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Brief of Appellant, Mark Andrew Matthews v. State of Maryland, No. 327

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In the Court of Special Appeals of Maryland
September Term, 2016

No. 327

MARK ANDREW MATTHEWS,
Appellant,

v.

STATE OF MARYLAND,
Appellee.

Appeal from the Circuit Court for Montgomery County
(The Honorable Nelson W. Rupp, presiding)

BRIEF OF APPELLANT MARK A. MATTHEWS

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STATEMENT OF THE CASE

On October 14–16, 2015, Mark Matthews was tried in the Circuit Court for Montgomery County for sexual offense in the second degree (Count I), and sexual offense in the fourth degree (Count II). Case No.1263769. The jury found Mr. Matthews not guilty as to sexual offense in the second degree, and guilty as to sexual offense in the fourth degree.[1] ($T_{6.}$ 5). Mr. Matthews was sentenced to 365 days, and received credit for the 365 days he had already served. ($T_{9.}$ 12). Mr. Matthews filed a timely notice of appeal to the Maryland Court of Special Appeals on April 8, 2016. This appeal follows.

[1] [1] Citations to the trial transcript are as follows:

- $T_{1.}$ = First hearing, Sept. 1, 2015;
- $T_{2.}$ = Second hearing, Sept. 8, 2015;
- $T_{3.}$ = Third hearing, Oct. 9, 2015;
- $T_{4.}$ = First day of trial, Oct. 14, 2015;
- $T_{5.}$ = Second day of trial, Oct. 15, 2015;
- $T_{6.}$ = Third day of trial, Oct 16, 2015;
- $T_{7.}$ = Fourth hearing, Mar. 24, 2016;
- $T_{8.}$ = Fifth hearing, Apr. 4, 2016; and
- $T_{9.}$ = Sentencing, Apr. 7. 2016.

QUESTIONS PRESENTED

I. Did the trial court err when it allowed government witness, Allison Stansbury, the purported victim in an unrelated case, to testify to the alleged prior bad act of Mr. Matthews?

II. Did the trial court err when it did not allow defense counsel to use Allison Stansbury's prior inconsistent statement to impeach her?

STATEMENT OF THE FACTS

In late 2015, Mary Hunkeler walked into Damascus Tattoo Company and asked if there was anyone available to tattoo her. (T_4. 135). The receptionist introduced Ms. Hunkeler to Mark A. Matthews, one of the tattoo artists at the shop. (T_4. 136). Ms. Hunkeler and Mr. Matthews sat down to discuss the tattoo design Ms. Hunkeler wanted. (T_4. 136). After looking at a few tattoo designs, Mr. Matthews told Ms. Hunkeler he would draw up a design and send her a rough outline of what the tattoo would look like. (T_4. 136). Ms. Hunkeler liked the design Mr. Matthews sent her, so she made an appointment for November 22, 2015. (T_4. 137).

Ms. Hunkeler wanted a large phoenix tattoo that would stretch from her right inner hip to her very inner thigh near her vagina. (T_4. 163, 173). Ms. Hunkeler and Mr. Matthews agreed on a price of $350 for the tattoo. ($T_4$. 137). Because the tattoo was so large and the location so sensitive, Mr. Matthews said the tattooing process would need to be split across two separate days. (T_4. 137). Mr. Matthews estimated the first day of the process would take around four hours. (T_4. 137).

On November 22, 2015, Ms. Hunkeler went to Damascus Tattoo for her scheduled appointment. (T_4. 138). She brought her boyfriend, Calvin DaSilva, to sit with her while Mr. Matthews worked. (T_4. 138). When Ms. Hunkeler arrived, she was brought to the room where Mr. Matthews would complete the tattoo. (T_4.

139). The room was small and had a door with a window on it. (T_4. 140-41). Given the size and location of the tattoo Ms. Hunkeler had chosen, she decided to wear a tee shirt and a bikini bottom for the tattooing process. (T_4. 139). Ms. Hunkeler was lying on the tattoo table, while her boyfriend, Mr. DaSilva, sat in a chair near her feet. Mr. Matthews sat to her side as he worked. (T_4. 140-41).

Mr. Matthews showed Ms. Hunkeler the final design and put a stencil of the tattoo on the location she specified so Ms. Hunkeler could decide if she wished to change anything about the design or location. (T_4. 139). She decided she did want to change the size and asked Mr. Matthews to make the tattoo even larger. (T_4. 140). He did as she requested, and then reapplied the new stencil. (T_4. 140).

Approximately 45 minutes before Mr. Matthews finished working, Mr. DaSilva announced that he had to leave to go to work. (T_4. 143). During the entire tattooing process, there was a camera crew at the studio, making a promotional video of Damascus Tattoos. (T_4. 166). In her later interview with police, Ms. Hunkeler said that someone, possibly a member of the camera crew, came in the room during the tattooing process and gave both she and Mr. Matthews a thumbs up. (T_4. 168). Mr. Matthews told her this was distracting and asked if she minded if he closed the door. (T_4. 168). Ms. Hunkeler told Mr. Matthews that she was "okay with it." (T_4. 169).

Ms. Hunkeler testified that at some point after the door closed, Mr. Matthews inappropriately touched her vagina for about twenty minutes and that he penetrated her with his finger continuously for about five minutes. (T_4. 144-45).

She also told police that his fingers were inside of her for thirty minutes. (T_4. 156). Ms. Hunkeler further testified that during the time she said Mr. Matthews was touching her inappropriately, he was also: wearing thick black gloves, using at least one hand to hold the tattoo gun, using at least one hand to reload the gun with ink periodically, using one or both hands to hold her skin taut as he was applying the tattoo, and using at least one hand to wipe the tattooed area clean of blood. (T_4. 169, 176-79). Ms. Hunkeler testified that during the alleged touching, Mr. Matthews did not say anything inappropriate to her, did not look her in the eye, did not breathe heavily, and did not acknowledge in any fashion that he was touching her in an inappropriate fashion. (T_4. 178).

During the tattoo process Ms. Hunkeler texted back and forth with her boyfriend, Mr. DaSilva, who had left to go to work. (T_4. 146). She sent several messages to him while the inappropriate touching allegedly occurred. (T_4. 160). She first wrote, "I feel violated." (T_4. 160). She next messaged him saying, "I can't really tell what he's doing because I'm in pain." (T_4. 160). She next wrote, "He's getting kind of close to fingering me." (T_4. 160). She next sent him a message saying that she thought she was "going to cry." (T_4. 160). Her final message was "He's done, I'm leaving." (T_4. 160).

As Mr. Matthews had initially estimated, the tattoo session lasted just over four hours. (T_4. 186). At the end of the session, Ms. Hunkeler paid Mr. Matthews in the room where she got the tattoo. (T_4. 151). She gave him the full amount of the tattoo, plus a $40 tip. ($T_4$. 172). Ms. Hunkeler then met her mom, Nancy

Hunkeler, in the lobby. (T_4. 151). The receptionist of the tattoo studio, Jocelyn Amoroso, testified that Ms. Hunkeler was acting normally, gave Mr. Matthews a large tip, and hugged Mr. Matthews before she left. (T_5. 131).

When Ms. Hunkeler got in her mother's car, she started crying and told her mother that Mr. Matthews' fingers were "at the crotch," but never penetrated her. (T_5. 11). Ms. Hunkeler called the police about two hours after she got home. (T_4. 191). She also subsequently sought psychological counseling, was diagnosed with post-traumatic stress disorder, and was prescribed medication. (T_4. 153-54). Testimony at trial revealed that Ms. Hunkeler had pre-existing mental health issues. (T_4. 183-84).

To bolster its case against Mark Matthews, the prosecution was allowed to call a second witness named Allison Stansbury. (T_5. 58). Ms. Stansbury testified that Mark Matthews had inappropriately touched her in a similar fashion while he tattooed her. (T_5. 58). Over defense counsel's objection, the court found Stansbury's testimony admissible as other bad acts evidence that demonstrated a common scheme or plan, motive, intent, opportunity, knowledge, absence of mistake, or accident. (T_5. 58).

Ms. Stansbury testified that she was tattooed by Mark Matthews twice. (T_5. 66). Ms. Stansbury was 19 or 20 when she got her first tattoo, which was a small teapot behind her ear. (T_5. 67). When Ms. Stansbury later decided to get a second tattoo, she returned to Mr. Matthews because she was pleased with his work from the first tattoo. (T_5. 66). Ms. Stansbury told the jury that during the second tattoo

session she brought her boyfriend, Kyle Logan, and his brother, Zack, to the appointment. (T_5. 76). Kyle Logan and Zack were in the room during the entire tattoo session, sitting an arm's distance of away from Stansbury. (T_5. 91-95). Throughout the tattoo there were also people walking by the room and poking their heads in. (T_5. 96). Nonetheless, it was still Ms. Stansbury's testimony that during the tattoo process, Mark Matthews touched her vagina for twenty minutes. (T_5. 103).

Ms. Stansbury did not say anything to Mr. Logan or Zack when this touching supposedly occurred. (T_5. 80). It was not until Ms. Stansbury got home from the appointment that she told Mr. Logan that she was not sure anything happened, but thought Mark Matthews might have touched her. (T_5. 80-81). When Ms. Stansbury was interviewed by police after the incident, Stansbury again confirmed that she "couldn't say" if Mr. Matthews ever penetrated her labia. (T_5. 90). Police also interviewed Kyle Logan after the alleged incident. (T_5. 123). He explained in a statement that Allison Stansbury told him that, "She was so conflicted about whether or not it had happened because, you know, where he was and where the tattoo was located." (T_5. 123). Logan further explained Stansbury told him, "the tattoo was in a spot that, you know, where she had thought that maybe he had accidently touched her." (T_5. 123).

During Mark Matthews' trial, Ms. Stansbury had become much more certain of her claim. (T_5. 81). She told Mr. Matthews' jury that the inappropriate contact "definitely happened." (T_5. 81). Defense counsel attempted to impeach

Ms. Stansbury's testimony using the statements she made to Mr. Logan. ($T_{5.}$ 123). But, the trial judge did not allow defense counsel to cross-examine Ms. Stansbury with her prior inconsistent statements. ($T_{5.}$ 83). The defense also sought to impeach Stansbury's testimony by calling Kyle Logan as a witness to tell the jury what Stansbury had previously told him. ($T_{5.}$ 122). The court refused to allow Mr. Logan to be called. ($T_{5.}$ 126).

At the close of the evidence, the jury found Mr. Matthews guilty of a fourth degree sex offense against Ms. Hunkeler. ($T_{6.}$ 5).

ARGUMENT

I. ALLISON STANSBURY, THE PURPORTED VICTIM IN AN UNRELATED CASE, SHOULD NOT HAVE BEEN PERMITTED TO TESTIFY ABOUT MARK MATTHEWS' ALLEGED PRIOR BAD ACT BECAUSE THE UNFAIR PREJUDICE OF HER TESTIMONY SUBSTANITALLY OUTWEIGHED ITS PROBATIVE VALUE.

In an effort to bolster its claim that Mark Matthews touched Mary Hunkeler inappropriately as he was giving her a tattoo, the State introduced the testimony of Allison Stansbury. ($T_{2.}$ 25). Stansbury was another tattoo client of Mark Matthews who claimed he touched her inappropriately too. ($T_{2.}$ 25). Defense counsel objected to the admissibility of Stansbury's testimony both because it was unclear the inappropriate touching she reported ever happened, and because any probative value of her testimony was substantially outweighed by its prejudicial effect. ($T_{2.}$ 11, $T_{5.}$ 57).

The law does not presume the defendant is of good character. *Greer v. United States*, 245 U.S. 559, 560 (1918). The law also, however, does not allow the prosecution to urge a jury to convict by presenting evidence that does little more than establish the accused is a "bad person." *Michelson v. United States*, 335 U.S. 469, 475 (1948).

In keeping with these rules, the State is not allowed to introduce the defendant's prior bad acts, even though such acts might logically be useful to the prosecution in establishing that the accused is, by propensity, more likely to have committed the crime. *Id*. This evidence of character is not excluded because it is irrelevant, rather evidence of bad character is excluded because it weighs too

heavily with the jury, and tends to over-persuade them to prejudge the defendant. *Id*. at 475-76. Evidence of bad character is excluded because such evidence tends to cause confusion of the issues, unfair surprises, and undue prejudice. *Id*.

While evidence of other bad acts is not admissible to prove the character of a person in a sense of propensity, under Maryland Rule 5-404(b), evidence of prior bad acts may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident. Md. R. 5-404(b). A three-pronged test governs the admissibility of other bad acts evidence. *Wynn v. State*, 351 Md. 307, 316 (1998); *State v. Faulkner*, 314 Md. 630, 634 (1989); *Behrel v. State*, 151 Md. App. 64, 125 (2003).

The trial court first must determine if the evidence fits within one or more of the exceptions to the rule. *Wynn*, 351 Md. at 316. If the evidence does not fit within one of the specified exceptions of Rule 5-404(b), then the evidence is not allowed. *Id*. This threshold decision does not involve any discretion on the part of the trial court. *Id*. If the trial court determines the evidence fits within one of the narrow exceptions of Rule 5-404(b), then the trial court must determine whether the accused's involvement in the other bad acts is established by clear and convincing evidence. *Id*. Lastly, if the first two prongs are satisfied, the trial court must undergo an additional balancing test to weigh the necessity for, and probative value of, the other bad acts evidence against any undue prejudice likely to result from its admission. *Wynn*, 351 Md. at 316.

In the instant case, Allison Stansbury's testimony did not fit into any of the exceptions specified by Rule 5-404(b). The trial judge said he was allowing Stansbury's testimony to demonstrate Mark Matthews common scheme or plan, motive, intent, opportunity, knowledge, absence of mistake, or accident. ($T_{2.}$ 25). The only reasoning why the trial judge gave for allowing the evidence of the alleged prior bad acts under all of these exceptions was that the two alleged acts were "similar." ($T_{2.}$ 25).

However, contrary to the trial judge's ruling, in cases where the defendant's position is that the charged act never happened, prior bad acts tend not to be admissible under Rule 5-404(b). This is because, in such a case, the other bad acts evidence would not preempt a defense claim of mistaken identity, nor would it rebut a defense assertion that what did happen was simply a mistake. *McKinney v. State*, 82 Md. App. 111, 127 (1990). Similarly, where the defense is "it never happened," such other bad acts evidence does not establish a claimed lack of intent on the defendant's part, but instead is offered only to establish propensity. *Id*. at 124. Therefore, where the defendant's position is that the acts never happened, evidence tending to show multiple offenses would not establish motive, opportunity, preparation, or knowledge. *Id*.

Also, where the defendant's identity is not at issue, and the act was not part of a grand scheme to commit others, it is improper to allow the evidence of prior bad acts under the common scheme or plan exception. *Reidnauer v. State*, 133 Md. App. 311, 321 (2000). Evidence of other bad acts is typically only allowed

under the common scheme or plan exception in two scenarios. *Id.* the first scenario, the evidence is allowed to establish a defendant's typical modus operandi, when identity is at issue. *Id*.

Alternatively, such evidence might properly be admissible under the common scheme or plan exception when one bad act is presumed to be part of a grand scheme to commit others, "such as a theft of nitroglycerine for use in blowing open a safe." *Id*. The concurrence of common features under the common scheme exception to the other bad acts rule must be more than a manner of operation, which is possessed by most people who commit the bad act at issue. *Reidnauer*, 133 Md. App. at 321. These limits on other bad acts evidence in "it never happened" cases are illustrated by this court's decisions in *McKinney v. State*, 82 Md. App. 111 (1990) and *Behrel v. State*, 151 Md. App. 64 (2003).

In *McKinney*, an outdoor education teacher was convicted of third degree sexual assault for inappropriately touching three young campers. *McKinney*, 82 Md. App. at 125. The victims alleged McKinney had touched them in inappropriate areas, but McKinney consistently denied any misconduct. *Id*. at 114. McKinney freely admitted he was in situations where he made socially acceptable physical contact with the victims, such as when he hugged them or patted them on the back, or applied insect repellant. *Id*. When McKinney was asked if he could have possibly touched the girls inappropriately by accident, McKinney conceded that he may have accidentally touched the girls, but did not say that he ever touched them on any intimate part of their bodies. *Id*. at 115.

This court held that the combined testimony of the three alleged victims might very well have tended to disprove any defense based on accident or mistake. *McKinney*, 82 Md. App. at 125. But, since no such defense was asserted, there was no material fact to be established by the other bad acts evidence. *Id*.

In *McKinney*, this court also held that evidence tending to show the commission of similar conduct with a different victim would not be relevant to establish, motive, opportunity, preparation, or knowledge. *Id*. at 124. This court reasoned that the evidence of other similar victims would not show intent except in the sense of propensity. *Id*. at 124.

As for the common scheme or plan exception, in *McKinney*, because identity was not at issue and the inappropriate touching of one victim was not part of a grand scheme to commit others, this court concluded the evidence of similar inappropriate touching of multiple victims would not tend to prove that these acts were part of a common scheme or plan. *McKinney*, 82 Md. App. at 124.

Similarly, in *Reidnauer*, this court considered the improper admission of other bad acts evidence in a rape case where the defendant was suspected of a second rape against a different victim. *Reidnauer*, 133 Md. App. at 323-24. Using Rule 404(b)'s common scheme or plan exception, the prosecution sought to introduce the testimony of the second alleged victim in an attempt to bolster its case for guilt in connection with the first. *Id*. This court held that even though the two events had "many similarities," they were not part of a common scheme or

plan because identity was not at issue, nor was one rape a part of a grand scheme to commit other rapes. *Id*.

Again, in *Behrel v. State*, this court held that testimony of similar victims was not admissible to show that a priest's molestation of several children was part of a common scheme or plan, even though they were all groomed and molested in similar ways. *Behrel*, 151 Md. App. at 132. This court mirrored the analysis it provided in *McKinney*. Because identity was not at issue, evidence that appellant engaged in similar conduct would not show the defendant planned to "commit one offense as part of a grand scheme to commit others." *Id*. at 130.

Conversely, in *Cousar*, this court found that evidence of other bad acts was correctly admitted. *Cousar v. State*, 198 Md. App. 486 (2011). In *Cousar*, the appellant was accused of raping and assaulting a Craigslist prostitute whose services he had procured. *Id*. at 515. During the attack, Cousar was accused of defecating in the woman's mouth against her wishes. *Id*. Cousar maintained that the defecation had been completely accidental during consensual analingus (oral-anal sexual contact). *Id*. The prosecution introduced the testimony of a second woman who Cousar had assaulted in a similar manner on a separate occasion. *Cousar*, 198 Md. App. at 515. The court found the admission of the second woman's testimony was proper in light of Cousar's defense of accident. *Id*.

In the instant case, the admission of the other bad acts evidence was improper and should have been excluded as it was in *McKinney, Reidnauer* and *Behrel*. Mark Matthews did not deny making appropriate physical contact with

Mary Hunkeler. Given the nature of the tattooing process, Matthews obviously was forced to make physical contact with those parts of Hunkeler's body where she instructed him to apply the tattoo. However, he completely denied ever touching her (or the prosecution's "other bad acts" witness Allison Stansbury) in an inappropriate way.

Mark Matthews' defense at trial was "it never happened." As defense counsel explained during opening argument, "Mistake, misperception, and misinterpretation. That's why we're here. We're here because Mary Hunkeler made a mistake. She misperceived a physical contact that took place on her leg next to her vagina because the tattoo that she wanted was next to her vagina. We're here because Mary misinterpreted a sensation." (T_4. 126). In opening argument, defense counsel further elaborated, "Mark Matthews never touched Mary Hunkeler inappropriately." (T_4. 127) (emphasis added). As defense counsel reminded the jury during closing, "It didn't happen. Mr. Matthews never touched her inappropriately." (T_4. 169) (emphasis added). In closing argument, defense counsel further argued, "This is not a sexual case. It is about Mary making a mistake. It is about her convincing herself that something happened when it did not. (T_4. 177) (emphasis added).

It follows that since the only concern was whether the inappropriate contact happened, allowing Stansbury's testimony to show intent, knowledge, motive, or opportunity, did nothing except to suggest to the jury that Mark Matthews had a propensity to sexually abuse his customers. Allowing this evidence did nothing

except to bolster Mary Hunkeler's credibility in the eyes of the jury. Also, since identity was not an issue, nor was one bad act part of a grand scheme to commit others bad acts, this testimony could not have been allowed under the common scheme or plan exception.

Because Allison Stansbury's testimony was inappropriately introduced to bolster Mary Hunkeler's believability, Mark Matthews was deprived of his Sixth Amendment right to a fair trial. The introduction of other bad acts evidence had prejudicial effects that far outweighed any probative value. Moreover, as discussed in detail in the next section, following the trial court's improper allowance of Stansbury's testimony, the court refused to allow defense counsel to impeach Stansbury, further denying Mark Matthews Sixth Amendment right to a fair trial. The trial judge erred in allowing the other bad acts evidence to come in under all of the Rule 5-404(b) exceptions because they were "similar."

II. THE COURT ERRED IN NOT ALLOWING DEFENSE COUNSEL TO IMPEACH ALLISON STANSBURY USING HER PRIOR INCONSISTENT STATEMENTS.

The trial court compounded its error of admitting Allison Stansbury's "other bad acts" testimony by then refusing to allow the defense to properly challenge Ms. Stansbury's claims. On examination, Allison Stansbury asserted that the inappropriate touching by Mark Matthews "definitely happened." ($T_{5.}$ 81). However, Ms. Stansbury had previously told her boyfriend, Kyle Logan, she was not sure whether any inappropriate touching occurred. ($T_{5.}$ 123). These prior inconsistent statements had been reduced to writing and recorded in notes from the police interview of Kyle Logan. Nonetheless, defense counsel was improperly precluded from using the prior inconsistent statements to impeach Allison Stansbury's testimony before the jury.

When interviewed by police shortly after the tattoo, Stansbury's boyfriend, Logan, explained to officers what Stansbury told him about the alleged incident. ($T_{5.}$ 123). Logan told police that Stansbury told him how "She was so conflicted about whether or not it had happened because, you know, where he was and where the tattoo was located." ($T_{5.}$ 123). Logan further explained Stansbury told him, "the tattoo was in a spot that, you know, where she had thought that maybe he had accidently touched her." ($T_{5.}$ 123) (emphasis added). Defense counsel attempted to impeach Ms. Stansbury on cross-examination using her statements that she was not sure whether any inappropriate touching ever occurred. ($T_{5.}$ 81, 123). The

trial judge repeatedly sustained the State's objections to defense counsel's questions. ($T_{5.}$ 81).

The following colloquy shows how Stansbury firmly asserted on cross-examination that when she spoke to Logan, she was "sure that the contact definitely happened," and she was one hundred percent sure that the contact was intentional:

COUNSEL:	It's only after you got home and you were with him that you told him what you believed happened right?
WITNESS:	Yes, ma'am.
COUNSEL:	And when you talked to Kyle you were conflicted about what happened, correct?
WITNESS:	Correct.
COUNSEL:	And you were not sure whether the contact that you described to the jury today, you were not sure that the contact was an intentional contact, correct.
STATE:	Objection.
COURT:	Overruled.
WINTESS:	I was sure that the contact definitely happened.
COUNSEL:	Correct, that's not my question.
WITNESS:	Yes.
COUNSEL:	The question is, <u>when you spoke to Kyle you told Kyle that you were not sure whether the contact was intentional, correct</u>?
WITNESS:	<u>Not true, no</u>.
COUNSEL:	Okay, so you were one hundred percent sure when you spoke with Kyle that the contact was intentional?
WITNESS:	Yes, ma'am.

($T_{5.}$ 102-03) (emphasis added).

The Sixth Amendment of the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." U.S. Const. amend. VI.; *see also Davis v. Alaska*, 415 U.S. 308 (1974). The Confrontation Clause of the Sixth Amendment is applicable to the States. *Douglas v. Alabama*, 380 U.S. 415 (1965). The Supreme Court has long held that a primary interest secured by the Confrontation Clause is the right of cross-examination. *Id*. at 418. Cross-examination is the principal means by which the believability of a witness and the truth of her testimony are tested. *Id*.

"It is enough to compel a reversal that a constitutional right was improperly restricted leaving prejudice an obvious possibility." *Reese v. State*, 54 Md. App. 281, 291 (1983). When a constitutional right is infringed, the usual broad discretion of the trial judge becomes narrow. *Id*. at 286.

"The credibility of a witness may be impeached by showing that the witness has made statements which contradict the witness's trial testimony as to material facts provided a proper foundation has been established." *Gonzalez v. State*, 388 Md. 63, 70 (2005). "A witness generally may be cross-examined on any matter relevant to the issues, and the witness's credibility is always relevant." *Hill v. Wilson*, 134 Md. App. 472, 480 (2000). Where the limitations imposed by the court upon cross-examination plainly inhibit the ability of the accused to obtain a fair trial, the general rule of allowing the trial judge to determine what is allowed to be asked on cross examination is manifestly inapplicable. *Cox v. State*, 51 Md. App. 271, 282 (1982); *De Lilly v. State*, 11 Md. App. 676, 681 (1971).

Md. Rule 5-616 sets out specific rules that must be followed for methods of impeachment. Md. R. 5-616. Maryland Rule 5-616(a)(1) provides that the credibility of a witness may be attacked through questions asked of the witness, under Rule 5-613(a) that the witness has made statements that are inconsistent with the witness's present testimony. Md. R. 5-613(a).

Maryland Rule 5-613(a) provides that a party may examine a witness about a prior inconsistent statement as long Rule 5-613(a)'s two requirements have been met. *Id*. First, at some point during her examination, the witness must be presented with the statement. *Brooks v. State*, 439 Md. 698, 716 (2014). Second, the witness must be given an opportunity to explain or deny the statement. *Id*. Once these two prerequisites have been satisfied, cross-examination seeking to impeach with prior inconsistent statements is permissible. *Id*.

In addition to cross examining the witness, counsel may also seek to introduce extrinsic evidence for the purpose of impeaching a witness with his or her own prior inconsistent statements. *Id*. at 716-17. As long as the proper framework is laid before the end of examination of the witness, counsel may call another witness to testify about the first witness's prior inconsistent statements. *Brooks*, 439 Md. at 717.

The Maryland Court of Appeals has derived a four-prong test to be used when determining when Rule 5-613 can be used for a party to offer extrinsic evidence of a prior allegedly inconsistent oral statement of a witness. *Id*. The first two prongs of the test are the same as the prongs needed to utilize a prior

inconsistent statement on cross-examination. First, at some point during examination, the witness needs to be presented with the statement. *Id*. Second, the witness needs to be given an opportunity to explain or deny the statement. *Id*. Third, the witness must refuse to admit she made the statement. *Brooks*, 439 Md. at 717. Lastly, the statement must not be "collateral" to the issues at trial. *Id*.

In *Cox*, the defendant was accused of rape, and the sole witness was the victim. *Cox*, 51 Md. App. at 274. At trial, the judge barred defense counsel from impeaching the witness. *Id*. This court found reversible error because the defendant was precluded from attempting to undermine the victim's credibility, and the exclusion of counsel's question violated the defendant's right to present his defense fully. *Id*. at 282.

Along these same lines, in *Warren*, this court held the trial court did not err by allowing the cross-examination of a witness as to his alleged out-of-court confessions made to a third party while incarcerated. *Warren*, 205 Md. App. at 126. This court held that the State laid a proper foundation for impeachment under Md. Rule 5-613(a) when the witness was informed of the statement and then given an opportunity to admit, deny, or explain the statement. *Id*. at 127.

Similarly, in *Foreman v. State*, the wife and son of the defendant would not testify to the defendant's abuse when called to testify at trial. *Foreman v. State*, 125 Md. App. 28, 32 (1999). At the scene of the crime, the wife and son told police and an EMT about the abuse from the defendant. *Id*. The mother and the son were shown their previous statements at trial, which they then were given a

chance to respond to, and they denied making the statements. *Id*. The issue was not collateral to the issues at trial, therefore, all four prongs had been met and this court held that it was not error for the police officer and EMT to testify in order to impeach the hostile witnesses. *Id*.

In the instant case, defense counsel was improperly precluded from either method of impeachment, even though counsel satisfied all of the necessary prerequisites for both methods. On cross-examination, defense counsel repeatedly attempted to impeach Stansbury using her own prior inconsistent statement. ($T_{5.}$ 102-03). The following colloquy is illustrative:

COUNSEL: Now I just want to make sure that you never said any of the following words to Kyle, okay?

STATE: Objection.

COURT: Sustained.

COUNSEL: You never told Kyle?

STATE: Objection.

COURT: Sustained.

COUNSEL: Well your statement today was that you never told Kyle that considering the location of where your tattoo was --

STATE: Objection.

COURT: Sustained.

COUNSEL: You never used the word "accident?"

STATE: Objection.

COURT: Sustained.

COUNSEL: Did you use to him the word --

STATE: Objection.

COURT: Sustained.

($T_{5.}$ 102-03). As the record reflects, the trial judge completely precluded defense counsel from asking about the statements that Ms. Stansbury made to Kyle Logan shortly after getting her tattoo. ($T_{5.}$ 102-03). This line of questioning was necessary for impeachment purposes, given Stansbury's testimony that she was one hundred percent positive that the inappropriate touching definitely happened.

Not only was defense counsel not allow to directly impeach Allison Stansbury with her own statements, defense counsel was similarly precluded from introducing extrinsic evidence of Stansbury's prior statements. ($T_{5.}$ 125). After the State rested, defense counsel attempted to call Kyle Logan as a witness to ask Logan about Stansbury's statements to him that contact may not have happened and if it did it may have been accidental. ($T_{5.}$ 125). The trial judge did not allow Logan to testify. ($T_{5.}$ 126). The trial judge reasoned that Logan should not be allowed to testify because his statements were merely his interpretation of what Stansbury had been feeling, as opposed to what she said actually said to him. ($T_{5.}$ 126). As a factual matter, the record refutes the trial judge's assumption that the statements were not Stansbury's own.

Kyle Logan told police, "<u>She's telling me</u> she was so conflicted about whether or not it happened because, you know, where he was and where the tattoo was located. <u>She didn't want to accuse him of doing that</u>." ($T_{5.}$ 123) (emphasis added). The words "She's telling me" indicate that what Kyle Logan was

reporting was not merely his interpretation of how Stansbury was feeling, but rather was Logan was telling police what Stansbury told him. Logan further explained Stansbury told him, "the tattoo was in a spot that, you know, where she had thought that maybe he had accidently touched her." (T_5. 123) (emphasis added). The words "she had thought," indicate again that this is how Stansbury told Logan she was feeling, not how Logan interpreted Stansbury to be feeling.

Stansbury testified she did not say anything to Logan while he was in the room with her during the entire tattoo session. (T_5. 80-81). Nor did she say anything to him during the ride home. (T_5. 80-81). Instead, Stansbury's very first disclosure to Logan was back at the house, where she told Logan that "she thought maybe he had had accidentally touched her," and her statement that "she was conflicted about whether or not it happened." Kyle Logan relayed these statements to police. (T_5. 80-81). These statements were a critical piece of the defense's case.

Not allowing Kyle Logan to testify was error because all four necessary prongs required by Maryland courts in order to introduce extrinsic evidence were met. As mentioned, the first two prongs were established on cross-examination when defense counsel attempted to read Stansbury her prior statement, which she would have had the opportunity to explain or deny. (T_5. 81, 102-03). The third prong, that the witness needs to deny making the statement, was established when Stansbury told defense counsel, "Not true, no," when asked if she'd ever told Logan the contact might not have been intentional. (T_5. 81, 102-03). The fourth

prong was met because the statement was non-collateral to the issues at trial. (T_5. 81, 102-03). The statements were directly related to whether the inappropriate touching actually happened.

As seen in *Cox*, where the credibility of a witness is a critical piece of the case, it is required that counsel be allowed to impeach the witness in order to undermine her credibility. *Cox*, 51 Md. App. at 282. Matthews' defense rested entirely upon the jury's belief that the claimed offensive contacts had not happened. Not allowing Stansbury to be impeached by her own prior inconsistent statement undercut Matthews' defense. Defense counsel should have been permitted to introduce Stansbury's prior inconsistent statement on cross-examination, as in *Warren*, or through the testimony of another, as in *Foreman*.

Matthews was denied his Sixth Amendment right to a fair trial when defense counsel was not allowed to press the credibility of one of Matthews' key accusers by impeaching her with her prior inconsistent statement that she was unsure whether anything inappropriate ever happened. Reversal is required.

CONCLUSION

For the foregoing reasons, Mr. Matthews respectfully requests that his conviction be overturned, and his case remanded for a new trial.

Respectfully submitted,

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STATEMENT PURSUANT TO RULE 8-112

1. This brief contains 5,923 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

TEXT OF CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. amend. VI.
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

MARK A. MATTHEWS,	*	IN THE
Appellant,	*	COURT OF SPECIAL
v.	*	APPEALS
STATE OF MARYLAND,	*	OF MARYLAND
Appellee.	*	September Term, 2016
	*	No. 327

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of November, 2016, three copies of the Brief of Appellant were mailed, first-class, postage pre-paid to the Office of the Attorney General, Criminal Appeals Division, 17th Floor, 200 St. Paul Place, Baltimore Maryland, 21202.

_____

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