Circuit Court for Prince George's County
Case No. CT140879X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1815

September Term, 2016

MICHAEL JAMES BACOTE

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Shaw Geter,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: April 23, 2018

Appellant, Michael James Bacote, was charged by indictment in the Circuit Court for Prince George's County, with (1) Controlled Dangerous Substance (CDS) possession with the intent to distribute; (2) possession of cocaine; (3) wearing, carrying and transportation of a handgun; (4) possession of a firearm in relation to a drug trafficking offense; (5) possession of a firearm by a prohibited person; (6) possession of a firearm by a person convicted previously of a felony; and, (7) CDS possession in a large amount. Bacote was tried (the first time) over 16-18 November 2015, ending in a mistrial after the jury was unable to reach a unanimous verdict. The State retried Bacote over 26-28 July 2016. The second jury returned guilty verdicts on all counts. This appeal ensued.

Bacote poses the following questions for our consideration, which we have rephrased modestly:

I. Did the trial court err when it advised the venire panel that Bacote was "found with" a backpack with a kilogram of cocaine and a loaded handgun when arrested?

II. Was it improper for the prosecutor to suggest pre-trial to law enforcement's forensic scientists that the fingerprint expert's analysis was crucial because a conviction was "important to his office"?

III. Was the trial court's disclosure to the jury of the existence of a prior felony conviction of Bacote so prejudicial as to require a new trial?

IV. Was Bacote's grand jury indictment obtained unlawfully, in the absence of any reliable evidence or testimony of probable cause?

V. Did the trial court err when it precluded Bacote from arguing that the existence of an outstanding child non-support warrant against him may have been the reason he ran from law enforcement?

VI. Did the trial court err when it precluded Bacote from cross-examining the State's fingerprint expert, Ms. Mertina Davis, for possible bias?

Factual Background

On 2 May 2014, Prince George's County Police Officer Shea Jefferson executed a traffic stop of a vehicle on running a red light. As Officer Jefferson approached the stopped vehicle, the driver drove from the scene. Approximately one mile later, the driver exited his vehicle and fled on foot toward the rear of a townhouse community. Officer Jefferson pursued the driver, catching and placing him under arrest.

The driver was identified as Michael James Bacote. After the arrest, Officer Jefferson, canvassed the area in the vicinity of the escape route and arrest, recovering a backpack found behind the townhouse community. The officer retrieved from the backpack a firearm and approximately one kilogram of what proved to be cocaine. Officer Jefferson acknowledged that, as he saw Bacote running, he did not see him actually in physical possession of the backpack.

The grand jury returned, on 19 June 2014, a seven-count indictment against Bacote. In November 2014, Dr. William Vosburgh, a supervisor in the forensic science division of the Prince George's County Police Department, received from the Assistant State's Attorney assigned to prosecute Bacote a request for expedited analysis of fingerprint cards

containing latent fingerprints recovered from the weapon and narcotics found in the backpack. The prosecutor, in his email request to Dr. Vosburgh, explained the need for expedition as "[t]his [matter] is in for trial on December 2nd, and [he knew] fingerprints c[ould] normally take a great deal of time, but this is a lot of drugs and [it was] very important to [him] and [his] office that [he] secure [a] conviction."[1] Dr. Vosburgh responded to the prosecutor's request stating, in short, that his office would be unable to complete the analysis before the stated trial date. Unwilling to accept this response, the prosecutor reached-out to Ms. Mertina Davis, a subordinate forensic scientist of the fingerprint unit, who conducted a manual analysis of the submitted fingerprint cards. Ms. Davis matched one of the fingerprints on the cards to Bacote's left ring finger.

Bacote was tried over 16-18 November 2015, which ended in a mistrial after the jury was unable to reach a unanimous verdict. The State elected to retry Bacote. On 26 February 2015, Bacote motioned the trial court for transcription of the grand jury testimony. The trial court denied his motion as moot, explaining that "no testimony was taken." Bacote took no additional action on that score.

Bacote's retrial began on 26 July 2016. On the first day, the parties stipulated there would be no mention during the retrial of a prior felony conviction of Bacote. In

[1] The prosecutor's email request was:

> This is in for trial on December 2[], and I know fingerprints can normally take a great deal of time, but this is a lot of drugs and it's very important to me and the office that I secure his conviction. Is there any way we can compare the latent prints immediately so I can have the report [] before December 2.

furtherance of this stipulation, in the context of the "possession of a firearm by a convicted felon" count, the parties agreed to refer to Bacote only as a "disqualified person," rather than a convicted felon.

During *voir dire*, the trial judge described to the venire the events giving rise to Bacote's indictment. In his description of Bacote's arrest, the judge stated, "[u]ltimately [Bacote] was caught and found with a backpack full with – excuse me, with a kilogram of cocaine and a loaded handgun and the parties agreed that this possession of this handgun was illegal possession of a handgun." At this point, Bacote asked to approach the bench. The State approached as well. Bacote stated to the judge that "[t]he allegation is not that [Bacote] was found with a backpack. A backpack was found." The trial court acknowledged at the bench his mischaracterization, but did not correct it to the jury. Bacote did not request explicitly that the trial judge make this distinction clear to the jury. Additionally, he did not object when the trial judge, without correcting before the jury that the backpack was not found in Bacote's physical possession, proceeded to the next *voir dire* question. At the end of *voir dire*, Bacote indicated his satisfaction with the *voir dire* as posed.

During Bacote's cross-examination of Officer Jefferson, he attempted to advance the notion that he fled from Officer Jefferson's traffic stop and bailed-out of his car, not because he was attempting to elude law enforcement's recovery of any contraband he may have possessed, but because there was an outstanding child non-support warrant against

him at the time, for which he feared incarceration if apprehended.[2] The trial court sustained the State's objections to Bacote's cross-examination of Officer Jefferson relating to the existence of a child non-support warrant. No actual outstanding child non-support warrant (or a copy of same) against Bacote was admitted into evidence. Bacote elected not to testify at trial.

During its deliberations, the jury sent a note to the trial judge that included the question: "Clarify Q5. Did defendant have a prior 'felony' conviction vs[.] 'crime'? Is Q5 related to prior conviction or current charges[?]."[3] In discussing with counsel how to respond, the trial judge acknowledged that "[he] erroneously left Count 5 [firearm possession with a felony conviction] and Count 6 [illegal possession of a regulated firearm] on the verdict sheet." The parties agreed that the trial court would provide the jury with a new verdict sheet and advise the jury that "Count 5 [was] included in error." The trial court responded in writing (initialed by both parties) to the jury's note that "Count 5 was included in error. Also, we will provide a new verdict sheet with corrected language in number 4 and renumbered with the elimination of number 5." A new verdict sheet was given to the jury; however, the trial judge did not instruct the jury to disregard the error on the first verdict sheet. Bacote did not object to this state of affairs. On 28 July 2016, the jury

[2] Bacote broached this same line of questioning during his cross-examination of Corporal Terrance Howell of the Prince George's County Sheriff's Office. Corporal Howell acknowledged that, in his experience, it was not uncommon for an individual with an outstanding child non-support warrant to respond by running away when confronted.

[3] The jury question, Q5, related to what has become Bacote's Question III in this appeal.

returned guilty verdicts on each count of the indictment. Bacote was sentenced to 25 years of active incarceration.

On 16 November 2017, Bacote's mother contacted the Prince George's County Circuit Court Reporter's Office (through a Public Information Act request) to obtain the grand jury transcripts of its investigation resulting in Bacote's indictment. She spoke with Ms. Phyllis Hernandez, the supervisor of the court reporter's office. Ms. Hernandez informed her (just as the trial judge did in dismissing Bacote's 26 February 2015 grand jury transcript request) that there was no audio recording or transcript of the grand jury proceeding.

Analysis

I. The Judge's *Voir Dire* "Found With a Backpack" Mischaracterization.

The State urges us to decline to review the merits of Bacote's claim that he suffered prejudice because the trial court erred in its oral description to the venire that Bacote was "found with" the backpack upon his arrest. Specifically, it is argued this argument is unpreserved because Bacote

> failed to ask the judge to make this distinction clear to the jury. . . . Bacote [failed to] object when the judge, without again addressing where the backpack was found, proceeded to the next *voir dire* question . . . [and] at the end of *voir dire*, Bacote announced his satisfaction with the *voir dire* questions posed.

In reply, Bacote asserts that his statement to the trial judge during the bench conference alerted the judge to the mischaracterization, and "made clear [his] objection to the statement of the court . . . ." Moreover, if we were to find Bacote's "objection"

insufficient to preserve this question for our consideration, then we should review it on its merits for plain error.

Maryland Rule 4–323(c)[4] governs the "manner of objections during jury selection," including objections made during *voir dire*. *Marquardt v. State*, 164 Md. App. 95, 142, 882 A.2d 900, 928 (2005) (citing *Baker v. State*, 157 Md. App. 600, 609, 610, 853 A.2d 796, 802 (2004)). It is sufficient that a party make known to the court the action that the party desires the court to take or the objection to the action of the court. Md. Rule 4–323(c); *see also Marquardt*, 164 Md. App. at 143, 882 A.2d at 928. The objection need not be a formal exception to the ruling or action, Md. Rule 4–323(d); rather, the objector need only make "known to the circuit court 'what [is] wanted done.'" *Marquardt*, 164 Md. App. at 143, 882 A.2d at 928 (quoting *Baker*, 157 Md. App. at 610, 853 A.2d at 802).

During *voir dire*, the following germane colloquy took place as to what became Bacote's appellate question:

> [THE COURT:] Ultimately[,] the defendant was caught and found with a backpack full with -- excuse me, with a kilogram of cocaine and loaded handgun and the parties agreed that this possession of this handgun was illegal possession of a handgun. Does any member of the-
>
> [BACOTE]: May we approach, briefly?
>
> THE COURT: Sure.

[4] The Rule provides, in pertinent part, that

> it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs.

(Counsel approached the bench)

> [BACOTE]: The allegation is not that he was found with a backpack. A backpack was found.
>
> THE COURT: True. The backpack was found in the vicinity. Okay? All right.
>
> (Counsel returned to their trial tables and the following ensued)
>
> THE COURT: Does any member of the panel know anything, heard anything, seen anything, read anything about this case?

We view Bacote's comment to the judge regarding his mis-statement as more like an emendation.[5] MD. Rule 4-323(c) specifies that "a party . . . [must] make[] known to the court the action that the party desires the court to take." Bacote's remonstration contained no request for what corrective measure he wanted the judge to take. Specifically, Bacote did not request the trial judge to correct this factual inaccuracy before the jury. Of greater significance, Bacote did not note an exception during *voir dire* when the trial judge, without correcting to the jury where the backpack was found, proceeded to the next *voir dire* question and, at the end of *voir dire*, Bacote accepted how it was conducted. The appellate challenge was not preserved.

Bacote shall find no solace in plain error. Instances in which we recognize, under plain error, an un-objected-to shortcoming are when there are "compelling, extraordinary,

[5] The trial judge instructed the jury that
> the instructions that I give you about the law are binding upon you. . . . [A]ny comments I may make or may have made about the facts are not binding upon you [and] are advisory only. You are the ones to decide the facts and apply the law to those facts.

exceptional or fundamental [circumstances] to assure the defendant a fair trial." *State v. Brady*, 393 Md. 502, 509, 903 A.2d 870, 874 (2006) (quoting *Conyers v. State*, 354 Md. 132, 171, 729 A.2d 910, 931 (1999)). These circumstances are absent here. Both parties got before the jury (in their opening and closing statements, as well as in cross and direct examination of Officer Jefferson[6]) that Bacote did not possess physically the backpack when he was apprehended. The State connected, however, Bacote to the backpack by way of fingerprint analysis. Under these circumstances, we surmise that the jury may have given short-shrift to the trial judge's brief and inaccurate description of one of the events surrounding Bacote's arrest made on the first day of a three-day trial. Accordingly, we decline to review the merits of the trial judge's factual mischaracterization under plain error.

II. Alleged Prosecutorial Misconduct in the Outreach to the County Police's Forensic Science Division.

Bacote points-out that, under the Maryland Attorneys' Rules of Professional Conduct, "[i]t is professional misconduct for an attorney to: . . . [] state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Maryland Attorneys' Rules of Professional Conduct or other law." Md. Rule 19-308.4 (f). He claims that the prosecutor transgresssed in this regard by communicating

[6] The prosecutor in his opening statement referred to the backpack as "right nearby"; defense counsel in her opening statement stated, "I need to be very clear that [the backpack] was never found on [Bacote's] person."); Officer Jefferson testified that that he did not see Bacote run with backpack, and the backpack was found 100 yards away from where Bacote was running; and, the prosecutor, in his closing statement, stated "[O]f course, we didn't see him wearing the backpack."

to the forensic office his (and the prosecutor's office's) desire to convict Bacote as a prelude to the conduct of analysis of the fingerprint cards. In response, the State asserts that we should not decide this challenge because it was not raised in, or decided by, the trial court. *See* Md. Rule 8-131(a).

Maryland Rule 8–131(a) states: "[o]rdinarily [] the appellate court will not decide any [ ] issue unless it plainly appears by the record to have been raised in or decided by the trial court . . . ." Rule 8–131(a) requires a defendant to make "'timely objections in the lower court,'" or "'he will be considered to have waived them and he cannot now raise such objections on appeal.'" *Breakfield v. State*, 195 Md. App. 377, 390, 6 A.3d 381, 388 (2010) (quoting *Caviness v. State*, 244 Md. 575, 578, 224 A.2d 417, 418 (1966)). Generally, our function as an appellate court is to review for error the rulings of the trial court. *Cason v. State*, 140 Md. App. 379, 400, 780 A.2d 466, 479 (2001) (appellate court function is to "review decisions, rulings, and actions of the [trial] court"). We do not serve, in the main, to review the conduct of counsel, parties, or witnesses for behavior characterized as "erroneous." *Walls v. State*, 228 Md. App. 646, 668, 142 A.3d 631, 644 (2016) (citing *DeLuca v. State*, 78 Md. App. 395, 397–98, 553 A.2d 730, 731–32 (1989)).

Moreover,

> one of the most fundamental tenets of appellate review [is that] [o]nly a judge can commit error. Lawyers do not commit error. Witnesses do not commit error. Jurors do not commit error. The Fates do not commit error. *Only the judge can commit error, either by failing to rule or by ruling erroneously when called upon, by counsel or occasionally by circumstances, to make a ruling.*

DeLuca, 78 Md. App. at 397–98, 553 A.2d at 731–32 (emphasis added); *see also Braun v. Ford Motor Co.*, 32 Md. App. 545, 548, 363 A.2d 562, 564 (1976) ("error in a trial court may be committed only by a judge, and only when he rules, or, in rare instances, fails to rule, on a question raised before him in the course of a trial, or in pre-trial or post-trial proceedings . . . We know of no principle or practice under which a judgment of a trial court may be reversed or modified on appeal except for prejudicial error committed by the trial judge.").

Rule 8–131(a) directs that we may decide an issue only if "it plainly appears by the record to have been raised in or decided by the trial court." Bacote does not claim judicial error in this argument; rather, he claims the prosecutor committed professional misconduct by attempting to influence unduly the Prince George's County Police fingerprint folks. Moreover, Bacote did not advance to the trial court any claim for relief for this alleged prosecutorial misconduct. He cannot make this assertion for the first time on appeal.

III. Verdict Sheet Error.

Bacote argues that, in view of the stipulation to the contrary, the trial court's inclusion on the original verdict sheet of an indication that he had a prior felony conviction prejudiced the fairness of his trial. Bacote "requested [alternative] terminology [("disqualified person")] so as to avoid the possibility of prejudice as a result of the jury being lured "'into a sequence of bad character reasoning.[']" Bacote contends *Carter v. State*, 374 Md. 693, 824 A.2d 123 (2004), is controlling in this regard, compelling the grant of a new trial.

The State remonstrates that we should decline also to consider this claim because the claimed error "was invited by Bacote, and when [] discovered, the judge provided precisely the instruction that Bacote requested."[7] Moreover, the State continues, even if the verdict sheet was erroneous, Bacote did not move for a mistrial, object before the verdict sheet went to the jury, or object when the judge failed to instruct the jury to "please ignore [Question 5] on other charges."

As elaborated earlier, Md. Rule 4-323(c) states that "[f]or purposes of review . . . it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court." Bacote offered no such iteration to the trial court. In fact, Bacote made known to the trial court his satisfaction with the course of action taken (acquiesced in by *both* parties) when the judge was made aware of its error on the original verdict sheet, as evinced in the following colloquy:

[7] The invited error doctrine is not implicated truly here. The "invited error" doctrine is a "term for the concept that a defendant who himself invites or creates error cannot obtain a benefit-mistrial or reversal-from that error." *Klauenberg v. State*, 355 Md. 528, 544, 735 A.2d 1061, 1069 (1999) (quoting *Allen v. State*, 89 Md. App. 25, 43, 597 A.2d 489, 498 (1991)). "The doctrine stems from the common sense view that where a party invites the trial court to commit error, he cannot later cry foul on appeal." *State v. Rich*, 415 Md. 567, 575, 3 A.3d 1210, 1215 (2010) (quoting *United States v. Brannan*, 562 F. 3d 1300, 1306 (11th Cir. 2009)). The record is transparent that both parties wished that any mention of Bacote's felony conviction not be reflected as such on the verdict sheet. Moreover, Bacote's suggestion that he was in "agreement [with] how [the verdict sheet was rendered] last time except if the Court wants to remove number 6, that's fine with me," does not overcome the stipulation by the parties that Bacote's retrial was to be cleansed of all mention of his prior felony conviction.

THE COURT: I erroneously left Count 5 and Count 6 on the verdict sheet. I think the appropriate response is they were included in error, please ignore on other charges. That's what I - -

[DEFENSE]: I agree with that. They also have another question, and I think that the Court should also correct the jury -- I mean the verdict sheet for a Number 4 as well to the correct charge, because it's not wearing.

[THE STATE]: It's just possessing a firearm.

THE COURT: Okay.

[THE STATE]: I think that's correct as well.

THE COURT: Why don't I redo the verdict sheet.

[THE STATE]: That's fine, too.

[DEFENSE]: I'm sorry.

THE COURT: Should I just redo the verdict sheet?

[THE STATE]: I think that's –

[DEFENSE]: And tell them that was an error?

THE COURT: Yes.

[DEFENSE]: You think they should be told that?

THE COURT: Okay. Count 5 is included in error.

[THE STATE]: Yes.

THE COURT: Count 5 is - - was included in error. Also we will provide a new verdict sheet, And reworded -.- excuse me, renumbered, with the elimination of Number 5.

[THE STATE]: All right. That's fine with the State.

[DEFENSE]: *Okay*.

> THE COURT: Okay. *Go ahead initial that*, and then I'll run this back, get it straightened out, and I'll have the clerk come out and bring you each a copy. Thank you.

(emphasis added). The court provided the jury with a second verdict sheet, which removed the "Felony Conviction" language. Bacote did not object to the remedial verdict sheet before it was given to the jury, nor did he move for a mistrial. Bacote avers only now his dissatisfaction with the trial judge's alleged dereliction in not also instructing orally the jury regarding his initial error. Bacote failed, however, to make that contention during his trial, which is a predicate to satisfying the requirements of Md. Rule 4-323(c). Thus, this appellate claim is unpreserved for our consideration.

Even had we found this issue preserved, the trial court's error was harmless. Harmless error exists

> [w]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of-whether erroneously admitted or excluded-may have contributed to the rendition of the guilty verdict.

"To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Bellamy v. State*, 403 Md. 308, 332, 941 A.2d 1107, 1121 (2008) (quoting *United States v. O'Keefe*, 128 F.3d 885, 894 (5th Cir.1997)).

Bacote's reliance on *Carter v. State* is misplaced. In *Carter*, the Court of Appeals addressed the aptness of a disclosure by a prosecutor and trial judge to the jury of the details

of a criminal defendant's prior felony conviction. *Carter*, 374 Md. at 701, 824 A.2d at 128. Carter asked the circuit court to "'sanitize the first count,'" [in a variety of respects,] in which proof of his previous conviction for armed robbery with a deadly weapon was an essential element." *Carter*, 374 Md. at 699, 824 A.2d at 127. Carter offered to stipulate that he was convicted previously of a crime of violence "so that the judge . . . would not describe the nature of that previous crime to the jury." *Carter*, 374 Md. at 701, 824 A.2d at 128. The trial court indicated it would agree to Carter's proffered stipulation, but the State would not. *Id.*

The State, with the permission of the trial judge, introduced documentary evidence that Carter had been convicted of robbery with a deadly weapon. *Carter*, 374 Md. at 702, 824 A.2d at 129. The jury convicted Carter on all counts. The Court of Appeals reversed the judgment of the circuit court, explaining

> that the name and nature of a previous conviction, although technically relevant, addresses no detail in the definition of the prior-conviction element that would not be covered by the stipulation or admission of that element. Therefore, we, too, are of the opinion that, when requested by the defendant in a criminal-in-possession case under Maryland Code, Article 27, Section 445, the trial court must accept a stipulation or admission that the defendant was convicted of a crime that qualifies under the criminal-in-possession statute. We hold also that, in such situations, the name or nature of the previous conviction should not be disclosed to the jury.

Carter, 374 Md. at 720–21, 824 A.2d at 140 (quotation marks, footnote, and alterations omitted). The Court enlightened further that

> when the defendant admits or the parties stipulate to the previous-conviction element of a charge under Section 445(d), the trial judge should inform the jury that the defendant admits that he or she has been convicted of a crime for which he or she is prohibited from possessing a regulated firearm under

> the law. The judge should not describe the previous conviction with any more particularity or by using the categories of crimes under Section 445 (such as 'crime of violence' or 'felony'). A description of the conviction by its statutory category carries with it a high potential to lure jurors 'into a sequence of bad character reasoning,' just as if the judge described the crime by its name or nature (i.e., robbery with a deadly weapon). Moreover, describing the crime with particularity is no more probative that the previous-conviction element exists than if the judge were to use the general language set forth above. This general description also avoids any potential confusion in determining how to characterize a previous conviction that fits more than one of the categories of crimes listed under Section 445(d).

Carter, 374 Md. at 722, 824 A.2d at 141 (2003) (footnote omitted).

The present case is distinguishable from *Carter*. Here, the parties stipulated that Bacote would be referred to as a disqualified person, i.e., someone who was prohibited from firearm possession because of being a convicted felon. The stipulation was given the slip, however, by the trial court in its inclusion on the original verdict sheet sent to the jury framing the relevant question as "not guilty or guilty of Firearm Possession with a Felony Conviction?" This statement is less prejudicial, however, than the State's proffer in *Carter* of redacted docket entries describing Carter's prior felony conviction as one for robbery with a deadly weapon. The "Felony Conviction" reference here does not describe to the jury, in any degree, what type or nature of felony Bacote was convicted of previously. Further, Bacote's prior felony conviction was not admitted into evidence or described to the jury by the State or trial judge.

We are not unmindful of *Carter's* admonition that "the judge should not describe the previous conviction with any more particularity or by using the categories of crimes under Section 445 (such as 'crime of violence' or 'felony')." *Carter*, 374 Md. at 722, 824

A.2d at 141. The Court's guidance in this regard, however, was not the pronouncement of a rigid rule.[8] Moreover, unlike *Carter*, the trial judge here was made aware of his mistake and took remedial action. That the jury returned a guilty verdict after the corrected verdict sheet was provided is insufficient, standing alone, to convince us that the error requires reversal.

IV. The Absence of a Record of the Grand Jury Proceeding.

Bacote argues the grand jury indictment in this matter was achieved without the production by the State of any reliable evidence or testimony upon which probable cause could be found. Specifically, "[i]f there was no[] testimony provided by the [S]tate to the Grand Jury, then there was no information upon which the Grand Jury could have relied in finding that there was probable cause to believe that [Bacote] had committed the offenses for which he was convicted." The State responds that ordinarily, under Md. Rule 4-252, Bacote was obliged to assert such a claim in a motion claiming a defect in the institution of the prosecution filed by no later than the earlier of thirty days of the appearance of

[8] The Court explained in a footnote:

> In a somewhat analogous case, *State v. Broberg*, 342 Md. 544, 677 A.2d 602 (1996), we addressed whether the trial judge may admit "in life" photographs of a homicide victim after the parties had stipulated to the victim's identity. We concluded that "the trial judge should retain the discretion to determine whether evidence may be admitted to prove a stipulated fact." *Id*. at 560, 677 A.2d at 609. Our opinion in the present case should not be perceived as a withdrawal from our position in *Broberg* but, rather, as a recognition that, as a matter of law, the probative value of the name or nature of a previous conviction is substantially outweighed by the danger of undue prejudice when the defendant admits or the parties stipulate to the prior-conviction element under Section 445.

Carter v. State, 374 Md. 693, 722 n.10, 824 A.2d 123, 141 n.10 (2003).

counsel or the initial appearance before the court of the defendant. Bacote failed to make such a motion.

Md. Rule 4-252 requires that a motion charging a "defect in the institution of the prosecution" must be filed "30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213(c), except when discovery discloses the basis for a motion, the motion may be filed within five days after the discovery is furnished." Failure to raise a Md. Rule 4-252 challenge at the trial level constitutes a waiver if occurring in several contexts: "(1) if the defendant fails to comply with the time requirements for filing a motion under the rule; (2) if the defendant files a notice but fails to pursue it; and (3) if there is a hearing on the motion, but the defendant fails to present any grounds to support the motion." *Joyner v. State*, 208 Md. App. 500, 510, 56 A.3d 787, 793 (2012) (citing *Jackson v. State*, 52 Md. App. 327, 331–32, 449 A.2d 438 (1982)).

Bacote did not allege a defect in the institution of the prosecution in the trial court. At the most, Bacote moved the trial court for a transcription of any testimony taken before the grand jury. The trial court, however, ruled his motion moot because no testimony was taken before the grand jury. *Jones v. State* explained that "the jury judge has discretionary power to so appoint a stenographer but is not mandated to do so." 297 Md. 7, 22, 464 A.2d 977, 984 (1983). Moreover, "whether to require transcription of recorded grand jury testimony in a particular case is a matter for the discretion of the grand jury or the State's Attorney and ultimately for the jury judge, whose judgment ought not to be disturbed

absent an abuse of said discretion." *Id.* Bacote took no further action following the trial court's denial of his motion for a transcript of grand jury testimony.

Maryland Rule 8-131(a) states that "[o]rdinarily, the appellate court will not decide any [ ] issue unless it plainly appears by the record to have been raised in or decided by the trial court . . . ." Bacote failed to point to any error by the trial court in this matter. Bacote's present claim went unraised during his trial. The fact that Bacote's mother sought, after Bacote's conviction, through a Public Information Act request, the same information Bacote requested (unsuccessfully) on 26 February 2016, does not overcome Bacote's failure to observe the requirements of Md. Rules 4-252 and 8-131.[9]

V. The Child Non-Support Warrant.

Bacote believes that the trial court erred when it precluded him from inquiring about (or arguing) during the trial the existence of an outstanding child non-support warrant for his arrest being the motive for his attempts to evade police apprehension. The State avers, however, that the trial court exercised its discretion correctly in excluding inquiry or evidence showing that Bacote was the subject of an outstanding child non-support warrant:

> Bacote did not, however, proffer any evidence that he knew about the child[]support warrant at the time he fled from police. Absent proof that he knew about the warrant at the time of his flight, the warrant was irrelevant, and as such, correctly excluded.

Generally, "all relevant evidence is admissible. Evidence that is not relevant is not admissible." Md. Rule 5-402. Rulings on evidentiary relevance are left to the sound

[9] *Joyner v. State*, 208 Md. App. 500, 517–19, 56 A.3d 787, 797–99 (2012), explained that a waiver under Md. Rule 4-252 is not subject to plain error review.

discretion of the trial court, and we will not dispute the trial court's decisions as to the relevancy of evidence absent a clear showing of an abuse of discretion. *Parker v. State*, 156 Md. App. 252, 268, 846 A.2d 485, 494–95 (2004) (quoting *Jeffries v. State*, 113 Md. App. 322, 339, 688 A.2d 16, 24 (1997) (citations omitted)).

The abuse of discretion standard explains that:

> a ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling. The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.

King v. State, 407 Md. 682, 697, 967 A.2d 790, 799 (2009). We see no such abuse here.

A consciousness of guilt is a critical foundation in permitting the drawing of an inference that a suspect's flight from police was motivated by reasons unconnected to the offense(s) at hand. *Thompson v. State*, 393 Md. 291, 312, 901 A.2d 208, 220 (2006). "Knowledge that the person is suspected of the charged crime is important because the value of the conduct lies in the culprit's knowledge that he or she has committed the charged offense and in his or her fear of apprehension." *Thomas v. State*, 372 Md. 342, 354, 812 A.2d 1050, 1057 (2002). Bacote neither proffered nor adduced evidence supporting his awareness on 2 May 2014 of the existence of an outstanding child non-support warrant. An inference to that effect cannot be drawn merely from an offer at trial of the original or copy of a warrant. The following colloquy illuminates the significance of the missing link:

> [THE STATE]: This [evidence of the outstanding warrant] is a line of argument that [Bacote] tried to introduce the last trial too. The problem is

there was a warrant that was issued at a lower court that the defendant wasn't --

[DEFENSE]: It was not a lower court, it was this court.

[THE STATE]: -- that [Bacote] was not aware of and there is no evidence that he was aware of in the court file. Otherwise, unless [Bacote] is going to testify to his firsthand knowledge that he had a warrant, it's irrelevant to this case because it can't provide motivation for doing anything. There are no defense witnesses voir-dired or subpoenaed so that means there's no defense witnesses that are going to be able to testify as to firsthand knowledge.

So unless [Bacote] himself says I was aware I had a warrant, and that's why it's irrelevant and unduly prejudicial among other things this officer would be testifying to hearsay as to whether there was a warrant. He can testify that hypothetically -- he could testify at most that the system reflected a warrant, but that wouldn't include any known fact of whether or not the defendant was aware he had a warrant.

[DEFENSE]: I disagree. I think that we are allowed to put on a defense and if I have certified documents I believe I can put those in if they automatically come in to show that he did have a warrant and that's as good as testimony because you can admit court documents without anything else and it is relevant as to his defense. And if this officer is aware that he had a warrant, I think I'm able to ask him that question when he ran his information.

[THE STATE]: The problem is –

THE COURT: He ran it afterward.

[DEFENSE]: He said he doesn't know for sure.

THE COURT: But it's not relevant to suggest he was fleeing because of a warrant unless he had knowledge of the warrant. And unless there's some proffer that's going to present that knowledge –

[DEFENSE]: But how is there any evidence to refute that he knew? And he doesn't have to testify until later. And what I'm asking this officer is I didn't say he ran because he had a warrant, that's not what I was asking. I asked him so he was aware that he had a warrant.

[THE STATE]: The officer can't possibly testify to that.

[DEFENSE]: If he saw that yes, he can.

THE COURT: Sustained.

We find as in-bounds the trial judge's exercise of discretion in denying the admission of the child non-support warrant and limitating cross-examination of the State's witnesses regarding it.

VI. Cross-Examination of Ms. Davis for Bias.

Finally, Bacote claims that the trial court prevented erroneously him from cross-examining Ms. Davis, as the State's expert fingerprint witness in its case-in-chief, as to her potential bias to testify favorably for the State. He protests that this preclusion violated his right to confront an adverse witness (in the form of asking close-ended questions), notably because the State's case depended significantly on the partial fingerprint, recovered under "specious circumstances," connecting Bacote to the backpack.

The State contends that the trial court exercised soundly its discretion in precluding Bacote from cross-examining Ms. Davis because the inquiry Bacote sought was obtained otherwise.

Md. Rule 5-611, governing the mode and order of trial interrogation, states that

> [t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

"The Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantees a criminal

defendant the right to confront the witnesses against him or her." *Pantazes v. State*, 376 Md. 661, 680, 831 A.2d 432, 443 (2003). This right, however, is not without limits. Managing the scope of cross-examination is a matter lying within the sound discretion of the trial court. *Simmons v. State*, 392 Md. 279, 296, 896 A.2d 1023, 1034 (2006). Trial courts have "wide latitude to 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, 831 A.2d at 443 (emphasis added).

To determine whether the trial court abuses its discretion in limiting the cross-examination of an opposing witness's bias or motive to fabricate, we look to whether there was sufficient information before the fact-finder from which to assess the particular witness's possible motives for testifying in favor of the other side. *Martin v. State*, 364 Md. 692, 698, 775 A.2d 385, 388 (2001). Thus, the inquiry is whether the trial court's limitation inhibited the defendant from receiving a fair trial. *Id.*

The Court precluded Bacote from cross-examining Ms. Davis, during the State's case-in-chief, as to her communications with the prosecutor regarding his request that she analyze the fingerprint evidence. The trial court allowed Bacote, however, to call Ms. Davis as a defense witness. During his direct examination of Ms. Davis, Bacote asked her leading questions (allowed by the trial judge) to elicit any potential bias on her part

regarding the prosecutor's fingerprint analysis email request,[10] and why Ms. Davis conducted the analysis expeditiously, even though her supervisor declined to undertake it.

Ms. Davis admitted, during the State's case, that she, in contravention of Dr. Vosburgh's decision, skipped-over other analyses to get to this one quickly. Any evidence of Ms. Davis' alleged bias was revealed to the jury through unflagging examination.[11] We are persuaded that cross-examination of Ms. Davis (when testifying as a State witness) on this point would have been repetitive or only relevant marginally. Contending that Bacote's Sixth Amendment Right was violated when the trial court precluded him from cross-examining Ms. Davis, without any indicia of suffered prejudice, is insufficient to suborn the notion that he had a fair trial. We conclude that the jury had sufficient information from which to assess Ms. Davis's motives, if any, to testify in favor of the State.[12] We can find no abuse of discretion by the trial court.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[10] The email from Dr. Vosburgh had been admitted previously during the State's case.

[11] Bacote cites Md. Rule 5-616(a)(4) which grants each party an opportunity to question a witness about facts that are of consequence to the issue of whether "the witness is biased, prejudiced, interested in the outcome of the proceeding, or has motive to testify falsely." Bacote was apprised of this opportunity, just not in his desired avenue. The trial judge allowed him to examine Ms. Davis directly as a defense witness. Further, the trial judge allowed Bacote continued use of leading questions during his examination of Ms. Davis. *See* Md. Rule 5-611(c) "The allowance of leading questions rests in the discretion of the trial court. Ordinarily, leading questions should not be allowed on the direct examination of a witness except as may be necessary to develop the witness's testimony."

[12] Bacote argued, vigorously, during his closing argument the bias, if any, Ms. Davis had to testify favorably for the State.