Circuit Court for Montgomery County
Case No.: 134356C

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 408

September Term, 2023

ETIENNE KABONGO

v.

STATE OF MARYLAND

Berger,
Leahy,
Ripken,

JJ.

Opinion by Leahy, J.

Filed: December 3, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Md. Rule 1-104(a)(2)(B).

On August 30, 2018, Etienne Kabongo, ("Appellant" or "Defendant"), was indicted on 14 counts alleging that he committed sex offenses against four special needs students while they were riders on the Montgomery County Public Schools bus that he drove. After pleading not criminally responsible ("NCR"), Appellant entered guilty pleas to one count of sexual abuse of a minor as to Victim A, one count of second-degree rape as to Victim B, one count of second-degree rape as to Victim C, and one count of sexual abuse of a minor as to Victim D. *See* Maryland Code, (2001, 2018 Repl. Vol.), Criminal Procedure Article ("CP"), section 3-111(c) (governing pleading and bifurcated proceedings for defendant claiming he was not criminally responsible);[1] Md. Rule 4-314 (governing trial on criminal responsibility following guilty plea). In a three-day trial litigating Appellant's NCR plea, a jury in the Circuit Court for Montgomery County found Appellant criminally responsible on those four counts. He was sentenced to a total of 90 years with all but 40 years suspended, followed by five years of probation, and he was required to register as a Tier III sex offender.

In this timely appeal, Appellant presents the following two issues:

1. "Did the trial court abuse its discretion by granting the State's request to modify the pattern instruction on the defendant's burden of proof?"

2. "Did the trial court abuse its discretion by permitting the State to elicit misleading and/or confusing testimony from the defense expert on cross examination?"

[1] Our analysis is not altered by the statutory amendments effective October 1, 2024. *See* 2024 Md. Laws, ch. 444 (H.B. 432).

Because we conclude that the trial court did not abuse its discretion, either in instructing the jury or in permitting cross-examination of Appellant's defense expert regarding a pattern in his professional opinions, we shall affirm Appellant's convictions.

BACKGROUND

Appellant does not dispute the sufficiency of the evidence supporting his convictions. Consequently, our summary of the record provides the necessary background for our discussion of the issues raised by Appellant, rather than a comprehensive review of the evidence presented.

According to the State's proffer at Appellant's plea hearing, on August 1, 2018, Montgomery County Police began investigating a report that a special needs student was sexually assaulted by her bus driver who was employed by Montgomery County Public Schools. Based on statements and bus records, including video footage from surveillance cameras, Appellant was charged with sexual abuse of that student, as well as three other student passengers.

On July 31, 2018, Appellant transported Victim A and Victim B from their summer school program on a bus equipped with cameras. Video footage shows Appellant walking past Victim A, to interact with Victim B. Appellant put his hand between her legs, moving it in a back-and-forth motion and causing visible discomfort to Victim B. When Victim A stood up, Appellant approached her. After touching her vagina with an open hand on top of her clothing, Appellant sat next to her, placed his right hand between her legs, and moved it around. Victim A screamed "ow" and began to cry.

Victim A's mother reported that after getting off the bus, her daughter told her the bus driver touched her vagina. In an interview with Child Protective Services, Victim A, who has autism but is able to communicate, stated that her bus driver put his finger inside her private part, under her shorts. Victim B, who gave single word answers due to her disability, identified her vagina as "two" and using an anatomical drawing, mouthed the word "two" while pointing to her own vagina, a photo of Appellant, and a picture of a school bus.

Video recordings captured incidents with two additional victims, both of whom are nonverbal. On July 9, 2018, Appellant moved his right hand around Victim C's chest. After briefly going to the front of the bus, he returned and placed his right hand between her legs, moving it back and forth. When Appellant's movements became aggressive, Victim C groaned in apparent discomfort. After smelling his fingers, Appellant again moved his hand between Victim C's legs. He then reached to his waist area, motioned like he was unzipping his pants, placed his right knee on the seat, and thrust his pelvis back and forth against Victim C. The next day, Appellant again awakened Victim C by moving his hand on her chest. Victim C's mother reported that after her daughter attended the summer program for one week, she began having behavioral issues, including turning away whenever her mother attempted to clean her vaginal area.

Victim D used a seat harness. On May 29, 2018, after releasing Victim D from her harness, Appellant tied a gray jacket around his waist, moved his hand towards his crotch, unzipped his pants, approached Victim D, reached into his unzipped pants. On June 13,

2018, Appellant repeated the encounter, placing Victim D's hands on his crotch, under his jacket, on top of his unzipped pants.

Within minutes of Victim A telling her mother about the assault, at 1:05 p.m. on July 31, 2018, her mother reported the allegation to the Montgomery County Public Schools Transportation Division. About ten minutes later, when Appellant arrived from his bus route, his cluster manager asked if anything happened. Even though the manager did not mention a specific student, Appellant claimed that Victim A was loud and walking around the bus, so he sat next to her to calm her down.

The next morning, on August 1, the bus dispatcher told Appellant that he needed to speak with the cluster manager at 6:00 a.m. at the bus depot. When Appellant did not report to work, the dispatcher exchanged text messages with Appellant, who claimed he had a family emergency but would come into the depot at 3:00 p.m. He did not show up. The next day, Appellant informed the cluster manager that he was in Pennsylvania and was not going to be able to meet with her.

Two days later, on August 3, 2018, the Department of Homeland Security received notice of an active arrest warrant for Appellant, who had purchased a ticket to travel solo to Togo on August 7, 2018. Dana Williams, a Child Abuse and Sexual Assault Unit investigator, testified that after authorities began asking questions about Appellant, he bought an "unaccompanied" plane ticket to West Africa. Appellant was arrested on August 5, 2018.

Because Appellant entered guilty pleas relating to each victim, the jury trial in this case focused only on Appellant's criminal responsibility. During the trial, held over three

days beginning February 7, 2023, the defense presented one expert witness, and the State called five witnesses to include three doctors, Detective Dana Williams of the Montgomery County Police, and Tracy Marquez who was employed with Montgomery County Public Schools.

In a "battle of the experts," jurors were asked to decide whether Appellant met his burden of proving that he was not criminally responsible for the sexual abuse he admitted committing against all four victims. Appellant predicated his NCR defense entirely on a bifurcated expert opinion by board certified forensic psychiatrist Dr. Fred Berlin that although Appellant did appreciate the criminality of his conduct captured on the bus surveillance cameras, nevertheless, he was unable to conform his behavior to the requirements of the law because he suffered from severe depression accompanied by "psychotic features." According to Dr. Berlin, the nature of Appellant's behavior, i.e., sexually abusing vulnerable students while he knows he is being filmed, when viewed in light of his history of being sexually abused by an aunt when he was 10 years old and his behavior following a recent trip to the Congo, indicated that Appellant was experiencing psychotic features during the abuse episodes, and therefore lacked the substantial capacity to conform his conduct to legal requirements.

The prosecution countered that "Dr. Berlin . . . is a hired gun" who "makes his living" by testifying "for the defense on issues of criminal responsibility[,]" in each case rendering "the same exact" opinion that he was presenting on Appellant's behalf. The prosecutor pointed out that Appellant's claim that "he was hearing voices" was undermined by undisputed evidence that "he never saw a psychologist, a psychiatrist, a social worker,

any mental health professional until he got caught," and that he was able to drive the school busses, waited for the bus attendant to leave, and selected highly vulnerable victims.

According to Maryland Department of Mental Health experts, forensic clinical psychiatrist Dr. Danielle Robinson, and forensic psychologists Dr. Charles Evans and Dr. George Cowan, Appellant was "malingering" by feigning and exaggerating symptoms and by deliberately "failing" tests that required his effort, in order to avoid criminal conviction. Testimony by Appellant's co-worker, Tracy Marquez, demonstrated that Appellant lied when questioned about his interaction with Victim A.

Although both the State's expert and Appellant's expert testified that Appellant had the substantial capacity to appreciate the criminality of his conduct, they disagreed about whether he lacked substantial capacity to conform his behavior to the requirements of the law. We will review the relevant portions of the defense expert's testimony below, in our discussion of the cross-examination issue addressed in Part II of our opinion.

DISCUSSION

I. Jury Instructions

Appellant challenges the trial court's decision, at the request of the State, to modify Maryland Criminal Pattern Jury Instruction 5:05.1 regarding the standards for finding a defendant not criminally responsible, by adding language from Maryland Civil Pattern Jury Instruction 1:14, in order to explain how the preponderance of evidence standard of proof would operate in the event the jury found "the evidence is evenly balanced on [that] issue[.]" Although the State bears the burden of proving each element of a crime beyond a reasonable doubt, a defendant who pleads NCR "has the burden to establish, by a

preponderance of the evidence, the defense of not criminally responsible." CP § 3-110(b). *See McCloud v. State*, 317 Md. 360, 363 (1989) ("It is the defendant who 'must prove lack of criminal responsibility by a preponderance of the evidence.'") (quoting *Treece v. State*, 313 Md. 665, 686 (1988)).

Maryland Criminal Pattern Jury Instruction 5:05.1 explains the NCR defense and burden of proof as follows:

> The defendant has been found guilty beyond a reasonable doubt. You have heard evidence that the defendant is not criminally responsible for [his][her] conduct by reason of insanity. A defendant is not criminally responsible by reason of insanity, if, at the time of the criminal act, because of a mental disorder . . . , the defendant lacked the substantial capacity either:
>
> (1) To appreciate the criminality of the conduct; or
>
> (2) To conform that conduct to the requirements of the law.
>
> Mental disorder means mental illness or other forms of behavioral or emotional illness resulting from psychiatric or neurological disorders. Mental disorder does not include an abnormality that is manifested only by repeated criminal or antisocial conduct. . . .
>
> The presence of a mental disorder . . . does not, by itself, mean that a person lacks criminal responsibility. A person is not criminally responsible only if, as a result of the mental disorder . . . , [he][she] lacks the substantial capacity to appreciate the criminality of the conduct or to conform the conduct to the requirements of the law. To lack substantial capacity means to lack the power or ability to a significant degree. The expression to appreciate the criminality of the conduct means the ability to realize or understand that the conduct is criminally wrong. The expression to conform the conduct to the requirements of the law means the ability to act as the law requires a person to act. The law recognizes that willpower, like reason, may be so seriously impaired or destroyed by a mental disorder that the person affected lacks the substantial capacity or ability to exercise control over [himself][herself].
>
> The burden of proof is on the defendant to establish this defense by a preponderance of the evidence. This means that the defendant must persuade you, by a preponderance of the evidence, that at the time of the criminal act,

> as a result of a mental disorder [or mental retardation], [he] [she] either lacked the substantial capacity to appreciate the criminality of [his] [her] conduct or lacked the substantial capacity to conform [his] [her] conduct to the requirements of the law. To prove by a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your mind a belief that is more likely true than not true. If the defendant has met that burden, you must find the defendant not criminally responsible by reason of insanity. If the defendant has not met that burden, you should find the defendant guilty of the offenses that the State has proven beyond a reasonable doubt.

In this case, over defense counsel's objection,[2] the trial court modified this pattern criminal instruction, by adding language predicated on a portion of Maryland Civil Pattern Jury Instruction 1:14, which states: "If you believe that the evidence is evenly balanced on an issue, then your finding on that issue must be against the party who has the burden of proving it." Adapting that instruction to the NCR issue, the trial court instructed the jury that, "If you believe that the evidence as to criminal responsibility is evenly balanced, then your finding on that issue should be that the defendant is criminally responsible."

[2] Although Appellant concedes that he did not object to the addition of this language after instructions were given, as required by Maryland Rule 4-325(f), the State acknowledges that there was "extensive discussion of the issue between the court and the parties over several days, leading to a firm ruling by the court in the lead up to the instructions[.]" Under these circumstances, the State accepts "that [Appellant] substantially complied with Maryland Rule 4-325(f) as explicated in *Gore v. State*, 309 Md. 203, 209 (1987) ('there must be an objection to the instruction; the objection must appear on the record; the objection must be accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the record and the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless')." In these circumstances, "the State does not interpose a preservation defense" in this appeal. Because the record supports what the State acknowledges, we will address Appellant's challenge to this instruction.

Although Appellant does not dispute that this instruction is a correct statement of the law, he contends that it amounted to impermissible and prejudicial commentary on the evidence. Citing *Gore v. State*, 309 Md. 203 (1987); *Fagan v. State*, 110 Md. App. 228 (1996); and *Appraicio v. State*, 432 Md. 42 (2013), Appellant maintains that the trial "court's deviation from/addition to 5:05.1 '[h]ad the effect of overemphasizing just one of the many proper inferences' the jury could draw from the evidence presented, and ran the risk of being construed as a comment on the question of fact which was for the jury to decide." In his view, the instruction was "improper" under Maryland case law and otherwise unnecessary because the substance was adequately covered by the pattern language contained in MPJI-Cr 5:05.1.

The State, pointing out that the challenged instruction "substantively tracked the pattern form . . . with one exception[,]" contends that

> the trial court soundly exercised its discretion to modify the pattern jury instruction on the defendant's preponderance burden of proof to explain, using language from yet another pattern jury instruction, how the burden should apply if the jury found the parties' competing evidence was evenly balanced.

In the State's view, this was not improper because "[n]othing in the trial court's additional explanation of the preponderance burden—itself a matter of law—commented on the content of the evidence in this case." We agree.

Under Maryland Rule 4-325, a trial court is responsible for instructing the jury in a manner that aids jurors' "understanding [of] the case" and gives "guidance for . . . deliberations[.]" *Chambers v. State*, 337 Md. 44, 48 (1994). Subsection (d) expressly authorizes the court to frame the issues in light of the evidence presented to the jury, stating:

> [i]n instructing the jury, the court may refer to or summarize the evidence in order to present clearly the issues to be decided. In that event, the court shall instruct the jury that it is the sole judge of the facts, the weight of the evidence, and the credibility of the witnesses.

Md. Rule 4-325(d).

Here, the trial court did not refer to any specific evidence, but merely adapted the pattern civil instruction to help the jury understand how the preponderance standard applies in this NCR context. Using approved language from that pattern instruction, the court correctly explained that if the jury found the evidence to be "evenly balanced," *i.e.*, the proverbial 50-50 tie, then the verdict must be against Appellant, as the party who failed to meet his burden of proving his NCR defense by a preponderance of the evidence.

To be sure, "it is generally improper for a trial judge to show his or her opinion of those matters upon which the jury will eventually pass. The object of this rule is simply to prevent the court's opinion from influencing the verdict." *Gore*, 309 Md. at 214. A trial court may run afoul of this neutrality principle by giving an instruction that the jury could perceive as commenting on "facts and factual inferences" from the evidence, in a manner that invades the jury's deliberative prerogatives. *Id*.

Nevertheless, the cases cited by Appellant do not support his claim that the challenged instruction in this case constituted inappropriate commentary on the evidence. Those cases are factually and legally inapposite. For example, the trial court in *Gore*, 309 Md. at 214, improperly "instructed the jury that there was sufficient evidence as a matter of law to convict[,]" which "was an indirect comment on the general weight of the evidence as to each count and outside the permissible scope of comment." In *Fagan v. State*, 110

Md. App. 228, 245 (1996), during deliberations, the trial court gave supplemental instructions on accomplice culpability that improperly included "specific examples of corroboration from the evidence before it" that "appeared to be favoring the testimony of certain witnesses over that of others, and commented on the general weight of the evidence." By contrast, the trial court in *Appraicio v. State*, 431 Md. 42, 57 (2013), did not abuse its discretion when responding to a deliberating jury's inquiry about whether it could consider the absence of a police report corroborating the complaining victim, by merely referring the jury to the pattern instructions about making its decision based on the evidence presented.

As in *Appraicio*, 431 Md. at 57, we are satisfied that the trial court "allowed the jury to draw what inferences it might from the evidence, without the court impermissibly suggesting what inferences to draw." Here, in contrast to *Fagan*, 110, Md. App. at 245, the challenged instruction occurred before the jury began deliberating and, unlike *Gore*, 309 Md. at 214, merely stated how the burden of proof standard for NCR would operate if the jury were to conclude that the evidence was "evenly balanced." Moreover, the court twice instructed jurors that "you are the sole judge of whether a witness should be believed," and that they "should not draw any conclusions about my views of the case, or of any witness from my comments or questions" and "should give expert testimony the weight and value you believe it should have." *See Appraicio*, 431 Md. at 56-57 (reminding the jurors that "they were free to draw inferences based on their commonsense and reasoning" is not an abuse of discretion). Because the court did not refer to any specific

evidence, much less suggest its view of the record, jurors could not reasonably perceive the challenged instruction as a comment disfavoring Appellant's NCR defense.

Nor are we persuaded by Appellant's contention that the challenged instruction was unnecessary. As the State points out, the trial court "explained how the burden-of-proof operated" in NCR cases, by explaining that "an evidentiary tie . . . goes to the State." This legally correct instruction addressed a scenario that is not expressly covered by the pattern criminal instruction. In any event, to the extent that it duplicated other instructions, it did not prejudice Appellant. Based on this record, we conclude that the trial court did not abuse its discretion in supplementing the pattern criminal instruction.

II. Cross-Examination

Appellant contends that the trial court abused its discretion in permitting the State to cross-examine Dr. Frederick Berlin, a board-certified psychiatrist who was qualified as an expert for the defense, about his history of testifying for defendants who sought to prove that they met the NCR standard. During trial, the State cross-examined Dr. Berlin, with Appellant's counsel raising intermittent objections as follows:

> [PROSECUTOR]: Now, how many times have you testified on the issue of criminal responsibility in a court?
>
> [DR. BERLIN]: Over 30 years or so years, five or six. Maybe something like that. A handful.
>
> [PROSECUTOR]: Only a handful of times?
>
> [DR. BERLIN] :Yes.
>
> [PROSECUTOR]: You've testified in some pretty high profile cases. Correct?

[DR. BERLIN]: That's correct. Yes.

[PROSECUTOR]: You've testified for—you've been called by the defense in those cases. Correct?

[DR. BERLIN]: That's correct.

[PROSECUTOR]: You have testified in Wisconsin. Correct?

[DR. BERLIN]: That's correct.

[PROSECUTOR]: You testified that a certain individual in Wisconsin was not criminally responsible. Correct?

[DR. BERLIN]: That is correct. I did testify that that was my professional opinion. Yes.

[PROSECUTOR]: That individual could appreciate the criminality of their conduct. Correct?

[DR. BERLIN]: I'm just thinking back. Yes. In that case, I did feel that they could not [sic] appreciate the criminality.

[DEFENSE COUNSEL]: Judge, I will object. It is a different separate case. Irrelevant.

THE COURT: Well, we will see if there is a pattern.

[PROSECUTOR]: That's what this is.

THE COURT: I will give the State a little leeway here and connect it up.

[PROSECUTOR]: Thank you.

THE COURT: Okay. Overruled.

[PROSECUTOR]: And you testified that that person lacks substantial capacity to conform their conduct within the requirements of the law. Correct?

[DR. BERLIN]: Yes. That's what I testified to, because that's what I believed.

[PROSECUTOR]: By somebody who had murdered and raped multiple people?

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained as to the underlying facts.

[PROSECUTOR]: And you testified in Connecticut. Correct?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[DR. BERLIN]: Yes. I think that's correct.

[PROSECUTOR]: You testified that the person understood the criminality of their conduct?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[DR. BERLIN]: That's correct.

[PROSECUTOR]: But that that person lacked substantial capacity to conform their conduct within the requirements of the law?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[DR. BERLIN]: That's correct.

[PROSECUTOR]: In fact, has every opinion that you have given in a courtroom on the issue of criminal responsib[ility] been that same opinion?

[DR. BERLIN]: Again, it's been a handful, and I'm not going to be asked to come in if I don't have that opinion of the defense attorney that's called me, but yes, in those cases in which I have testified, that has been the case, but I can assure you I have told every attorney that I will call it as I see it.

[PROSECUTOR]: But what I'm asking you, sir, every time you testified on the issue of criminal responsibility you have found that that person could understand the criminality of their conduct. Correct?

[DR. BERLIN]: That's correct.

> **[PROSECUTOR]: But that they lacked substantial capacity to conform their conduct to the requirements of the law?**
>
> **[DR. BERLIN]: That's correct.**
>
> [PROSECUTOR]: Court's indulgence for just one moment, Your Honor. I apologize, but I kind of want to go through more. You also testified to that same opinion in Washington D.C. Correct?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: I'm going to sustain the objection. **He said every time he has done that. So he has said he testified a handful of times. Five or six. So I don't think the various jurisdictions matter.**

(Emphasis added.)

Citing Maryland Rule 5-403, providing that even when relevant, evidence "may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury[,]" Appellant contends that the trial court abused its discretion in permitting the prosecutor to question Dr. Berlin about his pattern of professional opinions supporting NCR defenses based solely on each defendant's lack of capacity to conform his conduct to the law. In Appellant's view, the State's cross-examination "elicit[ed] this misleading and/or confusing testimony from Dr. Berlin" by "suggest[ing] to the jury with its questions" the following "'pattern': that Dr. Berlin always arrives at the same opinion (an opinion favorable to the defendant) whenever a defense attorney asks him to do an evaluation[,]" even though "the accurate figure would be that in 100% of the cases where he arrived at an opinion favorable to the defense, he was called to testify by the defense." Such improper "hired gun" impeachment, Appellant argues, "cannot be deemed harmless beyond a reasonable doubt."

The State counters that Appellant's challenge is not preserved because "[a]lthough defense counsel objected several times during Berlin's cross-examination, none of those objections pertained to the question of the true pattern sought to be established[.]" On the merits, the State disputes Appellant's claim that the "pattern amounted to nothing more than the obvious proposition that Berlin had testified favorably for the defense in every case in which he was called to testify[.]" According to the State, Appellant ignores that "Dr. Berlin himself dispelled that misinterpretation" by testifying that he would not "be asked to come in if [he didn't] have that opinion of the defense attorney that's called" him. Instead, the State claims that Appellant's argument reflects "a misapprehension of the pattern that the prosecutor's questioning sought to establish." "It was not the net conclusion of Berlin's opinions (*i.e.*, always finding NCR) that the prosecutor sought to establish as a pattern," the State argues, "but rather the opinions' repetitive, internal legal structure."

The admission of evidence is not an error "unless the party is prejudiced by the ruling, and . . . a timely objection or motion to strike appears of record." Md. Rule 5-103(a). To preserve an evidentiary objection for appellate review, a party "shall" object at the time that evidence is elicited or offered, "or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." Md. Rule 4-323(a); *Ware v. State*, 170 Md. App. 1, 19-20 (2006). A party whose objection to evidence elicited by a question has been overruled must either request a continuing objection or object each time the question is asked, *Jones v. State*, 213 Md. App. 483, 493 (2013), so the court can consider

the challenge and correct any errors. *See Robinson v. State*, 404 Md. 208, 216-17 (2008) (emphasizing that such requirements serve the interest of fairness and judicial economy).

In this instance, defense counsel did not object or otherwise contest the State's impeachment of Dr. Berlin based on his historical pattern of rendering the same professional opinion in each instance he testified as a defense expert. As the excerpted colloquy shows, defense counsel initially objected to the relevance of the prosecutor's cross-examination of Dr. Berlin about his prior NCR testimony in other jurisdictions. After the court overruled that objection, as well as ensuing general objections to questions about Dr. Berlin's opinion in individual cases, defense counsel did not request a continuing objection. Nor did counsel object when the prosecutor elicited Berlin's testimony about his pattern of testifying, in all five or six cases he was called as a defense expert, to the same bifurcated professional opinion that he reached with respect to Appellant, *i.e.*, that the defendant in question was NCR because, even though he lacked the capacity to appreciate the criminality of his conduct, he could not conform his conduct to requirements of the law.

When those questions were asked, and when Dr. Berlin acknowledged that pattern, defense counsel did not object, much less assert that such testimony was so misleading or confusing as to be more prejudicial than probative. In these circumstances, Appellant did not preserve his Rule 5-403 challenge to the State's cross-examination.

Even if he had, we would not be persuaded that the court abused its discretion. Appellant characterizes this cross-examination as an inappropriate attempt to impeach Dr. Berlin by establishing a pattern that he testified favorably for all five or six defendants who

called him as an expert witness. As Dr. Berlin himself pointed out, however, such a pattern was neither disputed, nor probative because any expert called by a defendant to support his NCR defense can be expected to offer supporting testimony. We conclude that the cross-examination of Dr. Berlin was not so misleading or confusing as to prejudice the jury's deliberations, and hold that the trial court did not abuse its discretion.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.