UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2527

September Term, 2015

PAVEL S. IVANOV

v.

STATE OF MARYLAND

Eyler, Deborah S.
Beachley,
Thieme, Raymond G. Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: February 9, 2017

Following a trial in the Circuit Court for Montgomery County, a jury convicted appellant, Pavel S. Ivanov, of first-degree murder. The court sentenced him to life imprisonment.

Appellant appeals, raising the following questions for our review, which we have rephrased as follows:

1. Did the trial court commit plain error in permitting the State to question appellant concerning details that he omitted from his statements to police?

2. Did the trial court commit plain error in instructing the jury that appellant's statements to police were admissible as substantive evidence?

3. Did the trial court abuse its discretion by limiting the scope of cross-examination about a witness's prior bad act?

4. Did the trial court abuse its discretion by excluding evidence that appellant sought to introduce as a prior consistent statement, or alternatively, for rehabilitation?

5. Did the trial court abuse its discretion in permitting appellant to discharge counsel prior to sentencing and in denying appellant's subsequent request for a postponement of sentencing?

For the reasons set forth below, we affirm.

BACKGROUND

Evidence adduced at trial revealed that on July 3, 2014, appellant was dating Carla Zaidan ("Zaidan"), whom he had been dating for several months. Zaidan had previously dated Bryan Hall ("Hall"), and she continued to have a sexual relationship with Hall during her relationship with appellant.

On July 3, 2014, appellant consumed alcohol in the afternoon with Zaidan, and continued drinking in the evening at a party with Zaidan and friends. Appellant testified that he also took some "maui," an illegal drug. At the party, Zaidan received a text from

Hall asking her to meet him for sex. When appellant saw the texts from Hall on Zaidan's phone, he became "a little pissed" and "agitated" because he did not like the "dirty inappropriate things" that Hall was texting her.

Appellant instructed Zaidan to call Hall and tell him that appellant wanted to meet up with him, which she did. Appellant and Hall agreed to meet at Green Park. Zaidan testified that on the way to Green Park, appellant told her in a "really angry" tone that he knew "what to do to [Hall]," and "where to hide the body." Appellant and Zaidan arrived at Green Park, exited appellant's vehicle, and waited for Hall.

On his way to Green Park, Hall texted a friend: "[I]t's about to go down … [o]ne of two things are going to happen, either I'm going to get my ass kicked or I'm going to kick some ass." When Hall arrived at Green Park, he approached appellant, "sizing him up," and asked appellant "what's going on, what's the deal?" Zaidan testified that appellant shoved Hall four to five times in the chest, which appellant denied. Hall then punched appellant in the face, causing appellant's nose to bleed. Appellant pointed toward a park bench and said "let's go talk[.]" But Hall said that he was "done" and turned to walk away toward his car. Zaidan testified that appellant followed Hall and pulled a knife from his back pocket. Appellant testified that he pulled the knife out to scare Hall so that Hall would "back off," but that Hall punched him again. Zaidan testified that when Hall saw the knife, he said to appellant, "dude, you're really going to threaten me with a knife . . . I have a gun."[1] Appellant responded by stabbing Hall in the head, face and neck. Hall fell to the

[1] Appellant testified that Hall said that he was going to get his gun. Police recovered an airsoft BB gun from the trunk of Hall's vehicle.

ground, and appellant continued to stab him, inflicting a total of twelve stab wounds and three cutting wounds.

Appellant then "panicked" and left the scene, and Zaidan called 911. Emergency personnel arrived and transported Hall to Suburban Hospital. Shortly thereafter, police located appellant's vehicle at his mother's apartment building and took him into custody. Hall was later transferred to University of Maryland Shock Trauma Center, where he died. As indicated, appellant was convicted of first-degree murder.

DISCUSSION

I.

Appellant's Custodial Statements

Following his arrest, appellant was advised of his *Miranda* rights and signed a *Miranda* waiver form. In response to a question from Detective Michelle Smith to appellant about the vehicle he had been driving, appellant responded:

> [T]he only reason I came here, I was trying to get here earlier because **I wanted to file a police report that I was attacked and that I think I may have injured somebody badly.** But I wanted to come to the police station. But other than that, I really want an attorney now.

(Emphasis added.)

After appellant requested an attorney, he continued to speak with police, and made the following statements:

> **[DET. SMITH]:** Okay. All right. Well, we just wanted to talk to you about what happened tonight and get your side of the story. I thought you wanted to talk to us.
>
> **[DET. CARVAJAL]:** You said you wanted to file a police report because somebody attacked you?

> **[APPELLANT]: Yes. I was attacked. That's why I have the bloody nose.**
>
> **[DET. SMITH]:** And do you want to tell us about that?
>
> **[APPELLANT]: I mean, all I did was self-defense. I might have hurt somebody really badly** and I was just advised to have an attorney.

(Emphasis added.)

Appellant testified at trial regarding the events of July 3 and July 4, 2014, but he did not testify on direct examination regarding his statements to police while in custody. On cross-examination, the State inquired as follows:

> **[PROSECUTOR]:** After you were advised of your rights you told the police that you wanted to file a police report, correct?
>
> **[APPELLANT]:** Yes.
>
> **[PROSECUTOR]:** And you told them that you were attacked, correct?
>
> **[APPELLANT]:** Yes.
>
> **[PROSECUTOR]: But you never said you were threatened with a gun**, did you?
>
> **[APPELLANT]:** I didn't.
>
> **[PROSECUTOR]: You never mentioned a gun**, did you?
>
> **[APPELLANT]:** I just gave a very short statement to them.
>
> **[PROSECUTOR]: All you said was I was attacked, right, you never mentioned a gun, correct?**
>
> **[APPELLANT]:** I didn't mention a lot of things to them.

(Emphasis added.)

Appellant contends that the prosecutor's questioning on cross-examination about "what he did *not* tell the police" was the equivalent of commenting on appellant's post-

arrest silence, which violated his right against self-incrimination. Appellant concedes that he failed to object to the State's questioning at trial and thereby failed to preserve this claim for appeal. Thus, appellant asks this Court to overlook the preservation requirement and exercise our discretion to conduct plain error review.

The State asserts that plain error review is not warranted, but in any event, contends that appellant did not invoke his right to silence, and therefore "the prosecutor properly questioned appellant about the inconsistency between his trial testimony, in which Hall's alleged threat to use a gun played prominently, and [appellant's] statement to police, which made no mention of a gun." The State argues that even if it was error for the trial court to permit the prosecutor to comment on the fact that appellant did not mention a gun in his statement, the error was not so prejudicial as to affect the outcome of appellant's trial.

Our review of an unpreserved evidentiary issue is discretionary. *Kelly v. State*, 195 Md. App. 403, 431 (2010). Appellate courts generally will not consider issues on appeal that an appellant failed to preserve at trial. Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears . . . to have been raised in or decided by the trial court[.]"). Although we have discretion to address an issue that was not raised in or decided by the trial court, the Court of Appeals has explained:

> It is a discretion that appellate courts should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.

Chaney v. State, 397 Md. 460, 468 (2007).

We undertake plain error review only if the mistake "'vitally affect[ed] a defendant's right to a fair and impartial trial,'" *Diggs v. State*, 409 Md. 260, 286 (2009)(quoting *State v. Daughton*, 321 Md. 206, 211 (1990)), which we reserve for those circumstances that are "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Savoy v. State*, 420 Md. 232, 243 (2011) (citation omitted). "[A]ppellate invocation of the 'plain error' doctrine 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003), *cert. denied*, 380 Md. 618 (2004).

In the present case, we are asked to determine if allowing the prosecutor's questioning of appellant at trial about "what he did *not* tell the police" while he was in custody constituted an error by the trial court that was so compelling, extraordinary, exceptional or fundamental as to deny him a fair trial. We conclude that it did not.

The privilege against self-incrimination embodied in the Fifth Amendment of the United States Constitution serves to protect individuals who are interrogated by law enforcement while in custody. *Williams v. State*, 219 Md. App. 295, 315 (2014), *aff'd*, 445 Md. 452 (2015) (citing *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)). When a suspect in police custody exercises the right to remain silent, the State generally may not introduce evidence of that silence as substantive evidence of guilt. *Ware v. State*, 170 Md. App. 1, 21, *cert. denied*, 396 Md. 13 (2006), *cert. denied*, 549 U.S. 1342 (2007). *See also Grier v. State*, 351 Md. 241, 245 (1998) (holding that defendant's post-arrest silence was inadmissible as substantive evidence of guilt).

Appellant argues that he invoked his right to counsel at the beginning of the custodial interview, and therefore, the prosecutor was prohibited from referencing his post-arrest silence on cross-examination. But the record indicates that after appellant waived his rights, and before he requested an attorney, appellant stated voluntarily, that he was "attacked" and that he "may have injured somebody badly." Appellant continued to speak to police after he requested an attorney, further explaining that he acted "in self-defense." There was no evidence that appellant exercised his right to remain silent prior to or during those statements. Rather, he spoke to police after being advised of his *Miranda* rights and waiving them. Thus, appellant's reliance upon cases addressing the constitutional protections of a defendant's post-arrest silence are misplaced. At issue in this case is whether appellant's post-arrest statements, to the extent they were inconsistent with his trial testimony, could be introduced to impeach his credibility as to that testimony.

The constitutional safeguards established in *Miranda* do not prohibit the prosecution from using a defendant's custodial statements to impeach his or her credibility when the statements contradict the defendant's testimony at trial. *Harris v. New York*, 401 U.S. 222 (1971); *Oregon v. Hass*, 420 U.S. 714, 722 (1975). In *Harris*, a statement made by the defendant while he was in custody was admitted on cross-examination to impeach his testimony. 401 U.S. at 223. Although the evidence was not admissible substantively because the defendant was not advised of his *Miranda* rights, the Supreme Court held that evidence of defendant's statements to police that partially contradicted his direct testimony were admissible to impeach the defendant's credibility. *Id.* at 224-25. The Court determined that "having voluntarily taken the stand," the defendant was obligated "to speak

truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process." *Id*. at 225.

In construing the impeachment exception set forth in *Harris*, the Court of Appeals has held that the impeachment exception does not extend to the defendant's credibility generally, but only to his specific credibility on matters arising from a contradiction between his testimony and the impeaching statement. *State v. Kidd*, 281 Md. 32, 49 (1977). The Court explained that "[w]hile the contradiction need not be a direct one, the (trier of fact) must be able to reasonably infer some inconsistency between the witness' testimony and the impeaching evidence.'" *Id*. (quoting Comment, 73 Colum. L. Rev. 1476, 1485 (1973)). *Accord Hall v. State*, 292 Md. 683, 688-89 (1982)(applying *Harris* to uphold the prosecution's use of the defendant's statement to impeach the defendant's direct testimony that contradicted his earlier statement) and *State v. Franklin*, 281 Md. 51, 60–61 (1977)(holding that defendant's extrajudicial statements met the impeachment exception announced in *Harris*).

Once appellant testified on direct examination that Hall had threatened him with a gun, the trial court did not err in permitting the prosecutor to impeach appellant's credibility on that fact by inquiring as to why appellant failed to mention that Hall had a gun when he spoke to police. On re-direct examination, it was defense counsel who introduced appellant's statement to police *after* he requested an attorney:

> **[DEFENSE COUNSEL]:** Now [appellant,] again did you tell detectives and this is page 15 of your interview from line 11 to portion of line 12 "I mean all I did was self-defense. I might have hurt somebody really badly" did you say that?

[APPELLANT]: Yes.

On re-cross-examination, the State also inquired about appellant's statement to police after he requested counsel:

> **[PROSECUTOR]:** [Appellant] when you told the police yes I was attacked that's why I have a bloody nose. You didn't mention a gun did you?
>
> **[APPELLANT]:** I did not.
>
> **[PROSECUTOR]:** And when you told the police "I mean all I did was self-defense. I might have hurt somebody really badly." You didn't mention a gun did you?
>
> **[APPELLANT]:** I didn't mention a lot of things.

We perceive no error in the trial court allowing the prosecution to inquire as to appellant's statements to police which failed to mention a gun, as those statements were inconsistent with his testimony at trial that Hall had threatened him with a gun. To the extent that allowing the prosecution's questioning about appellant's statements to police was error, it was not so compelling as to affect his right to a fair and impartial trial.

II.

Jury Instruction as to Appellant's Custodial Statements

Appellant claims that the trial court "plainly erred" in instructing the jury that they could consider appellant's custodial statements as substantive evidence. Appellant concedes that this claim is unpreserved because defense counsel failed to object to the jury instruction, but requests that we exercise plain error review. The State contends that we should not review this claim because appellant affirmatively agreed to the jury instruction as given.

We conclude that appellant's unpreserved claim that the court improperly instructed the jury that it could consider appellant's custodial statements as substantive evidence did not constitute a compelling, extraordinary, exceptional or fundamental error so as to deny him a fair trial, and we therefore decline to exercise plain error review of the claim.

The suppression court found that appellant's statements to police before he requested an attorney were freely and voluntary made, and were admissible as substantive evidence. Moreover, the statements were admissible as substantive evidence pursuant to Md. Rule 5-803(a)(1). Although the suppression court ruled that appellant's statements to police after he requested counsel were made in violation of his *Miranda* rights, and therefore, admissible for impeachment purposes only, it was defense counsel, not the State, who introduced appellant's statement that he acted in self-defense on re-direct examination. We perceive no prejudice to appellant in the court's instruction that the jury could consider appellant's statement as substantive evidence after the defense had introduced that statement to support appellant's testimony on re-direct examination. Even if the agreed-upon jury instruction was error, it did not affect the outcome of the trial.

III.

Limitation on Cross-Examination of Zaidan

Appellant claims that the trial court abused its discretion in limiting defense counsel's cross-examination of Zaidan, who was appellant's girlfriend and the State's key witness. Appellant contends that, under Maryland Rule 5-608, he should have been permitted to question Zaidan as to the details of a false rape allegation that she made against a former boyfriend. The State counters that the court did not abuse its discretion in limiting

defense counsel's inquiry into the "collateral" details of Zaidan's prior false accusation, so as to avoid a "mini-trial."

The trial court permitted defense counsel to cross-examine Zaidan as to the false rape allegation, but limited the cross-examination as follows:

> The [d]efense will be allowed to ask if she made a false report or [sic] rape, and for her to acknowledge that it was false when it was made. And that she made it to several people including her parents, the school nurse, hospital personnel and law enforcement authorities. That she made those reports on more than one occasion. And I'm also going to allow the defendant to determine when it was that she has recanted the falseness of that report.
>
> But as to the details and the particulars of what the report was, who it was against, any of those kinds of things, I think they are just so collateral and so beyond the scope of this trial, and I also think that they would sidetrack the jury into what the State has called a mini-trial. And I don't think that's proper cross-examination.
>
> So just to say that again. There was a report of rape. That it was false. [T]hat it was made to several different parties, the parents, the school nurse, the hospital, police officers or law enforcement officials. That it may have been made more than one time and that it was not recanted until now.

"[T]he scope of examination of witnesses at trial is a matter left largely to the discretion of the trial judge and no error will be recognized unless there is clear abuse of discretion." *Rodriguez v. State*, 191 Md. App. 196, 226 (2010) (quotation marks and citation omitted). Thus, a trial court's ruling that restricts witness impeachment by prior conduct will be overturned "only if the court exercised[d] discretion in an arbitrary or capricious manner or … act[ed] beyond the letter or reason of the law." *Thomas v. State*, 422 Md. 67, 73 (2011) (quotation marks and citation omitted).

The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant the right to confront witnesses against him or her, and the opportunity to cross-examine witnesses is central to that right. *Pantazes v. State*, 376 Md. 661, 680 (2003). "[T]he defendant's right to cross-examine witnesses includes the right to impeach credibility, to establish bias, interest or expose a motive to testify falsely." *Id.* (citations omitted). The right to cross-examination, however, is not unlimited, and the right to confrontation does not prevent a trial judge from imposing limits on cross-examination. *Id.* "[T]rial courts retain wide latitude in determining what evidence is material and relevant, and to that end, may limit, in their discretion, the extent to which a witness may be cross-examined for the purpose of showing bias." *Merzbacher v. State*, 346 Md. 391, 413 (1997) (citations omitted).

Appellant contends that, pursuant to *State v. Cox*, 298 Md. 173 (1983), he should have been permitted to establish that Zaidan "was capable of making a false report of the most serious nature against a loved one," by showing that she fabricated the details of the false report against her boyfriend at the time. In *Cox*, the trial court precluded the defendant, who was on trial for sexual assault, from impeaching the victim's testimony by introducing alleged prior false testimony given by the victim in a prior assault trial that she later recanted. 298 Md. at 179. In affirming this Court's decision that it was error for the trial court to exclude the prior testimony, the Court of Appeals addressed the common law rule regarding the use of prior bad acts to impeach a witness, which was later codified as Md. Rule 5–608(b). *Id.* The Court of Appeals explained that evidence of prior bad acts is permissible for impeachment where there is a reasonable factual basis for the question and

it is unlikely to obscure the issue on trial, but the party is bound by the witness's answers and may not inquire further. *Id*.

As codified, Maryland Rule 5-608(b) provides:

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

In *Pantazes v. State*, *supra*, the Court of Appeals reiterated that the inquiring party is bound by the witness's response and explained that "[t]his limitation is a safeguard intended to avoid dangers such as undue consumption of trial time, confusion of the issues, and unfair surprise." 376 Md. at 683.

In the instant case, the trial court complied with Md. Rule 5-608(b) and the parameters set forth by the Court of Appeals in *Cox*, *supra*, in permitting defense counsel to question Zaidan about the prior false allegation, but limiting cross-examination to the fact that the allegation was made, to whom it was made and that it was not recanted until appellant's trial, so as to keep the jury from getting "sidetracked." Moreover, appellant suffered no actual prejudice because appellant's concern that the jury be aware that Zaidan "was capable of making a false report against a loved one," was resolved when Zaidan admitted on re-direct examination that she made the allegation against a former boyfriend. Accordingly, the trial court did not abuse its discretion in limiting the scope of defense counsel's impeachment of Zaidan.

IV.

Exclusion of Appellant's Facebook[2] Message

Appellant claims that the trial court erred in excluding evidence of a Facebook message from appellant to Alex Oradei ("Alex") that defense counsel sought to introduce as a prior consistent statement or, in the alternative, for rehabilitation following appellant's testimony. The State counters that appellant's Facebook message failed to qualify as an admissible prior consistent statement because the State did not "open the door" to the issue, and appellant did not send the Facebook message to Alex prior to his motive to fabricate, as required by Md. Rule 5-802.1(b). In addition, the State argues that appellant's Facebook message was inadmissible under Md. Rule 5-616(c)(2) because it "did not detract from the alleged impeachment" of appellant.

Appellant testified on direct examination:

> **[DEFENSE COUNSEL]:** Okay and I'm going to direct you back to Defense Exhibit 3 and you said you just referred to a text from you to Katia?
>
> **[APPELLANT]:** Yes.
>
> **[DEFENSE COUNSEL]:** And what does it say?
>
> **[APPELLANT]:** I'm sorry I have to leave. Tell Alex I love him a lot.

[2] Facebook is a social networking website that allows users to create online profiles to share information about themselves with other Facebook users. *Sublet v. State*, 442 Md. 632, 637 n.5 (2015) (citing Joshua Briones & Ana Tagvoryan, *Social Media as Evidence* 1:5:1:1 (2013)). Facebook "messages" may be sent to any Facebook user and are only visible to the recipient of the message. 442 Md. at 638 n.10.

[DEFENSE COUNSEL]: Okay, and when you say Alex who are you referring to?

[APPELLANT]: My best friend.

[DEFENSE COUNSEL]: Okay, if you highlight that, okay. So you said I'm sorry I have to leave. Tell Alex I love him a lot. What does that mean? What did you mean by it?

[APPELLANT]: That I was going to go to the police and I didn't know what was going to happen.

On cross-examination, the prosecutor questioned appellant about his text message to Katia as follows:

[PROSECUTOR]: Now and during the time that you are at your mom's you text your friend Katia.

[APPELLANT]: Yes.

[PROSECUTOR]: Telling her I need to leave.

[APPELLANT]: Yes so I can take her to the police.

[PROSECUTOR]: Well you didn't say that. You said I need to leave, right?

[APPELLANT]: Whatever it's intended that I was leaving for the police.

[PROSCUTOR]: But that's not what you texted Katia, correct? I'll show you what's been marked as Defense Exhibit No. 3 which is actually a replica. What you say is I'm sorry I have to leave. Tell Alex I loved him a lot, correct?

[APPELLANT]: Yes.

[PROSCUTOR]: Not I'm going to the police station.

[APPELLANT]: But that's what I meant.

Following the above colloquy, the defense sought to introduce appellant's Facebook message to Alex that read, "bye, I'll miss you, turning myself in for self-defense."

The trial court found that appellant's text message to Katia did not "open[] the door" to the introduction of appellant's Facebook message to Alex. The trial court further found that appellant's Facebook message to Alex did not qualify as a prior consistent statement under either Md. Rule 5-802.1(b) or Md. Rule 5-616(c)(2). "[P]rior out-of-court statements by a witness that are consistent with the witness's trial testimony, generally, are not admissible to bolster the credibility of the witness." *Thomas v. State*, 429 Md. 85, 96 (2012) (citation omitted). There are two exceptions to the general rule. "A witness's prior consistent statement may be admitted (1) under Md. Rule 5–802.1(b), 'to rebut an express or implied charge against the [witness] of fabrication, or improper influence or motive;' and/or (2) under Md. Rule 5–616(c)(2), if the statement 'having been made detracts from the impeachment[.]'" *Anderson v. State*, 420 Md. 554, 567 (2011).

As a threshold matter, however, these rules become applicable only once the party examining the witness on cross-examination "open[s] the door" to the evidence that was otherwise not relevant or admissible. *Thomas*, 429 Md. at 96-97. Appellant contends that the trial court erred in finding that the State did not "open the door" to the admission of appellant's Facebook message to Alex. We agree. Appellant testified on direct examination that in writing the text message to Katia, that read, "I'm sorry I have to leave. Tell Alex I loved him a lot," he meant that he had to leave to go to the police. On cross-examination, the State sought to impeach appellant by pointing out that, despite what he now claims that he meant, he did not write in the text message to Katia *that he was going to the police*, thereby attempting to demonstrate that appellant's explanation of the meaning of the text message at trial was fabricated.

But even if the State's cross-examination of appellant "opened the door" by attempting to impeach his explanation of the text message to Katia, the Facebook message to Alex was not admissible as substantive evidence under Md. Rule 5-802.1(b) because appellant did not send the message prior to his motive to fabricate.

Prior consistent statements that were made when the declarant had an alleged motive to falsify are not admissible under Md. Rule 5-802.1 (b). *Thomas*, 429 Md. at 105. "[W]hen the witness is obviously under investigation or has been arrested when the statements were made, [the witness's prior statements] are generally inadmissible because the motive to fabricate has already arisen." *Id.* at 103; *accord Tome v. United States*, 513 U.S. 150, 158 (1995). *See also* 2 *McCormick on Evidence* § 251, at 152 (Kenneth S. Brown ed., 6th ed. 2006) (collecting cases).

Appellant sent the Facebook message to Alex in the hours following the murder. Appellant testified that he fled to his mother's house and that he spoke to his parents about what he should do before deciding to go to the police. Appellant knew that he was under investigation, and presumably, that his arrest was imminent. Thus, at the time that appellant sent the Facebook message to Alex, he had a motive to fabricate.

The trial court also found that appellant's Facebook message to Alex failed to qualify as a statement offered as non-hearsay rehabilitation under Md. Rule 5-616(c)(2) because 1) the Facebook message "arose at a time well after when any motivation to create a fabrication or [sic] would have occurred," and 2) the message did not detract from the impeachment as required by Md. Rule 5-616(c)(2). Contrary to the trial court's findings, appellant's Facebook message to Alex likely would have detracted from any impeachment

of appellant because it supported appellant's claim that he was going to the police to turn himself in for self-defense. Additionally, a finding that the statement was made prior to the time of any motive to fabricate is not an element under Md. Rule 5-616(c)(2). But even if appellant's Facebook message to Alex was admissible under Md. Rule 5-616(c)(2), any error in excluding it was harmless because the message would only be admissible for rehabilitation, and not as substantive evidence. *See Holmes v. State*, 350 Md. 412, 427 (1998)(noting that under Md. Rule 5–616(c)(2), a witness's prior consistent statements are admissible, not for their truth, but for nonhearsay purposes to rehabilitate the witness's credibility).

Ordinarily, the admissibility of evidence is within the sound discretion of the trial court. *Dyson v. State*, 163 Md. App. 363, 373 (2005) (citation omitted). "We will not disturb a trial court's evidentiary ruling absent error or a clear abuse of discretion." *Id.* (citation omitted). But "[o]nce it has been determined that error was committed, reversal is required unless the error did not influence the verdict; the error is harmless only if it did not play any role in the jury's verdict." *Bellamy v. State*, 403 Md. 308, 332 (2008) (citation omitted). *See also Dionas v. State*, 436 Md. 97, 108 (2013)(an error is harmless when a reviewing court is "satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict")(quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). Error for appellate purposes "may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling." *Clark v. State*, 140 Md. App. 540, 564-65 (2001)(citing Md. Rule 5-103 (a)).

Although the trial court erred in determining that the State had not "opened the door" to the admission of appellant's Facebook message to Alex, and in determining that it was not admissible under Md. Rule 5–616(c)(2), these errors were harmless beyond a reasonable doubt. Appellant testified that he told police at the time of his arrest that he "was trying to get here earlier because [he] . . . was attacked," and that he may have "injured somebody badly," but that "all [he] did was self-defense."

As the State points out, under Md. Rule 5-616(c)(2), appellant's Facebook message to Alex would have been admissible only for the purpose of rehabilitating appellant, not as substantive evidence that appellant intended to turn himself in to the police. In fact, appellant had introduced substantive evidence during his testimony that he intended to turn himself in to the police, specifically that he and his mother drove to the Gaithersburg Police Station, but it was closed, and they returned to appellant's mother's apartment. Appellant also testified that he was preparing to drive to his father's house so that his father could accompany him to the police station when he was arrested. Thus, any error in failing to admit appellant's Facebook message to Alex for rehabilitation purposes was harmless beyond a reasonable doubt in light of the substantive evidence that appellant introduced demonstrating his efforts to go to the police and turn himself in.

V.

Appellant's Discharge of Counsel and Request for a Continuance

On September 8, 2015, three months after the jury had returned its verdict, appellant's private counsel moved to withdraw on the grounds that there had been a breakdown in the attorney-client relationship. The court allowed the motion to withdraw

and postponed the sentencing hearing so that appellant could obtain new counsel. At a status conference on September 23, 2015, appellant reported to the court that he was not represented by counsel, and that he had not yet decided whether he would be represented by private counsel or a public defender. At a status conference on October 23, 2015, Brian Shefferman, District Public Defender for Montgomery County ("public defender"), appeared on behalf of appellant and addressed various *pro se* motions that appellant had filed. The court set a deadline of November 13, 2015 for the filing of any further motions and scheduled appellant's sentencing for December 9, 2015.

A. Appellant's Request to Discharge Counsel

On December 9, 2015, appellant appeared for sentencing with his public defender. The sentencing court informed the parties that it had received a letter from appellant dated November 27, 2015, requesting that he be permitted to discharge his public defender and represent himself. Appellant did not inform his public defender that he had sent the November 27 letter to the court, nor did he discuss the matter with his public defender during their meeting in the days preceding the sentencing.

Appellant explained to the sentencing court that he wanted to discharge his public defender because he had failed to spend "any time with [him] to prepare for sentencing" and he failed to arrange for a psychiatric evaluation of appellant. Appellant indicated that his public defender also failed to file "motions" that appellant requested and failed to provide him with the State's sentencing memorandum and the victim impact statements. Appellant further claimed that he thought that his public defender was "taking drugs." The

sentencing court considered appellant's request, and after conducting a voir dire of appellant, it determined that appellant was competent, and that he was making the decision to discharge his assigned public defender knowingly and voluntarily.

Appellant claims that the sentencing court violated Md. Rule 4-215, which he contends applied to the discharge of his public defender post-trial, because the sentencing court failed to make a finding that appellant's request to discharge his public defender and to continue the matter was meritorious, as required by the Rule. We disagree that Rule 4-215 applied to appellant's post-trial request to discharge his public defender. In considering the "precise rubric" of Maryland Rule 4–215(e), this Court has explained:

> [Md. Rule 4-215(e)'s] prescribed rigid drill for considering the requested discharge of counsel only applies pretrial. Once meaningful trial proceedings have commenced, the decision of whether to permit the discharge of counsel is entrusted to the discretion of the trial judge.

Barkley v. State, 219 Md. App. 137, 162 (2014).

Rule 4-215 no longer applies once trial begins, although the court must still adhere to constitutional standards. *State v. Brown*, 342 Md. 404, 426 (1996). Specifically, the trial court must determine the reason for the requested discharge, and conduct an inquiry to assess whether the defendant's reason for dismissal of counsel justifies any resulting disruption before deciding whether dismissal should be allowed. *Id.* at 428. Once trial has begun, the trial court's decision to permit appellant to discharge counsel is reviewed under an abuse of discretion standard. *Id*. at 428-29.

Here, the court inquired as to the reasons underlying appellant's request to discharge his public defender and provided him with an opportunity to explain those reasons. The court inquired as to whether appellant had made any efforts to obtain private counsel for sentencing, and appellant responded that he discussed the matter with his family, but that no progress had been made in obtaining private counsel. The court also noted that appellant had discussed the decision to discharge his assigned public defender with his father and step-mother, who were present in the courtroom. Appellant stated that he understood the consequences of discharging his public defender and representing himself, and that he accepted those consequences.

Because appellant's trial had concluded, and sentencing was the only task that remained, permitting appellant to discharge his public defender was minimally disruptive to the proceedings. Based on the record, it is evident that the trial court considered the reasons given by appellant for discharging his public defender, and that the court determined that appellant made the request to discharge his public defender knowingly and voluntarily. Accordingly, the court did not abuse its discretion in granting appellant's request to discharge his public defender.

B. Appellant's Request for a Continuance

Appellant also claims that the sentencing court abused its discretion in denying his request for a continuance of the sentencing to permit him to obtain successor counsel and to prepare for the sentencing. The State argues that the court did not abuse its discretion in denying appellant's request for a continuance because appellant failed to indicate what information he would have presented had the sentencing hearing been continued.

Moreover, the State argues that appellant did not request a continuance in order to obtain new counsel, but only to prepare for sentencing, and therefore, he makes the argument that he needed more time to obtain counsel for the first time on appeal. In reply, appellant asserts that he believed that the trial court was not going to postpone the sentencing for any reason, but that he indicated to the court that he only wished to go forward "if no other option [was] available, which I don't think one is, other than that as being provided to me."

Once his public defender was discharged, appellant requested a continuance "for the fact that I haven't had adequate time to prepare for sentencing, only recently realizing that counsel isn't doing anything and I haven't had a chance to read the State's memorandum, but then again you are giving me that opportunity now." The court denied appellant's request for a continuance, but recessed briefly to provide appellant an opportunity to review the State's sentencing memorandum and the victim impact statements. When the court reconvened, appellant indicated that he had reviewed the presentence investigation report as well as the sentencing memorandum and most of the victim impact statements. Appellant presented legal argument that he had prepared, and he called five (5) witnesses who testified on his behalf. Appellant also provided the court with his institutional report that indicated that he had no disciplinary actions and a "multitude of certificates" that he obtained while incarcerated.

Appellant now claims that he was "deprived of the opportunity to discuss with counsel his allocution and to consider with the advice of counsel whether placing the blame on a third party for the cause of death was likely to be an effective and persuasive sentencing strategy." Appellant also maintains that if he had been granted a continuance,

he would have undergone a mental health examination which would have included information about mental health issues and diagnoses, substance abuse history (which was relevant because [he] used alcohol and drugs the night of the incident and personal characteristics of [appellant]."

The decision whether to grant or deny a request for a continuance is within the sound discretion of the trial judge. *Ware v. State*, 360 Md. 650, 706 (2000). *See also Jones v. State*, 403 Md. 267, 300 (2008)(holding that trial court did not abuse its discretion in denying defendant's motion for a continuance to obtain counsel after the defendant expressly waived the right to counsel).

Assuming, without deciding, that appellant requested a continuance in order to both obtain counsel and prepare for sentencing, his arguments that the court abused its discretion in denying his request for a continuance are unpersuasive. Before discharging his public defender, the court advised appellant that he had been found guilty of first-degree murder, that the maximum penalty was life in prison, and that his public defender was specially trained to provide assistance in sentencing proceedings. Appellant responded that he understood the penalty that he faced as well as the consequences of discharging his public defender and representing himself, and that he accepted those consequences. There was nothing in the record to indicate that appellant suffered from a mental disorder or that he was incompetent. And although his public defender indicated that he would attempt to schedule a mental health examination for appellant but failed to do so, there was nothing in the record showing that a mental health examination was required, or that it would have otherwise assisted the court in sentencing beyond what was contained in appellant's

presentence investigation report. We perceive no abuse of discretion in the court's denial of appellant's request for a continuance of his sentencing.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.