UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2517

September Term, 2013

DERRYL WALKER

v.

STATE OF MARYLAND

Zarnoch,
Wright,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: December 15, 2014

A jury in the Circuit Court for Baltimore City found appellant, Derryl Walker, guilty of first degree rape, first degree sex offense, second degree assault, unnatural or perverted practice, and reckless endangerment. This appeal asks us to determine whether Walker was entitled to a new trial because of newly discovered evidence asserted to be related to the impeachment of a key witness for the State and because of allegedly erroneous evidentiary rulings by the trial court. Additionally, Walker argues that the circuit court failed to merge certain of his convictions, resulting in an illegal sentence. For the following reasons, we affirm Walker's convictions, but find that two of his convictions should have been merged for sentencing purposes.

FACTS AND PROCEEDINGS

I. <u>Facts at Trial</u>

On November 23, 2011, A.W., the victim, and Ronnie Newtel, a friend, went out for drinks in the Mount Vernon neighborhood of Baltimore City. The two women had a couple glasses of wine at A.W.'s apartment before they headed to a local bar around 9 p.m. By the time, A.W. and Newtel left the bar, A.W. was "highly buzzing." When they returned to her apartment building at 914 North Charles Street, A.W. and Newtel encountered two men sitting outside on the stoop of the building, who were later identified as Derryl Walker and Michael Morstein. Newtel collected her dog from A.W.'s apartment and left. The two men asked A.W. if she would like to smoke marijuana with them. A.W. testified that they seemed friendly and that she invited them into her apartment.

The next thing that the victim recalled happening was being alone in her bedroom with Walker. She testified that Walker told her to take off her clothes, which she did out of fear. She was stunned and told herself to comply because she was "afraid of this man at this point." A.W. testified that Walker proceeded to force fellatio once and vaginal intercourse with her multiple times. She was on her back the entire time and testified that Walker pinned her down, hit her in the head, choked her with both hands, and hit her with his fists. Initially, she fought back, but it caused Walker to respond more aggressively. He yelled "Die bitch" while he choked her, so she began to "play dead" for fear that Walker might kill her. During the rape, A.W. said that Walker ejaculated on her face and that she lost consciousness multiple times. Walker attempted to penetrate the victim anally, but she said no and he stopped.

After losing consciousness again, A.W. awoke to find herself clothed with no underwear or bra. She testified that she went into the kitchen to find Walker and Morstein seated at the table. A.W. pretended that nothing happened and told Walker that she had a good time. She asked Walker to call her cell phone, which she said she did "so that she would have his number to give to police." The two men then left her apartment. A.W. was unable to locate her phone so she ran to her neighbor, Brad Nicholas to have him call 911 for her. The police arrived at the scene and A.W. was taken to Mercy Medical Center to have a rape kit completed. Photographs of the scratches and bruises on her neck, arms, and legs were taken at this time. At trial, the parties stipulated that "sperm and seminal fluid with a DNA profile matching Mr. Walker as a major

contributor, combined with A.W. and an unknown source, were recovered from vaginal and oral swabs of A.W."

When the State called Morstein to testify, he gave this account. Morstein and Walker had previously lived together in a town home in Baltimore, but it had been about two years since they ceased being roommates when this incident occurred. Morstein testified that after meeting up with Walker at the Red Maple Club, he and Walker sat down on the stoop of 914 North Charles to smoke "a bowl of marijuana." His testimony as to the first meeting with A.W. was consistent with the other testimony presented at trial. Morstein testified that A.W. was visibly drunk and making comments about her aunt being "raped by a Black man in the '70s." Morstein testified that he left the apartment and returned to Red Maple before any of the alleged activity occurred. Walker returned to Red Maple shortly after and told Morstein that he had sex with A.W. When the two left the club, Morstein testified that he recalled seeing police lights outside of the victim's apartment building and that Walker did not have a visible reaction upon seeing the police.

Erica Sellman, a Baltimore City Police Detective, conducted the initial investigation after she responded to the call that a rape had occurred at 914 North Charles Street. At the scene, Sellman observed that A.W. was upset, intoxicated and slurring her words. A.W. told Sellman at this time that an "unidentified, bald black male, who was approximately six feet tall" raped her. A.W. explained that "a black man had come up behind her, forced her into her apartment, and raped her on a futon in the living room."

During a conversation the following day, A.W. told Sellman that she invited the two men inside and that the black man "immediately dragged her to the back and raped her on the bed." This statement differed from what A.W. had told Sellman at the scene and A.W. acknowledged at trial that this statement contradicted her current memory of the incident, which she said was "spotty," but was starting to return.

The unfamiliar number in A.W.'s phone was traced to Walker and Sellman pulled up his MVA photo to create a photo array, but A.W. was unable to identify the photo. After Morstein appeared as a mutual friend on the victim's Facebook, Sellman called both Morstein and Walker in to be interviewed. In May of 2012, Detective Scott Suriano took over the investigation and procured a recorded statement by Walker on May 10, 2012. In this statement, Walker "said he had gone out with Morstein the night before Thanksgiving but denied having ever met A.W." Suriano obtained the records for Walker's cell phone and noted that there was a call to A.W.'s phone.

Suriano testified that he was contacted by Donta Vaughn to discuss the case. Vaughn was in prison facing murder charges and had volunteered to assist the State's Attorney's Office on four other occasions. Vaughn testified that he met Walker in the Baltimore City Detention Center and the two were assigned to the same housing unit. He testified that he and Walker discussed Walker's pending charges. Walker explained to Vaughn that he had an alter ego called Jackson that associated with the book *50 Shades of*

Grey and the "sexual behavior in the book."[1] Vaughn testified to the account that Walker shared with him about the night that A.W. was raped:

> Q Right. And what did Derryl Walker say happened next?
>
> A Well Derryl Walker just said that, as they was talking, he said that -- he said that he observed that the victim was ignoring him. And at this time, he was observing her and that's when he took interest in her. And at this one point she left from where she was having a discussion with Mike. And that she left that area, went into the kitchen area with him. But during this time, while she was talking to Mike, is when he was preparing alcohol for her and that he also put some narcotics in her drink.
>
> Q What did he put in the victim's drink?
>
> A Well, it was some type of ecstasy. Initially when he told me, he told me two different occasions about these particular pills. And at one time I thought it was ecstasy but then when I inquired again, he said, it was XO or something like that. I'm not familiar with but on two different occasions, the term ecstasy was used.
>
> Q Did you ask him -- you said, XO. Did you ask Derryl Walker what XO is?
>
> A Yes. And he explained that they was [sic] some potent, more potent version of ecstasy and that he would sell them in the nightclub and he would also use them, dealing with women.
>
> Q What did -- did you [sic] him what he meant by more potent?
>
> A Yes. He said that for sexual purposes, he described having multiple ejaculations and said that it was more potent than ecstasy and that it was cheaper.
>
> . . .
>
> Q Did Derryl say that the victim drank the drink with the XO in it?
>
> A Yes. He said that she drank it and she also smoked marijuana.
>
> . . .
>
> Q What did he say?

[1] *50 Shades of Grey* is a popular erotic book trilogy that depicts a consensual relationship involving fetishes, controlled beating and forcible sex acts.

A He said that, he smacked her. He pulled her hair. He fucked her. He said that he ejaculated a dozen times. And that's when he when he was describing the XO or the ecstasy that he placed in her drink. And he said that afterwards, he – again, making references to this character, Christian Grey, that he changed her clothes. Put her clothes back on her.

. . .

Q So Mr. Walker told you that he ejaculated on the victim's face, what else did Mr. Walker say happened?

A He said -- I know he said he ejaculated in her face. He ejaculated multiple times. He ejaculated -- he raped her. He was choking her. He was pulling her hair, slapping her. But again, this was all in his explanation about this character, Jackson, [sic] that he calls himself. And she was resistant and she was fighting him. Then he was saying, bitch, cussing her out, you know. Them type of terms [sic].

On cross examination, Vaughn was asked about his involvement with the police and his pending charges. He testified that he was not promised anything in exchange for testifying in this case and that he was not shown any documents relating to Walker's case. Vaughn explained that he felt "very strongly about crimes against women" and that he independently reached out to the State's Attorney's Office to provide the information.

The State's final witness was Shannon Boldin, who was qualified as an expert in sexual assault forensic exams ("SAFE"). Her testimony was based on her report in evidence, which was conducted at Mercy Medical Center the night of the incident. Boldin detailed the story that A.W. told her that day which was largely consistent with the other accounts of the November 2011 events. The blood and urine tests conducted showed the presence of both alcohol and marijuana in A.W.'s system, but no test for ecstasy was performed. Using the photographs of A.W., Boldin testified that there was

evidence of strangulation, bruising and tears in A.W.'s vagina. In her expert opinion, A.W's injuries were "consistent with forced or non-consensual sexual intercourse" and with the victim's narrative.

After being informed of his right to testify and discussing it with his counsel, Walker elected not to testify on his own behalf and the defense rested on the evidence.

Following jury instructions and closing arguments, the jury began deliberations and found Walker guilty of first degree rape, first degree sex offense, second degree assault, perverted practice, and reckless endangerment. The jury returned a not-guilty verdict as to the attempted murder and first degree assault charges.

II. Motion for a New Trial and Sentencing

Walker filed a Motion for a New Trial on the basis of newly discovered evidence. After a conversation with Assistant State's Attorney Tanya Lapolla on November 15, 2013, Walker's counsel was made aware that Vaughn, the State's witness, was said to be on a Federal "do not call" list. This list, according to Walker's motion, is "designed for those individuals who the Federal Government refuses to call as a witness in a federal cases [sic] based on their questionable creditability [sic]." Walker alleged that the failure to turn over this impeachment evidence is a violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

On January 6, 2014, the circuit court held a hearing on the motion. Walker argued that the information about Vaughn being on the "do not call" list was essential to the

impeachment of the witness, making it material to the case. Additionally, Walker argued that Vaughn's testimony was important to fill in the gaps in A.W.'s story:

> And, you know, it was when Mr. Vaughn testified with regard to the drug and it's [sic] effect on memory, and all of that, or the effect on a person. I winced, you know, as he was testifying to that. Because I was thinking, okay, now that will explain why she didn't add [sic] she had this memory lapse. So his testimony was important. Certainly, if I could have brought to the jury's attention that this guy is so lacking in credibility that the Federal government says if he calls us, don't take his call, we will never use him.

The State responded, based on a conversation with a Federal prosecutor, they believed that "there [was] no Federal do not call list at that time. And that idea about [the] do not call [list was the prosecutor's] personal opinion" of Vaughn.

The court acknowledged that this evidence was "potential *Brady* material." In denying the motion, the court concluded that the evidence relating to Vaughn was material, but that the State was not required to search for this information and that Vaughn's credibility had already been greatly diminished on cross-examination by the defense. Ultimately, the court found that the do not call list was not evidence that would create a reasonable probability that the verdict would have been different, particularly since the existence of the list was in doubt. After denying Walker's motion, the circuit court sentenced Walker to concurrent life sentences for first degree rape and first degree sex offense, and concurrent sentences of ten years, ten years, and five years for assault, unnatural or perverted sexual practice, and reckless endangerment, respectively. Following his sentencing, Walker appealed.

Additional facts will be provided as necessary.

QUESTIONS PRESENTED

Walker raises the following questions, which we reproduce below:

> 1. Did the trial court err by failing to order a new trial after the late disclosure of impeachment evidence against a key State's witness?
>
> 2. Did the trial court abuse its discretion by limiting cross-examination concerning the bias of a key State's witness?
>
> 3. Did the trial court abuse its discretion by allowing testimony by a medical expert that related to the credibility of another witness?
>
> 4. Did the trial court impose illegal sentences by failing to merge three of Mr. Walker's convictions?

For the following reasons, we conclude that two of Walker's convictions should have been merged for sentencing purposes and remand for resentencing. Otherwise, we affirm all other sentences and judgments.

DISCUSSION

I. Motion for a New Trial

a. Standard of Review

"Denials of motions for new trials are reviewable on appeal and rulings on such motions are subject to reversal when there is an abuse of discretion. We have noted that the discretion afforded a trial judge is broad but is not boundless." *Campbell v. State*, 373 Md. 637, 665 (2003) (Citations omitted). Accordingly, this standard is flexible:

> [I]t may be said that the breadth of a trial judge's discretion to grant or deny a new trial is not fixed or immutable; rather, it will expand or contract depending upon the nature of the factors being considered, and the extent to

> which the exercise of that discretion depends upon the opportunity the trial judge had to feel the pulse of the trial and to rely on his own impressions in determining questions of fairness and justice.

Id. (Citations omitted). "In order for the newly discovered evidence to warrant a new trial, the trial judge must find it to be both material and persuasive such that the newly discovered evidence may well have produced a different result, that is, there was a substantial or significant possibility that the verdict of the trier of fact would have been affected." *Id.* at 666–67 (Citation omitted).

b. The *Brady* Standard

In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Impeachment evidence is a required disclosure under Md. Rule 4-263, regardless of any request by the accused. To show a *Brady* violation, three elements must be established: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *State v. Williams*, 392 Md. 194, 199 (2006) (citing *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)). In simpler terms, the evidence must be "helpful, suppressed, and material." *Adams v. State*, 165 Md. App. 352, 363 (2005).

c. Walker's Motion for a New Trial

At the motions hearing, Walker argued that the discovery of Vaughn's presence on a Federal "do not call" list was important impeachment evidence. Walker contends that the newly discovered evidence regarding Vaughn's credibility was undisclosed *Brady* evidence that was suppressed by the State and the circuit court should have granted Walker a new trial. The State responds that Walker did not successfully prove that the evidence was material because Walker failed to present any evidence that the Federal "do not call" list actually existed or that it was material to his verdict.

i. Did the State suppress the evidence?

Under *Brady,* "suppression is inextricably intertwined with the timing of disclosure." *Yearby v. State*, 414 Md. 708, 722–23 (2010). In *Williams*, the Court of Appeals confronted the *Brady* issue in reference to impeachment evidence. The Court held that "[w]hen the core of the State's argument relies on the testimony of an essential witness, the State has a duty to discover anything, and everything, that concerns that witness's credibility and, thus, potential for impeachment." *Williams*, 392 Md. at 210. The case involved a jailhouse informant who claimed to have testified "out of the goodness of his heart. . . because he did not like guns and violence." *Id* at 200. He further explained on the stand that "he was promised nothing in exchange for the information and, furthermore, had not asked for anything." *Id.* at 199–200.

At the time of Williams's trial, it was unknown to the prosecution that the informant "had been, for at least 10 years, a paid and registered police informant for the

Baltimore City Police Department, Eastern District Drug Unit, with his own confidential informant number." *Id.* at 200. This information was known to "at least one member of the Baltimore City State's Attorney's Office." *Id.* The Court of Appeals held that "the effect of the nondisclosure is not neutralized because the prosecuting attorney was not shown to have had knowledge of the exculpatory evidence." *Id.* at 214–15 (Citation omitted).

While the knowledge of this evidence may be imputed to the State's Attorney, it does not necessarily constitute misconduct by the prosecution. The Supreme Court has "rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel." *United States v. Agurs*, 427 U.S. 97, 111 (1976) *holding modified by United States v. Bagley*, 473 U.S. 667 (1985). There "is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Id.* at 109 (Citation omitted). There is a duty on the prosecution to disclose certain evidence, but it will not be considered error unless it affects the outcome of the trial:

> On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith) the

> prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

Kyles v. Whitley, 514 U.S. 419, 437-38 (1995) (Citations omitted). The Court of Appeals explained that "under *Brady* and its progeny, the defense is not relieved of its obligation to investigate the case and prepare for trial." *Yearby*, 414 Md. at 723 (Citation omitted).

Here, the evidence was discovered after Walker's trial but before sentencing. On November 15, 2013, Walker's counsel had a conversation with Assistant State's Attorney Tanya Lapolla, the prosecutor in Donta Vaughn's homicide case, who said that Vaughn was on a federal government "do not call" list and that the federal government refused to use him as a witness. Accordingly, under the *Williams* standard, knowledge of this information would be imputed to other attorneys in the State's Attorney's Office. *See Williams*, 392 Md. at 214–15. However, the court found and, we agree, that it was not within the requirements of *Brady* for the prosecutors to seek out this information:

> [C]learly that was not known to the Prosecutor. There's no way that she could have that. Now, whether or not that - - which gets us to the next question of whether or not there was any obligation of Ms. Burrell to find that information out, to somehow poll the members of her office, or to communicate with Ms. Lapolla, who she may or may not have had information about whether or not she was handling Mr. Vaughn as a prosecutor. That is something else. And I don't - - I tend to agree with the State here, that that is not information that she, although I hear what Mr. Brown is saying, that is something that's required under Brady for her to seek that out, I believe that's an unreasonable requirement to place on the State under these circumstances.

Therefore, in order for Walker to be granted a new trial on the basis of newly discovered evidence, the evidence must have been favorable and material to have an effect on his verdict.

ii. Was the evidence favorable to Walker?

In order to be favorable under the *Brady* rule, the evidence must be either exculpatory or allow for impeachment of a witness. Impeachment evidence and the reliability of witnesses fall within "the general rule of *Brady*." *United States v. Bagley*, 473 U.S. 667, 677 (1985). While it falls within the rule, the nondisclosure of the evidence does not "automatically require a new trial whenever a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict." *Id.* (Quotation omitted). Under *Brady*, the impeachment evidence must be material: "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 682 (Quotations omitted).

Impeachment evidence is favorable to the defense "if disclosed and used effectively [and] it may make the difference between conviction and acquittal." *Id* at 676.

In Justice Marshall's dissent to the *Bagley* opinion, he noted that:

> If the testimony that might have been impeached is weak and also cumulative, corroborative, or tangential, the failure to disclose the impeachment evidence could conceivably be held harmless. But when the testimony is the start and finish of the prosecution's case, and is weak nonetheless, quite a different conclusion must necessarily be drawn.

Id. at 689 (Marshall, J. dissenting). However, the Court of Appeals has explained that the "mere accusations of crime or misconduct may not be used to impeach." *Thomas v. State*, 422 Md. 67, 77 (2011).

Here, the newly discovered evidence went only to one prosecutor's opinion of Vaughn and his tactics, not his reputation for truthfulness, as noted by the State:

> There is no Federal list right now where Donte [sic] Vaughn is listed as a do not call witness. It is merely the opinion of another prosecutor that he personally does not approve of Donte [sic] Vaughn and his antics to gain information from other fellow inmates. . . . And there was nothing saying that he had ever testified untruthfully or caused untruthful testimony which is what would have been discoverable.

Additionally, the newly discovered evidence would not have been helpful to impeach Vaughn's testimony. At the hearing on the motion for a new trial, the prosecutor argued that the evidence of the do not call list was weak and cumulative as to Vaughn's credibility:

> I asked the Federal prosecutor at length, was there anything that Donte [sic] Vaughn had been convicted of, charged of, accused or, in open court, or found guilty, or even had a judgment, a finding, or a ruling on his veracity to tell the truth. And the prosecutor told me; no, there's no such thing. Donte [sic] Vaughn does have a very serious criminal history that was argued ad nauseam before the jury. The jury heard all about his convictions by the State and by the Defense, as the court says, through a very thorough cross examination.

The circuit court agreed with this characterization of Vaughn's testimony and the lack of credibility that he maintained throughout the trial. Walker's counsel conducted a very effective cross-examination of Vaughn that provided the jury with every reason to doubt his testimony: "In fact, it is the Court's assessment and the Court's opinion that Mr.

Vaughn, in his testimony, was considerably damage[d] by the cross examination" by Walker's counsel. As a result, in order to establish a *Brady* violation, it must be shown that the evidence was material to his verdict.

iii. Was the evidence material to Walker's verdict?

Material evidence is evidence that "had it been known and used by the defense, would truly have made a difference to the outcome of the case." *Adams*, 165 Md. App. at 425. The Supreme Court detailed the factors required for determining materiality of evidence:

> [F]irst, . . . a showing of materiality does not require a demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal; second, . . . materiality is not determined by a sufficiency of the evidence test; third, . . . a *Bagley* [473 U.S. at 667] error was not harmless error; and finally, . . . materiality in terms of suppressed evidence is considered cumulatively, not individually.

Williams, 392 Md. at 231(citing *Kyles*, 514 U.S. at 434-37). Moreover, in order to show materiality,

> petitioner must convince this Court that there is a reasonable probability that his conviction or sentence would have been different had the suppressed documents been disclosed to the defense. The adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the suppressed evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

Strickler, 527 U.S. at 264. In *Strickler*, the testimony was prejudicial "in the sense that it made petitioner's conviction more likely than if [the witness] had not testified and discrediting [the] testimony might have changed the outcome of the trial." *Id.* at 289.

However, it has been made clear that this was not the standard under *Brady*: "[Petitioner] must convince us that 'there is a reasonable probability' that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." *Id.* There was no *Brady* violation in *Strickler* because "other evidence in the record [including forensic evidence] provide[d] strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death, even if [the witness] had been severely impeached or her testimony excluded entirely." *Id.* at 264.

Similarly, in *Campbell*, the Court of Appeals concluded that there was not a "substantial or significant possibility" that the newly discovered evidence would have resulted in a different verdict and therefore there was no *Brady* violation. 373 Md. at 668 (Quotations omitted).[2] If the "new evidence, when weighed with the evidence before the jury, would not affect the verdict," then it does not constitute the need for a new trial under *Brady*. *Id.*

During Walker's hearing, the circuit court concluded that the evidence was important:

> The court believes whether or not the [do not call] list exists or not . . . I have no doubt that Ms. Lapolla would not have presented to Mr. Brown in that way unless she believed there to be in existence such a list. And she believe that that, in some way, I guess she wanted him to have that information.

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[2]Maryland's current law under *Brady* requires a substantial possibility, which has been determined to be synonymous with a "reasonable probability." *See Adams*, 165 Md. App. at 435 (There "is no quantitative difference between the Maryland standard and the federal standard . . . 'Reasonable probability' and 'substantial possibility' are synonyms").

However, the circuit court found that even if the evidence was material, it would not have affected the outcome, which is a required aspect of the materiality analysis.

Here, the non-disclosed evidence would not have created a substantial possibility that the result of the trial would have been different. The circuit court noted that questions as to Vaughn's credibility were before the jury:

> And let's get to the issue of whether or not there was a reasonable likelihood it could affect the judgment of the jury. . . . And even if he was not, there was so much other information available, not just – his record was available, how he obtained this information from Mr. Walker, how he did all of these different things. All of this information was available to the jury.

In this case, the nature of the relationship between favorable evidence and material evidence is relevant:

> There is a massive overlap, but they are not identical. All material evidence is contained within the larger category of helpful evidence. Evidence that is material is *per se* helpful. Any evidence that is not helpful cannot, by definition, be material. . . . On the other hand, evidence may be helpful even if it is not material. Such evidence is helpful, but not helpful enough. It moves in the right direction, but it fails to achieve materiality's critical mass.

Adams, 165 Md. App. at 437. It is apparent that what we have here is helpful evidence, but not material evidence. The evidence of Vaughn's name on an alleged Federal "do not call" list alone does not undermine confidence in the verdict.

Just as in *Strickler*, the State had significant additional evidence and any reliance on Vaughn's testimony was cumulative. Walker contends that this was a close case and that Vaughn's testimony provided the State with a confession which ultimately led to his

conviction. However, Vaughn's testimony was not the linchpin to the jury's decision to convict Walker. The jury had a significant amount of physical and forensic evidence that put Walker in the victim's apartment. The evidence proved Walker to be the primary contributor to the semen recovered from A.W.'s vaginal and oral swabs. Photographs showed the serious injuries A.W. suffered and the other testimony was consistent with the series of events that Vaughn described. All of this evidence is enough for a jury to convict Walker of the charges, without Vaughn's additional testimony relating to the XO drug and the *50 Shades of Grey* connection. As a result, the circuit court was not acting in error when it denied Walker's Motion for a New Trial on the basis of newly discovered evidence or a potential *Brady* violation. We affirm the denial of Walker's motion and turn our attention now to the questions relating to the court's handling of testimony and sentencing.

II. Cross Examination of Vaughn

Walker contends that the circuit court erred in limiting his cross-examination of Vaughn, specifically related to the potential benefits that Vaughn would receive as a result of testifying. The State responds that Walker did not preserve this issue for appeal and that Walker was able to cross-examine Vaughn in depth, including questions about his pending homicide charges.

Under Md. Rule 8-131(a), it is within our discretion to review issues that were not raised below. Since objections were raised during Vaughn's testimony, we will address the questions. We review the circuit court's decisions regarding cross examination of

witnesses for an abuse of discretion. *See Martin v. State*, 364 Md. 692, 698 (2001) ("The trial court has broad discretion in determining the scope of cross-examination, and we will not disturb the exercise of that discretion in the absence of clear abuse"). While the circuit court has broad discretion in this area, it is not unlimited:

> In assessing whether the trial court abused its discretion in limiting the cross-examination of the attorney who wished to show bias or motives to fabricate, we look to see whether the jury had sufficient information to make a discriminating assessment of the particular witness's possible motives for testifying falsely in favor of the State.

Id. at 698–99 (Citation omitted). Md. Rule 5-616(a)(4) allows the defendant to question a State's witness about "whether the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely."

Walker claims that the court erred by sustaining the State's objection to the following defense question:

> I'm going to hand you what's been (indiscernible) being marked as Defense Exhibit No. 3 and ask you if you can identify this writing. And while we're doing this you also contacted the prosecutor in your case, and asked her to just dismiss the case; is that correct?

It is true that there is no indication that this form of questioning confused Vaughn. The State objected because of the compound nature of the inquiry. Walker said the question was not too complicated for the witness to answer. However, nothing limited Walker's ability to confront Vaughn or to question him about his bias or interest to testify falsely. As noted above, the jury already had sufficient evidence about Vaughn's motives for

testifying. During the State's direct examination of Vaughn, he was asked about his criminal record and his involvement in Walker's case:

Q You are currently incarcerated?
A That's correct.
Q You've been found guilty of other charges?
A That's correct.
Q Yet you reached out to law enforcement?
A Yes
Q And you've done so without any promise of any assistance for anything else in your (indiscernible), right?
A I didn't ask for anything nor was anything promised to me.

On cross examination, Vaughn's credibility was questioned during a discussion of his extensive criminal record, his previous attempts to assist the State and the pending homicide charges against him:

Q Okay. Thirty-seven now and so, essentially, since you were 19, you have been serving either state or federal prison, all of - - the entire time, except for four years, essentially; is that correct?
A Exactly. Yes, sir.

. . .

Q So during this time, federal, state trouble and while you were in a state facility, you have assisted many agencies with your cooperation; is that correct?
A Correct

…

Q Okay. And now you're [sic] – you are awaiting trial in the murder, kidnaping [sic], extortion case; is that correct?
A Correct.
Q Where the deceased is found floating in the harbor, right?
MS. BURRELL: Objection
THE COURT: Um –
THE WITNESS: That's incorrect but go ahead.

. . .

Q	You have contacted the State's Attorney or the police and say, hey, I've got some information on these individuals; is that right?
A	No - -
Q	That I could be of some help to you?
A	Well the same way Mr. Walker case - -

. . .

Q	Okay. Here it goes. Here it is. Read it. "I've been successful in everything –
A	That's right.
Q	"I've done yet, I have not been successful as a man[."]
A	Correct
. . .

Q	Okay. So, because of my talents and lack of integrity, I've been a fairy. Those are your words referring to you?
A	That's absolutely correct?
Q	Okay. So you admit a lack of integrity on your own part; is that correct?
A	It had nothing to do with this case.
Q	(Indiscernible) talking about you –
A	That's correct.
Q	- - and your credibility and you admit that you are a man who has very little integrity?
A	I never said that.

The court acknowledged that this cross-examination was very effective: "It was not the high point for Mr. Vaughn in terms of his testimony, your cross examination of him. Don't you feel that you really had an adequate opportunity to cross-examine him?" It was completely within the discretion of the circuit court to limit the cross of Vaughn due to the compound nature of the question presented to the witness.

Additionally, any potential error would have been harmless because Walker's counsel was able to effectively impeach Vaughn's credibility and his potential motive for testifying. It "has long been the policy in this State that this Court will not reverse a lower court judgment if the error is harmless. The burden is on the complaining party to show prejudice as well as error." *Flores v. Bell*, 398 Md. 27, 33 (2007) (Citation omitted). To "justify the reversal, an error below must have been both manifestly wrong and substantially injurious." *Id.* at 34 (Citation and quotations omitted). The jury was aware of Vaughn's involvement with the State and no prejudice resulted from any limit on cross-examination. It was not an abuse of discretion for the circuit court to sustain the State's objections during the cross-examination of Vaughn.

III. The SAFE Nurse's Statement

Walker contends that the circuit court erred by allowing the State's expert witness to testify on issues that related to the credibility of the victim's testimony. The State again responds that Walker failed to preserve this issue for appeal and that there was no error because the nurse's testimony did not impact on credibility but simply stated her observation of A.W.'s injuries.

As with the cross-examination issue, it is within our discretion to review issues pursuant to Md. Rule 8-131(a). Since Walker objected to portions of the SAFE nurse's testimony during trial, we will review the objection. Typically, absent review of a legal question, the "examination of witnesses at trial and control over witnesses' testimony are left to the discretion of the trial judge." *Conyers v. State*, 354 Md. 132, 161 (1999).

The Court of Appeals has drawn a distinction between testimony "in which a witness expresses an opinion that simply vouches for the credibility of another witness, and situations in which a witness assesses whether a statement of another witness is consistent with other facts known to the testifying witness." *Id.* at 729. A witness's testimony may not "encroach[] on the jury's function to judge the credibility of the witnesses and weigh their testimony and on the jury's function to resolve contested facts." *Id.* at 730 (Citation omitted). However, the Court of Appeals has held that it is appropriate to allow a witness to testify that statements are "consistent with other facts known to the testifying witness." *Id.* at 729.

The situation presented here is most similar to the facts of *Conyers*, which supports the use of this testimony as to consistency. In *Conyers*, the Court of Appeals noted that the questions asked of the nurse were open-ended and that the prosecution was only asking whether "the account that [the victim] had given the nurse during the examination was 'consistent or inconsistent with' the injuries she observed on [the victim]." *Id.* at 732. The SAFE nurse in Walker's case was asked: "Given your training as a safe nurse examiner, and you're an expert in this area, were A.W.'s injuries consistent with her narrative of what occurred to her on November 24?" The nurse's response to this question was "yes," without any elaboration about the details. Her answer was not a judgment on the credibility of the victim, but a judgment that in her opinion, the injuries she observed were consistent with non-consensual vaginal intercourse. Therefore, it was

not improper for the State to ask this question since the nurse's answer did not intrude on the jury's responsibility to weigh the evidence.

IV. Merger

The State contends that the issue of merger is not properly before this Court. However, Md. Rule 4-345(a) provides that "the court may correct an illegal sentence at any time." The Court of Appeals held that:

> When the trial court has allegedly imposed a sentence not permitted by law, the issue should ordinarily be reviewed on direct appeal even if no objection was made in the trial court. . . . Thus, a defendant who fails to object to the imposition of an illegal sentence does not waive forever his right to challenge that sentence.

Jordan v. State, 323 Md. 151, 161 (1991) (Citation omitted). Md. Rule 4-345 provides an "exemption from the normal preservation requirements and the normal filing deadline is based upon the inherent 'illegality' of the sentence [which allows for] open-ended and timeless review." *Pair v. State*, 202 Md. App. 617, 624 (2011). Even if a non-merged sentence were not inherently illegal, it is still within our discretion to correct the sentence if the circuit court failed to merge lesser included offenses with the greater offense.

Merger, governed by the required evidence test, focuses on the elements of each charged offense: "if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter." *State v. Lancaster*, 332 Md. 385, 391 (1993) (Quotation omitted). "When applying the required evidence test to a multi-purpose criminal offense, *i.e.,* an offense containing alternative elements, a court must examine the element or elements

relevant to the case before it." *Id.* at 398–99. For sentencing purposes, "in the context of merger, [any] ambiguity is resolved in favor of the defendant." *Nicolas v. State*, 426 Md. 385, 400 (2012).

Here, Walker was convicted of five offenses: first degree rape, first degree sex offense, second degree assault, unnatural or perverted sexual practice, and reckless endangerment. The State concedes, and we agree, that parts of Walker's sentence should merge. Walker's sentence for second degree assault should merge with his first degree rape conviction. The jury was instructed that second degree assault in this case required that:

> [T]he State must prove (1) that the Defendant caused offensive physical contact with [the victim] or that the Defendant caused physical harm to [the victim]. (2) That the contact was a result of an intentional or reckless act of the Defendant and was not accidental. And (3) that the contact was not consented to by [the victim].

The State concedes that it "intended to prosecute the second degree assault charge as a lesser included crime of the first degree rape." Therefore, under the required evidence test, the circuit court should have merged this sentence with Walker's sentence for first degree rape. *See Brooks*, 439 Md. at 707 ("The court merged the second degree assault conviction and second degree rape conviction into the first degree rape conviction for sentencing purposes").

However, we agree with the State's characterization of the reckless endangerment charge. Reckless endangerment "does not require, of course, that any harm actually be inflicted on a victim. It is enough that a substantial risk or threat of such harm be created

and then consciously disregarded." *Williams v. State*, 100 Md. App. 468, 482 (1994). Reckless endangerment can merge with a completed crime when the "actual harm to the endangered victim should come to pass." *Id.* Courts have determined that "merger will still be required in those particular instances where the inchoate crime of reckless endangerment has ripened into an instance of the consummated crime." *Id.* at 489.

Here, Walker's conviction for reckless endangerment was not the same as the first degree rape or second degree assault for merger purposes. The reckless endangerment instruction provided that the State must prove "(1) that the Defendant engaged in conduct that created a substantial risk of death or serious physical injury to another; (2) that a reasonable person would not have engaged in that conduct; and (3) that the Defendant acted recklessly." The jury convicted Walker of first degree rape and second degree assault on the basis of "offensive contact" not the alternative "serious bodily injury" option which was also presented to them on the verdict sheet. As argued by the State and accepted by this Court, Walker's reckless conduct created a risk of serious bodily injury to A.W., but did not result in serious bodily injury. Therefore, the reckless endangerment charge cannot merge under the required evidence test.

As for the third sentencing issue raised by Walker before this Court, we agree that Walker's convictions for first degree sexual offense and unnatural or perverted practice should merge. The act of fellatio was the basis for the sexual offense charge: "the State must prove (1) that the Defendant committed fellatio with [A.W.]; (2) that the act was committed by force or threat of force; and (3) that the act was committed without the

consent of [A.W.].” Based on the required element test, first degree sexual offense would merge with unnatural or perverted sexual practice, which requires only nonconsensual fellatio. We agree with the State’s concession that these two charges should have been merged at sentencing in accordance with the *Lancaster* decision.

Accordingly, Walker’s sentence for second degree assault should be merged with his sentence for first degree rape and his sentence for unnatural or perverted practice should be merged with his sentence for first degree sexual offense. We affirm the denial of Walker’s Motion for a New Trial and remand for a new sentence consistent with this opinion.

SENTENCES FOR SECOND DEGREE ASSAULT AND UNNATURAL OR PERVERTED SEXUAL PRACTICE ARE VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL OTHER SENTENCES AND JUDGMENTS AFFIRMED.THREE-FOURTHS OF COSTS TO BE PAID BY APPELLANT; ONE-FOURTH BY MAYOR AND CITY COUNCIL OF BALTIMORE.