UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2397

September Term, 2014

LUIS ADOLPHO GUARDADO

v.

STATE OF MARYLAND

Meredith,
Hotten,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: October 14, 2015

After a trial, a jury in the Circuit Court for Montgomery County convicted Luis Adolpho Guardado of second-degree rape. Neither he nor his victim denied that they engaged in sexual intercourse on February 13, 2013—the case turned on whether the victim consented to it. To support his theory that the victim had accused him falsely for personal benefit, Mr. Guardado hoped to prove that she concocted this rape allegation in order to cure her unlawful immigration status. Mr. Guardado argues that the trial court improperly precluded him from questioning the victim about her knowledge of special immigration treatment for crime victims, and that the trial court erred in declining to propound an identification instruction. We find no error in either decision and affirm.

I. BACKGROUND

Mr. Guardado and the victim, Ms. V., were childhood friends in El Salvador. Mr. Guardado met Ms. V. through his mother, who was in a relationship with Ms. V.'s father. Ms. V. moved to the United States in 2003, and Mr. Guardado arrived in 2004 or 2005. The two began dating in 2008, lived together through 2009, and broke up in 2010. They dated again in 2011 and 2012. After their 2012 break-up, Ms. V. testified that Mr. Guardado adamantly pursued seeing her again.

During their relationship, Mr. Guardado took sexually explicit photographs of Ms. V. and videos of their sexual relations, and threatened to disseminate them after their 2012 break-up. Mr. Guardado eventually agreed to turn his memory card containing the sexually explicit material over to her, and they planned to meet on February 13, 2013 in a parking lot to make the exchange. When Ms. V. arrived, Mr. Guardado told her that his phone was at his house, and asked her to ride with him to his house to retrieve the phone**.** She agreed

and went with him to the basement, at which point Mr. Guardado began charging his phone and again promised to delete the material. But that's not what happened: as Ms. V. sat on a bed and waited, Mr. Guardado positioned himself in front of her, pinned her down, removed her shorts, and forcibly engaged in vaginal intercourse with her.

Afterward, Ms. V. said that she was very upset and tried to enter the bathroom, but Mr. Guardado blocked her and asked for forgiveness. She then went to the kitchen to grab a knife in order to cut herself, but Mr. Guardado took the knife from her. Mr. Guardado then agreed to drive Ms. V. to her sister's house. She testified that, while en route, Mr. Guardado told her to "say a black guy had done it, because if [she] didn't do that, something would happen to her father." She understood this statement as a threat that Mr. Guardado could have her father harmed (Mr. Guardado had paid a woman in El Salvador to protect his mother and Ms. V.'s father). Mr. Guardado then dropped Ms. V. in a parking lot near her sister's house.

Ms. V. then went to her sister's house, and her sister called 911. Ms. V. told the responding officers that she "had been walking towards my sister's house and that a black guy with his face covered up by a black mask pointed a gun at me, [and] told me to get in his black car," and that the "black man" drove her to a recreation center and raped her. Ms. V. shared this same story with her husband.

That same day, Ms. V. went to a local hospital for an examination. She told a similar story to the hospital staff, except this time she said that the "black man" raped her in the back seat of his car and that she exited the car upon hearing sirens. Ms. V. testified that the following day, she told her other sister that Mr. Guardado was her assailant. Several

days after the incident, Ms. V. met with Detective H. Reyes,[1] who confronted her with video surveillance footage that did not match Ms. V.'s story about being picked up by a "black man."

At trial, the State introduced June 2013 text messages between Mr. Guardado and Ms. V. in which Mr. Guardado told her that he wanted to see her again and Ms. V. told him to leave her alone. Ms. V. promised to meet with Mr. Guardado if that would make him stop bothering her. On June 19, Mr. Guardado texted Ms. V., "I know that I made a big mistake with you, but you don't have to ignore me."

On August 1, 2013, Ms. V. wore a body wire while meeting with Mr. Guardado in a park. During the meeting, Ms. V. resisted Mr. Guardado's persistent attempts to kiss and hug her. The officer who assisted with and monitored the body wire recalled Ms. V. keeping to herself and seeming nervous during the 45-minute meeting, while Mr. Guardado gestured often and seemed upset. At one point, Ms. V. told Mr. Guardado that "after what you did to me, I'm a bit afraid," to which he said, "[o]h please, don't act like that."

On January 29, 2014, two detectives interviewed Mr. Guardado, and the translated transcript was admitted into evidence. Mr. Guardado told the detectives that he had consensual sex with Ms. V. on the day of the alleged rape, that he erased many of the sexually explicit photographs from his phone, and that he never threatened to disseminate them. Mr. Guardado also stated that after the consensual sex, Ms. V. was upset that Mr. Guardado did not want to be in a relationship with her. He recounted that he met her later

[1] The record doesn't include the Detective's full first name.

at a park, at which time he apologized to her for verbally insulting her on a prior occasion. We will discuss additional facts as they are relevant to particular issues.

After a three-day trial, a jury convicted Mr. Guardado of second-degree rape. The court sentenced him to twenty years of incarceration, with all but nine years suspended, and five years of probation. Mr. Guardado filed a timely appeal.

II. DISCUSSION

Mr. Guardado argues that the circuit court committed two errors that, in his view, require reversal.[2] *First*, he contends that the court erred in preventing him from cross-examining Ms. V. about her immigration status, which prevented him from arguing that she had accused him falsely in order to obtain more favorable immigration status. *Second*, he contends that the court erred in refusing to include a pattern jury instruction regarding the identification of the defendant as the perpetrator. We disagree as to both.

A. The Trial Judge Properly Limited The Scope Of Defense Counsel's Cross-Examination.

On cross-examination, defense counsel sought to ask Ms. V. if, on the date of the crime, it "was [her] understanding that if [she] were the victim of a crime, that that would allow [her] to remain in the United States longer?" This question, and others he would

[2] Mr. Guardado's brief phrased his Questions Presented as follows:

1. Did the trial court err in limiting defense counsel's cross-examination?

2. Did the trial court err in not giving Maryland Criminal Pattern Jury Instruction 3:30 (identification of defendant)?

have asked, were relevant, he proffered, to establish Ms. V.'s motive to characterize her sexual contact with Mr. Guardado as a crime, and her as a victim:

> Ms. V. held an immigration status short of citizenship or permanent resident, and she was in danger of being forced to exit the United States now or in the future, so she fabricated a rape story with the intent to remain in the United States. She chose to blame the rape on an unidentifiable masked black man in a black car. The police immediately undermined her story because she claimed the rape happened in a particular parking lot, however the video surveillance of the lot and surrounding area revealed that no black car ever entered that zone on February 13, 2013. Caught in a lie, "she ha[d] to come up with a second lie once, once the first one is, is proven false by the detective. So she blame[d] her ex-boyfriend."

The State objected on relevance and foundation grounds: "I don't know that there's any basis for that question. There's no evidence that at that time she knew anything about whether or not, it's obviously prejudicial to her and there's not a . . . good faith basis for asking that question." The trial judge sustained the State's objection.

Mr. Guardado argues on appeal that the court committed reversible error in doing so. He explains that he wanted to "explore whether bringing charges against Mr. Guardado might affect Ms. [V]'s immigration status," and that this question "had a direct bearing on [her] credibility." The State responds that Mr. Guardado "had no factual basis for this line of inquiry."[3] We agree with the State.

[3] The State also argues that "the probative value of the inquiry was substantially outweighed by the danger of harassment, undue prejudice, or confusion" and, alternatively, that any error was harmless. We need not address these arguments in detail in light of our decision on the foundation issue, but we agree with the State in this regard as well, and note that "[i]mmigration status alone does not reflect upon an individual's character, and is thus not admissible for impeachment purposes." *Ayala v. Lee*, 215 Md. App. 457, 480 (2013).

The Sixth Amendment, as echoed in Article 21 of the Maryland Declaration of Rights, guarantees criminal defendants the right to confront the witnesses against them. U.S. Const. amend. VI; Md. Const. art. 21, Declaration of Rights. The "right of confrontation includes the right to cross-examine a witness about matters which affect the witness's bias, interest or motive to testify falsely." *Carrero-Vasquez v. State*, 210 Md. App. 504, 519 (2013) (quoting *Marshall v. State*, 346 Md. 186, 192 (1997)). But although a trial judge should allow a defendant "wide latitude" to inquire as to bias or prejudice, trial judges also retain "wide latitude . . . to impose reasonable limits on such cross-examination" to combat dangers of harassment, confusion of the issues, repetitive questioning, or interrogation that is only marginally relevant. *Smallwood v. State*, 320 Md. 300, 307-08 (1990) (citations omitted) (questioning shall not be permitted to "stray into collateral matters which would obscure the trial issues" and confuse the jury).

Constitutional confrontation requires a trial court to allow a defendant a "threshold level of inquiry" that "expose[s] to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witnesses." *Peterson v. State*, 444 Md. 105, No. 13, Sept. Term 2014 (filed July 27, 2015), slip op. at 12 (citations omitted) ("To the extent that Mr. Peterson is suggesting that we apply a de novo standard of review to each individual decision a trial court makes to limit cross-examination when a Confrontation Clause challenge is raised, we reject that suggestion."). "In a criminal jury trial, [impeachment questions] should only be prohibited if (1) there is no factual foundation for such an inquiry in the presence of the jury, or (2) the probative value of such an inquiry is substantially outweighed by the danger of undue

prejudice or confusion." *Calloway v. State*, 414 Md. 616, 638 (2010) (citation omitted). We review judicially imposed limits on cross-examination for abuse of discretion, viewing the cumulative result of the trial judge's decisions to determine whether the defendant's right to confrontation was honored. *Peterson*, slip op. at 14.

At the threshold, then, a defendant must lay a factual foundation for a line of inquiry before he is entitled to confront a witness with it. In *Calloway,* for example, the evidence revealed *first* that defendant's cellmate claimed that the defendant made inculpatory statements and admissions while they were living together; *second*, that charges pending against the cellmate were *nolle prossed*; and *third*, that the cellmate was never charged with violating his probation for fighting another inmate while in jail. 414 Md. at 619, 630, 637. At trial, the defendant was barred from examining the cellmate's motive for testifying, whether it "was from the heart" as he claimed, or because he expected to receive a benefit in exchange, as the defendant claimed. *Id.* at 631. The Court of Appeals reversed, and held that whether the cellmate contacted the prosecutor "in the hope of being released from detention" or whether the cellmate testified at trial "in the hope of avoiding a violation of probation charge" should have been issues for the jury. *Id.* at 637. And importantly, the Court of Appeals found a "solid factual foundation for an inquiry into [the cellmate]'s self interest." *Id.* at 639; *see also Martinez v. State*, 416 Md. 418, 431 (2010) (finding a factual foundation where, just six days before his testimony, the State *nolle prossed* charges against the eyewitness and allowed his incarceration pending his testimony).

Mr. Guardado points us to *Carrero-Vasquez v. State*, a case in which we found that the trial judge had erred in limiting cross-examination about the immigration consequences

the State's key witness faced if she were convicted of possessing the stolen handgun at issue. 210 Md. App. 504, 527-28 (2013). Unlike this case, though, the witness in *Carrero-Vasquez* already had testified that she was in the United States illegally and that she was aware of her potential exposure. *Id.* Put another way, the foundation had been laid. In addition, we recognized the potential for prejudicial sideshows in situations where the foundation cannot be laid easily: "The defendant's proper goal may be achievable by the propounding of just a few basic questions to the witness. The court . . . is not required to allow a wholesale fishing expedition by defense counsel that, in effect, puts the witness on trial through unanswerable accusations." *Id.* at 529 (quoting *Gray v. State*, 368 Md. 529, 582 (2002) (Wilner, J., concurring)).

The trial court was right to view the defense's question about Ms. V.'s "understanding" as the first step onto a fishing boat rather than the first brick in a firm foundation. There was no dispute, and indeed Ms. V. had testified, that she was born in El Salvador and moved to the United States in 2003. But the defense offered no evidence that Ms. V. lacked stable immigration status, that she could be eligible for some sort of favorable immigration treatment as a crime victim,[4] or, if it exists, that she was aware of that program at the time she identified Mr. Guardado as her assailant. The outcome might be different if the court had prevented Mr. Guardado from cross-examining Ms. V. with

[4] In his brief in this Court, Mr. Guardado describes the Department of Homeland Security's U visa program: "The U nonimmigrant status (U visa) is set aside for victims of certain crimes who have suffered mental or physical abuse and are helpful to law enforcement or government officials in the investigation or prosecution of criminal activity." None of this, however, was before the circuit court, nor did the defense attempt to proffer it after the court sustained the State's objection.

information he had in hand, but it is not appropriate for counsel to invite the jury to speculate about Ms. V.'s motivation:

> "[In] suggesting that a witness is biased or has a motive to testify falsely, there must be a factual foundation for the question. The pending charges are not the impeachment evidence; rather, they are part of the factual predicate for asking the permitted question about bias or motive. But the existence of pending charges alone is not a sufficient predicate for such a question . . . . [a]nd unlike *Calloway*, [or] *Martinez*, . . ., there was no other direct evidence (e.g., an agreement with the prosecution to resolve charges in return for testimony) or circumstantial evidence (e.g., dismissal of charges, nolle pros, decision not to charge, postponement of a disposition proceeding) that, in conjunction with the pending charges, would complete the factual foundation to support a question whether [the witness] expected some kind of leniency from the prosecution for his testimony. The defense . . . never asserted any connection between that agreement and Mr. Peterson's case, or even the pending charges that [the witness] faced in Maryland."

Peterson, slip op. at 35 (citations omitted).[5]

[5] The out-of-state cases cited in the State's brief made the same distinction in the specific context of victims/witnesses alleged to be motivated by U visas. In *State v. Del Real-Galvez*, our Oregon counterpart court found reversible error in a trial court's refusal to allow questioning about the U visa where there was a sufficient factual foundation. 346 P.3d 1289, 1293 (Ore. 2015). There, the defendant presented evidence that the victim's mother had applied for a U visa on the grounds of her daughter's alleged abuse, and that the daughter/victim knew of her mother's immigration status and that alleging sexual abuse would allow her mother to obtain the U visa. *Id.* In contrast, the Supreme Court of Arizona in *State v. Buccheri-Bianca*, 312 P.3d 123 (Ariz. 2013), held that the trial court had properly excluded evidence of the victim's immigration status for lack of foundational evidence that the victim had an unauthorized immigration status, or knew about a U visa. The victim in that case applied for a U visa a year after reporting the molestation, and the court found the length of time between the victim's first report of molestation and her visa application was too long for the application to be relevant to her accusation. *Id.* at 328.

B. The Trial Court Did Not Abuse Its Discretion In Declining To Provide The Identification Instruction.

Maryland Criminal Pattern Jury Instruction 3:30 (the "identification instruction"), lists a series of factors for the jury to consider when evaluating identification testimony, assures the jury that single-witness identification is sufficient to convict a defendant, places the burden of proof on the State, and advises the jury to examine the identification with "great care." MPCJI-Cr 3:30; *Gunning v. State*, 347 Md. 332, 341 (1997). Mr. Guardado argues that Ms. V., the sole eyewitness to the alleged rape, equivocated in identifying her attacker, as evidenced by her changing stories, and that the court erred in refusing to give the identification instruction. The State responds that the identification instruction was not relevant and that any questions relating to identification would be covered by other instructions. We agree with the State, both that this particular identification instruction was not required in this case and that any aspects relating to identification were sufficiently addressed by other instructions.

Although there is no uniform national approach to the question, our cases vest the trial court with the discretion to determine whether the identification instruction is appropriate:

> "We do not find instructions on such issues to be always mandatory, but neither do we consider them never necessary nor *per se* improper . . . . We instead recognize that an identification instruction may be appropriate and necessary in certain instances, but the matter is addressed to the sound discretion of the trial judge."

Gunning, 347 Md. at 348 (1997). We consider whether (1) "the requested instruction was a correct statement of the law"; (2) the instruction "was applicable under the facts of the

case"; and (3) "it was fairly covered in the instructions actually given." *Bazzle v. State*, 426 Md. 541, 549 (2012); *Malaska v. State*, 216 Md. App. 492, 517 (2014), *cert. denied*, 439 Md. 696 (2014), 135 S. Ct. 1162 (2015). There is no dispute that Mr. Guardado's rendition of MPJI-Cr 3:30 constituted a correct statement of law, but Mr. Guardado's request fails both of the two remaining tests.

First, an instruction is "applicable under the facts of a case" when the defendant produces "some evidence . . . [that] supports the requested instruction. Some evidence is not strictured by the test of a specific standard. It calls for no more than what it says—'some,' as that word is understood in common, everyday usage." *Bazzle*, 426 Md. at 551. The defendant carries the burden of pointing to some evidence related to the requested instruction that is sufficient to create a jury issue with respect to that instruction. *Id.*

Mr. Guardado points to Ms. V.'s varied accounts of the assault as evidence of a dispute about her identification: first she told her sister, her husband, the hospital staff, and the police that "a black man with his face covered up by a black mask" was her rapist, then identified Mr. Guardado only later. But there is no dispute that on February 13, 2013, Mr. Guardado brought Ms. V. to his house, where sexual intercourse occurred, and Ms. V. admitted that (and explained why) there was in fact no "black man." This left the jury only to decide whether their sexual encounter was consensual. The defense had the opportunity to cross-examine Ms. V. regarding her initial, fabricated identification of the "black man," a revelation that relates to her credibility as a witness rather than any uncertainty about whether Mr. Guardado was the man with whom she had the sexual encounter. There was,

therefore, no dispute over her identification of Mr. Guardado as her assailant that justified the identification instruction.

Second, and although the foregoing ends the inquiry, a jury instruction need not be given, regardless of its applicability and the desire of a party, if the substance of the instruction is fairly covered in another instruction. "The court need not grant a requested instruction if the matter is fairly covered by instructions actually given." Md. Rule 4-325(c); *see also England v. State*, 274 Md. 264, 275-76 (1975); *General v. State*, 367 Md. 475, 487 (2002). And in this case, the substance of the identification instruction relating to Mr. Guardado's false accusation defense was covered more than adequately by:

1. instructions regarding the credibility of witnesses;

   > [THE COURT]: "You [the jury] should consider . . . the accuracy of the witness's memory; . . . whether the witness's testimony was consistent; . . . whether and the extent to which the witness's testimony in court differed from statements made by the witness on any previous occasion . . . ."

2. an instruction charging the jury with deciding whether to believe any or all of Ms. V.'s testimony; and

   > [THE COURT]: "It is for you [the jury] to decide whether to believe the trial testimony of Nancy Vasquez in whole or in part."

3. a burden-of-proof instruction, which informed the jury that the State had the burden of proving all elements of each offense charged.

The jury heard testimony from both parties that Ms. V. changed her story, and she admitted as much. The jury heard Mr. Guardado's theory and Ms. V.'s explanation. The

court delivered multiple instructions that alerted the jury to the changed story, advised the jury of how to examine witness credibility, and reminded the jury that the State bears the burden of proof. We see no abuse of the trial court's discretion in its decision not to propound the identification instruction under these circumstances.

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