Circuit Court for Baltimore City
Case No. 117079012

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 455

September Term, 2018

BRIAN HAWKINS

v.

STATE OF MARYLAND

Reed,
Beachley
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: May 6, 2019

"You can't fight in here. This is the War Room!"

Peter Sellers as President Merkin Muffley, in *Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb* (Columbia Pictures 1964).

Appellant, Brian Hawkins ("Hawkins") was convicted by a jury in the Circuit Court for Baltimore City of: 1) reckless endangerment; 2) discharging a firearm; 3) possession of a firearm with a disqualifying conviction; 4) wear/carry/transport of a handgun; 5) possession of cocaine with intent to distribute; and, 6) possession of marijuana. He was charged also with, but acquitted of, attempted murder in the second degree, assault in the first degree, use of a firearm in the commission of a crime of violence, and conspiracy to use a handgun in the commission of a crime of violence. The trial judge sentenced Hawkins to serve cumulatively 20 years in prison: five years for reckless endangerment and 15 consecutive years for possession of a firearm with a disqualifying conviction. Hawkins received several more sentences, to be served concurrently with the reckless endangerment and possession sentences: three years for wear/carry/transport,[1] seven years for possession of cocaine with intent to distribute, and six months for possession of marijuana.

Hawkins contends that the circuit court made at least two errors meriting a new trial. First, the trial judge erred in admitting evidence during the State's case of a threat made against a material witness. Second, the judge erred in approving the State's use as impeachment evidence of Hawkins' prior conviction for sodomy should he testify in the defense case-in-chief. For reasons to be explained, we shall address first the situation

[1] The conviction for discharging a firearm was merged into this conviction for sentencing purposes.

surrounding the trial court's approval for use as impeachment of the prior conviction. On that score alone, we shall reverse the judgment and remand for a new trial consistent with this opinion. It seems likely that, upon any new trial, the question of the admissibility of the threat against the State witness may arise again. Thus, we shall exercise our discretion, in the interests of judicial economy, to reach also that question. Our resolution of that question favors also a reversal and remand.

QUESTIONS PRESENTED

Hawkins presents three questions for our review. We have re-ordered and re-phrased the questions modestly:[2]

> 1. Are arguments relating to the alleged inadmissibility as impeachment evidence of Hawkins' prior sodomy conviction preserved for appellate review?
>
> 2. If preserved, was Hawkins' prior conviction for sodomy admitted in error?
>
> 3. Did the circuit court err in admitting evidence constituting a threat against a State witness and denying Hawkins' motion for mistrial regarding that evidence?

[2] His original questions, in order, were:

1. Did the circuit court err in admitting evidence of threats made against a witness and denying Hawkins's motion for a mistrial?

2. Did the circuit court err in admitting Hawkins's prior conviction for sodomy in violation of the United States Constitution and the Maryland Declaration of Rights?

3. In the alternative, did the circuit court abuse its discretion in admitting Hawkins's prior sodomy conviction?

FACTUAL AND PROCEDURAL BACKGROUND

A Bare Bones Overview

On 19 February 2017, Davon Fletcher ("Fletcher") drove to a Baltimore City fast-food restaurant with a passenger, William Moore ("Moore"). Upon arrival, Fletcher got out of the automobile and met a friend, Mason Wilkes ("Wilkes"), in the parking lot. The two men entered the restaurant, ordered food, and took it back to Fletcher's car to eat. Fletcher sat in the driver's seat, Moore in the front passenger seat, and Wilkes behind Moore in a rear passenger seat. As they ate their food, Hawkins approached the vehicle and got in, sitting in the rear seat behind Fletcher.

After Hawkins entered the vehicle, an unidentified man (with dreadlocked or cornrowed hair) pulled a gray or white vehicle in front of Fletcher's vehicle. The unidentified man exited his car and approached Fletcher at his driver-side window. He demanded the keys to Fletcher's car. As Fletcher reached for the keys, he was shot. As this occurred, Hawkins exited the vehicle and more gunfire ensued. Hawkins was wounded. Moore and Wilkes brought Hawkins to the hospital for treatment.[3]

What the Police Investigation "Revealed"

Baltimore City police collected video surveillance footage from the restaurant security camera pointed toward the parking lot. The tapes showed muzzle flashes from gunshots. It was unclear from a silent viewing of the video, however, who fired those shots

[3] Because our analysis of Appellant's questions is affected to some degree by the convoluted and confusing evidence adduced at trial, we shall get into the weeds regarding the evidence.

or the circumstances giving rise to them.[4] Police collected shell casings, cell phones, and two bags of marijuana from the relevant immediate environs of Fletcher's car and the parking lot. A ballistics expert analyzed the shell casings, concluding that three firearms of different calibers were involved. The police did not recover any firearms for testing.

Police questioned Hawkins while he was in the hospital. The interview was recorded on one of the officer's body cameras. In addition to the interview, police seized a small pill bottle, which had been removed from Hawkins' clothing by a nurse. A substance in the bottle was identified as cocaine.

What Else Came Out at Trial?

During its case-in-chief, the State introduced the hospital-room, body camera interview of Hawkins. In that interview, Hawkins claimed that he had been shot as the result of a drug deal gone wrong. He stated that he "snatched" the gun from a person who was attempting to rob him.

The State called Fletcher as a witness. Fletcher identified himself, Wilkes, and his vehicle in still photographs and in the surveillance video from the restaurant. He narrated also the surveillance video as the incident unfolded. According to Fletcher, a person walked to his vehicle and got in. Fletcher claimed that he: (1) did not know Hawkins; (2) he did not get a chance to look at the stranger in the back seat; and, (3) that he did not see in the court room the stranger who got into the back seat. Continuing his narration of the video, he pointed-out another person approaching the driver's side door of the vehicle.

[4] Adding to the confusion, conflicting evidence was introduced by the State at trial regarding the events leading up to the gunshots and who fired the shots.

Fletcher explained that next there erupted "a lot of shooting[,]" coming from both the area of the driver's side door and from the person who had entered the back of the vehicle. Finally, Fletcher explained that the video showed the gray/white vehicle driving away, and the stranger who had entered the back of the vehicle running away from the scene.

Moore testified also as a witness for the State. He explained that Fletcher was his stepson. Fletcher's friend who met him at the restaurant was known by Moore only as "Cheese" or "Mayo." Fletcher and "Cheese" sat in the car with their food, Fletcher in the front passenger seat and "Cheese" in the back seat. Then, according to Moore, a white/gray car pulled up in front of Fletcher's vehicle and yet another person entered the back seat of Fletcher's car. Moore identified that person as Hawkins. He saw next an unidentified man with "cornrows or dreads" get out of the white/gray car. The unidentified man told Fletcher to turn off his car's motor and give him the keys. Fletcher complied. Then, Hawkins exited the vehicle and "all hell broke loose. It was a bunch of shooting." When the shooting stopped, Moore and "Cheese" took Fletcher to the hospital. Moore stated that Hawkins did not shoot Fletcher, and that he never saw Hawkins with a gun.

The State introduced a videotaped statement given by Moore to police. In that statement, Moore narrated what was depicted on the surveillance video, but gave a different play-by-play of the events than in his trial testimony. He claimed that "[a]nother gentleman came to the car, and he got in the back driver's side seat. He pulled a gun. And then as he exit [sic] the car, he opened fire." Moore claimed additionally that Fletcher returned fire in self-defense.

Hawkins elected to testify during his defense case-in-chief. He explained that the restaurant parking lot shoot-out was the result of a drug deal gone awry. He entered Fletcher's vehicle intending to buy back marijuana from Fletcher that had been rejected by a customer. As he was giving the money to Fletcher, Wilkes grabbed him by the hood of his sweatshirt and reached for a gun. A struggle ensued, resulting in Hawkins taking the gun away from Wilkes. Hawkins then saw Fletcher reach for a gun. Hawkins exited stage-left from the vehicle. As he was escaping across the parking lot, he fired shots in the direction of Fletcher's vehicle in self-defense. Hawkins was shot multiple times in the leg as he retreated.

The jury was instructed, based on Hawkins' testimony, on the elements of self-defense. It found Hawkins guilty of the six charges itemized earlier. This timely appeal followed.

DISCUSSION

I. Is Hawkins' appellate challenge to the admissibility ruling on the impeachment use of Hawkins' prior conviction for sodomy preserved for our review?

The State contends preliminarily that Hawkins' challenge regarding the admissibility ruling regarding the State's use for impeachment purposes of Hawkins' prior sodomy conviction was not preserved for our consideration. We disagree.

Hawkins was convicted in 2007 for sodomy, which has been historically an impeachable offense in Maryland. The following relevant colloquy about this conviction occurred at trial before Hawkins took the stand:

> [The Court]: All right. Does he have any impeachables?
>
> [The State]: Yes, Your Honor. He does.
>
> [The Court]: What does he have?
>
> [The State]: Your Honor, the State would argue that his 2007 conviction is listed as sex offense on my sheet. But it actually is listed as a sodomy on his test copy, would be an impeachable offense. Additionally, he has a 2006 unauthorized use. And the State's position is that unauthorized use is also an impeachable offense the State could raise.
>
> * * *
>
> [Defense Counsel]: Are you seriously going to ask him about a sodomy conviction?
>
> [The State]: *No, I prefer not to.*

(emphasis added).

Out of the jury's presence, defense counsel argued to keep Hawkins' sodomy conviction from the jury:

> [Defense Counsel]: Okay. Well, the, I'm asking you to keep out the sodomy conviction because I don't think that it is a crime that has anything to do with anybody's ability to tell the truth.
>
> [The Court]: Well, you're wrong about that. If that is your reason for asking me to keep it out, that is not the law.
>
> [Defense Counsel]: Well I understand that it is a common law felony. I'm not disagreeing with that. But the point of impeachment is to effect [sic] the witness's – their – the idea that they're not telling the truth. It is to – it is to make the jury think that they're not telling the truth.
>
> * * *
>
> [Defense Counsel]: Well I believe that the Court has the responsibility to do a balancing test.
>
> * * *

[The Court]: Okay.

All right. As to [Md. Rule] 5-609, as to the first factor, the impeachment value of the prior crime, it is a common law felony. So it is a crime that could be used for impeachment value in this case.

As to the second factor, the point in time of the conviction, the defendant's subsequent history, the sodomy occurred in 2007. [].

* * *

[The Court]: Okay. And number three, the similarity between the past crime and the crime charged. Well, of course, there is no similarity between the two crimes.

The importance of the defendant's testimony, of course, is always important for the defendant to testify.

The essentiality of the defendant's credibility. Credibility is a factor in this case because the defendant has given prior statements to the officers which were played in this case for the jury.

So as to point two, the point in time of the conviction favors admission. The similarity between the past crime and the crime charged favors admission. The importance of the defendant's testimony favors admission. The essentiality of the defendant's credibility favors admission.

Then the next step is, I have to balance the probative value of the evidence against the prejudice to the defendant. Which is basically the defendant's right to testify against the State's right to impeach defendant on cross-examination.

And the court finds that the probative value outweighs any prejudice in this case based on his prior statement to the officer concerning the facts and what happened on February 19th of 2017. That is the Court's ruling.[5]

[5] Prior to jury instructions and closing arguments, the judge clarified to counsel, without being prompted, her reasoning for approving use of the sodomy conviction:

> But when you go back and look at the history of the offense, of how it started in England where basically, you know, it was – there was no separation of church and State back then. So it was a crime against the church. The church found it to be an immoral act.

Hawkins elected to testify in his defense. Considering the court's earlier ruling, defense counsel chose to ask Hawkins on direct examination about the prior sodomy conviction in an attempt to "draw the sting" from the conviction, anticipating that the State might introduce it:

> [Defense Counsel]: Okay. And you were also convicted of a charge called sodomy, correct?
>
> [Hawkins]: Yes.
>
> [Defense Counsel]: And do you know what that means?
>
> [Hawkins]: What sodomy – it is illegal to have – it is illegal to have oral or anal sex in the State of Maryland.

The State asserts that Hawkins' objection to the ruling on the admission of the sodomy conviction is not before us properly. As regards a "drawing the sting out" situation, the Court of Appeals has observed that:

> [B]y "drawing the sting out" of a conviction by testifying about the conviction on direct examination during the defense case, knowing that the court will admit the prior conviction for the limited use of impeachment, a defendant does not waive his or her right to appellate review of the admissibility ruling on the use of that conviction for impeachment purposes.

> And then when the colonies began here and Maryland was colonized, it continued that crime. And it has continued it to today.
>
> And basically, those infamous crimes, people weren't even allowed to testify back then. And we have kind of evolved from that.
>
> But if you look at it – because it is an immoral act that goes directly to somebody's dishonesty. Even if you Google immoral, you will see dishonest is one of the synonyms. So that is why it is. That is why.

Cure v. State, 421 Md. 300, 321-22, 26 A.3d 899, 912 (2011). In order for a defendant to preserve his or her right to appellate review of the admissibility ruling on the use of a conviction for impeachment purposes, the following factors must be met:

> (1) the State makes clear that it intends to offer the conviction if the defendant testifies; (2) the defendant makes a clear objection to the evidence; (3) the court makes a definitive ruling, intended to be final, that the evidence will be admitted; and, (4) the defendant testifies and, to blunt the force of the conviction, reveals it on direct examination.

Id.

Under our microscope here is the first *Cure* factor. The State claims (curiously so) that Hawkins waived his right to appellate review regarding the admissibility of his sodomy conviction because the prosecutor did not make crystal clear that he intended to offer the conviction if the defendant testified. On the circumstances before us, we reject this argument. The State equivocated before Hawkins testified whether it intended to introduce the sodomy conviction if he testified. Rather than stake-out a position with clarity, the State engaged in equivocation, whether as a type of trial gamesmanship to induce Hawkins not to testify or perhaps as an expression of doubt that a sodomy conviction should be an impeachable conviction in these modern times. Although the *Cure* factor seems to require that the State "make[] clear" its intent to offer the relevant conviction, an equivocation must be treated, under the circumstances, as the equivalent of the State expressing its intention to introduce the sodomy conviction. The State may not "reserve," at this critical point in the trial, on whether it will deploy the conviction.

When asked by defense counsel whether he intended to confront Hawkins about his prior sodomy conviction, the prosecutor responded, "[n]o, *I prefer not to*." (emphasis

added). Such an elusive response, under these circumstances, creates, at best, legitimate concern on the part of the defense that the State might ask nonetheless about the conviction if Hawkins testified. Adding to this mix, the State argued, during its statement of its position on the use of Hawkins' collective prior offenses, that: "sodomy … would be an impeachable offense." Taken as a whole, the State went far enough in this regard to influence the defense's decision to adopt the response of trying to take the sting out of any reference to the sodomy conviction. Even if viewed generously in the State's favor, we conclude from this record that the State's possible intent to reserve on the introduction of Hawkins' prior conviction for sodomy must be treated as "clear" for the purposes of applying the law announced in *Cure*.

Holding to the contrary could encourage prosecutors to speak enigmatically and thereby intendedly or unintendedly influence a defendant, who wishes to testify, not to testify. Assuming the State was aware of the *Cure* factors, adopting the State's posture on appeal would ensure that admissibility issues relating to the propriety of the State's use as impeachment of a defendant's prior conviction would evade appellate review. Condoning such a course of conduct prejudices a defendant and creates uncertainty, preventing the defense from making an informed decision in mounting a vigorous defense, including calling the defendant as a witness. This also goes against the spirit of *Cure* and the fair execution of the criminal justice system.

There is no doubt that the other three *Cure* factors were met on this record. We hold that a challenge to the admissibility of the use of the sodomy conviction for impeachment was preserved properly for our review.

II. Was Hawkins' sodomy conviction admissible for impeachment purposes?

The State concedes on appeal that it was an abuse of discretion for the trial judge to sanction the use of the sodomy conviction as impeachment evidence.[6] Nevertheless, it argues that this error was harmless beyond a reasonable doubt. Hawkins retorts, of course, that such an error was not harmless. We conclude that the trial judge abused her discretion, an error which was not harmless beyond a reasonable doubt on this record. It follows then that we must reverse the judgment and remand for a new trial consistent with this opinion.

Standard of Review

We review a trial court's evidentiary determinations ordinarily for an abuse of discretion. *Ruffin Hotel Corp. of Maryland v. Gasper*, 418 Md. 594, 619, 17 A.3d 676, 691 (2011). We give deference to a trial court's application of the balancing test outlined in Md. Rule 5–609. *King v. State*, 407 Md. 682, 696, 967 A.2d 790, 798 (2009).

Discussion

Maryland Rule 5-609 provides, in relevant part:

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

[6] *See infra* at 15.

Rule 5-609 supplies a three-part test to determine the admissibility of prior convictions for impeachment purposes. First, "the conviction must fall within the eligible universe to be admissible. This universe consists of two categories: (1) infamous crimes,[7] and (2) other crimes relevant to the witness's credibility." *Jackson v. State*, 340 Md. 705, 712, 668 A.2d 8, 12 (1995). If the prior conviction satisfies the first criterion, the proponent must establish next that the conviction is less than 15 years old. *Id*. Finally, if the previous two criteria are satisfied, the trial judge must weigh the probative value of the impeaching evidence against the danger of unfair prejudice to the defendant. *Id*.

The genesis of the balancing test of Rule 5-609 "stems from the risk of prejudice." *King*, 407 Md. at 700, 967 A.2d at 801. Rule 5-609, by directing trial courts to perform a balancing test, attempts "to discriminate between the informative use of past convictions to test credibility, and the pretextual use of past convictions where the convictions are not probative of credibility but instead merely create a negative impression of the witness." *Id.* (internal quotations omitted). The Court of Appeals identified five non-exhaustive

[7] Infamous crimes are those that have been viewed traditionally as bearing on the moral turpitude of a defendant, thus making the defendant's testimony in court unworthy of belief. Such crimes include: "murder, manslaughter, robbery, rape, burglary, larceny, arson, sodomy and mayhem." *Cure*, 421 Md. at 324, 26 A.3d at 913 (2011) (quoting *Robinson v. State*, 4 Md. App. 515, 523 n. 3, 243 A.2d 879, 884 n. 3 (1968)). Hawkins argues that, although sodomy is a common law felony, it should not be used in 2018 (the year of trial) to impeach a witness. We leave for another day answering a constitutional challenge to the use of a sodomy conviction as impeachment evidence because we can decide this appeal on a non-constitutional ground. *See VNA Hospice of Md. v. Dep't of Health and Mental Hygiene*, 406 Md. 584, 604, 961 A.2d 557 (2008) (stating: "the Court's strong and established policy is to decide constitutional issues only when necessary." (internal citations and quotation marks omitted)).

considerations to guide trial courts in weighing the probative value of a prior conviction against the danger of unfair prejudice:

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

Id. at 700-01, A.2d 801; *see also Rosales v. State*, __ Md. __ (2019) (No. 6, Sept. Term, 2018) (Filed 17 April 2019; op. by Getty, J.).

In present day Maryland, sodomy appears still to be considered an infamous crime, thus falling within the "eligible universe" of admissibility for impeachment purposes.[8] For purposes of this opinion, we assume that still to be the case. Hawkins was convicted of sodomy in 2007, less than fifteen years before his trial in this case. As such, the first two prongs of the Rule 5-609 test are satisfied.

The trial judge, continuing to attempt to balance the five *King* factors, determined that the probative value of the sodomy conviction outweighed any danger of unfair prejudice. Hawkins, among his claims, contends that the judge abused her discretion in admitting his prior sodomy conviction for impeachment purposes under the *Jackson* balancing test. He maintains specifically that a sodomy conviction has little-to-no probative value for impeachment and the risk of the nature of the crime could lead to unfair bias against him.

[8] *See supra* footnote 7.

Although we assume, without deciding, that sodomy remains an impeachable common law felony, the probative value of that conviction, if any, was outweighed here by the danger of unfair prejudice to Hawkins. Jurors may well have negative feelings about sodomy, irrespective of its criminality, given its obvious association with sexuality. Introducing such a conviction tends to create bias against the witness based on societal notions of sexual propriety or assumptions regarding a witness's sexuality.

In her Rule 5-609 analysis, the trial judge determined that the crimes for which Hawkins was on trial bore no similarity to the crime of sodomy. Were that all that appeared in the transcript, we would have no problem. Notwithstanding this determination, however, the trial judge stated, perhaps quixotically in the context of this cold record as we read it: "[t]he similarity between the past crime and the crime charged favors admission." This comment could have just been the judge thinking out loud about the 5-609 balancing. The trial judge reiterated, however, "of course, there is no similarity between the two crimes[,]" an observation with which we agree. It is a bit muddled. We agree with the State's concession of error.

Although the State concedes that "it was an abuse of discretion for the trial court to determine that the probative value of a prior sodomy conviction outweighed the danger of unfair prejudice[,]" it follows quickly that concession with an argument that the error was harmless beyond a reasonable doubt. To find an error harmless, we must determine that "beyond a reasonable doubt, [] the error in no way influenced the verdict." *Dorsey v. State*, 276 Md. 638, 659, 350 A.2d 665, 678 (1976). In support of this position, the State contends that there was no amplification on the sodomy conviction other than it embraced oral or

anal sex. The State did not question Hawkins on cross-examination regarding the conviction; nor did it mention explicitly it in closing arguments.[9]

We agree that the trial court abused its discretion in approving Hawkins' prior sodomy conviction for use as impeachment evidence. Moreover, that error was not harmless beyond a reasonable doubt.

When a testifying defendant's credibility is at issue, an error is seldom harmless. The Court of Appeals has observed: "where credibility is an issue and, thus, the jury's assessment of who is telling the truth is critical, an error affecting the jury's ability to assess a witness' credibility is not harmless error." *Dionas v. State*, 436 Md. 97, 110, 80 A.3d 1058, 1066 (2013); see also *Howard v. State*, 324 Md. 505, 517, 597 A.2d 964, 970 (1991) (Holding "[i]n a case that largely turned on whom the jury was going to believe, the improperly admitted evidence of the defendant's prior conviction may have been the weight which caused the jurors to accept one version rather than the other."). Hawkins testified in his own defense, so his credibility was paramount in the defense case and the jury's determinations. The trial judge observed that, if the jury believed Hawkins' self-defense testimony, "he would have been found not guilty of everything." Because his credibility was at issue, we assume the very real possibility that Hawkins was prejudiced by the ruling on the admissibility of the sodomy conviction. As such, it was an abuse of discretion to

[9] Although the State did not mention the sodomy conviction in closing arguments, it called into question generally Hawkins' integrity and credibility. For instance, it stated "anything the defendant says has got to be taken with some caution." The State questioned also Hawkins' veracity relating to other parts of his testimony (i.e., asking "[d]o you believe that or do you not?" regarding his self-defense claim).

allow Hawkins' prior sodomy conviction as impeachment evidence and that error was not harmless beyond a reasonable doubt. A new trial is in order.

III. Did the trial court err in admitting evidence regarding an alleged threat made against a State witness?

Hawkins contends that the trial judge erred in admitting evidence of an apparent threat towards a witness – a threat that was linked, ambiguously perhaps, to Hawkins. We address this issue because it is our judgment that this situation could occur again at a new trial and judicial economy would be served by doing so. For reasons to be explained, it was error for the judge, on this record, to admit evidence implying that Hawkins was complicit in an alleged threat against a State witness.

The State asked Moore, on direct examination in the State's case-in-chief, whether he received any assistance from the State in exchange for his testimony. Moore responded:

> [Moore]: Okay. I had got a call from the first State's Attorney. I don't remember his name – Lewis or something. And I didn't answer the phone. So they came to me and my wife in a police car. Came to me and my wife house. And they told me to call detective Mohamed.
>
> I called detective Mohamed and I was informed that the gentleman right here is about to send a kite out.[10] I don't know how they found out.

[10] A "kite," unbeknownst to the trial judge at the time (or to us on appeal, for that matter, had counsel not enlightened us), is a written jailhouse communication to the outside world. Although it is not crystal clear based on the record, it appears that Moore gestured towards Hawkins or used other body language movements that suggested Hawkins was the one who sent the kite or instigated its transmission (we interpret, under the circumstances, the tense of the passive verb in Moore's testimony – "about to send" – as actually meaning past tense).

According to Moore, the State got word of a potential threat to his safety from an unknown source. The State informed him of this and provided for his housing relocation, where he resided at the time of trial.

Defense counsel objected immediately. In an exchange at the bench, counsel stated that the testimony regarding the "kite" prejudiced Hawkins because it implicated, through hearsay, Hawkins as making or inducing the threat.

The trial judge acknowledged that she was unfamiliar with the term "kite" in the context used here, and that she was unsure whether the jury would understand the relevant definition of the term. As such, she decided to give a supposed curative instruction, telling the jury to disregard Moore's testimony regarding the "kite." She ordered the testimony to be struck from the record.

The judge allowed, however, the State to inquire thereafter from Moore why the State's Attorney's Office provided Moore relocation benefits. After she ordered the jury to disregard the "kite" testimony and struck it from the record, the following colloquy ensued between the prosecutor and Moore:

[The State]: Mr. Moore, were you moved because you received some threats?

[Moore]: Yes.

* * *

[The State]: And was that at the behalf of the State's Attorney's Office?

[Moore]: Yes.

[The State]: And that included finding different housing for you?

[Moore]: Yes.

[The State]: Is that currently where you are today?

[Moore]: Yes.

Defense counsel objected to this line of questioning. The trial judge overruled the objection.

Ordinarily, "[e]vidence of threats to a witness, or attempts to induce a witness not to testify or testify falsely, is generally admissible as substantive evidence of guilt when the threats or attempts can be linked to the defendant and not admissible as substantive evidence absent such linkage." *Washington v. State*, 293 Md. 465, 468 n.1, 445 A.2d 684, 686 n.1 (1982)). Upon our review of this record, it appears to us that sufficient elaboration regarding linkage of the threat to Hawkins did not exist to justify admitting this portion of Moore's testimony as evidence of Hawkins' guilt. The trial judge seemed to recognize this and ordered the prior testimony to be struck from the record, yet, allowed thereafter the State to inquire further of Moore regarding threats as the basis for why he was offered (and accepted) relocation benefits. This testimony, following so closely on the heels of the earlier exclusion of the "kite" testimony, resurrected the potential of prejudice to Hawkins.

Evidence of threats to a witness, beyond use as substantive evidence of guilt by a defendant, may be admitted for other purposes. *See Armstead v. State*, 195 Md. App. 599, 643, 7 A.3d 169, 195 (2010) (stating evidence of threats to a witness, or fear on the part of a witness, is generally admissible in criminal cases, even if the threats or fear are not linked to the defendant). In *Armstead*, a witness, in the course of his testimony, stated that he was scared because he received threats. Defense counsel sought to exclude the testimony. The

judge allowed the testimony for the purpose of determining the witness's credibility. He instructed the jury to consider the evidence for:

> the very limited purpose of weighing or deciding his credibility or in explaining or tending to explain any previous inconsistent statements that he gave. You may not use it and must not use it as substantive evidence against the defendant because there is absolutely no evidence that the defendant was involved in any such threats or even knew about them.

Id., A.3d 194 (2010).

Here, unlike *Armstead*, the jury was not instructed on what limitations, if any, cloaked Moore's admitted threat testimony. The trial judge did instruct the jury: "[y]ou may consider the testimony of a witness who testifies for the State as a result of a benefit. However, you should consider such testimony with caution … [the testimony] may have been influenced by a desire to gain a benefit by testifying against the defendant." No additional instruction regarding the threat aspect of the permitted testimony was given. Allowing such testimony for any purpose other than acknowledgement evidence of the defendant's guilt, without a limiting instruction narrowing its purpose, invited impermissible inferences by the jury as to Hawkins' guilt. The testimony was admitted in error.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.