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Recent Developments: Taylor v. State: Under Maryland Rule 5-806, a Party May Attack the Credibility of a Hearsay Declarant during the Cross-Examination of a Testifying Witness but May Not Present Proof of a Declarant's Misconduct

Cover Page Footnote

Please note that the matter discussed in this article has been expunged from Mr. Taylor's record.

RECENT DEVELOPMENT

TAYLOR V. STATE: UNDER MARYLAND RULE 5-806, A PARTY MAY ATTACK THE CREDIBILITY OF A HEARSAY DECLARANT DURING THE CROSS-EXAMINATION OF A TESTIFYING WITNESS BUT MAY NOT PRESENT PROOF OF A DECLARANT'S MISCONDUCT.

By: N. Tucker Meneely

In a matter of first impression, the Court of Appeals of Maryland held that Maryland Rule 5-806 permits a party to impeach the credibility of a hearsay declarant through the cross-examination of a testifying witness provided that no extrinsic evidence of the declarant's misconduct is put forth. *Taylor v. State*, 407 Md. 137, 963 A.2d 197 (2009). The court determined that to hold otherwise would permit a party to insulate a hearsay declarant from impeachment. *Id.* at 164, 963 A.2d at 213.

On September 22, 2004, Todd Tyrone Taylor ("Taylor") was involved in a sexual encounter with B.D., a 15 year-old boy. After notifying his parents, B.D. interviewed with Detective Deana Mackie ("Detective Mackie") of the Montgomery County Police Department. A forensic nurse examined B.D., and B.D. informed the nurse that he had performed fellatio and had anal intercourse with Taylor. A subsequent DNA sample taken from B.D. matched that of Taylor.

Taylor was indicted on two counts of sexual offense in the third degree and one count of sexual offense in the fourth degree. Before the Circuit Court for Montgomery County, the State, instead of having B.D. testify, relied on testimony from B.D.'s father and Detective Mackie. During the father's cross-examination, Taylor intended to impeach B.D.'s version of the encounter by alleging that B.D. had previously lied to his father about his sexual experience. During Detective Mackie's cross-examination, Taylor further attempted to establish that B.D. had told inconsistent stories about his encounter with Taylor. In both instances, the trial court prohibited Taylor's questioning with regards to B.D.'s history of lying and his sexual experience.

The jury convicted Taylor of one count of sexual offense in the third degree. Taylor appealed to the Court of Special Appeals of Maryland, which held that the trial court did not err in curtailing B.D.'s impeachment, and, if error had occurred, it was harmless. The Court of Appeals of Maryland granted Taylor's petition for a writ of certiorari.

Before the Court of Appeals of Maryland, Taylor argued that the questions regarding B.D. lying about his sexual experience and the encounter with Taylor were admissible because they had impeachment value bearing on B.D.'s veracity. *Taylor*, 407 Md. at 153, 963 A.2d at 206. Therefore, Taylor argued, the questions were not affected by the extrinsic evidence limitation of Maryland Rule 5-608(b) ("Rule 5-608(b)"). *Id.* Alternatively, the State argued that Taylor's questions constituted the introduction of extrinsic evidence, and therefore, the questions were impermissible under Rule 5-608(b). *Id.*

The Maryland Rules of Evidence provide that a party may impeach a hearsay declarant with any evidence that would be admissible had the declarant testified as a witness. *Id.* at 153, 963 A.2d at 206 (citing Md. Rule 5-806(a)). Due to the confluence of Maryland Rules 5-806 and 5-608(b), the court first determined whether Taylor would have been permitted, under Rule 5-608(b), to cross-examine B.D. with the same questions he was prohibited from asking B.D.'s father and Detective Mackie at trial. *Taylor*, 407 Md. at 153-54, 963 A.2d at 206.

The Court of Appeals of Maryland has held that, under Rule 5-608(b), witnesses may be questioned regarding matters that are likely to affect their credibility, test their memory or knowledge, or show their relation or bias to the parties. *Id.* at 154, 963 A.2d at 207 (quoting *State v. Cox*, 298 Md. 173, 178, 468 A.2d 319, 321 (1983)). The cross-examination is limited in that proof of particular facts is inadmissible when impeaching a witness. *Taylor*, 407 Md. at 157, 963 A.2d at 209. The purpose of this limitation is to avoid distracting the jury with a mini-trial regarding a collateral matter, while still allowing questions about prior instances of lying. *Id.* at 159-60, 963 A.2d at 210 (citing *Merzbacher v. State*, 346 Md. 391, 417-20, 697 A.2d 432, 445-46 (1997)).

Applying these principles, the court found that under Rule 5-608(b), if B.D. had testified, the questions Taylor planned to ask during cross-examination would have been permitted because they went directly toward B.D.'s character for truthfulness. *Taylor*, 407

Md. at 160, 963 A.2d at 211. However, if B.D. simply had replied “no” to these questions, Taylor would have been bound by B.D.’s answers. *Id.* Taylor could not have introduced extrinsic evidence to prove that B.D. lied about his sexual experience or his encounter with Taylor. *Id.*

Given that Taylor did not have the opportunity to cross-examine B.D. at trial, the court turned its focus to whether, under Maryland Rule 5-806 (“Rule 5-806”), the State could have avoided the impeachment of B.D.’s veracity by never calling him to the stand. *Id.* at 161, 963 A.2d at 211. Observing that this was an issue of first impression, the court examined federal case law for guidance. *Id.*

Federal courts indicated that Rule 806 of the Federal Rules of Evidence, which is similar in important respects to Maryland Rule 5-806, would allow the impeachment of a non-testifying hearsay declarant, but not proof of misconduct. *Id.* Specifically, the unavailability of a declarant would not always foreclose using prior misconduct as an impeachment tool. *Id.* at 163, 963 A.2d at 212 (quoting *U.S. v. Saada*, 212 F.3d 210, 221 (3rd Cir. 2000)). The witness could be questioned about the declarant’s misconduct, so long as there was no introduction of extrinsic evidence. *Taylor*, 407 Md. at 163, 963 A.2d at 212 (citing *Saada*, 212 F.3d at 221). One federal court reasoned that evidence of prior misconduct would not have been admissible had a declarant testified, and therefore, under Federal Rule 806, it also was inadmissible during the cross-examination of a testifying witness. *Taylor*, 407 Md. at 162, 963 A.2d at 212 (citing *U.S. v. White*, 116 F.3d 903, 920(D.C. Cir. 1997)).

Similarly, based on the determination that Taylor could have asked B.D. whether he lied about his sexual experience and his encounter with Taylor under Rule 5-608(b), the Court of Appeals of Maryland found that Rule 5-806 would permit the same questions to be posed to B.D.’s father and Detective Mackie. *Taylor*, 407 Md. at 164, 963 A.2d at 213. Therefore, the court held that the trial court erred in limiting Taylor’s cross-examination of B.D.’s father and Detective Mackie. *Id.* However, due to the substantial amount of DNA evidence, the majority held that this error was harmless and did not sway the verdict. *Id.* at 166-67, 963 A.2d at 214. Conversely, the dissent argued that had the jury been given the opportunity to hear that B.D. lied, the jury might have had a different perspective on the scientific evidence, which may have resulted in a different verdict. *Id.* at 179, 963 A.2d at 222 (Bell, C.J., dissenting).

By clarifying the scope of Rule 5-806, *Taylor* gives an opposing party the opportunity to establish a hearsay declarant's penchant for untruthfulness. This decision is particularly important in cases where a declarant's well-being requires that they refrain from testifying, especially in cases involving minors or victims of sexual offenses. Before this decision, a party's strategy may have included presenting a declarant's statements through other witnesses. Now, depending on the depth of favorable evidence, a party may have no choice but to put a declarant on the stand. Otherwise, a party will be forced to leave attacks to a declarant's credibility unanswered. These instances may be rare, because under Rule 5-806, an opposing party is prohibited from presenting contrary extrinsic evidence and bound by whatever answer a testifying witness provides.