Circuit Court for Wicomico County
Case No. C-22-CR-18-000337

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 506

September Term, 2019

LEE BRABOY

v.

STATE OF MARYLAND

Friedman,
Beachley,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: January 19, 2022

A jury in the Circuit Court for Wicomico County convicted appellant, Lee Braboy, of first-degree murder, conspiracy to commit first-degree murder, use of a firearm in the commission of a felony or crime of violence, and related offenses. The trial court sentenced Braboy to two consecutive life sentences, plus 35 years, after which he filed a timely notice of appeal. Braboy now challenges that (1) the trial court committed plain error by giving a jury instruction on evidence tampering; (2) defense counsel provided ineffective assistance with regard to the tampering instruction; (3) the trial court abused its discretion by allowing the State to make a prohibited "golden rule" argument; (4) the trial court abused its discretion by impeding defense counsel's cross-examination of Adrian Downing; and (5) the trial court erred in admitting evidence of Chantay Moss's prior statement. For the reasons that follow, we affirm the judgments.

FACTS AND LEGAL PROCEEDINGS

On June 9, 2017, Jaquanta Walton and Unique Siebenberg left the home they shared with their girlfriends and headed for a night out at a party being held at the Salisbury VFW hall. Once there, the two men split up and spent the evening with their respective friends. When the party ended at approximately 1:00 a.m., Walton, his friend Devon Cormack, and a few other people started a dice game outside the VFW hall. Siebenberg told Walton he would wait for him in the car, which was parked down the street. As he waited, Siebenberg heard a gunshot. Siebenberg drove around looking for Walton, but, unable to find him and assuming he had run from the gunshot, Siebenberg returned home alone.

After the gunshot rang out, Walton and Cormack ran to Cormack's car, where Leonard Pompilus sat listening to music. After they were in the car, Cormack noticed that

Walton's shirt was turning red and realized that Walton had been shot. Pompilus drove to Peninsula Regional Medical Center ("PRMC"). Walton was not responsive during the drive and was not breathing when they arrived at the emergency room. Medical staff helped Pompilus and Cormack get Walton out of the backseat of the car and onto a gurney. Pompilus and Cormack then drove away to avoid answering questions about the shooting. Walton was pronounced dead at the hospital from a single gunshot wound to the chest.

Maryland State Police Corporal Scott Sears responded to PRMC after receiving a report about the arrival of a gunshot victim.[1] At PRMC, Corporal Sears spoke with Walton's girlfriend, Renee Lane, who had come to the hospital after learning that Walton had been shot. Lane informed Corporal Sears that Walton had been at the VFW in Salisbury with Seibenberg earlier that night. Corporal Sears then went to speak with Seibenberg, who accompanied Corporal Sears to the street corner outside the VFW hall where the shooting had occurred.

The VFW hall had seven security cameras—three inside and four outside— that had recorded video footage that Corporal Sears was able to retrieve and review.[2] On the video from the interior of the hall during the party, Corporal Sears observed what he believed to be, from his police training, knowledge and experience, Walton "rolling Crip signs with his hands," that is, exhibiting gang signs, and making "a throat slash gesture" toward a man

[1] Although police received a report about Walton arriving at PRMC, there were no reports made about a gunshot having been fired outside the VFW hall.

[2] Anthony Imel of the FBI enhanced and retrieved still photos from 28 videos from the night of the shooting.

identified as Dionte Dutton. Dutton approached Walton, but two women identified as Dia Hitch and Fonnette Gail stepped in to separate the men. When the lights came up in the club at the end of the party, Dutton tried to approach Walton again, but Gail pulled him back, and both men exited the VFW hall.

At approximately 1:15 a.m., video from the VFW hall's exterior cameras revealed a burgundy Lincoln Town Car, later determined to belong to Braboy, blocking traffic. Witnesses testified that they saw Dutton driving the car.

At 1:30 a.m., the video showed a person coming from behind a building across the street from the VFW hall, shooting Walton one time in the chest from a very close distance, and then running across Route 50. The shooter was wearing a black ski mask with a single cut-out for the eyes (instead of the more typical two holes), jeans, white athletic shoes, and a black tee shirt that was "a little small" for him and kept riding up to reveal his skin. He also had "a strange or different type of run."[3] Later, Dutton, who had been wearing an appropriately fitting black tee shirt inside the VFW hall, was observed driving Braboy's Lincoln wearing a white tank top; Braboy, in the passenger seat, was wearing a black shirt.

After the police identified Braboy and Dutton as suspects in Walton's homicide, they executed a search and seizure warrant at the home of Braboy's girlfriend, Chantay Moss. Recovered during the search was a black ski mask with only one opening for the

[3] Glay Kimble and Adrian Downing, long-time friends of Braboy's, testified that Braboy is pigeon-toed, has unusually long arms, and runs stiffly, "with his butt poked out." From the VFW videos, both men identified Braboy by his body type and distinctive running style as the person seen running from the scene after the shooting. Kimble also added that Braboy appeared in court to be "a lot smaller … not as muscular as he was" in June 2017.

eyes, a men's size medium black tee shirt, and size 10½ white Nike Air Jordan athletic shoes.[4]

The ski mask was sent to the police lab for DNA analysis. The analysis showed that the inside of the mask contained the DNA of three individuals. Dutton was not one of them. Braboy, however, could not be excluded as a significant contributor, and, according to the forensic DNA expert, the probability of finding someone other than Braboy who also could not be excluded as a significant contributor was one in 19 quintillion African-Americans.

On June 20, 2017, Corporal Sears interviewed Braboy about the shooting. Braboy, who acknowledged being a former member of the Blood gang, said that he did not know Walton but had heard that "a Blood dude was shot." Braboy initially proclaimed lack of memory about where he was on the night of June 9-10, 2017, saying he could have been with Chantay Moss or with Keeva Parker, another of his girlfriends. When Corporal Sears presented him with photos of his car at the VFW hall, Braboy wondered how it had gotten there. Braboy later changed his story to say that he and Dutton had been at the VFW hall at approximately midnight but that he was at Moss's home at the East Road apartments at the time of the shooting, despite the fact that his car was captured on the VFW video three minutes before the shooting and the East Road apartments are a five-minute drive away.

[4] From the enhanced VFW hall videos, Imel compared Dutton's shoes and the shooter's shoes to the shoes recovered from Moss's house. The recovered shoes did not match the dark shoes worn by Dutton, but there were "limited class characteristic similarities" between the shooter's white shoes and the ones recovered during the search such that the shoes recovered from Moss's house could not be eliminated as a possible match.

A month or two after the shooting, Adrian Downing's girlfriend, Bianca Giddens, overheard Braboy tell her friend Nicole that, "I did the VFW but not the other one," explaining that the VFW shooting related to "gang stuff." Braboy further told Nicole that he and Dutton had argued with "the boy who was killed" and that they were flashing gang signs at each other. Braboy also mentioned that he and Dutton had had to switch shirts because of the cameras inside the VFW hall.

In April 2018, the police obtained authorization to tap two of Braboy's phone lines and one of Dutton's, expecting calls to witnesses advising them not to cooperate with the police in response to recently issued grand jury subpoenas. They were not disappointed. Amongst the calls intercepted by police was a telephone call between Braboy and Hitch, in which Braboy instructed Hitch to tell Gail that if she was subpoenaed and asked about who was in the car with Dutton on the night of the shooting, she should say he wasn't there. In addition, when he learned that Dutton had been arrested on April 19, 2018, Braboy called Ashlyn Farare, another of his girlfriends, and directed her to pick him up and get him out of the area. Braboy was arrested while he was on the phone with Farare.[5]

[5] In a separate trial, Dutton was convicted of second-degree murder and related offenses. Dutton appealed, and we reversed and remanded for further proceedings, on the ground that the prosecutor made six separate impermissible comments during closing argument, which, cumulatively, denied Dutton a fair trial, especially in light of the thinness of the State's case against him. *See Dionte Keith Dutton v. State of Maryland*, No. 2184, September Term, 2019 (filed September 21, 2021). Although Braboy also argues that the prosecutor made an improper comment during closing argument, we note that "the propriety of prosecutorial argument must be decided 'contextually, on a case-by-case basis.'" *Anderson v. State*, 227 Md. App. 584, 589 (2016) (quoting *Mitchell v. State*, 408 Md. 368, 381 (2009)). Thus, our decision in Dutton's case—despite the facial similarity of this one issue—has no particular significance to our review of Braboy's appeal.

DISCUSSION

I. JURY INSTRUCTION: PLAIN ERROR

Braboy first contends that the trial court committed plain error in instructing the jury that defense counsel's removal of a trial exhibit from the courtroom during a recess, without the court's permission, was not enough to establish Braboy's guilt but could be considered as evidence of guilt. Braboy claims that the instruction was not generated by the evidence, was not a correct statement of the law, and was highly prejudicial.

After the prosecutor gave her initial closing argument, the trial court took a brief recess. When trial resumed, the prosecutor advised the court she had learned that, during the recess, defense counsel had removed State's exhibit 32, the black tee shirt recovered from Moss's house, from the courtroom and had taken it into lock-up and permitted Braboy to hold it and put it on.

Defense counsel acknowledged that he had taken the tee shirt to Braboy's cell without the court's knowledge. Defense counsel explained that he and Braboy inspected the shirt, after which Braboy tried it on because he wanted to wear it in front of the jury. The trial court admonished defense counsel that such a request should have been made to the court before trial and that evidence "never leaves this courtroom, ever."

The trial court told defense counsel that it would review the video footage to determine whether the tee shirt appeared to have been manipulated. If so, Braboy would not be allowed to try it on in front of the jury. If, however, the trial court and the State agreed that the tee shirt did not appear to have been manipulated, it would be up to Braboy to decide whether to try it on in front of the jury. If he chose to do so, the trial court noted

that it believed it would be fair to give an instruction "that deals with alteration of evidence." The trial court then gave defense counsel the opportunity to consult with Braboy about how he wished to proceed.

After a short recess, defense counsel advised the court that Braboy still wished to try on the shirt for the jury. The trial court then discussed with the attorneys at length the timing and content of the instruction it proposed to give the jury and its reasoning in crafting the instruction. After being given an opportunity to voice "any objection to that," both the prosecutor and defense counsel affirmatively declared that the proposed instruction was "acceptable." Defense counsel added that, "[t]here was no intent to trick the court, it was a mistake [for which] I will[,] for the record[,] take responsibility."

In accordance with its discussion with counsel, the trial court instructed the jury, before defense counsel's closing argument:

> I would note for the record that the defense removed State's No. 32, the black tee shirt recovered from Ms. Moss's house, from the courtroom without the Court's permission and it could have provided an opportunity for it to have been manipulated outside of the presence of the Court. Such conduct is not enough by itself to establish guilt but may be considered as evidence of guilt. It may be motivated by a variety of factors, some of which are fully consistent with innocence.

Defense counsel proceeded immediately to closing argument without objection or comment. The trial court permitted Braboy to try on the shirt in front of the jury but did not permit "any commentary about it," instead leaving it to the jury to "draw [its] own conclusions."

In his brief, Braboy concedes that his lack of a timely objection to the jury instruction renders this issue unpreserved for appellate review. Nonetheless, he urges us to exercise our discretion and review the instruction for plain error.

Maryland law draws a clear distinction between forfeiture and waiver of a right: "[f]orfeiture is the failure to make a timely assertion of a right, whereas waiver is the intentional relinquishment or abandonment of a known right. **Forfeited rights are reviewable for plain error, while waived rights are not.**" *State v. Rich*, 415 Md. 567, 580 (2010) (cleaned up) (emphasis in original); *Yates v. State*, 202 Md. App. 700, 722 (2011).

Although Braboy's attorney did not specifically request the evidence tampering instruction, he also did not simply acquiesce to the instruction by failing to object. *Yates*, 202 Md. App. at 722. Rather, he affirmatively waived. As noted above, the trial court explained to defense counsel that if Braboy chose to try on the shirt in front of the jury, it believed that an instruction on "alteration of evidence" would be "fair to be given at [that] point." After a brief recess to allow defense counsel to consult with Braboy, defense counsel informed the court that Braboy still wanted to try on the tee shirt in front of the jury. The court then discussed its plan to give an "alteration of evidence" instruction and invited comments from both the prosecution and the defense. In response, defense counsel, without objecting to the giving of such an instruction, requested only that he be permitted to explain to the jury why he had taken the tee shirt from the courtroom. When the trial court advised counsel of the wording of its proposed instruction, defense counsel affirmatively told the court that the instruction was acceptable. Counsel also stated, as

quoted above, that he took responsibility for the mistake that gave rise to the instruction. We read these actions as an affirmative waiver, not a mere forfeiture. Thus, under *Yates*, we are prohibited from conducting plain error review of this claim.

II. JURY INSTRUCTION: INEFFECTIVE ASSISTANCE OF COUNSEL

Alternatively, Braboy argues that we should find that his lawyer's failure to preserve the alleged instructional error for appeal amounts to ineffective assistance of counsel.

Criminal defendants have a constitutional "right to the assistance of counsel at critical stages of the proceedings." *Mosley v. State*, 378 Md. 548, 556 (2003). Ineffective assistance of counsel claims are assessed under the U.S. Supreme Court's test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the *Strickland* test, "a defendant must prove that counsel's competence failed to meet an objective standard of reasonableness and that counsel's performance prejudiced the defense … to be successful in an ineffectiveness of counsel claim." *Mosley*, 378 Md. at 557 (discussing *Strickland*).

The Court of Appeals has explained repeatedly that a post-conviction proceeding is generally the most appropriate mechanism for raising a claim of ineffective assistance of counsel. *See, e.g.*, *Bailey v. State*, 464 Md. 685, 703-05 (2019). This is because "the trial record rarely reveals why counsel acted or omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel's ineffectiveness." *Mosley*, 378 Md. at 560. To consider a claim of ineffective assistance of counsel on direct appeal, "the trial record clearly must illuminate why counsel's actions were ineffective because, otherwise, the Maryland appellate courts

would be entangled in the perilous process of second-guessing without the benefit of potentially essential information." *Id.* at 561 (cleaned up).

Here, after the prosecutor advised the trial court that defense counsel had removed the exhibit and permitted Braboy to handle it, the court expressed its anger and disappointment that counsel had not asked permission and stated that if Braboy still wanted to try on the shirt for the jury, it would give an evidence tampering instruction. Defense counsel then took responsibility for his mistake and accepted the court's instruction. We know nothing, however, about defense counsel's strategy. He may have agreed that the jury instruction was appropriate in light of his actions, or he may have been mindful of the trial court's anger and determined that it was in his client's best interest not to provoke the court further, or he may have been instructed by his client to accept any sanction that would permit Braboy to try on the shirt for the jury. In the absence of further information, we are not willing to consider on direct appeal whether defense counsel's performance was reasonable.[6]

III. CLOSING ARGUMENT

Next, Braboy avers that the trial court abused its discretion in permitting the prosecutor to make a prohibited "golden rule" argument during her initial closing argument. By asking the jury to "'make it stop here' in reference to [Braboy's] reputation

[6] We make no finding, however, and Braboy is free to raise the issue in a subsequent post-conviction proceeding.

for violence," Braboy concludes, the prosecutor impermissibly appealed to the jurors to convict him to preserve the safety of their community.

To address this issue, some context is helpful. Throughout the several days of trial, evidence was presented that the shooting of Walton related to some sort of gang altercation. After Bianca Giddens testified for the State, the prosecutor notified the trial court that she had heard spectators in the gallery say "something to the effect of that bitch is going to get herself killed" and also that Glay Kimble, another State's witness, was "a dead man." On another occasion, the trial court noted that people outside the courtroom had been "causing a disturbance" that interrupted Corporal Sears's testimony and that they would be removed if they remained disruptive. Then, on the final day of testimony, the court notified counsel that it had received a note from a juror stating that a man in the gallery had been pointing his phone toward the jury box, causing "nervousness" among the jurors.

In her initial closing argument, the prosecutor said:

> Is there more to it? Is there more to this? I hope so. I hope there is a better reason that Lee Braboy shot Jaquanta Walton that we all don't know. I hope there's a better one. We would like to think that executions don't happen on the street corners of our city for nothing. We would like to think that 30 plus people don't leave people dying for no reason. We would like to think that our friends don't throw us out at the hospital. We would like to think that maybe he was such a bad person that he deserved it. But the truth of the matter is it's not. The crappy truth is that it's horrible. And the crappy truth in this case is everybody is afraid of him.
>
> So I said in the beginning I'm asking you to invest. I'm asking you to invest enough not to care how dangerous anybody is. I'm asking you to invest enough to ignore all the stuff that's been going on from this part of the courtroom for the last three days. I'm going to ask you to ignore the staring and the hand gestures and the fussiness in the hallway, I'm going to ask you to ignore that.

At that point, defense counsel objected, and the trial court sustained the objection, telling the prosecutor to "focus on the case." The prosecutor continued:

> On the facts, what you see on the television, what you see in the phone records, what you heard from the witness stand.
>
> *I'm asking you to make it stop here* … I'm asking you to look at facts and apply them to the law.

(Emphasis added). Defense counsel again objected, and the trial court invited both sides to approach the bench. Asking for a mistrial, defense counsel elaborated on what he was objecting to:

> [DEFENSE COUNSEL]: ["]I'm asking you to make it all stop["]. And by ["all["] it was referring to the activities, the gang signs, the stares, it certainly had a community element to it, and I don't want to come up now and do this but this is when the courts say is the time to do it and I think I'm on fairly stable grounds that that is beyond the scope of what would be appropriate in closing argument because it's going beyond the scope of this case and it's very prejudicial especially to point out to that side of the room and to represent what's going on outside in the hallway which may or may not have anything to do with this case.
>
> So again[,] regrettably[,] I'm going to voice an objection and also move for a mistrial.
>
> THE COURT: Okay.
>
> [PROSECUTOR]: I think that the jurors, they have been in the courtroom for three days and they can make their own observations and use their own personal judgment. I didn't point to the defense side but the entire courtroom. I think they can observe what's been going on, they can observe the fuss, they can observe the staring that's been happening. I have seen it and the State's seen it,

> they've seen it. What I say isn't evidence and they don't have to believe me but certainly if they've seen it then they've seen it.
>
> And I'm asking them to make a determination today about the guilt or innocence of Mr. Braboy.

The court overruled defense counsel's objection and denied his motion for mistrial but advised the prosecutor to "refrain from any further comments as it relates to the gallery at large, let's focus on the facts of this case." As instructed this time, the prosecutor moved on.

Prosecutors are given "wide latitude in the presentation of closing arguments," *Lee v. State*, 405 Md. 148, 162 (2008), but it is a fundamental rule that they may not appeal to the prejudices and fears of the jury and ask them to abandon their neutral fact-finding role. *Lawson v. State*, 389 Md. 570, 594, 597 (2005). One form of improper appeal to fear and prejudice is the so-called "golden rule" argument, "in which a litigant asks the jury to place themselves in the shoes of the victim or in which an attorney appeals to the jury's own interests." *Lee*, 405 Md. at 171 (2008) (cleaned up). When prosecutors make a golden rule argument, they are "calling for the jury to indulge itself in a form of vigilante justice rather than engaging in a deliberative process of evaluating the evidence." *Id.* at 173; *see also Hill v. State*, 355 Md. 206, 225 (1999) (noting that it is improper and prejudicial for a prosecutor to suggest that jurors convict to preserve the safety or quality of their communities).

Defense counsel argues that the prosecutor's statement emphasized above—"I'm asking you to make it stop here"—constitutes an impermissible golden rule argument. In

our view, however, it is not entirely clear from the context of the prosecutor's argument what the "it" is that she asked the jury to "stop here" and whether the statement actually is, or is not, a golden rule argument. But, even assuming for the sake of argument that it is and that the trial court erred in overruling defense counsel's objection, that fact would not end our inquiry. We must also address whether the error is harmless. *See Lee*, 405 Md. at 174 (golden rule argument is subject to harmless error analysis); *Carrero-Vasquez v. State*, 210 Md. App. 504, 511 (2013) (prosecutorial impropriety in closing argument is harmless if we can say that it did not contribute to the verdict beyond a reasonable doubt). When determining whether overruling defense objections to improper statements during closing argument constitutes reversible or harmless error, we consider several factors, including "the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Lawson*, 389 Md. at 592 (quoting *Spain v. State*, 386 Md. 145, 158-59 (2005)).

Even if the prosecutor's remark was improper, it was a single sentence that occurred in the midst of a lengthy closing argument. Because it was an isolated comment, and because it was open to various interpretations, we cannot say that the remark was severe. Moreover, defense counsel had an opportunity in his closing argument to bring additional pertinent facts to the jury's attention. And, although the court did not issue a curative instruction to the jury, the court had instructed the jury that closing arguments were not evidence in the case. *See Shelton v. State*, 207 Md. App. 363, 388 (2012).

In addition, the weight of the evidence against Braboy was strong: video evidence placed Braboy's car at the scene of the shooting and placed Dutton, who had interacted

with Walton, in the car prior to the shooting; two people identified Braboy as the shooter from the video from his distinctive body type and style of running; items consistent with what the shooter was wearing were recovered from Braboy's girlfriend's house, and one contained his DNA; a witness overheard Braboy tell a friend that he had done "the VFW" because of "gang stuff" and that he had to change shirts with Dutton; the police intercepted a phone call from Braboy instructing a witness to say he hadn't been at the VFW hall the night of the shooting; and Braboy tried to have someone remove him from the area once he learned that Dutton had been arrested. Given the weight of the evidence, the jury was unlikely to have been swayed by the single, allegedly improper remark by the prosecutor. *See Jones-Harris v. State*, 179 Md. App. 72, 108 (2008) ("The difficulty in persuading a jury to acquit under such circumstances was unlikely to have been caused by the isolated remark by the prosecutor."). We, therefore, hold that the remark was harmless.

IV. CROSS-EXAMINATION

Braboy next claims that the trial court abused its discretion in limiting defense counsel's cross-examination of Adrian Downing about whether he had worked selling drugs for Braboy. Evidence that Downing had distributed drugs, Braboy continues, is a prior bad act that he should have been permitted to use to impeach Downing's testimony.

The crux of Downing's testimony was that he had known Braboy for years and therefore was able to identify him as the shooter from the VFW video, based on his knowledge of Braboy's body type and his unusual manner of running. *See* supra n.**Error! Bookmark not defined.**. During defense counsel's cross-examination of Downing, the following occurred:

[DEFENSE COUNSEL]: Recently, did you ever do any work for Mr. Braboy? Did you work for him?

[DOWNING]: Did I work for him?

[DEFENSE COUNSEL]: Did you sell drugs for him?

[DOWNING]: No.

[PROSECUTOR]: I'm going to object.

THE COURT: Approach.

(Whereupon, counsel approached the bench and the following occurred at the bench:)

[PROSECUTOR]: It's a prior bad act on the part of the witness. There's been no suggestion that he sold drugs. It's simply been offered to discredit the witness. It wouldn't be appropriate if it was the Defendant so it's certainly not appropriate for the witness.

[DEFENSE COUNSEL]: I asked if he worked for him.

THE COURT: No, then you asked if he sold drugs for him.

[DEFENSE COUNSEL]: I can re ask did you ever work for him.

THE COURT: You already asked him that and he said he didn't—

[DEFENSE COUNSEL]: No, he said worked and I clarified by saying sell drugs. He didn't answer my questions.

[PROSECUTOR]: Whether or not he sold drugs is prejudicial and irrelevant.

THE COURT: Sustained.

[DEFENSE COUNSEL]: I'd make a proffer then, if I could.

THE COURT: What's the proffer?

[DEFENSE COUNSEL]: That this witness has sold heroin for or on behalf of Lee Braboy and he would do it as a way to support his own heroin habit.

[PROSECUTOR]: That has nothing to do with this case.

[DEFENSE COUNSEL]: That's why it's a proffer, I'm just making the proffer.

THE COURT: Make the proffer.

[DEFENSE COUNSEL]: And I would ask to inquire into those matters, that he is known to Mr. Braboy and Mr. Braboy knows him by virtue of his use of heroin and his dealing of heroin in order to support his heroin habit.

THE COURT: I'm going to sustain the objection. Step back.

The trial court also struck Downing's "last response," at the request of the prosecutor.

As we explained recently in *Baires v. State*,

> Central to the right of criminal defendants to confront witnesses against them from the Sixth Amendment's Confrontation Clause and Article 21 of the Maryland Declaration of Rights is the opportunity to cross-examine witnesses. Still, the right to cross-examine witnesses is not without limit as trial judges have the authority and the sound discretion to limit the scope of cross-examination. Specifically, the Confrontation Clause does not prevent a trial judge from imposing limits on cross-examination. Judges 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' safety, or interrogation that is repetitive or only marginally relevant.
>
> When exercising their discretion, trial judges should balance a question's probative value against the danger of unfair prejudice. On appellate review, we determine whether the trial judge imposed limitations upon cross-examination that inhibited the ability of the defendant to receive a fair trial. Therefore, we review the cross-examination limitations imposed on [a defendant] by the trial judge on an abuse of discretion standard.

249 Md. App. 62, 96-97, *cert. denied*, 474 Md. 634 (2021) (cleaned up). To apply this standard, we will not second-guess any reasonable ruling on the admission of evidence, even if it could have gone the other way. *Peterson v. State*, 196 Md. App. 563, 584-85 (2010).

Impeaching a witness with prior bad acts is permitted by Rule 5-608(b), which provides:

> **Impeachment by examination regarding witness's own prior conduct not resulting in convictions**. The court may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction but that the court finds probative of a character trait of untruthfulness. Upon objection, however, the court may permit the inquiry only if the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred. The conduct may not be proved by extrinsic evidence.

Even if the cross-examination is admissible, allowing it still falls within the discretion of the trial court: "The most salient legal characteristic of Rule 5-608(b) is that the permissibility of the use of prior bad conduct [as impeachment] is a decision entrusted to the wide discretion of the trial judge. The use of this impeachment device is by no means automatic." *Molter v. State*, 201 Md. App. 155, 173 (2011). And, as always, a trial court does not abuse its discretion when it excludes cross-examination that is irrelevant. *See* MD. RULE 5-402 (irrelevant evidence is inadmissible).

The trial court did not abuse its discretion in this case. The proposed topic of the cross-examination—whether Downing had worked selling drugs for Braboy—was both inadmissible to impeach Downing under Rule 5-608(b) and not relevant to show that he was biased or had a motive to lie about anything related to Braboy's guilt.

First, defense counsel failed to establish a reasonable factual basis to permit questioning Downing about whether he had sold drugs for Braboy, as required by Rule 5-608(b). Mere accusations cannot be used for impeachment purposes. *State v. Cox*, 298 Md. 173, 181 (1983).

At the bench conference following the prosecutor's objection, defense counsel proffered only the accusation that Downing had sold drugs for Braboy, to fund his own drug habit. Defense counsel proffered no conviction, admission by Downing, or anything other than hearsay as proof that Downing had worked for Braboy selling drugs.[7] Nor did defense counsel explain how the alleged misconduct "related to the veracity of the [witness] and the potential value of that impeachment evidence to the defense's theory of the case." *Fields v. State*, 432 Md. 650, 671 (2013). Thus, the trial court did not err by prohibiting defense counsel from cross-examining Downing about whether he worked selling drugs for Braboy, based on counsel's unsupported belief that he did so.

Second, we fail to see how questions regarding whether Downing had worked selling drugs for Braboy were relevant to Downing's testimony that he had known Braboy for years, was familiar with aspects of his body type and his unusual method of running, and was therefore able to identify him as the shooter from the VFW hall video. Had

[7] In fact, although the response was stricken by the trial court, Downing had already answered that he had not worked for Braboy selling drugs, and there is no reason to assume he would have answered differently if asked again. Defense counsel would then have been unable to offer extrinsic evidence to prove that Downing had sold drugs for Braboy. *See Cox*, 298 Md. at 179 ("the cross-examiner is bound by the witness' answer and, upon the witness' denial, may not introduce extrinsic evidence to contradict the witness or prove the discrediting act").

Downing answered that he had been employed by Braboy, that would likely have enhanced, rather than detracted from, the prosecutor's suggestion that Downing knew Braboy well enough to identify him on video. And having been employed by Braboy selling drugs to fund his own drug habit would not have made Downing less credible as a witness on that limited subject.

Finally, even if the trial court erred in declining to permit defense counsel to question Downing about whether he had worked for Braboy selling drugs, any such error would be harmless. Had Downing been permitted to answer the question, and had he answered affirmatively that he had sold drugs for Braboy, all it would have put before the jury was that Downing had previously undertaken illegal conduct. The jury, however, already had before it Downing's candid testimony that he was incarcerated at the time of trial and that he had served a considerable amount of time in prison with Braboy in the past. Any more evidence of his illegal activity would have been merely cumulative. Downing also acknowledged that he hoped his testimony in this case would lead to a favorable resolution in his pending criminal case, thereby cutting off any impact the defense might have made in suggesting that Downing was a criminal who had an ulterior motive in testifying against Braboy.

V. PRIOR INCONSISTENT STATEMENT

Lastly, Braboy asserts error in the trial court's admission of a statement Chantay Moss made to Detective Chasity Blades during the execution of the search warrant at Moss's house. During her direct examination by the State, Moss testified that she did not recall making the statement to the police, and the court permitted Detective Blades to relate

the prior inconsistent statement to the jury. Braboy now claims that the statement comprised inadmissible hearsay because the court did not make an explicit finding that Moss was feigning lack of memory before admitting the statement.

Upon direct examination, Moss claimed not to know what items the police took from her house during the execution of the search and seizure warrant, and she said she could not recall whether Detective Blades had shown her the black ski mask, or her response when Detective Blades explained the significance of the mask to her, even after she was presented with the transcript of her exchange with the detective.[8] The prosecutor then questioned Detective Blades, who explained that she had shown the ski mask to Moss and that Moss had responded, as reported in the transcript.

When the prosecutor sought to move the transcript into evidence as Moss's prior inconsistent statement, defense counsel voiced a one-word objection—"Hearsay." The court overruled the objection, and Detective Blades was permitted to read Moss's reaction to the discovery of the ski mask to the jury:

> If you all think you know who this person is, I'm pretty sure you all do, and I'm pretty sure you already onto them so I don't, I don't put my name. I'm not having nobody come and do anything to me or my child. I have no idea, I mean I do have an idea, but I'm saying I don't, you know I don't know for sure so I don't want to say but I'm pretty sure you guys—I don't know."

On appeal, Braboy asserts that the statement comprised inadmissible hearsay because the trial court did not make an explicit finding that Moss was feigning lack of

[8] The transcript was created from the recording on Detective Blades' body-worn camera.

memory about the statement before admitting the statement into evidence as a prior inconsistent statement. The sole basis for objection at trial, however, was that the statement was hearsay; he made no argument that the court was required to make an explicit finding that Moss was feigning lack of memory before admitting the statement as an exception to the rule against hearsay. Therefore, Braboy has failed to preserve the issue for our review. *See Klauenberg v. State*, 355 Md. 528, 541 (1999) ("It is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal.").

Moreover, even if we were to consider whether the trial court erroneously admitted Moss's statement, we would find the error, if any, harmless. In our view, the statement is virtually unintelligible and does not implicate Braboy specifically. In the absence of an understanding about what Moss was attempting to explain to Detective Blades, we cannot say that the admission of the statement unfairly prejudiced Braboy or rendered his trial unfair.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED; COSTS ASSESSED TO APPELLANT.