Circuit Court for Montgomery County
Case No. 67055-C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 808

September Term, 2019

SHERWOOD JACKSON

v.

STATE OF MARYLAND

Wells,
Gould,
Eyler, James,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, J.

Filed: October 8, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Sherwood Jackson, petitioner, filed a Petition for Writ of Actual Innocence in the Circuit Court for Montgomery County stemming from his 1993 conviction of first-degree rape, assault with intent to rape, assault with intent to commit a sexual offense, first-degree sex offense, and robbery. Following an evidentiary hearing, the circuit court denied his petition, finding that Jackson's "newly discovered evidence," a statement modifying a witness' in-court testimony, was, at best, merely impeaching and did not create a substantial possibility that the verdict would have been different.

Jackson timely appealed to this Court. He asks whether the circuit court abused its discretion in denying his petition for writ of actual innocence

Given the Court of Appeals' commentary on the "merely impeaching" standard in *Hunt v. State*, 443 Md. 238 (2015), and the cases that followed that decision, we disagree with the circuit court's characterization that Jackson's evidence was "newly discovered." Nonetheless, we conclude that, under the cumulative materiality analysis outlined in *Faulkner v. State*, 468 Md. 418, 460 (2020), the circuit court did not abuse its discretion in finding that the witness' new statement did not create a substantial or significant possibility that the result of the trial may have been different. We therefore affirm.

BACKGROUND

A. Rape and Robbery

On June 18, 1992, Sherwood Jackson and Robert Shuebrooks drove from Washington, D.C. to Silver Spring, Maryland to recover Jackson's father's work van and to visit Jackson's friend, who lived at an apartment building. The friend was not home, so Jackson left a handwritten note on the friend's car. Returning to their vehicle, the men

encountered Carol Tussey outside of her ground floor apartment. Posing as painters, the men gained entry to Tussey's apartment. Tussey testified that when the two men entered her apartment, the taller, "stockier" of the two [did most of the talking], while the shorter man remained passive and quiet.

According to Tussey's trial testimony, the taller man then grabbed her by both arms and forced her into her bedroom. The man tied her hands behind her back with a cord from an answering machine, made her lie face down on the bed, and placed a pillow over her head. The man then removed Tussey's shorts and underwear and attempted to engage in anal intercourse with her. Unsuccessful, he rolled her on to her back and vaginally penetrated her with his penis. He then forced her to perform oral sex until he ejaculated. Throughout this ordeal, the man told Tussey that he would kill her if she did not comply or if she told anyone about the attack. Tussey testified that the man who raped her took money from her purse and the telephone located in her bedroom.

After the attack, Tussey said that her hands remained tied behind her back and she could hear the men walking around her apartment. One of the men then came back into the bedroom and "rummag[ed] around [her] jewelry box." Once she believed that the men left her apartment, Tussey called for help and noticed that her television and VCR had been stolen and earrings from her jewelry box were missing. Based in part on the note Jackson left on his friend's car, he was subsequently arrested and tried for first-degree rape and related charges, including robbery.

B. Investigation and Trial

Although both Jackson and Shuebrooks were arrested, only Jackson was indicted. Prior to trial, the police showed Tussey an array of seven photographs, one of which, photograph number three, was of Jackson. A photograph of Shuebrooks was not included. In looking through the array, Tussey saw photograph number three and said, "[t]his could have been one of them. This looks like him except he had more of a beard." She also paused on photograph number five, which was of neither Jackson nor Shuebrooks, and said that the person depicted "might have been the other [man,]" but maintained that the photograph of Jackson "resemble[d] the man who raped me." The man depicted in photograph number five was never identified.

At trial, the prosecutor presented Tussey with the original photographic array, and she initially identified the man depicted in photograph number five as the man who attacked her. However, when reminded that she had, in fact, previously identified photograph number three, Jackson's photograph, as the man who raped her, she responded, "Okay, I am sorry. This is the other one. This is definitely the one that raped me right here," referring to the photograph of Jackson. When confronted on cross-examination with her incorrect identification during direct examination, Tussey repeatedly maintained that Jackson was the man who raped her.

As part of his defense, Jackson argued that the State could not show beyond a reasonable doubt that he, rather than Shuebrooks, was the man who attacked Tussey. Jackson testified that Shuebrooks accompanied him to Silver Spring the day of the attack. He explained that it was Shuebrooks, and Shuebrooks alone, who entered Tussey's

apartment posing as a painter, while he waited outside at the patio door. Growing impatient, Jackson stated that he left the scene in Shuebrooks' vehicle to run an errand at the District of Columbia Department of Motor Vehicles. Jackson explained that he returned to Shuebrooks' home hours later to return the vehicle to him, who was there when Jackson arrived.

The defense also sought to show that Tussey's description of her attacker more accurately described Shuebrooks' physical appearance, rather than Jackson's. But, throughout her testimony, Tussey repeated that, of the two men who entered her apartment, the one who attacked her was the bigger and stockier of the two and wore a full beard. Jackson maintained that he was the shorter of the two men and only wore a goatee and moustache, unlike Shuebrooks who, he claimed regularly wore a full beard.

Shuebrooks' then-wife, Mildred Riggins[1], was called as a defense witness to bolster Jackson's testimony. Riggins testified that on the day of the rape, her husband, Shuebrooks, had a "full beard" and brought home a new telephone. According to Riggins, Shuebrooks told her that the telephone was a gift from Jackson for Shuebrooks' birthday, which happened to be on June 18. She also testified that Shuebrooks was "definitely" the taller of the two men, but that Jackson also had a "full" beard, just "[not] as full as my husband's [Shuebrooks]" on the day of the attack. She further maintained that she did not notice any "unusual" or unfamiliar jewelry at her home around the time of the attack.

[1] At the time of trial, Mildred Riggins was married to Robert Shuebrooks and went by the name Mildred Shuebrooks. After their divorce, she went by Mildred Riggins and will be referred to as such herein.

After a two-day bench trial, on March 26, 1993, the court found Jackson guilty of first-degree rape, assault with intent to rape, which merged with first- degree rape, assault with intent to commit a sexual offense, first-degree sex offense, and robbery. He was sentenced to consecutive terms of imprisonment totaling 50 years. A year later, on direct appeal, his convictions were affirmed in an unreported opinion. *Jackson v. State*, No. 383, Sept. Term 1993 (filed March 14, 1994). Over ten years later, in June 2005, Jackson's petition for post-conviction relief was also denied. In a 2014 unreported opinion, this Court again affirmed his convictions, holding that assault with intent to commit a sexual offense and first-degree sexual offense did not merge with his conviction for first-degree rape. *Jackson v. State*, No. 2022, Sept. Term 2012 (filed April. 8, 2014).

C. Petition for Writ of Actual Innocence

In June 2017, represented by new counsel, Jackson began to build his case for a petition for writ actual innocence. His attorney, aided by a local law student, located Riggins, who offered to discuss Jackson's case and her 1993 testimony. In a signed statement dated January 8, 2018, expanding on her trial testimony, Riggins wrote that she now recalled that her ex-husband, Shuebrooks, brought home unfamiliar jewelry around June 18, 1992 and that "he placed it in a box." Riggins stated that Shuebrooks was physically and emotionally abusive throughout their marriage. Consequently, at Jackson's trial, she "did not want to testify in a way that might cause him to be angry with [her]."

This statement is Jackson's basis for the petition for writ actual innocence, filed on April 30, 2018. [2]

Following an evidentiary hearing, the circuit court denied Jackson's petition.[3] The court found that, although Riggins' 2018 statement constituted "newly discovered evidence," the testimony was "merely impeaching," as it "concerned what can be considered inconsequential details, based on [the trial judge]'s ruling and the grounds behind this ruling. . . . This matter rested on the identification by the victim of [Jackson], as opposed to Shuebrooks." In the circuit court's opinion, Riggins' testimony simply "did not play a substantial role in the State's case, or [the trial judge]'s ruling, against [Jackson]." Ultimately, in the court's view, Riggins' testimony did not create a substantial or significant possibility that the result of the trial may have been different. Jackson subsequently appealed to this Court.

Additional facts will be added as needed.

DISCUSSION

We review a denial of a petition for writ of actual innocence for an abuse of discretion, "provided that, as here, a hearing was held on the petition." *French v. State*, __ Md. App. __ (2019) (slip op. 7) (citing *McGhie v. State*, 449 Md. 494, 509 (2016); *State v. Hunt*, 443 Md. 238, 247-48 (2015); *Ward v. State*, 221 Md. App. 146, 156 (2015)). A trial court abuses its discretion when it fails to apply the appropriate legal standards, "even when

[2] We observe that Riggins' typed statement, found in Appellant's appendix at 8-17, is not in the form of an affidavit and she does not make the statement under oath.

[3] Sadly, Riggins passed away prior to Jackson's hearing.

making decisions that are regarded as discretionary in nature." *Wilson-X v. Department of Human Res.*, 403 Md. 667, 675 (2008); *see also Faulkner v. State*, 468 Md. 418, 461 (2020)**]**. We accept the court's findings unless clearly erroneous. *Faulkner*, 468 Md. at 460 (citing *Yonga v. State*, 221 Md. App 45, 95 (2015)). We uphold the discretionary determination of the trial court unless it is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *King v. State*, 407 Md. 682, 697 (2009) (internal marks and citations omitted).

For Jackson to prevail on an actual innocence petition, he must produce newly discovered evidence that: (1) "speaks to" his actual innocence; (2) could not have been discovered in time to move for a new trial under Maryland Rule 4-331[4]; and (3) "creates a substantial or significant possibility" that the trial result may have been different had the evidence been introduced. *Smith v. State*, 223 Md. App. 372, 422 (2017); Maryland Code. Annotated, (2018, 2019 Repl. Vol.), Criminal Procedure Article ("C.P."), § 8-301(a)[5]. The

[4] **(c) Newly Discovered Evidence**. The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule:
(1) on motion filed within one year after the later of (A) the date the court imposed sentence or (B) the date the court received a mandate issued by the final appellate court to consider a direct appeal from the judgment or a belated appeal permitted as post-conviction relief; and
(2) on motion filed at any time if the motion is based on DNA identification testing not subject to the procedures of Code, Criminal Procedure Article, § 8-201 or other generally accepted scientific techniques the results of which, if proved, would show that the defendant is innocent of the crime of which the defendant was convicted.

[5] (a) A person charged by indictment or criminal information with a crime triable in circuit court and convicted of that crime may, at any time, file a petition for writ of actual innocence in the circuit court for the county in

first prong "ensures that relief under § 8-301 is limited to a petitioner who makes a threshold showing that he or she may be actually innocent," *i.e.*, that Jackson "did not commit the crime." *Faulkner,*468 Md. at 460 (citing *Smallwood v. State*, 451 Md. 290, 323 (2017)). The second prong ensures the petitioner's exercise of due diligence in locating evidence of his or her innocence. It is not necessary for a petitioner to "exhaust every lead or seek to discover a needle in a haystack," *Smith*, 223 Md. App. at 415, but, the petitioner "must show that he or she could not have located the newly discovered evidence with the exercise of 'due diligence' by the deadline to file a motion for a new trial under Rule 4-311." *Faulkner*, 468 Md. at 460 (citing *Smith*, 223 Md. App. at 416). Lastly, the third prong introduces the "substantial or significant possibility" standard, which requires the petitioner to show that if the fact-finder had the "benefit of the newly discovered evidence," combined with the evidence introduced at the first trial, there is a substantial or significant possibility that the result would have been different. *Faulkner*, 468 Md. at 460. This standard "falls between 'probable,' which is less demanding than 'beyond a reasonable doubt,' and 'might,' which is less stringent than probable." *McGhie v. State*,

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> which the conviction was imposed if the person claims that there is newly discovered evidence that:
> (1)(i) if the conviction resulted from a trial, creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined; or
> (ii) if the conviction resulted from a guilty plea, an Alford plea, or a plea of nolo contendere, establishes by clear and convincing evidence the petitioner's actual innocence of the offense or offenses that are the subject of the petitioner's motion; and
> (2) could not have been discovered in time to move for a new trial under Maryland Rule 4-331.

449 Md. 494, 510 (2016) (internal citations omitted).

In its ruling on Jackson's petition, the circuit court found, and the State does not contest, that Riggins' statement constitutes as "newly discovered evidence" pursuant to Rule 4-331. We shall therefore focus our analysis on the first and third prongs.

A. "Mere Impeachment"

Jackson maintains that the circuit court abused its discretion in denying his petition when it classified his testimony as "merely impeaching." Jackson rests his appeal on the circuit court's erroneous distinction between "impeaching" evidence and evidence that is "merely impeaching." Relying on dicta from *Hunt v. State*, previously cited, Jackson contends that the circuit court's "narrow view" of the "mere impeachment" standard was an abuse of discretion. In his view, Riggins' new testimony creates a substantial or significant possibility that, if admitted at trial, the result would be different, as her testimony sufficiently undermines the State's narrative that Jackson, not Shuebrooks, attacked Tussey.

The State's counterargument is that Riggins' 2018 statement [6] does not "speak to" Jackson's innocence, nor does it create "'a substantial or significant possibility' that the trial court would have reached a different verdict." In the State's view, the court did not give Riggins' testimony significant weight when rendering its verdict, because her

[6] Fully acknowledging that we might be splitting hairs, we nonetheless observe that whereas Jackson calls Riggins' 2018 statement a "recantation," we think it more properly a "modification" of her earlier testimony, since she did not "retract" or "repudiate" her earlier statement, she changed it to add jewelry to the items Shuebrooks allegedly brought home after the incident. *See*, *The Oxford English Dictionary On-line*, https://bit.ly/3bptD8i.

testimony "concerned only the collateral issue of who possessed the victim's stolen property *after* the rape." By extension, Riggins' modification of events, which placed a telephone and jewelry from Tussey's home in Shuebrooks' possession, does not "speak to" Jackson's innocence in the commission of rape. Ultimately, according to the State, Riggins' 2018 statement "had no bearing on [the] credibility contest between [Ms. Tussey] and Jackson or whether Jackson committed the rape[.]"

The "threshold question" for determining whether evidence is "newly discovered," is whether the evidence is "material to the result." *Argyrou v. State*, 349 Md. 587, 601 (1998). "To be material, evidence must be more than 'merely cumulative or impeaching.'" *Jackson*, 216 Md. App. at 367 (internal citations omitted). Although the distinction between impeachment evidence and evidence that is "merely impeaching" is "nuanced, it is pivotally important." *Id.* (citing *Jackson*, 164 Md. App. 679, 697 (2005)). "Merely impeaching" or "collateral impeachment" evidence would be, for example,

> [n]ewly discovered evidence that a State's witness had a number of convictions for crimes involving truth and veracity or had lied on a number of occasions about other matters[, which] might have a bearing on that witness's testimonial credibility, but would not have a direct bearing on the merits of the trial under review.

Jackson, 164 Md. App. at 698. If, however, "newly discovered evidence . . . was that the State's witness had actually testified falsely on the core merits of the case under review, that evidence, albeit coincidentally impeaching, would be directly exculpatory evidence on the merits and could not, therefore, be dismissed as 'merely impeaching.'" *Id.*

In *Jackson*, this Court concluded that a victim's post-trial admission of "testifying under strong pressure" was mere impeachment. *Jackson*, 164 Md. App. at 698. There, a

jury convicted the petitioner of two counts of sexual child abuse after hearing testimony from the victim, appellant's eleven-year-old daughter. *Id*. at 684. The day after the trial's conclusion, however, the victim allegedly recanted her testimony, telling her [eleven-year-old] cousin that the victim's mother and stepfather "made her say those things" under the guise that "[petitioner] would be all right." *Id.* at 691. Petitioner moved for a new trial, arguing that the victim's recantation of her trial testimony amounted to newly discovered evidence under Maryland Rule 4-331. *Id.* at 688. At the hearing on the merits of that motion, the victim repeatedly denied having made such statements at all and reaffirmed her initial in-court testimony. *Id*. at 692-93. The circuit court denied the motion for a new trial, finding that the victim did not recant her testimony. *Id.* at 688.

In affirming the circuit court's decision, we concluded that the victim's "informal denial" of her trial testimony did not rise to the level of a "formal recantation," considering the victim, under threat of perjury, repeatedly reaffirmed her initial testimony. *Jackson*, 164 Md. App. at 692-93. Evidence of such informal renunciation, we held, "has value only for purposes of testimonial impeachment" and "does not qualify as 'newly discovered evidence' within the contemplation of the law governing motions for a new trial." *Id*. at 696. "Although that might be the reason to question [the witness's] credibility, it does not establish that she testified falsely. . . . The witness's alleged admission to [her cousin] went only to why the witness, reluctantly, testified. *It did not go directly to the truth of her testimony*." *Id*. at 698 (emphasis supplied). Said differently, "impeaching a witness on inconsequential details of his testimony [does] not warrant a new trial." *Cornish v. State*, 460 Md. 518, 534 (2018). However, "impeaching evidence that directly calls into question

a significant issue in the case may result in a new trial if the evidence raises core issues on the merits of the case." *Id.*

Ten years later, however, the Court of Appeals began to question the propriety of the long-held distinction between newly discovered evidence for purposes of "mere impeachment" and impeachment evidence that could possibly exculpate the accused. In *State v. Hunt*, cited previously, the appellants filed a petition for writ of actual innocence after a *Baltimore Sun* article reported that one of the State's expert witnesses at trial, a high-ranking Maryland law enforcement ballistics expert, lied about his credentials and qualifications in trials in Maryland for over twenty years. The circuit court denied appellants' petition without a hearing because the petitioners "fail[ed] to state a claim or assert grounds for which relief may be granted pursuant to [C.P. § 8-301(a)]." *Hunt*, 443 Md. at 245. We reversed the rulings of the circuit court and remanded them for further proceedings, and the State petitioned for a writ of certiorari, which the Court of Appeals granted. *Id.* at 247.

In concluding that the appellants' petitions were not "doomed" for mere technical violations, the Court of Appeals affirmed the judgment of this Court, thereby granting appellants a hearing on their petitions. *Id.* at 258. However, it is Judge Harrell's commentary on impeachment evidence that is perhaps the more consequential part of the Court's opinion:

> We also note that a hearing judge might conclude reasonably that the Court of Special Appeals' distinction between "impeaching" and "merely impeaching," in the context of § 8-301 petitions for writs of actual innocence, is overly rigid. When an expert is called to testify, it is conceivable that, based on the cumulative body of evidence presented at trial, falsity regarding

> the expert's credibility and qualifications might "create[] a substantial or significant possibility that the result may have been different. § 8-301(a)(a)

Id. at 263-64.

We relied on that very sentiment in *Snead v. State*, 224 Md. App. 99 (2015), in concluding that the trial court improperly dismissed appellant's petition for writ of actual innocence. There, appellant filed a petition after accidentally coming into possession of reports made by one of the detectives assigned to his case "long after [his] case was adjudicated." *Id.* at 104. The reports documented the detective's investigation into the shooting of which Snead was convicted and revealed that the victim identified someone other than Snead as the shooter. *Id.* Snead's petition was denied without a hearing for failure to assert grounds upon which the petition could be granted. *Id.* at 105.

On appeal, the State argued that Snead's newly discovered evidence "would have merely impeached other testimony but could not have created a substantial or significant possibility of a different result." *Id*. at 109-10. Relying on the "mere impeachment" dicta from *Hunt*, this Court concluded that Snead's new evidence, "if believed, could tend to exculpate Snead by showing that the victim had identified someone other than Snead as the shooter." *Id.* at 113 (internal citation omitted). "Because the circuit court dismissed Snead's petition on account of his failure to meet a standard that no longer appears to apply," namely, the "mere impeachment" standard, we vacated the circuit court's order and remanded for further proceedings. *Id.* at 102 (citing *Hunt*, 443 Md. at 260).

Turning to Jackson's appeal, we see no reason to re-evaluate recent precedent differentiating the impeachment standard. In our view, the standard lends itself to

capricious and unpredictable application in lower courts, as happens when there is merely a difference between permissible and impermissible evidence. Standing alone, impeachment simply calls into question the veracity and reliability of a witness and/or his/her testimony. As discussed, under *Smith*'s three-pronged newly discovered evidence analysis, a petitioner must show that the new evidence not only speaks to their innocence, but also creates a substantial or significant possibility that the outcome of the trial would have been different if said evidence was admitted. *Smith*, 223 Md. App. at 422. This necessarily puts the burden of proof on the petitioner to show that the newly discovered evidence fulfills both of those requirements, regardless of the form of evidence. For newly discovered impeachment evidence, then, a petitioner would have to show that the newly found evidence so significantly undercuts a witness's testimony that a court would seriously reconsider the merits of a conviction. And, in making such an assessment, it is unnecessary for a court to immediately deny a petitioner's application because, facially, the evidence is "merely" impeaching. The holdings in *Hunt* and *Snead* show that a court's comprehensive assessment of newly discovered evidence should go to the likelihood that such evidence would lend itself to a different result; **not** to a standard that immediately discounts new evidence on the basis of its form.

However, our discussion of the "mere impeachment" standard does not end our analysis of the circuit court's denial of Jackson's petition. The court did not base its decision entirely on the form of Jackson's newly discovered evidence. Although it did find Riggins' testimony "merely impeaching," it also concluded, as we shall discuss, that the testimony did not play a significant role in the State's closing argument at trial or in the

trial court's findings and therefore did not go to Jackson's innocence or create a substantial likelihood of a different result.

B. Cumulative Materiality

Review of newly discovered evidence for purposes of petitions of actual innocence took on a broader view with *Faulkner*. There, the Court of Appeals reversed and remanded the circuit court's denials of the appellants' petition for writ of actual innocence, after appellants were serving life sentences for "ransacking" a woman's home and killing her in the process. *Faulkner*, 468 Md. at 428. The appellants brought petitions for a writ of actual innocence, claiming that new forensic techniques showed that neither man was the source of the palm prints and related evidence found on the exterior of the victim's utility room window and washing machine – supposedly the perpetrators' exit route. *Id*. at 467-69. Appellants argued that this discovery was sufficient to create a substantial possibility of a different outcome in their trials. *Id.* at 468. The Appellants also contended that newly discovered evidence concerning the State's main witness, namely, that she altered her testimony in return for a favorable disposition in a separate case, would have led to a different outcome. *Id.* at 474-77.

On review, the Court of Appeals adopted the "cumulative materiality" analysis for actual innocence cases. *Id* at 463. In so doing, the Court explained that a trial court, "in analyzing the materiality of multiple pieces of newly discovered evidence," must examine the cumulative impact of such evidence. *Id.* This cumulative assessment was required for two reasons:

> First, in some cases, no one distinct item of newly discovered evidence will suffice on its own to warrant relief, but cumulatively, such evidence will create a substantial or significant possibility of a different result. Second, even if one or more distinct pieces of newly discovered evidence independently justifies the granting of the writ, a cumulative analysis may affect the court's determination of the appropriate remedy.

Id. at 464. Although *Faulkner* applied the cumulative materiality test to factual scenarios in which a petitioner brings forward *multiple* pieces of newly discovered evidence, we see no reason why the same rationale should not apply in situations such as this, where a petitioner argues, essentially, that *one* piece newly discovered evidence is so pivotal that it calls into question his conviction.

Employing *Faulkner*'s cumulative materiality test, we conclude that Riggins' 2018 statement does not address Jackson's actual innocence, therefore, it does create the substantial possibility of a different verdict at trial. This is so for several reasons. If believed, Riggins' brief trial testimony established four things: (1) Shuebrooks was the taller of the two men; (2) Jackson regularly wore a full beard; (3) on the day of the attack, Jackson allegedly gifted a telephone to Riggins' then-husband, Shuebrooks; and (4) around the time of the attack, Riggins did not observe any new or unusual jewelry in her home. The only change in that testimony is that Riggins claims she now remembers seeing "unfamiliar jewelry" in her home around the time of the attack. In her statement, Riggins explained that she was afraid of Shuebrooks throughout their marriage. Indeed, she notes that when she was called as a defense witness at Jackson's trial, Shuebrooks "was a very emotionally and physically abusive husband," and she "did not want to testify in a way that

might cause him to be angry with [her]." [7]

While Riggins should be commended for coming forward, we conclude that had she testified in 1993 consistent with her 2018 statement, the verdict here would not have been any different. First, the trial court only made passing reference to Riggins' testimony during its ruling. Out of the six pages the court used to issue its ruling, Ms. Riggins' testimony is considered for a mere four sentences:

> THE COURT:. . . It is interesting to note that Ms. [Riggins] indicated that she had seen the defendant approximately 20 times prior to this time and that he always had a beard but not as full as her husband's.
>
> ***
>
> Interesting testimony from Ms. [Riggins] also with respect to the telephone in this case that her husband had brought. This was apparently the telephone missing from the apartment which he said that it was a gift from Sherwood Jackson on his birthday. Well, it was Mr. Jackson's birthday as I recall the testimony

Likewise, the court barely considered any of Riggins' trial testimony, and instead focused on the victim Tussey's description of her attacker. Indeed, when rendering its findings of fact, the court did not find Jackson's height to be a decisive factor:

> THE COURT: That leads us then to which of the two men performed these heinous acts on Ms. Tussey. I have reviewed very carefully my notes as well as evidence in this matter and it to me is very apparent that Ms. Tussey was always consistent in her description of the man who raped her as being the stockier, more heavily built man.

[7] At this point we must ask, if that truly is what Riggins claims, that she feared her then-husband, Shuebrooks, and she "did not want to testify in a way that might cause him to be angry with [her]," then why was she testifying that he, not Jackson, had raped Tussey? The trier of fact might very well have wished to resolve that seeming contradiction but cannot do so with Riggins' passing.

> That she did say that she thought that other one . . . that raped her was the taller of the two ***but quite frankly the Court does not consider that to be a significant discrepancy in her identification of the perpetrator in this case***.

(emphasis supplied). Nor did the court seriously consider the inconsistencies as to the precise amount of facial hair Jackson wore on the day of the crimes:

> With respect to the discrepancies on facial hair the only clear thing is that in this case it is clear that Bobby Shuebrooks did in fact have more facial hair than Mr. Jackson but that it is also clear that Mr. Jackson did have facial hair. He denies ever having a beard but he subsequently admitted that in fact he did have a goatee and he always had a moustache.
>
> ***
>
> Other witnesses testified that he [Jackson] had not [had a beard]. But clearly the photograph in State's [Exhibit] No. 37, I believe, shows Mr. Jackson with a goatee at the very least as well as a moustache. So the court does not place any significant value on the amount of hair on Mr. Jackson in the description given by Ms. Tussey.

Nor did the court base its verdict on the absence or finding of unfamiliar jewelry, in Shuebrooks' home. In fact, when finding Jackson guilty of robbery, the court made no mention of jewelry in its verdict:

> As to the fifth count, robbery, the Court will find the defendant guilty of that count. He without question took property from her purse, that he did it with force and threat of force and that he did intend to steal *the telephone and money from her purse*. She saw him do that. And that he intended to deprive her of that property permanently.

(emphasis supplied).

Significantly, the court focused almost exclusively on the conflicting testimonies of Tussey and Jackson, whereby the court plainly did not find Jackson's testimony credible. At first, the court found particularly relevant the "discrepancy between Ms. Tussey's testimony and that of [Jackson] as to [sic] it seems to the Court an important issue of

facts[,]" which went to Jackson's denial that he ever entered the apartment, "participat[ed] in the perusal of the painting in the apartment," or "walk[ed] around the apartment as Ms. Tussey said he did."

> Ms. Tussey's testimony was clear from the beginning that defendant in this case was on one side of her and the other gentleman was on the other side of her to the left, the defendant to the right as they went through the apartment.
>
> Whereas the defendant states that he did not do that at all, that he was not in that apartment, that he stuck his head in at a later time to try and get his friend to leave. ***Quite frankly that simply does not ring true and the court does not believe his testimony in that regard.***

(emphasis supplied). The trial judge found particularly compelling Tussey's consistency in her description and identification of Jackson as the man who raped her:

> But she is very vehement in her description and her recognition and her recollection that the defendant in this case was the one who took her arm, placed it behind her back, and forced her to go into the bedroom
>
> ***
>
> The court is also impressed by the fact that within approximately three to four hours Ms. Tussey did make an identification of the defendant through a photo array, photo number three I believe it is State's [Exhibit Number] 15. . . .
>
> She indicated to Detective Turner that number three resembles more the one who raped me. . . .
>
> ***
>
> Also interesting to note that in the Court's view, photograph number one in that photo array is one of a gentleman with a beard much like Bobby's, Bobby Shuebrooks in this case and she did not identify photograph number one.

As for Jackson's testimony, the trial judge found it "simply not believable," after Jackson provided the court "three version of the events and perhaps even a fourth."

Cumulatively, Riggins' in-court testimony and her 2018 statement amount to little more than additional information. In our view, Riggins' in-court testimony did not weigh

heavily, if at all in shaping the court's verdict. Riggins' 2018 statement does not fundamentally change the State's theory of the case, nor more importantly, Jackson's defense. At trial, both sides presented evidence that Jackson was with Shuebrooks at the scene of the crime. The court found that to be, in fact, true. Jackson's defense was that Shuebrooks raped and robbed Tussey. However, as the court reiterated multiple times, the trial judge did not find Jackson and his version of events to be credible. Ultimately, the court found Tussey's testimony, in which she repeatedly identified Jackson as her attacker, to be far more credible.

Finally, we think it important to keep in mind that Riggins had passed away by the time of Jackson's hearing. If the case was re-tried, Jackson does not explain how Riggins' 2018 statement could be admitted as evidence at trial. Her statement is not under oath and neither the court and nor the State had the opportunity to question Riggins to test the its veracity or accuracy. If Riggins' statement was somehow to be introduced, the only information that it would establish is that Riggins' former husband, Shuebrooks, was with Jackson around the time of the attack. Unlike *Faulkner*, this information does not tend to show that Shuebrooks, or somebody other than Jackson, sexually assaulted and robbed Tussey. Unlike *Snead*, the information does not establish that Tussey positively identified Shuebrooks, or some other man, as the one who assaulted her. And, unlike *Hunt*, Riggins' statement does not establish that a key witness lied about issue that was so significant that we could conclude that Jackson's convictions hung on that falsehood.

In conclusion, Riggins was not a key witness at trial and her testimony was not crucial to the court's verdict. Consequently, Riggins' 2018 statement, only modifying her trial testimony, does not speaks to Jackson's actual innocence.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. APPELLANT TO PAY THE COSTS.