

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1363

September Term, 2014

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DEXTER MOODY

v.

STATE OF MARYLAND

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Woodward,  
Kehoe,  
Arthur,

JJ.

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Opinion by Arthur, J.

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Filed: October 7, 2015

\* 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.

This matter comes to this Court on appeal from the Circuit Court for Baltimore City, where appellant Dexter Moody was indicted on charges stemming from a suspected sale of narcotics in an area just south of Clifton Park. Following a three-day trial from June 4 to June 6, 2014, a jury convicted Moody of possession of cocaine, possession of cocaine with the intent to distribute, and distribution of cocaine. Because of his prior convictions for narcotics violations, the trial judge sentenced Moody to a total of 30 years in prison, suspended all but ten, but required that those ten years be served without parole. Moody noted a timely appeal to this Court.

#### **QUESTIONS PRESENTED**

Moody raises two issues for our review, which we have rephrased as follows:

- I. Did the trial court err in precluding defense counsel from arguing in closing that the jury should draw an unfavorable inference from the State's failure to present any evidence with respect to fingerprints on the bag of narcotics alleged to have belonged to Moody for purposes of drug distribution?
- II. Did the trial court impermissibly restrict Moody's ability to impeach a witness with prior testimony intended to impeach the witness's ability to accurately recall the facts of the case or to testify truthfully?

For the reasons that follow, we answer in the negative to both questions. We accordingly shall affirm Moody's convictions.

#### **FACTUAL BACKGROUND**

Moody's trial concerned events that occurred in Baltimore City on the afternoon of February 25, 2012. Detective Duane Weston testified that he and his partner, Detective Salvatore Baio, were working on a narcotics investigation near the intersection of North Collington Street and East North Avenue. There, Det. Weston said that he saw

an “unknown white male” approach another man, whom he identified in court as Moody. Det. Weston testified that Moody engaged in a brief conversation with a second unidentified man, walked to a nearby alleyway, and “bent down and picked up a clear plastic bag containing unknown items suspected [to be] narcotics[.]” Moody placed the bag back down in the alley, returned to the two other men, and handed them what Det. Weston suspected was narcotics in exchange for money. The two alleged buyers then left the area. As Moody walked away on North Avenue, the officers detained him. In the alley, Det. Weston retrieved a plastic bag that had 73 smaller, zip-lock bags containing a powdery substance. The officers retrieved \$40 from Moody’s person.

The only other witness for the State was a chemist and criminalist, Anthony Rumber, who testified that the contents of the 73 bags were tested and identified as cocaine base. The State did not attempt to introduce any other physical or forensic evidence, such as photographs or fingerprint test results, connecting Moody to the bags of cocaine.

In his defense, Moody called his wife, Mia Moody. Ms. Moody testified that on the day in question she dropped her husband off for a haircut in the area of the alleged drug sale. When she returned, she said, he was being arrested.

Moody also called Det. Weston’s partner, Det. Baio, whom Moody attempted to impeach through the use of discrepancies between the police report and the detective’s trial testimony. In addition, Moody attempted to establish that, at a suppression hearing, Det. Baio had falsely denied that he had discussed his testimony with the Assistant State’s Attorney during a break. The court prohibited that line of questioning.

The jury convicted Moody of possession of cocaine, possession of cocaine with the intent to distribute, and distribution of cocaine.

## **DISCUSSION**

### **I. Closing Argument**

Moody challenges the trial court’s decision to sustain the prosecutor’s objection to a part of his closing argument. Specifically, Moody contends that the trial court committed reversible error by cutting off defense counsel’s attempt to draw the jury’s attention to the State’s failure to introduce evidence of fingerprint test results from the 73 bags of cocaine that the detectives tied to Moody upon his arrest.

#### **A. Background**

Defense counsel began her summation by commenting briefly on the lack of supporting physical evidence: “The whole reason we don’t have any back up evidence, any evidence that would support what these supposed buyers had done or said or anything like that because the officers had said they couldn’t do that . . . because it would jeopardize the whole investigation. Now, mind you that makes no sense at all.” Counsel then spent a considerable amount of time arguing that the detectives’ accounts of the alleged drug sale were inconsistent and generally not reliable or credible. Following this argument, counsel again addressed the “general evidence” against Moody “and the problems that exist with it.” The following exchange ensued:

[DEFENSE]:           Number one, like I said to you and I don’t need to repeat myself but there is no supporting evidence. There are ways that you don’t have to be a trained police officer to guess how you might document your investigation. Whether you’re looking into like a charge that you don’t

recognize on your credit card or doing an important investigation where you're trying to convict a human being of a felony.

[PROSECUTOR]: Objection, Your Honor.

THE COURT: Sustained.

[DEFENSE]: Of whatever the reason is, there are ways that you can do it that just use your common sense. You could jot down more information or write a description of the people that you say are the buyers in this case. Take a photograph. Try to take fingerprints off of the plastic bag —

[PROSECUTOR]: Objection.

[DEFENSE]: — that the drugs were found in.

THE COURT: Sustained.

[DEFENSE]: There are many things that you could do to back up your case instead of just coming to court and sort of winging it and testifying with no supporting evidence. There are many ways to document what you said you did yesterday or today and none of it exists here and it is an arrogant thing for the police officers to submit this case to you and say that none of that's necessary. They don't really prove anything or support anything. They're just going to say it and you have to do it. You have to believe them even if it makes no sense.

The trial court did not instruct the jury to disregard defense counsel's remark. Nor did the prosecutor move the court to strike the remark.

Defense counsel went on to address the issue of reasonable doubt. While she did not use the word “fingerprints,” she referred twice to the State’s failure to prove that Moody had “touched” the bag that contained the drugs.<sup>1</sup>

On appeal, Moody, citing *Eley v. State*, 288 Md. 548 (1980), and cases applying it, argues that defense counsel was “engag[ing] in proper closing argument when he [sic] attempted to alert the jury to the ‘problems that exist with’ the State’s case” by pointing out the lack of fingerprint evidence from the bag containing the 73 bags of cocaine. Moody asserts that the court abused its discretion by precluding counsel from arguing that the lack of fingerprint evidence demonstrated the insufficiency of the State’s evidence that Moody was guilty beyond a reasonable doubt of the alleged crimes.

**B. Preservation**

The State argues that Moody failed to preserve this issue because it was unclear that Moody’s counsel was asking the jury to draw a negative inference from the unexplained failure to produce fingerprint evidence. Instead, according to the State, counsel was compiling an array of reasons for the jury to doubt the detectives’ credibility, including their failure to “jot down more information,” their failure to “write a description” of the alleged buyers, their failure to “[t]ake a photograph” of the scene, and their “arrogant” insistence that jury should simply believe their testimony. The State insists that, “to the extent that Moody complains on appeal that the court’s ruling

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<sup>1</sup> During deliberations, a juror sent a note asking whether he or she could base the decision only on the closing arguments. The trial court informed the jury that “opening statements and closing arguments of the lawyers are not evidence. They are intended only to help you understand the evidence and to apply the law.”

precluded [counsel] from arguing to the jury that it could infer reasonable doubt from the absence of fingerprint evidence, the Court also should decline to consider this complaint.”

Md. Rule 8-131(a) provides that, ordinarily, appellate courts “will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court.” Here, the State objected to Moody’s argument, and the court sustained the objections. On its face, the issue of the propriety of counsel’s comments appears to have been raised and decided.

The State cites no authority for the proposition that, upon pain of waiver, a party must object to the court’s decision to sustain an adversary’s objection to a statement in closing argument. Nor does the State cite any authority for the proposition that, after a court has sustained an adversary’s objection to a statement in closing argument, a party must, upon pain of waiver, make a proffer of what he or she had intended to argue.<sup>2</sup>

The State does cite *Bing Fa Yuen v. State*, 43 Md. App. 109 (1979), but that decision does not support the proposition that Moody failed to preserve his complaint about an improper limitation on closing argument. In *Bing Fa Yuen*, the court ruled, outside the jury’s presence, that the defense could not read transcripts of testimony during closing argument. *Id.* at 117-18. To evaluate whether the court had abused its discretion in making that ruling, this Court required “some further proffer to indicate to the court

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<sup>2</sup> A proffer might, however, be useful in persuading the trial court to reevaluate its decision to sustain the objection, or in persuading an appellate court that the trial court has erred in sustaining the objection. *See infra* section I(C); *see also Sample*, 314 Md. at 207 (wherein defense counsel refers obliquely to *Eley*).

that which is to be read, the purpose for the request and the need as seen by the party making the request.” *Id.* at 118. “Just as discretion should not be arbitrarily withheld, it can not be unexplainedly demanded,” Judge Lowe reasoned. *Id.* at 118-19.

Unlike *Bing Fa Yuen*, this case does not involve a ruling that requires a comparable exercise of discretion. In any event, *Bing Fa Yuen* does not concern objections during closing argument itself, as this case does. Hence, *Bing Fa Yuen* does not require an attorney, on pain of waiver, to proffer the justification for a statement in closing argument after the court has sustained an objection.

Accordingly, we conclude that Moody has done enough to preserve his challenge to the limitation on his closing argument.

### C. The Merits

The question remains whether the trial court committed reversible error in sustaining the State’s objection to the defense’s criticism that the detectives did not “jot down more information,” “write a description . . . of the . . . buyers,” “[t]ake a photograph,” or “[t]ry to take fingerprints off of the plastic bag.” According to the State, “[t]he argument that a jury should acquit because the police failed to conduct a proper investigation is common.” The question is, was this an example of such an argument?

“[W]hen the State has failed to utilize a well-known, readily available, and superior method of proof to link the defendant with the criminal activity, the defendant ought to be able to comment on the absence of such evidence.” *Sample v. State*, 314 Md. 202, 207 (1988) (citing *Eley*, 288 Md. at 553); *see also Robinson v. State*, 436 Md. 560, 580 (2014) (discussing *Sample*, *Eley*, and the adverse inference that a jury may draw



from the unexplained failure to produce forensic evidence, in holding that trial court erred in giving “anti-CSI instruction”).

In *Eley*, 288 Md. at 549-50, the trial judge refused to allow defense counsel to comment during closing argument upon the State’s having “neither listed nor presented any witnesses to discuss whether fingerprint test results had been performed on the [alleged getaway] vehicle.” The Court of Appeals reversed, holding that the court should have permitted “defense counsel to argue that the State’s unexplained failure to produce fingerprint evidence should permit the adverse inference that the evidence would have been unfavorable to the State[.]” *Id.* at 553. The Court reasoned that:

[T]he excluded comments went to the strength of the prosecution’s evidence, or more specifically, to the *lack of evidence*. It is the State which has the burden of producing evidence sufficient to convince the jury beyond a reasonable doubt that the defendant is guilty.

. . . Yet the State failed to produce any such evidence and failed to offer any explanation for that failure. While it is not incumbent upon the State to produce fingerprint evidence to prove guilt, nevertheless, where a better method of identification may be available and the State offers no explanation whatsoever for its failure to come forward with such evidence, it is not unreasonable to allow the defendant to call attention to its failure to do so.

*Id.* at 553-54 (emphasis in original); *accord Sample*, 314 Md. at 207-08.

Moody insists that, under *Eley* and *Sample*, the trial court erred in limiting defense counsel’s ability to argue that the jury should draw a negative inference from the absence of fingerprint evidence. We disagree, because it is not sufficiently clear from this record that the counsel was actually making an argument based on *Eley* and *Sample* or that the ruling prevented counsel from making such an argument.

Although Moody’s counsel mentioned that the detectives did not “[t]ry to take fingerprints off of the plastic bag,” she did not attempt to argue that the unexplained absence of fingerprint evidence should lead the jury to infer a failure of proof on the State’s part. Neither before nor after the court sustained the objection to counsel’s comment about fingerprints did she tell the jurors that they could infer reasonable doubt from the State’s unexplained failure to produce fingerprint evidence. Instead, counsel referred to the failure to obtain fingerprints in conjunction with a compilation of other criticisms of the “arrogant” detectives, who, she said, had been “winging it” by “testifying with no supporting evidence.”

In short, counsel does not appear to have been making an *Eley-Sample* argument at the time of the objections. Consequently, even if the court ought not to have sustained the objections, the court did not interfere with Moody’s ability to argue that the jury could find reasonable doubt because of the unexplained failure to produce fingerprint evidence. In this regard, we note that the court neither struck counsel’s remark nor instructed the jury to disregard it.<sup>3</sup>

Furthermore, the closing argument did not end after the court sustained the objections. Later in the argument, counsel moved to the issue of reasonable doubt – an

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<sup>3</sup> On the cold, paper record before us, it is unclear why the State objected and why the court sustained the objection. The State suggests that defense counsel was making an improper “Golden Rule” argument, but counsel’s argument does not appear to ask the jurors to put themselves in the defendant’s shoes. *Cf. Lawson v. State*, 389 Md. 570, 594 (2005). It may be that the court was reacting to something in counsel’s tone or demeanor that the paper record cannot convey. Whatever the reason for the objection, however, the court did not prevent Moody from making a *Eley-Sample* argument by sustaining it.

issue directly related to *Eley*, *Sample*, and the failure to produce fingerprint evidence. In that portion of the argument, counsel argued that the jury “cannot convict Dexter Moody because it has not been shown that the bag that was recovered is the same bag that Dexter would have touched.” Similarly, in her final comment, counsel also argued that “[i]t has not been proved that the bag belonged to Dexter or that he ever touched it[,] and you must find him not guilty.” Although counsel did not explicitly refer to the absence of fingerprints, these arguments were unmistakably based on *Eley* and *Sample*, and counsel’s point would not have been lost on the jury. The State correctly refrained from objecting, and the court permitted the argument to proceed.

In short, the record does not support Moody’s assertion that the trial court improperly prevented his counsel from arguing that the jury could draw a negative inference against the State because of the unexplained failure to produce evidence that Moody’s fingerprints were on the plastic bag that contained the drugs. Even if the court erred in sustaining an objection to Moody’s initial reference to fingerprints, Moody succeeded in making his point to the jury both before and after the court sustained the objection.

## **II. Restricted Impeachment**

Moody argues that the trial court committed reversible error when it restricted his ability to impeach one of his own witnesses on issues of credibility and veracity. This complaint is without merit.

**A. Background**

Before trial, Moody moved to suppress evidence of the \$40 that the detectives claimed to have found on his person at the time of his arrest. At the start of the two-day suppression hearing, the suppression court, at defense counsel’s request, entered a sequestration order requiring that witnesses not “discuss their testimony with anyone until after they know the case is completed.”

At the suppression hearing, the prosecutor called Det. Baio as the State’s only witness. On direct, the detective’s testimony was confusing and ambiguous. He said that he entered an unidentified “covert location,” observed Moody retrieve the suspected narcotics and exchange them for money, “exited the covert location,” notified Det. Weston of what he had observed, “entered the area” (apparently meaning the area where Moody was found), and “exited the vehicle” before he and Det. Weston made the arrest.

On cross-examination, the detective tacitly acknowledged that the “covert location” was a “car” (the question assumed that it was). In addition, the detective said that he had been outside of the “covert location” when he made his observations. The court then broke for lunch recess, and Det. Baio was dismissed for the day with an admonition that the sequestration order was still in effect.

Before the suppression hearing resumed the following day, the Assistant State’s Attorney informed Moody’s counsel that he had spoken with Det. Baio at lunch to get “clarification” of his testimony. The prosecutor, however, evidently did not inform (or did not adequately inform) the detective that he had made that disclosure to defense counsel.

When cross-examination resumed at the suppression hearing, the detective confirmed that the “covert location” was a vehicle and that he had been out of the vehicle, smoking a cigarette, when he made his observations. At that point, Moody’s counsel asked him whether he had spoken to the prosecutor about the case during lunch. At first, the detective responded that he had had lunch with the prosecutor, but that they “didn’t talk about anything but lunch.” In response to another question, the detective said that he did “not recall” whether he had “attempt[ed] to clarify” his testimony to the prosecutor.

At that point, Moody’s counsel asked for a bench conference. At the bench, the prosecutor acknowledged that he had discussed the case with the detective at lunch and that the detective “gave clarification” of his testimony. When cross-examination resumed, Det. Baio changed his testimony and admitted that the prosecutor had asked him for “clarification”:

[DEFENSE]: Did there come a time where during lunch yesterday you attempted to clarify in some way in speaking with the State’s Attorney where your observations were made from in this case[?]

[DET. BAIIO]: I was asked for a better picture of where I was so I can explain it to him.

[DEFENSE]: Okay. So there was some conversation about where you made your observations from in this case?

[DET. BAIIO]: But nothing specific. He was asking for clarification about my observations and to paint a better picture for him.

[DEFENSE]: And what did you tell him yesterday during lunch?

[DET. BAIO]: I said . . . in the covert I made a mistake because I was, yes, in a vehicle but I did get out of the vehicle as well.

[DEFENSE]: And when did you realize you had made a mistake in saying that you had not been in a vehicle making your observations?

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[DET. BAIO]: When you asked if I was in a vehicle or out of a vehicle, I didn't clarify myself or explain myself like I should have to you and then you asked me to draw the map. So, I got sidetracked going over to the next question when I should have clarified that yes I was in a vehicle and out of a vehicle at the same time.

[DEFENSE]: . . . Is there anything else that you explained to the State's Attorney yesterday?

[DET. BAIO]: I mean, I painted a picture for him like he asked. He asked he said hey can you just explain what and I said hey I should explain this better and that was it . . . . I clarified to him because sometimes people don't understand positions that we're in so he wanted a better understanding and I explained it.

In response to further cross-examination, the detective said that he had told the prosecutor at lunch that he had made a mistake in his testimony, that he realized he had made the mistake when Moody's counsel asked him whether he was inside or outside of a vehicle when he made his observations, and (he seemed to say) that he observed Moody both when he was in the vehicle and when he was outside the vehicle. The court denied Moody's motion to suppress.

At trial, the State presented its evidence through the testimony of Det. Weston and did not call Det. Baio. In his defense Moody called two witnesses: his wife, who briefly testified that she had left Moody at the barbershop before he was arrested, and Det. Baio.

In the direct examination of Det. Baio, defense counsel elicited the circumstances of the arrest and impeached the detective with discrepancies between his trial testimony and the police report. Counsel also impeached the detective’s trial testimony with his statements from the suppression hearing. Det. Baio testified that he corrected some of his statements at the hearing “because [he] confused the covert location with a same case, type of case [sic] and [he] confused the covert locations.” When defense counsel impeached the detective with the differences between his testimony on the first and second days of the suppression hearing, Det. Baio testified that he “confused [this case] with another case,” but “corrected it the next day because” he “understood that [he] made a mistake.”

Defense counsel then attempted to interrogate Det. Baio about his conversation with the Assistant State’s Attorney at the lunch recess during the suppression hearing. When the prosecutor objected, the attorneys approached the bench. The trial judge, who had not presided over the suppression hearing but had listened to a recording of the detective’s testimony, began the following colloquy:

THE COURT:           What is this? Where is this going to?

[DEFENSE]:           Detective Baio – the State had revealed to the Court and to me that during the lunch break of the hearing while Detective Baio was still on the stand that they did have a conversation clarifying about the covert or where he was in a car, out of a car, that type of thing. When I asked Detective Baio about it on the stand he denied having that conversation with the State during lunch that had anything to do with the testimony in this case. Because that goes to either his recollection, his ability to recall events or his dishonesty, I believe it’s probative in this case.

[PROSECUTOR]: It's not relevant to this matter at all what occurred at that motion at that time. In addition, actually he ended up saying that he did have a conversation with me at lunch and described what we had. I think – it's not relevant.

THE COURT: The objection is sustained, thank you.

Moody argues that the trial court committed reversible error when it prevented defense counsel from continuing this line of questioning. We hold that the trial court neither erred nor abused its discretion.

**B. Legal Standards**

Under Md. Rule 5-607, parties are no longer prohibited, as they generally were at common law, from impeaching their own witnesses. Instead, “[t]he credibility of a witness may” now “be attacked by any party, including the party calling the witness.” *Id.* Nor is it necessary for parties to show that they were surprised by the witness’s testimony before they may impeach the witness. *See, e.g., Walker v. State*, 373 Md. 360, 387 (2003). In the absence of “full knowledge that the witness would recant on the stand,” a “party may impeach its own witness’s testimony pursuant to Rule 5-607.” *Id.*

If a party calls a witness to offer relevant testimony, but the witness answers questions “in an unexpected manner,” the party may seek to impeach the witness. *Id.* at 387-88. Upon objection, the court must determine, based on “the entirety of the witness’s testimony,” whether the party “called the witness merely as a subterfuge to permit impeachment evidence that advances the party’s case or whether the calling party legitimately expected the witness would testify as he or she indicated prior to trial.” *Id.* at



388. A party may not call a witness solely for the purpose of impeaching him or her. *See id.*

**C. Analysis**

Upon our review of the record, we see little reason to conclude that Moody called Det. Baio except to impeach him. The State refrained from calling Det. Baio in its case, and the detective's statements actually implicate rather than exculpate Moody. It is true that some of the confusion and inconsistency in the detective's testimony might indirectly discredit the observations and testimony of his partner Det. Watson, whom the State did call. The court, however, allowed Moody to examine Det. Baio on those topics that would discredit or impeach Det. Watson. Moody could not discredit Det. Watson by establishing that someone other than Det. Watson (namely, Det. Baio) testified falsely at the suppression hearing.

Moody responds that the court should have permitted him to impeach Det. Baio with his initial denial that he had discussed his testimony with the prosecutor, because, Moody says, it would show “weakness[]” in the detective's “capacity to . . . remember” what had happened only a day before the suppression hearing. Md. Rule 5-616(a)(5). The court correctly recognized this as a ruse to expose the detective's dissembling at the suppression hearing, not as a legitimate effort to expose the detective's faulty memory. It was not an abuse of discretion to foreclose that aspect of the examination, because the court had already permitted Moody to examine Det. Baio at some length about the confusion and inconsistencies in his testimony.

Moody goes on to argue that the court should have permitted him to use the detective's prior testimony in order to demonstrate his dishonesty. Moody, however, has no right to call a witness for the purpose of establishing that he is dishonest. The court gave Moody a fair amount of leeway in using Det. Baio's inconsistent testimony to undermine Det. Weston's testimony about his observations, but Det. Baio's false testimony at the suppression hearing had no legitimate bearing on the evaluation of his partner's testimony at trial. Moody clearly intended to tar Det. Weston with his association with Det. Baio. The court correctly exercised its discretion in precluding that line of questioning.

Moody offers an attenuated argument to the effect that at trial Det. Baio had attributed his errors to having "confused" Moody's case with another, while at the suppression hearing he said that he had talked to the prosecutor about a "misunderstanding." Moody finds some conflict between being confused and having a misunderstanding. He goes on to argue that the lunchtime conversation with the prosecutor was "the only explanation" for the "change" between the testimony at the suppression hearing and the testimony at trial. Consequently, he concludes that Moody's testimony at the suppression hearing, about his conversation with the Assistant State's Attorney, was admissible as a prior inconsistent statement. To the extent that this argument is intelligible,<sup>4</sup> it is unpreserved, as Moody failed to raise it at trial.

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<sup>4</sup> Det. Baio's conversation with the prosecutor preceded his amended testimony at the suppression hearing. For that reason, it is difficult to conceive how the conversation with the prosecutor caused the detective (allegedly) to change the testimony again when he appeared at trial.

It is disturbing that a police detective (and a prosecutor) apparently disobeyed a sequestration order and discussed (and improved on) the detective's testimony while he was in the middle of cross-examination. It is equally disturbing that the detective initially denied that he had disobeyed the order and discussed his testimony, before conceding that he did. In a case in which the defense attacked the credibility of the police, it is understandable that Moody would want to show that Det. Baio had apparently violated a court order and testified falsely about what he had done. But Moody was not entitled to call Det. Baio solely for the purpose of impeaching him. The circuit court did not err in foreclosing that line of questioning.

**JUDGMENTS OF THE CIRCUIT  
COURT OF BALTIMORE CITY  
AFFIRMED. COSTS TO BE  
PAID BY THE APPELLANT.**