial next month.
>
> The jury is entitled to observe [M.C.'s] demeanor if and when she denies that she believes her 2012 nolle prosequi was obtained in exchange for her testimony. I would expect her to say something like that, but the law doesn't say that the Court's decision presupposes that or the Court is to rule that. Instead what the constitution and all the case law says is the jury is entitled to hear the question and hear the answer and that's that.

The prosecutor expressed his concern that if the resolved prostitution charge was mentioned at trial, the jurors would hold that against M.C. Following additional discussion, defense counsel acknowledged that his bias theory was not relevant to the assault that M.C.

underwent, as she would not have consented to her injuries. He then reiterated the defense impeachment theory:

> [DEFENSE COUNSEL]: Here's our point. Our point is this also, on the bias issue, she may very well believe, and I'm entitled, I submit respectfully, to ask the question. She may very well believe that if she does not testify consistently with what she told the police in 2006, guess what happens after trial? She's charged with a case that was dismissed. So, that's her motive. It's a freedom interest, a liberty interest.

The trial court ruled that the defense could not ask M.C. about the 2012 prostitution charge and the State's decision to dispose of it by entering a nol pros. The court explained its ruling as follows:

> THE COURT: All right. I do not find that there is any probative value to the case that was nol-prossed in 2012 with respect to this case, but even if there was some probative value -- and I don't think that there is -- any such value would be substantially outweighed by the danger of undue prejudice or confusion to the jury.
>
> I'm not persuaded that -- at least based on what has been presented to me in this hearing -- that there's any sufficient reason to believe that [M.C.] has a motive to testify falsely to curry favor with the State to insulate herself from a revived prosecution of the events of January 2012. I do not think charges could be re-filed on this matter as of this date.

Although the court would not permit the defense to cross-examine M.C. with respect to her arrest in 2012 for solicitation of prostitution, the court did permit the defense to explore the nature of the business after the State agreed that the defense could enquire about whether M.C. operated a massage parlor.

> THE COURT: Well, what we've said on the record so far is that the Defendant can cross-examine [M.C.] as to whether or not she operated a massage parlor as of August 6, 2006, whether she had young women at her home who offered sex for money, and whether she was the agent or madam for

> these young women at her home who offered sex for money on August 6, 2006. Those were the three areas we discussed.

Thus at trial, defense counsel extensively cross-examined M.C. and other witnesses about the nature of M.C.'s employment, and argued in both opening and closing statements that M.C. was working in a brothel and invited Appellant in, after which "something went bad" and M.C. was beaten. Nevertheless, Appellant contends that the court's ruling precluding him from cross-examining M.C. about the nol pros of the 2012 prostitution charge was erroneous.

The Confrontation Clause and Rule 5-616

The Sixth Amendment to the United States Constitution, applicable to the State of Maryland through the Fourteenth Amendment, establishes that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.[11] The Confrontation Clause

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

[11] Article 21 of the Maryland Declaration of Rights—providing that "in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him . . . [and] to examine the witnesses for and against him on oath"—is analyzed "*in pari materia*" with the Sixth Amendment right to confrontation. *Cooper v. State*, 434 Md. 209, 232 (2013) (citations omitted), *cert. denied*, 134 S. Ct. 2723 (2014).

California v. Green, 399 U.S. 149, 158 (1970) (footnote omitted). Together, these "elements of confrontation" serve to safeguard "that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (citations omitted).

Central to the right of confrontation is the opportunity to cross-examine witnesses. *Pantazes v. State*, 376 Md. 661, 680 (2003). "[T]he defendant's right to cross-examine witnesses includes the right to impeach credibility, to establish bias, interest or expose a motive to testify falsely." *Id.* (citations omitted). The courts of Maryland have recognized that "'the exposure of a witness'[s] motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" *Id.* (quoting *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974)).

"The right to cross-examination, however, is not without limits." *Marshall v. State*, 346 Md. 186, 193 (1997) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *Smallwood v. State*, 320 Md. 300, 307 (1990)). The trial court may "establish reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is repetitive or only marginally relevant." *Pantazes*, 376 Md. at 680 (citing *Van Arsdall*, 475 U.S. at 679; *Merzbacher v. State*, 346 Md. 391, 413 (1997)). The Court of Appeals has "said on numerous occasions that trial courts retain wide latitude in determining what evidence is material and relevant, and to that end, may limit, in their discretion, the extent to which a witness may be cross-examined for the purpose of showing bias." *Merzbacher*, 346 Md. at

413. As the Supreme Court stated in *United States v. Scheffer*, a "defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. A defendant's interest in presenting such evidence may thus 'bow to accommodate other legitimate interests in the criminal trial process.'" 523 U.S. 303, 308 (1998) (citations omitted) (quoting *Rock v. Arkansas*, 483 U.S. 44, 55 (1987)); *accord Pantazes*, 376 Md. at 680-81.

The limits a trial court places on cross-examination must not themselves violate the Confrontation Clause:

> The Confrontation Clause of the Sixth Amendment is satisfied where defense counsel has been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and of credibility, could appropriately draw inferences relating to the reliability of the witness. The trial court's discretion to limit cross-examination is not boundless. It has no discretion to limit cross-examination to such an extent as to deprive the accused of a fair trial. In assessing whether the trial court has abused its discretion in the limitation of cross-examination of a State's witness, the test is whether the jury was already in possession of sufficient information to make a discriminating appraisal of the particular witness's possible motives for testifying falsely in favor of the government.

Marshall, 346 Md. at 193-94 (internal quotation marks and citations omitted).

Maryland Rule 5-616 allows a party to probe the bias of a witness through cross-examination, subject to the limitations of Maryland Rule 5-403.[12] *See Leeks v. State*, 110 Md. App. 543, 557 (1996). Rule 5-616(a) provides:

[12] Rule 5-403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

> **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 . . . [p]roving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely.

The Court of Appeals has devised two factors that courts must consider when limiting cross-examination concerning bias. In a jury trial, "questions permitted by Rule 5-616(a) 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) (quoting *Leeks*, 110 Md. App. at 557-58) (emphasis omitted). "When a defendant seeks to cross-examine a State's witness to show bias or motive, 'the crux of the inquiry insofar as its relevance is concerned, is the witness's state of mind.'" *Martinez v. State*, 416 Md. 418, 431 (2010) (quoting *Smallwood*, 320 Md. at 309). "When determining whether a particular item of circumstantial 'bias' evidence should be excluded on the ground that it is unfairly prejudicial and/or confusing, the trial court is entitled to consider whether the witness's self interest can be established by other items of evidence." *Id.* (quoting *Calloway*, 414 Md. at 638).

Allegation that the Nol Pros Procured Favorable Testimony

The archetypical situations involving Rule 5-616 and witness bias are where the witness's prior convictions and circumstantial evidence reasonably suggest the existence of an agreed upon quid pro quo between the State and the witness, or reasonably suggest that the witness hoped for some consideration from the State in exchange for testifying against the defendant. *See Leeks*, 110 Md. App. at 558. For example, in *Calloway v. State*, 414 Md.

616 (2010), the witness had volunteered to testify for the State while he was incarcerated pending trial in an unrelated matter. *Id.* at 619-20. Before becoming involved in the Calloway's trial, the witness was "(1) awaiting trial on charges of second degree assault and reckless endangerment, (2) facing a violation of probation charge . . . , and (3) [incarcerated and] unable to post a $10,000 cash bail that had been established as a condition of his pretrial release." *Id.* at 619. The witness "placed a telephone call to the Montgomery County State's Attorney's Office, and offered to testify about several inculpatory statements that [Calloway] had allegedly made to him [while in jail]." *Id.*

Between the date on which the witness spoke with the State and the date on which the witness testified in the case, the State (1) requested that the witness be released on a "personal bond," (2) nol prossed the witness's pending charges, and (3) filed a motion in which it requested that the trial court prohibit Calloway from cross-examining the 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 when he contacted the prosecutor's office." *Id.* (emphasis added). The Court of Appeals held that "there was a solid factual foundation for an inquiry into [the witness's] self interest," and that the evidence of the witness's self interest was not outweighed by the danger of confusion or unfair prejudice to the State. *Id.* at 639. Therefore, the Court concluded, the trial court "erred in granting the State's motion *in limine* [precluding cross-examination] on the ground that it found [the witness] to be [] credible." *Id.*

In *Martinez v. State*, 416 Md. 418 (2010), the Court of Appeals again had occasion to review a trial court's decision to limit cross-examination of a State's witness. There, the Court found significant that "a mere six days before [the witness] testified at the motions hearing in th[e] case, the State *nolle prossed* charges that had been pending against him, and that he was incarcerated pursuant to a writ of body attachment pending his testimony," after he failed to attend court on the first day of trial. *Id.* at 422, 431. These facts amounted to a "solid factual foundation for the defense's inquiry into [the witness's] potential bias." *Id.* at 431.

Other cases have involved similar indicia of bias—either of a quid pro quo or subjective expectation of a benefit—in response to leniency by the State. *See Dionas v. State*, 199 Md. App. 483, 509 (2011) (holding that sufficient factual foundation existed to support inquiry into witness bias where "[the witness's violation of probation] hearing had been postponed for him to 'complete cooperation' in [Dionas's] case, and that the [hearing] judge had granted bail pending the hearing and stated that the parties would bring to her attention at the sentencing hearing his participation as a witness in [Dionas's] case"), *rev'd on other grounds*, 436 Md. 97 (2013); *Leeks*, 110 Md. App. at 548, 553-54 (1996) (holding that the trial court erred in limiting inquiry into witness bias where the witness was incarcerated and the State nol prossed a controlled dangerous substance charge and entered into guilty pleas with the witness for offenses that were substantially reduced in severity from the original charges); *Brown v. State*, 74 Md. App. 414, 420 (1988) (holding that the trial court erred in limiting inquiry into witness bias where the witness was faced with pending

charges at the time she first volunteered information to the police which implicated the defendants, the witness's charges were nol prossed prior to defendant's trial, and the State could have prosecuted the witness for the same offense "under a new charging document if she refused to repeat her inculpatory statements at trial").

In considering the first of the two *Calloway* factors, we agree with the trial court that the facts do not support a finding of a sufficient factual basis for bias. The instant case does not present the indicia of bias attendant in other cases discussed *supra* and relied upon by Appellant. Here, the witness is *the victim,* who originally reported the crime to the police, many years prior to her prostitution charge. Clearly M.C. had her own motive, independent of anything the State did, to testify during the trial of Appellant, who according to independent DNA analysis, was the man who brutally assaulted her. *See Elliott v. State*, 185 Md. App. 692, 735 (2009) ("[T]he victim's 'motive' in testifying against appellant was established by her clear recollection of the events" of the day of her assault). This is not a situation, like *Calloway*, where a "jailhouse snitch" without any prior involvement in the case volunteered to testify for the State. *Cf. Calloway*, 414 Md. at 637. Further, unlike in *Calloway,* M.C. was not an informant with pending charges who contacted the State's Attorney to offer information, and the State did not nol pros her charge *after* she offered to testify. *See id.* Unlike in *Martinez,* M.C. was not a witness testifying while imprisoned on a writ of body attachment. *See Martinez*, 416 Md. at 422, 431. Moreover, there was not a scheduled violation of probation hearing where M.C. would be held to account if she failed to testify "consistently" with what the State was expecting. *See, e.g.*, *Dionas,* 199 Md. App.

at 507. All told, there is not a sufficient factual foundation of an expected benefit or quid pro quo that would have supported an inquiry into M.C.'s motives related to her nol prossed prostitution charge.

Allegation that M.C. Feared Prosecution

Even if we were to find that a factual foundation supporting inquiry into M.C.'s alleged partiality existed, we would agree with the trial court's alternate ruling—that the probative value of such an inquiry was substantially outweighed by the danger of undue prejudice or confusion to the jury—thus satisfying the second *Calloway* factor. "When determining whether a particular item of circumstantial 'bias' evidence should be excluded on the ground that it is unfairly prejudicial and/or confusing, the trial court is entitled to consider whether the witness's self interest can be established by other items of evidence." *Calloway*, 414 Md. at 638.

> For example, in *Ebb* [*v. State*, 341 Md. 578 (1996),] ballistics evidence established that the murder weapon was the handgun that investigating officers seized from the person of Todd Timmons. Because it is so obvious that Mr. Timmons had the strongest of motives to testify that he was not in possession of the murder weapon when the murders occurred, it is impossible to hypothesize a juror who would have (1) believed Mr. Timmons' testimony in the absence of evidence that there were unrelated criminal charges pending against him at that time, but (2) rejected his testimony upon learning about those charges.

Id. at 638-39.

Upon review of the record as a whole, we are satisfied that the trial court did not abuse its discretion in limiting the cross-examination of M.C. because Appellant was able to sufficiently inquire into M.C.'s motivations and present his theory to the jury in satisfaction

of his right to confrontation. To come to this conclusion, we must remember Appellant's theory of bias—that M.C. was predisposed to testify in favor of the prosecution because of a fear of future prosecution.

At the motions hearing, Appellant presented two motives for M.C. to testify falsely, which he resolutely maintained were separate and distinct. Appellant tried to distinguish (1) M.C.'s motive to testify falsely based on the State nol prossing her 2012 prostitution charge from (2) M.C.'s motive to testify falsely based on her alleged omission to police that she operated a brothel at the time of the 2006 assault. When pressed, however, defense counsel conceded that the foundation for both motivations—the motive to testify falsely in favor of the government—would be to curry favor with the government because of her fear of prosecution for prostitution or a related offense.

The court specifically allowed cross-examination about prostitution and the true nature of the massage center. The court stated that:

> the Defendant can cross-examine [M.C.] as to whether or not she operated a massage parlor as of August 6, 2006, whether she had young women at her home who offered sex for money, and whether she was the agent or madam for these young women at her home who offered sex for money on August 6, 2006."

These lines of inquiry touch on the same motive—to lie for fear of prosecution for prostitution or a related offense. Appellant was permitted to inquire into this motivation. Appellant had ample opportunity to impeach M.C. by implying that M.C. was, in fact, managing a house of prostitution instead of sleeping peacefully at the time of the assault. The trial court allowed Appellant to explore M.C.'s motivations related to any alleged

falsehoods in 2006 and at trial. We agree with the trial court that the limited probative value discussed above would be substantially outweighed by undue prejudice, confusion of the issues, and needless presentation of cumulative issues.

B. Misrepresentation on License Application

We next turn to Appellant's argument that the trial court erred in precluding him from cross-examining M.C. about her 1997 prostitution conviction in Rhode Island and her subsequent notarized statement to the State Board of Chiropractic and Massage Therapy Examiners that she had not been convicted of a crime. On the morning of the second day of trial, July 16, 2013, the State presented a motion *in limine* to preclude mention of M.C.'s 1997 Rhode Island conviction for prostitution and to preclude the use of the massage therapy license application. Appellant opposed the motion, arguing that both were relevant because M.C. "has lied from the beginning to the police; [] we challenge the legitimacy of what she purports to be, and that is a licensed validly legal massage therapist." Defense counsel quoted M.C.'s massage therapist license application to the court: "'Have you pled guilty, nolo contendere that's a spelling mistake, or been convicted or received probation before judgment of any criminal act excluding traffic violations? ANSWER: No.[']"

Defense counsel then articulated the reason, in his view, why he should be allowed to question M.C. about her conviction for prostitution in Rhode Island.

> [DEFENSE COUNSEL, quoting M.C.'s application]: "[T]he foregoing statements are true and correct." This was signed by her. This is a sworn statement. This is a falsehood in a signed statement.

My goal is to bring out that she is or is not a massage therapist. I intend to get into the application procedure. My intent would be then -- here it is, judge. She applies for the license she tells --

THE COURT: I saw all this yesterday. Now, Mr. [Defense Counsel], do you have a rule on which you are relying for your position or a case?

[DEFENSE COUNSEL]: Yes.

THE COURT: I understand your position.

[DEFENSE COUNSEL]: Yes. Rule 5-616.

THE COURT: 5-616.

[DEFENSE COUNSEL]: Subsection (a)4, "Impeachment by inquiry of the witness -- and I'm incorporating in this argument today the very same case law and rules that I articulated on June 20, 2013 at the motions hearing. This is bias evidence, because let me finish if I may and tell you what the bias is here, that on the date of the incident in August of 2006, she was illegally conducting a massage parlor. She did not tell the police that because that's her livelihood, and her fear was -- and I'm entitled, I submit, to explore this as bias evidence -- she feared if she told the police that night that she was serving men and holding a massage parlor, that she knew at that time she had a fraudulent license in her possession, and she knew she was committing a criminal act, and she knew that if discovered by the police and, hence, the authorities, that she would lose that license and her financial livelihood. Therefore, this is the best, one of the strongest motives to fabricate, and that is a financial basis of bias. I've cited it before but I'll repeat --

THE COURT: You said Rule 5-616 (a)4, is that correct?

[DEFENSE COUNSEL]: 5-616, (a)4, that's correct, impeachment and rehabilitation generally.

THE COURT: So proving that the witness is prejudiced --

[DEFENSE COUNSEL]: Bias, not prejudiced.

THE COURT: Bias. So, you're saying the witness is bias -- I guess I don't understand the application of that word to this situation.

[DEFENSE COUNSEL]: Bias being a motive to fabricate a story here. That's what bias is. She has a dog in the fight so to speak. She has a reason for it. I would further -- sure enough. I'll just read the rest of the rule for the record. It reads, "proving that the witness' bias, interest in the outcome of the proceeding or has a motive to testify falsely." Her motive to testify falsely is she's got to continue to tell the story that she told back in August of 2006. She still has a license that runs valid through the year 2014, therefore, she's running an illegal massage parlor, she subjects herself to criminal charges for running a brothel. She runs the threat of criminal charges. See, way happened in this case--

THE COURT: Well, I guess I'm still not sure I understand. Suppose she does run a brothel. Suppose that's true, it's a brothel.

[DEFENSE COUNSEL]: Yes.

[DEFENSE COUNSEL]: Well, I don't understand that a person who is in the business of running a brothel somehow has consented to being raped and beaten very badly. How is the fact she is running a brothel relate to the crimes charged in this case?

[DEFENSE COUNSEL]: It does not relate to the crime per se. Our theory is that whatever sex there was was consensual, but that has nothing to do with the bias itself. The bias issue is tied to the statements made of the witness to the police, first, and now her present testimony. What I'm stating --

THE COURT: Well, the testimony we have is that the sex is not consensual in the sense that there are these tears and other problems. You're saying the fact she runs a brothel -- I mean, even if she runs a brothel there could still be no[] consensual sex.

[DEFENSE COUNSEL]: Yes. Oh, absolutely, absolutely. That's for the jury to decide whether or not respectfully not for the Court to make a threshold determination as to the credibility of a witness.

THE COURT: I never met her, so I'm not making any determination about her credibility.

[DEFENSE COUNSEL]: If the Court does not allow me to question her or curtails cross-examination in the bias, I would suggest to the Court that under the Sixth Amendment of the Constitution, the Maryland Constitution, and under the case law by the Supreme Court, especially in Davis [*v. Alaska*, 415

> U.S. 308 (1974)], especially in the *Alford* case. I'm not talking about North Carolina [*v. Alford*, 400 U.S. 25 (1970)], I'm talking about *Alford* [*v. United States*, 282 U.S. 687 (1931)], which I cited on June 20th, and all the other cases..[.]

The court reserved its ruling for the trial, stating "[a]t this point we'll see what happens. I don't know. We'll see what you ask, what she says, objections may be sustained if they're made. I don't know. We'll see what the testimony is."

At trial, M.C. testified on cross-examination that she had been a licensed massage therapist since 2000 and had renewed her license every two years. Defense counsel then questioned M.C. about her application:

> [DEFENSE COUNSEL]: So, you do remember. In fact, on the application you were asked a number of questions you have to answer.
>
> [M.C.]: Yes.
>
> [DEFENSE COUNSEL]: In fact one of the questions is I quote, "Have you pled guilty or been convicted of or received probation before judgment of any criminal act?" There's a question whether or not you have a criminal conviction, correct?
>
> [M.C.]: No.
>
> [DEFENSE COUNSEL]: Isn't it a fact that when asked that question you answered, "No," that you have no criminal convictions, isn't that what you said?
>
> [M.C.]: That's correct.
>
> [DEFENSE COUNSEL]: In fact, on the last page you swore that everything in the application was true and correct, didn't you?
>
> [M.C.]: Probably it is.
>
> [DEFENSE COUNSEL]: In fact, when you answered the question, "No," that you had no criminal convictions, were you telling the truth -

[PROSECUTOR]: Objection.

THE COURT: Overruled.

[M.C.]: Yes.

[DEFENSE COUNSEL]: May we approach?

A sidebar ensued, and defense counsel explained the object of his cross-examination:

> [DEFENSE COUNSEL]: My intention is to ask or assert that, in fact, she was convicted of prostitution in Rhode Island on July 24, 1997. She just perjured herself. Perjured herself. We know as a matter of fact that she had a conviction. So, I intend to ask that question. I just wanted to raise that with the Court before I did so.
>
> [PROSECUTOR]: I would object, because that is extrinsic evidence that can [not] be allowed. He is stuck with that answer and that's it. That's the rule.
>
> THE COURT: I think that's the rule.

The trial court refused to permit further argument and questioning resumed:

> [DEFENSE COUNSEL]: My next question is this, when you said you had no criminal conviction, that was not true, you do have a criminal conviction, don't you --
>
> [PROSECUTOR]: Objection.
>
> THE COURT: All right. You already asked that question, and the objection is sustained because you've already asked that question and already had it answered.
>
> [DEFENSE COUNSEL]: You have a conviction --
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Objection sustained.
>
> [DEFENSE COUNSEL]: Do you have a conviction in Rhode Island --

[PROSECUTOR]: Objection.

THE COURT: It's not a question, yet, Mr. [Prosecutor].

[PROSECUTOR]: The question is does she have a conviction in Rhode Island, and I'm objecting to that.

THE COURT: Is that the whole question, Mr. [Defense Counsel]?

[DEFENSE COUNSEL]: Yes.

THE COURT: The objection to that question is sustained.

Appellant contends that the trial court erred in sustaining the objection because Rule 5-616 permitted him inquire into M.C. bias stemming from her conviction and massage therapy license.[13] The State avers that the trial court's limit on Appellant's cross-examination was a proper exercise of its discretion under Rule 5-616(a)(4).

We hold that the trial court did not abuse its discretion in limiting cross-examination with respect to M.C.'s Rhode Island prostitution conviction and the false statement on her application. In considering the first *Calloway* factor, there existed little factual basis for inquiry into bias stemming from her 1997 conviction and alleged falsehood on her license application. M.C. testified at the trial in 2013; any motive to testify falsely is far removed

[13] Appellant contended before the trial court that he sought to cross examine M.C. pursuant to Maryland Rule 5-616(a)(4) for bias. For the first time on appeal, Appellant relies on Maryland Rule 5-608(b) to buttress his challenge to the trial court's actions. As pointed out by the State, Appellant's Rule 5-608(b) challenge to M.C.'s character was not raised before the trial court and is thus not preserved. *See* Maryland Rule 8-131(a); *Joyner v. State*, 208 Md. App. 500, 519 (2012) (noting that an argument that is advanced for the first time on appeal is not preserved for appellate review); *see DeLeon v. State*, 407 Md. 16, 26 (2008) ("The essence of the preservation rule is that the trial court must have an opportunity to consider the issue, and rule on it first, in the context of the trial."); *Bell*, 334 Md. at 189-91.

from M.C.'s 1997 conviction and her massage therapy license application. Further, we reiterate that M.C. is the victim—she originally reported the assault to the police. M.C. had her own motive to testify, which was independent of her massage therapy work and any discrepancies in her application.

Regarding the second *Calloway* factor, we reiterate that, in determining "whether a particular item of circumstantial 'bias' evidence may be excluded on the ground that it is unfairly prejudicial and/or confusing, the trial court is entitled to consider whether the witness's self interest can be established by other items of evidence." *Calloway, supra*, 414 Md. at 638.

Here, any potential partiality resulting from M.C.'s concern over her massage therapy license was proved by other means, such as through the exploration that the true nature of the massage center was for prostitution, not massage therapy. Defense counsel spent considerable time laying a foundation that the massage center was, in fact, a brothel. M.C.'s motivation—an alleged motive to fabricate—was explored through the defense's assertion of prostitution and exploration of the consequences to M.C. if she violated the massage therapy code of ethics. During cross-examination, defense counsel asked M.C. if she knew that, "in order to keep your license [she had] to follow the Code of Ethics for massage [therapy?]" Counsel continued, stating the "Code of Ethics provides that a massage therapist who holds a license may not engage in a sexually intimate act with a client." Thus, the trial court did not err in limiting cross-examination on M.C.'s 1997 conviction because Appellant was allowed to prove M.C.'s possible partiality in other ways.

More generally, if we adopted Appellant's position, *any* prior misstep—even one that is wholly collateral to the trial proceeding—that could potentially result in negative consequences in a witness's personal or professional life would be ripe for cross-examination under the Confrontation Clause. In this area, "the trial judge plays a significant role; for he [or she] must balance the probative value of an inquiry against the unfair prejudice that might inure to the witness." *State v. Cox*, 298 Md. 173, 178 (1983). "Otherwise, the inquiry can reduce itself to a discussion of collateral matters which will obscure the issue and lead to the fact finder's confusion." *Id.* Appellant's interpretation would severely restrict the trial court's ability to place reasonable limits on cross-examination for the reasons articulated in Maryland Rule 5-403—unfair prejudice, confusion of the issues, misleading the jury, waste of time, or needless presentation of cumulative evidence.

JUDGMENTS AFFIRMED.

APPELLANT TO PAY COSTS.