Circuit Court for Montgomery County
Case No. 134698C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 568

September Term, 2019

JUNIOR ALEXANDER JOHNSON

v.

STATE OF MARYLAND

Nazarian,
Reed,
Truffer, Keith R.
(Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: June 26, 2020

I am the concierge chez-moi, honey
Won't letcha in for love, nor money
("It's cold out here!")
My home, my joy
I'm barred and bolted and I
(Get out of my house!)
(Won't let you in)[1]

A jury sitting in the Circuit Court for Montgomery County convicted Junior Alexander Johnson of possession with intent to distribute and possession of over fifty pounds of marijuana. The marijuana was found in the apartment of Kayann Malloy, his former girlfriend. Ms. Malloy called the police after the two had an argument and Mr. Johnson left the apartment. When he left, he sat in his car for a while, then drove away. The police attempted to pull him over, but he evaded them and wasn't arrested until later. Ms. Malloy was called to testify against Mr. Johnson at trial, but asserted her Fifth Amendment privilege against self-incrimination. She testified only after the court entered an order under § 9-123 of the Courts and Judicial Proceedings Article (Maryland Code (1973, 2013 Repl. Vol., 2019 Supp.)) ("CJ") that compelled her to testify but granted her use and derivative use immunity for that testimony.

On appeal, Mr. Johnson argues *first* that the trial court erred in giving a "flight" instruction to the jury because Mr. Johnson's flight from police, and any consciousness of guilt on his part, was unrelated to the marijuana in the apartment. He argues *second* that the court erred in declining to give a "witness promised benefit" instruction, which, he says, would have allowed the jury to evaluate the credibility of Ms. Malloy's testimony in

[1] Kate Bush, "Get Out of My House," from *The Dreaming* (EMI 1982).

light of the use and derivative use immunity she received. We hold that the circuit court abused its discretion in giving the flight instruction but not in declining to give the witness promised benefit instruction, and reverse and remand for further proceedings.

I. BACKGROUND

Mr. Johnson was charged and convicted with possessing and possessing with intent to distribute approximately 66 pounds of marijuana, all found in trash bags in the apartment where he previously had lived with Ms. Malloy. They had had an eleven-year relationship and lived together in the apartment for about nine of those years, although Mr. Johnson had stopped living there about a year before the incidents leading to his arrest. Ms. Malloy testified that Mr. Johnson had continued to pay most of the rent for the apartment and had keys to it. Mr. Johnson's twenty-something son also lived there, along with Ms. Malloy's thirty-seven-year-old daughter and her daughter's two children. Ms. Malloy testified that she and Mr. Johnson had continued their "sexual relationship" until they got into an argument at a party one weekend in July 2018, where Ms. Malloy saw Mr. Johnson with his new girlfriend. When Ms. Malloy got home after the party, she gathered two black trash bags of clothes belonging to Mr. Johnson that she wanted out of her apartment.

Ms. Malloy testified that the following Tuesday, July 24, 2018, Mr. Johnson had come to the apartment while she and her daughter were out. When she returned, she saw Mr. Johnson bagging up marijuana on her kitchen floor. She testified that they argued off and on for "about two to three hours." Unbeknownst to Mr. Johnson, Ms. Malloy tried to call or called 911 three times during the course of the argument. The first time was an

attempt, in the hallway outside of Mr. Johnson's presence, after Mr. Johnson had "cursed [her] out." Ms. Malloy's daughter grabbed the phone from her before she got through to the operator. The second time she called 911, again from the hallway, she reached the operator, but only told them where the building was and did not provide the apartment number. Ms. Malloy's daughter grabbed the phone from her again and the call ended. Ms. Malloy then left the apartment and called 911 a third time, and this time told the operator that she had gotten into an argument with Mr. Johnson, provided the car's license plate number, and asked for the police to come.

When the police did not arrive right away, Ms. Malloy walked down the street and found Officer Craig Rosia in his car. Officer Rosia testified that he had come there in response to Ms. Malloy's 911 disconnect and was waiting for backup. Ms. Malloy gave Officer Rosia a description of Mr. Johnson and said he was "in [the apartment] with marijuana." The officer testified that Ms. Malloy asked him "if [he] wanted to make a lock-up today," and when he asked her what she meant, she told him that her boyfriend had marijuana in the apartment and that he was loading it in his car.

When Ms. Malloy returned to the apartment, Mr. Johnson was still there. He left about twenty minutes later and took with him the same black trash bag into which Ms. Malloy had seen him put marijuana.

While Mr. Johnson was in the apartment, the police sent an undercover, plainclothes surveillance team to observe Ms. Malloy's apartment building. Ms. Malloy testified that she spoke with police by cell phone. She told the officers that Mr. Johnson was leaving the

apartment, and the officer testified that she told him he had left with a black trash bag he was using to hold marijuana. The officers watched Mr. Johnson leave the apartment and approach a blue Nissan matching the description and license plate number that Ms. Malloy had provided. He was carrying a black trash bag to his car.

According to the officers, Mr. Johnson sat in the car in the apartment building parking lot for about fifteen minutes, then got out for about a minute and looked around. Officer William Drew and Corporal Charles Haak characterized Mr. Johnson's demeanor as "doing countersurveillance." Officer Drew and Officer Chris Murray testified that Mr. Johnson's car windows were so heavily tinted that they were unable to see inside the vehicle. Officer Drew testified that in light of the tinted windows and their belief that marijuana was inside the car, they tried to stop Mr. Johnson as he drove out of the lot. They attempted, in several unmarked police cars, to block in Mr. Johnson's car. But Mr. Johnson drove around the police cars by hopping the curb. The officers followed him, but eventually lost him. They searched for Mr. Johnson at a few locations, but never found him or the blue Nissan, and they never recovered the black trash bag.

Corporal Haak and Officer Robert Johnson testified that after the pursuit failed, they returned to the apartment building. Ms. Malloy testified that by this point, she had left to run errands with her daughter; the officers could not reach her by phone, and she testified that her daughter had turned it off because she was "driving and [doesn't] need to be talking to the police," and that she ought to wait to talk to them until she was done. The officers asked around to find out Ms. Malloy's apartment number, which she had never provided

to the police. She testified on redirect that she didn't give her apartment number "[b]ecause Mr. Johnson's son was over that day."

Corporal Haak left to write a search warrant and Officer Johnson sat outside of Ms. Malloy's apartment, waiting for her to return. Officer Johnson testified that when she came back, she told him that they lived on a different floor.[2] Officer Johnson testified that they left and went into the stairwell. Ms. Malloy testified that at the direction of her daughter, she returned to speak with Officer Johnson, who then told her that "everyone [would be] going to jail" if he had to get a search warrant.[3] Ms. Malloy expressed concern to the officers about "getting in trouble," and the officers assured her that she would not get into trouble, so she agreed to let them search the apartment.

In Ms. Malloy's bedroom, the officers found a locked barrel and a locked closet that ultimately were found to contain trash bags of marijuana weighing approximately 66 pounds. Ms. Malloy testified that she had her own closet and did not have a key to Mr. Johnson's closet. She had noticed an odor coming from Mr. Johnson's closet "the past two or three months" before she moved out. She told the officers that everything in the barrel and closet, including the marijuana, belonged to Mr. Johnson. The officers did not find a key to the closet or the barrel, and Ms. Malloy told them that she didn't have a key to either. Other items that the officers recovered from Ms. Malloy's bedroom included two trash bags—similar to the black trash bags used to contain the marijuana—that Ms. Malloy

[2] Ms. Malloy said she did not recall saying this.

[3] Officer Johnson disputed saying this.

had filled with clothes that belonged to Mr. Johnson, ziploc bags, trash bags, and a scale that Ms. Malloy kept after packing up Mr. Johnson's clothes, although she testified she never used a scale.

II. DISCUSSION

Mr. Johnson raises two questions on appeal[4] that we rephrase: did the circuit court err in (1) giving a flight jury instruction and (2) declining to give a witness promised benefit instruction?

Maryland Rule 4-325 governs jury instructions, and subsection (c) addresses instructions requested by the parties:

> (c) The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the

[4] Mr. Johnson phrased the Question Presented in his brief as follows:

> 1. Did the trial court abuse its discretion by instructing the jury on flight where the evidence did not support an inference that any consciousness of guilt was related to the crime charged—possession of marijuana in Ms. Malloy's apartment?
> 2. Did the trial court err by failing to instruct the jury on a "promised benefit" when the State promised Ms. Malloy that she would not face prosecution for her compelled testimony against Mr. Johnson?

The State phrased the Questions Presented in its brief as follows:

> 1. Did the trial court act within its discretion in giving a jury instruction on flight?
> 2. Did the trial court act within its discretion in declining to give a "witness promised benefit" jury instruction?

matter is fairly covered by instructions actually given.

The Court of Appeals has interpreted Rule 4-325(c) to require the trial court to give a requested instruction when (1) it "is a correct statement of the law"; (2) it "is applicable under the facts of the case"; and (3) its "content . . . was not fairly covered elsewhere in the jury instruction[s]." *Thompson v. State*, 393 Md. 291, 302 (2006) (*quoting Ware v. State*, 348 Md. 19, 58 (1997)). Unless the trial court has made an error of law, we review its decision to give a jury instruction for abuse of discretion. *Id.* at 311; *Preston v. State*, 444 Md. 67, 82 (2015).

Mr. Johnson's arguments on both questions boil down to the second condition: he argues, *first*, that the flight instruction did not apply under the facts of this case and *second*, that the witness promised benefit instruction did.

A requested instruction applies to the facts of the case "if the evidence is sufficient to permit a jury to find its factual predicate." *Bazzle v. State*, 426 Md. 541, 550 (2012). And "[t]he threshold determination of whether the evidence is sufficient to generate the desired instruction is a question of law for the judge." *Id.* (*quoting Dishman v. State*, 352 Md. 279, 292–93 (1998)). On review, we determine whether the requesting party produced the minimum threshold of evidence necessary to generate the desired instruction. *Id.*; *Page v. State*, 222 Md. App. 648, 668 (2015). This threshold is low, and the requesting party need only produce "'some evidence' to support the requested instruction." *Page*, 222 Md. App. at 668 (*quoting Bazzle*, 426 Md. at 551)). In reviewing whether "some evidence" existed, we examine the facts in the light most favorable to the party requesting the

instruction. *Id.* at 669 (*citing Hoerauf v. State*, 178 Md. App. 292, 326 (2008)).

Because there is insufficient evidence on this record connecting Mr. Johnson's flight to any consciousness of guilt he may have had about marijuana in the apartment, we hold that the flight instruction was not generated by the facts of this case and that the circuit court abused its discretion in giving it. We hold as well that the facts of this case did not generate a witness promised benefit instruction because the circumstances under which Ms. Malloy was granted use and derivative use immunity did not amount to a "benefit," and that the circuit court therefore did not err in declining to give that instruction.

A. The Circuit Court Erred In Giving A Flight Instruction.

1. Factual Background

At trial, the State requested a flight instruction mirroring Maryland Pattern Jury Instruction—Criminal 3:24. The State argued that because the black trash bag in the car presumably contained marijuana, Mr. Johnson's consciousness of guilt was "related to the crime that he was packaging the marijuana that he possessed with the intent to distribute." Mr. Johnson argued that the consciousness of guilt was not related to the crime charged because he was "not charged with what[] [was] in that trash bag in his car."

After hearing argument from the parties, the circuit court decided to think about the issue overnight. The next day, the court ruled that "the elements for the flight instruction . . . have been sufficiently generated so that [it] is an appropriate instruction." Defense counsel again objected to the flight instruction, but the court overruled the objection, and ultimately instructed the jury as follows:

> A person's flight immediately after the commission of a crime or after being accused of committing a crime is not enough by itself to establish guilt but it is a fact that may be considered by you as evidence of guilt. Flight under these circumstances may be considered by you as evidence of guilt. Flight under these circumstances may be motivated by a variety of factors. Some of which are fully consistent with innocence. You must first decide whether there is evidence of flight. If you decide there is evidence of flight, you then must decide whether this flight shows a consciousness of guilt.

This instruction mirrored Jury Instruction—Criminal 3:24, with a few word changes that nobody challenges here.

2. Analysis

Flight instructions are not improper *per se*. *Thompson*, 393 Md. at 310 ("Because we have determined that the flight instruction may be appropriate under certain circumstances, and that, as the instruction appears in the Maryland Pattern Jury Instructions, the flight instruction does not impermissibly emphasize the value of flight evidence, we decline to adopt the position that flight instructions are *per se* improper."). But for a flight instruction to be given properly, the facts of the case must reasonably support four inferences: (1) "the behavior of the defendant suggests flight"; (2) "the flight suggests a consciousness of guilt"; (3) "the consciousness of guilt is related to the crime charged or a closely related crime"; and (4) "the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime." *Id.* at 312.

The third of these inferences is the one at issue here.[5] Mr. Johnson argues that the

[5] The four-factor test from *Thompson* applies as well to the admissibility of flight or other consciousness of guilt evidence at trial. *See, e.g.*, *Decker v. State*, 408 Md. 631, 641–42

evidence did not connect any consciousness of guilt relating to his flight to the crimes charged, all of which flowed from the marijuana he left behind in Ms. Malloy's apartment. He points out that there was no evidence that he knew that Ms. Malloy had called the police or that the police suspected him of possessing the marijuana in the apartment. The State responds that the evidence did support such an inference because the police observed him walking to his car with a black trash bag and that he briefly exited the vehicle as if, in their view, conducting "countersurveillance."

But the evidence at trial never connected Mr. Johnson's consciousness of guilt, and thus the reason for his flight, to the marijuana in the apartment, the source of all of the charges. As he points out, there was no evidence that he knew that Ms. Malloy had called the police at all, let alone that she had reported the marijuana in her apartment to them. And importantly, the trash bag that Mr. Johnson carried to his car was never recovered. Ultimately, we'll never know what was in the bag, or for what other reason Mr. Johnson may have fled—it may have been full of marijuana, or clothes, or anything else. But it was not Mr. Johnson's burden to fill in gaps in the State's evidence. It was the State's burden

(2009); *Thomas v. State*, 372 Md. 342, 352–53 (2002). Before trial, Mr. Johnson moved *in limine* to exclude the evidence relating to his flight from the police as irrelevant to the charges he was facing and argued, among other things, that the reason he fled was unknown and that the flight was not relevant to the charges related to the marijuana in the apartment. But defense counsel also conceded that the evidence "up until the traffic stop would likely be relevant because they're going to want to place him at the scene, leaving the apartment [] and for identification purposes" and also appeared to agree that the flight itself was relevant because it was "part of . . . the operative facts." The court denied the motion, and several officers testified about Mr. Johnson's flight at trial, and when the State introduced the flight evidence at trial, Mr. Johnson did not object to it, nor has he raised the relevance or admissibility of the flight evidence on appeal.

to produce "some evidence" supporting a flight instruction and, even viewing the facts in a light most favorable to the State, it didn't.

In addition, Mr. Johnson's ability to provide an alternative reason for the flight was hindered. In order to argue that his flight was not connected to the marijuana in the apartment, he would have had to provide some other reason for his flight, such as admitting that there was marijuana in his car. The Court of Appeals has held that a trial court errs in giving the flight instruction when the defendant faced a Hobson's Choice between introducing prejudicial evidence to explain his flight and declining to explain the flight and risking an inference that he fled because of the crime charged. *Thompson*, 393 Md. at 313–14 (flight instruction not appropriate where defendant charged with assault would have had to admit that he fled from police because of the crack cocaine found on his person, of which the jury was not aware). Because the evidence didn't generate the flight instruction, the circuit court erred in giving it, and we reverse the convictions and remand for further proceedings.

B. The Circuit Court Did Not Err In Declining To Give A "Promised Benefit" Instruction.

1. Factual Background

Before Ms. Malloy testified (and outside the presence of the jury), the court advised her of her Fifth Amendment right not to testify as a witness against herself.[6] The court

[6] U.S. Const., amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."); Md. Decl. of Rights, art. 22 ("That no man ought to be compelled to give evidence against himself in a criminal case.").

further advised that if she exercised the privilege, the State would make a motion to compel her to testify. Ms. Malloy did invoke her privilege, and the Court issued an order compelling Ms. Malloy's testimony under CJ § 9-123.

Section 9-123 requires the court, upon motion of the prosecutor, to issue an order compelling a witness who has invoked the privilege against self-incrimination to testify. CJ § 9-123(c)(1). In exchange, the witness receives use and derivative use immunity: no information compelled under the order, or information derived from it, may be used against the witness in any criminal case, with limited exceptions that don't apply here. CJ § 9-123(b)(2); *see also State v. Rice*, 447 Md. 594, 604–05, 607–08 (2016). An order issued under CJ § 9-123 does not preclude the State from bringing criminal charges against the witness in the future, but precludes the State from using the compelled testimony, or information derived from it, against the witness to support those charges (or any others).[7]

The defense cross-examined Ms. Malloy about the immunity order, and the jury learned the circumstances of her testimony and the scope of her immunity:

> [DEFENSE COUNSEL]: Well, Ms. Malloy, it has been explained to you that you cannot get in any trouble legally for anything that you say here today, is that correct?

[7] Although she expressed some confusion about it at various points, the court and the State explained the parameters of CJ § 9-123 to Ms. Malloy before she invoked the privilege. The court told her that "if I sign this order, . . . no information directly or indirectly derived from the testimony or other information may be used against [you] in any criminal case, except in a prosecution of perjury, obstruction of justice, or otherwise failing to comply with the order." The State told Ms. Malloy, "[T]he State's Attorney's Office will not use [your testimony] to prosecute you"; "[A]nything that you say here today cannot be used against you in a criminal proceeding"; and "[I]f you testify pursuant to that order, nothing will happen."

> [MS. MALLOY]: Okay.
>
> [DEFENSE COUNSEL]: All right. You have been given, essentially, what's called immunity for your testimony, is that right?
>
> [MS. MALLOY]: Okay.
>
> [DEFENSE COUNSEL]: And that was explained to you, correct?
>
> [MS. MALLOY]: Yes.
>
> [DEFENSE COUNSEL]: All right. And you actually saw, I guess, a court order saying that you have immunity and you have to testify, correct?
>
> [MS. MALLOY]: Yes.
>
> [DEFENSE COUNSEL]: All right. So, you know right now that you've been given this gift from the State and you cannot get in any trouble, correct?
>
> [MS. MALLOY]: Okay.
>
> [DEFENSE COUNSEL]: Is that right?
>
> [MS. MALLOY]: Yes.

In response to the immunity order, Mr. Johnson asked the court to include Maryland Pattern Jury Instruction—Criminal 3:13, also known as the "witness promised benefit" instruction, among the jury instructions:

> You may consider the testimony of a witness who [testifies] [has provided evidence] for the State as a result of [a plea agreement] [a promise that he will not be prosecuted] [a financial benefit] [a benefit] [an expectation of a benefit]. However, you should consider such testimony with caution, because the testimony may have been influenced by a desire to gain [leniency] [freedom] [a financial benefit] [a benefit] by testifying against the defendant.

Defense counsel argued that the instruction was warranted because Ms. Malloy received a benefit from the CJ § 9-123 order and the resulting use and derivative use immunity that applied to her testimony:

> [DEFENSE COUNSEL]: To get the immunity, they have to give her the benefit. The State could have said, okay, she took the Fifth. That's fine. We're not going to give her any benefit. When she takes the Fifth, they give her the benefit, and then the Court orders her to testify. This is exactly what this instruction is for. Yes, it doesn't mean she just voluntarily decided to come in and testify because of some benefit, but it is a benefit that was given. She invokes her Fifth Amendment right. She then is given a benefit. She's then forced to testify.
>
> The benefit has to be something, and that's exactly what this instruction is for. When a witness gets a benefit, the immunity encompasses that benefit. They could have said, Fifth, that's it. We won't, we won't call her. We won't push it.

The State responded, among other things, that the instruction did not apply, that the use and derivative use immunity that Ms. Malloy received was not a "benefit" because her testimony was compelled:

> [THE STATE]: [H]er testimony was compelled. She was not given an immunity letter to come here today. She came here, and we compelled her. It was a compulsory thing for her to testify. She did not have an option. And based on that compulsion, she will not be prosecuted for things she said here today. But she's not immunized from this case. She's not promised a benefit.

After considering the question overnight, the court decided not to give the instruction:

> [] I did not believe after reviewing cases as well as going beyond that in trying to analyze the whole issue about the assertion of privilege under the circumstances in which it was asserted here . . . [i]t doesn't seem that [] the witness promised [] benefit [instruction] is an instruction that applies here.

After the court administered the jury instructions, defense counsel objected to the trial court not giving the instruction.

2. Analysis

The relevant facts are undisputed: the court, on the State's motion, compelled Ms. Malloy to testify under CJ § 9-123, and her testimony was protected by use and derivative use immunity. And notwithstanding defense counsel's characterization of Ms. Malloy's immunity on cross-examination, Mr. Johnson agrees that the State did not promise to refrain from prosecuting her in the future in connection with the marijuana found in her apartment. In this context, the use and derivative use immunity Ms. Malloy received in this case was not a "benefit," and the witness promised benefit instruction did not apply.

As the Court of Appeals observed in *Preston*, "[t]here is a dearth of Maryland case law discussing Jury Instruction 3:13, despite the fact that some form of the instruction has been included in the Maryland Criminal Pattern Jury Instructions since at least 2001 . . . if not before." 444 Md. at 86–87 (citation omitted). Putting Jury Instruction 3:13 in context, *Preston* observed that it is "premised on the supposition that undercover agents, jailhouse informants, accomplices, and other witnesses who testify for pay, immunity, or other forms of personal advantage may be motivated to lie or exaggerate in order to obtain a particular 'benefit,' and that, accordingly, their testimony might be viewed with a degree of skepticism." *Id.* at 83.

In *Preston*, the Court of Appeals addressed whether the State paying a witness's temporary and "reasonable" protective housing and moving expenses, totaling $13,530, constituted a "benefit" for the purposes of Jury Instruction 3:13. The Court held that it did

not and that Jury Instruction 3:13 did not apply, reasoning that protective services were "hardly . . . [a] financial windfall," and that moving the witness out of her neighborhood was not necessarily beneficial or easy for her. *Id.* at 104. The Court examined cases from other jurisdictions holding that protective relocation and housing services "did not constitute a 'personal reason or advantage' sufficient to justify a particularized credibility instruction . . . ." *Id.* at 97 (*quoting Massachusetts v. McGee*, 467 Mass. 141, 4 N.E.3d 256, 259 (2014)).

Before reaching its conclusion, *Preston* looked at the few Maryland cases in which Jury Instruction 3:13 was given, *id.* at 87 (*citing Dickey v. State*, 404 Md. 187, 192, 194 n.3 (1998) and *Riggins v. State*, 155 Md. App. 181, 196, 198 n.16 (2004)), but found only one in which the court addressed squarely whether the trial court erred in declining to give a version of the witness benefit instruction at issue here. *Id.* at 87–88 (*citing Stouffer v. State*, 118 Md. App. 590 (1997), *aff'd in part and rev'd in part*, 352 Md. 97 (1998)). In *Stouffer*, the defendant (convicted of first-degree felony murder and kidnapping) requested a "witness promised leniency" instruction that would have instructed the jury that it "may consider the testimony of a witness who testifies for the State as a result of financial benefit. However, [it] should consider such testimony with caution, because the testimony may have been colored by a desire to gain a financial benefit by testifying against [appellant]." *Stouffer*, 118 Md. App. at 630. The police had promised $200 for rent to the witness in question at the time she gave her statement. *Id.* at 603. It wasn't until about a month after her statement, prompted by her call that she was having trouble paying her

rent, that the police gave the $200 to her. *Id.* at 603. But there was no evidence that she had been promised the $200 *before* she had given her statement, and there was testimony by one of the officers that the money was not given in exchange for her statement. *Id.* at 603. This Court held that the trial court did not err in declining to give the instruction because it was not generated by the facts of the case. *Id.* at 630 (there was no evidence supporting "that the witness was promised any financial benefit before the statement was made, nor was there any evidence of a *quid pro quo*").

The Court of Appeals observed that although *Stouffer* had since been vacated in part on other grounds, it was instructive that this Court had "taken a restrained view toward the applicability of Jury Instruction 3:13." *Preston*, 444 Md. at 88. And ultimately, *Preston* defined a "benefit" for these purposes as a "direct, *quid pro quo* compensation or inducement":

> We interpret the word "benefit," in the context of Jury Instruction 3:13, to mean something akin to a plea agreement, a promise that a witness will not be prosecuted, or a monetary reward or other form of direct, *quid pro quo* compensation or inducement.

Preston, 444 Md. at 85.

The parties did not cite, and we have not found, any other Maryland cases that address a trial court's decision not to give a witness promised benefit instruction, in any context. The parties also did not cite, and we did not find, any cases—either from a Maryland court or a state or federal sister court—addressing a witness-promised benefit instruction where the purported benefit was use and derivative use immunity granted in

exchange for compelled testimony. But after examining the nature of use and derivative use immunity and the context in which Ms. Malloy received it, we hold that the immunity granted here does not fit into the concept of "benefit" defined by the Court of Appeals in *Preston*.

The Court of Appeals discussed the immunity granted under CJ § 9-123 in depth in *Rice*, in which it held that such immunity does not violate the Fifth Amendment privilege against self-incrimination or the parallel privilege arising from Article 22 of the Maryland Declaration of Rights. 447 Md. at 635–36, 644. Relying on the United States Supreme Court's decision in *Kastigar v. United States*, 406 U.S. 441, 453 (1972), *Rice* reasoned that immunizing both the compelled testimony and the evidence derived from it affords the protection that the Fifth Amendment requires—*i.e.*, protecting a witness from being forced to give testimony that will lead to criminal penalties.[8] *Rice*, 447 Md. at 635–36.

Use and derivative use immunity is distinguishable from "transactional" immunity, which bars the state "from prosecuting the witness for any conduct arising out of the substance of the witness's testimony." *Id.* at 605 (citation omitted). And importantly, witnesses granted use and derivative use immunity under CJ § 9-123 are *compelled* to

[8] In the event the witness is prosecuted later, the Supreme Court also held that to ensure that the witness is indeed protected, the state bears a "heavy burden" to prove that the evidence it seeks to introduce was "derived from a legitimate source wholly independent of the compelled testimony." *Kastigar*, 406 U.S. at 461. Procedurally, trial courts hold what is known as a "*Kastigar* hearing" to determine whether the state has met that burden. *See Rice*, 447 Md. at 636–37, 638.

testify—they have no choice once the court orders them to take the stand, or else they risk facing contempt charges. But witnesses granted transactional immunity do have a choice—without it, they can choose to assert their Fifth Amendment privilege and not testify at all.

Now back to this case. The use and derivative use immunity Ms. Malloy received in this case provided no "direct, *quid pro quo* compensation or inducement," as required by *Preston*. 444 Md. at 85. For that reason, the use and derivative use immunity did not qualify as a "benefit" for the purpose of Jury Instruction 3:13, and the trial court did not abuse its discretion in declining to give it. The jury knew, based on defense counsel's cross-examination, that Ms. Malloy was ordered by the court to testify and that she was granted immunity from "anything that [she said]" in court that day. Defense counsel's questions may have sought to characterize the immunity as a more of a blanket promise not to prosecute but, critically, Mr. Johnson acknowledges on appeal that "Ms. Malloy was still subject to criminal prosecution under the order compelling testimony." And defense counsel's characterization—argument, really—doesn't change the nature of the limited use and derivative use immunity that Ms. Malloy received, nor that Ms. Malloy's testimony was *compelled*. She had no choice but to testify, under penalty of contempt, once the court issued its order. The function of the immunity was more to put Ms. Malloy in the same position she would have been in had she never testified than a personal benefit or *quid pro quo*.

Implicitly acknowledging this problem, Mr. Johnson argues in his reply brief that the "benefit" Ms. Malloy received was "the opportunity to tell her story, her way, in order

to discourage future criminal prosecution for the exact same crimes with which Mr. Johnson was charged." But that assertion was not made before the trial court and is speculative in any case, and Mr. Johnson cites no evidence to support it. And in any event, our holding today is not grounded in a *per se* rule that Jury Instruction 3:13 can *never* apply when a witness's testimony is compelled under CJ § 9-123. There may be some cases in which the circumstances under which the use and derivative use immunity was granted might make the witness promised benefit appropriate. But this case does not have such a record and is not such a case.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. MONTGOMERY COUNTY AND APPELLANT TO SPLIT COSTS.