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Casenotes: Evidence — Use of Prior Bad Acts Not Resulting in Conviction Are Permissible for Impeachment Purposes if Probative of Veracity and Readily Provable. *State v. Cox*, 298 Md. 173, 468 A.2d 319 (1983)

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EVIDENCE — USE OF PRIOR BAD ACTS NOT RESULTING IN CONVICTION ARE PERMISSIBLE FOR IMPEACHMENT PURPOSES IF PROBATIVE OF VERACITY AND READILY PROVA-BLE. *State v. Cox*, 298 Md. 173, 468 A.2d 319 (1983).

The defense counsel in a rape case asked the prosecutrix on cross-examination whether she had previously brought an assault charge against a former boyfriend.¹ After an objection to this question was sustained, the defense counsel proffered that the prosecutrix had previously charged a former boyfriend with criminal assault and then recanted the charge while testifying at his trial.² The trial judge rejected the argument that the recantation under oath was relevant to the prosecutrix's credibility, and prohibited further questioning on the matter.³ The defendant was subsequently found guilty⁴ and appealed to the Court of Special Appeals of Maryland, which reversed the conviction.⁵ The court of appeals granted certiorari and affirmed, holding that the inquiry into a false accusation previously made by the prosecutrix while under oath was proper for impeachment purposes.⁶

English common law allowed inquiry into any particular misconduct of a witness that tended to impugn his character (a prior bad act), even though the act had not been the basis for a criminal conviction.⁷ Although this questioning presented the dangers of harassing the witness and of undue prejudice, the disciplined discretion of the bar was relied upon to avoid abuses.⁸ In this country, however, there is a lack of agreement as to whether prior bad acts can be used for impeachment purposes.⁹ Generally, evidence of particular instances of misconduct is inadmissible for impeachment purposes on the grounds that its introduction may result in confusion of the jury and unfair surprise to the opponent.¹⁰ Prior misconduct, however, tends to be more probative of a witness's lack of veracity than does opinion or reputation testimony.¹¹

1. *State v. Cox*, 298 Md. 173, 176, 468 A.2d 319, 320 (1983).

2. *Id.* at 177, 468 A.2d at 320. Defense counsel proffered that the prosecutrix "first came into court and said that [the defendant] did commit the assault, and then on cross-examination the information I have is that she then recanted it." *Id.*

3. *Id.* at 177, 468 A.2d at 321.

4. *Id.* The defendant was sentenced to life imprisonment.

5. *Cox v. State*, 51 Md. App. 271, 443 A.2d 607 (1982), *aff'd*, 298 Md. 173, 468 A.2d 319 (1983).

6. *Cox v. State*, 298 Md. 173, 468 A.2d 319 (1983). The trial judge had therefore abused his discretion by not allowing defense counsel to cross-examine the witness. *Id.* at 184, 468 A.2d at 324.

7. C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 42 (E. Cleary 3rd ed. 1984). There are five means of attacking the credibility of a witness: (1) prior inconsistent statements; (2) bias; (3) attacks upon character; (4) defects in capacity to observe or remember; and (5) disproving the facts testified to by the witness. *Id.* § 33.

8. *Id.* § 42.

9. See *infra* notes 14-20 and accompanying text.

10. See 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 979, at 826-27 (Chadborn rev. 1970).

11. See *id.* One commentator stated: "It is easier to believe that a person is dishonest

Thus, in recognition of the importance of assessing a witness's credibility, two exceptions to the general rule forbidding the introduction of specific instances of misconduct have been created by judicial decision. Subject to the trial court's discretion, prior acts resulting in conviction are generally admissible so long as they are relevant to determining a witness's credibility.¹² The rationale for this rule is that the misconduct has been conclusively established, thereby obviating the danger that the witness's veracity will be unfairly impugned.¹³ The second recognized exception, concerning prior bad acts not resulting in conviction, cannot be so unequivocally stated.

Discord among the jurisdictions concerning the admissibility of prior bad acts not resulting in conviction has resulted in three different approaches. The majority of courts,¹⁴ as well as the Federal Rules of

and untruthful when it can be shown that he has been dishonest and untruthful before, than it is to believe that a person is dishonest and untruthful because his neighbors and associates believe him to be so." Note, *Impeaching and Rehabilitating a Witness With Character Evidence: Reputation, Opinion, Specific Acts and Prior Convictions*, 9 U.C.D. L. REV. 319, 329 (1976). Impeachment by opinion or reputation testimony is more common than impeachment by prior misconduct. Section 9-115 of the Maryland Code of Courts and Judicial Proceedings abrogated the common law rule that only allowed a character witness to testify as to the defendant's reputation for truthfulness in the community. MD. CTS. & JUD. PROC. CODE ANN. § 9-115 (1984); see also *Kelley v. State*, 288 Md. 298, 418 A.2d 217 (1980) (character witness can give personal opinion if there is an adequate basis for that opinion).

12. See, e.g., *United States v. Brashier*, 548 F.2d 1315 (9th Cir. 1976), cert. denied, 429 U.S. 1111 (1977); *Sims v. Callahan*, 269 Ala. 216, 112 So. 2d 776 (1959); *Griggs v. State*, 494 P.2d 795 (Alaska 1972); *People v. Birdette*, 22 Ill. 2d 577, 177 N.E.2d 170 (1961). See generally G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 81, at 285-92 (1978); C. MCCORMICK, *supra* note 7, § 43; 3A J. WIGMORE, *supra* note 10, § 980, at 985-87. The Federal Rules of Evidence allow impeachment for all crimes involving dishonesty and for other major crimes when the probative value of the conviction outweighs its prejudicial impact. FED. R. EVID. 609(a). For a discussion of Federal Rule 609(a), as well as a suggested approach for applying the rule when the witness is the criminal defendant, see Surratt, *Prior-Conviction Impeachment Under the Federal Rules of Evidence: A Suggested Approach to Applying the "Balancing" Provision of Rule 609(a)*, 31 SYRACUSE L. REV. 907 (1980). As to the admissibility of prior convictions for impeachment purposes in Maryland, see *Ricketts v. State*, 291 Md. 701, 708, 436 A.2d 906, 910 (1981) (allowing the introduction of felonies, infamous crimes, crimes involving moral turpitude, deceit, or dishonesty, and lesser crimes that reflect upon truth-telling). Difficulty exists, however, in determining whether a prior conviction is relevant to credibility. One Maryland court noted that "no rigid classification of crimes seems possible." *Linkin v. State*, 202 Md. 212, 220, 96 A.2d 246, 250 (1953). Another court, noting what it called a lacuna in Maryland case law, reasoned that this ambiguity regarding prior convictions "has done much to unsettle and to confuse the law." *Taylor v. State*, 278 Md. 150, 155, 360 A.2d 430, 434 (1976) (quoting 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 987 (Chadborn rev. 1970)).
13. 3A J. WIGMORE, *supra* note 10, § 980, at 828; see *Ricketts v. State*, 291 Md. 701, 436 A.2d 906 (1981).
14. See, e.g., *Vogel v. Sylvester*, 148 Conn. 666, 174 A.2d 122 (1961); *Lehr v. Rogers*, 16 Mich. App. 585, 168 N.W.2d 636 (1969); *State v. Cleveland*, 583 S.W.2d 263 (Mo. App. 1979); *Schreiberg v. Southern Coatings & Chem. Co.*, 231 S.C. 69, 97 S.E.2d 214 (1957); see also C. MCCORMICK, *supra* note 7, § 42.

Evidence,¹⁵ allow inquiry into acts that are probative of a witness's veracity. Other courts permit cross-examination regarding any specific act that demonstrates a lack of moral character.¹⁶ Under this liberal approach, the act may be only slightly related to credibility.¹⁷ A minority of courts, however, prohibits any inquiry into acts of misconduct for which there has been no criminal conviction.¹⁸ Although few jurisdictions have adopted this blanket prohibition, one commentator argues that this rule is the fairest because it lessens the dangers of prejudice to the witness, confusion of the issues, and abuse in the asking of unfounded questions.¹⁹ In addition, this commentator asserts that this approach is practical in that it is often difficult to determine whether particular acts are probative of a witness's veracity.²⁰

The confusion among the various jurisdictions regarding the admissibility of prior bad acts is reflected in the disparate decisions that often exist within one jurisdiction.²¹ Maryland courts recognize that decisional law regarding the use of prior bad acts to impeach is inconsistent.²² The Maryland rule regarding the admissibility of accusations of crime or misconduct, however, is explicit: mere accusations are strictly forbidden.²³ In addition, Maryland courts have consistently held that extrinsic evidence of particular acts may not be used to impeach the char-

15. FED. R. EVID. 608(b). Federal Rule 608(b) provides:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

See United States v. Estell, 539 F.2d 697 (10th Cir.), *cert. denied*, 429 U.S. 982 (1976).

16. *See* People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950); State v. Jones, 215 Tenn. 20, 385 S.W.2d 80 (1964); *see also* C. MCCORMICK, *supra* note 7, § 42.

17. *See* C. MCCORMICK, *supra* note 7, § 42.

18. *See* Coleman v. Southern Pac., 141 Cal. 2d 121, 296 P.2d 386 (1956); Berliner v. Schoenberg, 117 Pa. Super. 254, 178 A. 330 (1935); Christie v. Brewer, 374 S.W.2d 908 (Tex. Civ. App. 1964); *see also* C. MCCORMICK, *supra* note 7, § 42.

19. *See* C. MCCORMICK, *supra* note 7, at 83; *see also* Cox v. State, 51 Md. App. 271, 286, 443 A.2d 607, 617 (1982) (Lowe, J., dissenting), *aff'd*, 298 Md. 173, 468 A.2d 319 (1983) (quoting C. MCCORMICK, *supra* note 7, at 83).

20. C. MCCORMICK, *supra* note 7, at 83.

21. *Compare* Neam v. State, 14 Md. App. 180, 286 A.2d 540 (1972) (prior bad acts falling short of arrest completely inadmissible) *with* Mulligan v. State, 18 Md. App. 588, 308 A.2d 418 (1973) (prior bad acts admissible if probative of veracity). *See also* Cox v. State, 51 Md. App. 271, 286, 443 A.2d 607, 617 (1982) (Lowe, J., dissenting) (confusion exists in Maryland as to the rule concerning prior bad acts), *aff'd*, 298 Md. 173, 468 A.2d 319 (1983). *See generally* C. MCCORMICK, *supra* note 7, at 82.

22. *See* Cox v. State, 51 Md. App. 271, 286, 443 A.2d 607, 617 (1982) (Lowe, J., dissenting), *aff'd*, 298 Md. 173, 468 A.2d 319 (1983); Johnson v. State, 30 Md. App. 512, 514, 352 A.2d 371, 372 (1976).

23. *See* Martens Chevrolet v. Seney, 292 Md. 328, 339-40, 439 A.2d 534, 540-41 (1982);

acter or reputation of a witness.²⁴ Extrinsic evidence, or independent proof, is evidence obtained from a source such as documents or witnesses other than the witness sought to be impeached.²⁵ Confusion resulted, however, when the courts failed clearly to determine whether a witness could be questioned directly as to his own prior bad acts.²⁶

As early as 1919, the Court of Appeals of Maryland, in *Rau v. State*,²⁷ recognized as well settled the rule that a witness could be impeached only by attacking his reputation for truth and veracity, and not by inquiry into particular acts of misconduct, even though the particular act may have been probative of veracity.²⁸ This broad statement of the rule, however, has led to confusion because the *Rau* court appeared to be prohibiting only extrinsic evidence of a witness's prior bad acts, and not direct inquiry into the witness's own such acts.²⁹ Thus, the *Rau* court left unanswered whether a witness could be questioned about his own prior bad acts for impeachment purposes. In the 1937 case of *Mahan v. State*,³⁰ the court of appeals had an opportunity to clarify the ambiguity created by *Rau*, but failed to do so. In *Mahan*, a wrongful death action against a taxicab driver, the driver was asked on direct examination to state his age. On cross-examination he was asked whether he had falsely stated his age in a chauffeur's license application.³¹ Instead of delineating a rule as to whether inquiry into a witness's own prior bad acts was allowed, the court, reasoning that the driver's misstatement of his age adversely reflected on his credibility, summarily concluded that it was "obvious enough" that such a line of inquiry was permissible.³² Thus,

Burgess v. State, 161 Md. 162, 170, 155 A. 153, 156 (1931). See generally Annot., 28 A.L.R.4TH 505 (1984).

24. See, e.g., *Martens Chevrolet v. Seney*, 292 Md. 328, 439 A.2d 534 (1982); *Richardson v. State*, 103 Md. 112, 63 A. 317 (1906); *Poff v. State*, 3 Md. App. 289, 239 A.2d 121 (1968).
25. C. McCORMICK, *supra* note 7, at 67.
26. See *Johnson v. State*, 30 Md. App. 512, 514, 352 A.2d 371, 372 (1976); *Rau v. State*, 133 Md. 613, 616-17, 105 A. 867, 868 (1919).
27. 133 Md. 613, 105 A. 867 (1919).
28. *Id.* at 616-18, 105 A. at 867.
29. *Id.* The confusion caused by the decision is indicated by the belief of the court of special appeals in *Cox* that *Rau* was not good precedent. *Cox v. State*, 51 Md. App. 271, 275, 443 A.2d 607, 610 (1982), *aff'd*, 298 Md. 173, 468 A.2d 319 (1983).
30. 172 Md. 373, 191 A. 575 (1937).
31. *Id.* at 379-80, 191 A. at 578-79.
32. *Id.* at 380, 191 A. at 579. The case of *Sappington v. Fairfax*, 135 Md. 186, 108 A. 575 (1919), a suit for malicious prosecution, also failed to clarify the rule regarding the admissibility of prior bad acts. The trial court in *Sappington* had permitted a defense witness to be cross-examined as to whether he knew at the time he testified against the plaintiff before a grand jury that the plaintiff had not stolen the property in question. The court of appeals in *Sappington* simply held that the evidence was, if for no other purpose, at least admissible for the purpose of attacking the witness's credibility. *Id.* at 192, 108 A. at 578. After these early cases, one commentator termed the law in Maryland regarding prior bad acts as "obfuscated." Kauffman, *Impeachment and Rehabilitation of Witnesses in Maryland*, 7 MD. L. REV. 118, 126 (1943).

Mahan seemed to limit *Rau* to prohibiting extrinsic evidence of prior bad acts, but allowing the witness himself to be asked about them.

Subsequent case law failed to elucidate a Maryland rule concerning inquiry into a witness's own prior bad acts. In *Neam v. State*,³³ the Court of Special Appeals of Maryland held that the state could not cross-examine the defendant as to his prior narcotics addiction for purposes of impeachment.³⁴ The court first analogized the use of prior bad acts to the use of prior convictions, noting that the admissibility of prior convictions for impeachment purposes had been limited by statute.³⁵ Because of the danger of insufficient proof of prior bad acts not resulting in conviction, the court therefore determined, in contrast to *Mahan*, that it was logical to exclude completely evidence of prior misconduct falling short of arrest.³⁶ The *Neam* court further reasoned that although narcotics addiction was highly relevant to the witness's credibility, evidence of the addiction was inadmissible because of the undue prejudice to the witness that would result from its use.³⁷

Another Maryland case, however, deviated from *Neam*'s total prohibition of evidence of prior misconduct falling short of arrest. In *DeLilly v. State*,³⁸ the court of special appeals held that the trial court erred in refusing to permit the defendant in a rape case to impeach the victim's identification testimony by showing that she had previously misidentified another person accused of rape.³⁹ The basis for the *DeLilly* court's holding was that the specific act was directly relevant to the witness's credibility.⁴⁰ Thus, the conflicting decisions in *DeLilly* and *Neam*, as well as the ambiguity created by *Rau*, left the law unsettled regarding the use of

33. 14 Md. App. 180, 286 A.2d 540 (1972).

34. *Id.* at 187-90, 286 A.2d at 545-46.

35. *Id.* at 188, 286 A.2d at 545. The *Neam* court was referring to what is now MD. CTS. & JUD. PROC. CODE ANN. § 10-905(a) (1984), which provides in pertinent part: "[e]vidence of conviction is not admissible if an appeal is pending, or the time for an appeal has not expired, or the conviction has been reversed, and there has been no retrial or reconviction."

36. *Neam*, 14 Md. App. at 187-90, 286 A.2d at 545-46.

37. *Id.* The court balanced the undue prejudice against the utility of determining testimonial veracity. Another decision that stood for the proposition that Maryland courts would be firm in refusing to allow inquiry into prior bad acts to impeach was *Martens Chevrolet v. Seney*, 292 Md. 328, 439 A.2d 534 (1982). In *Martens*, the court of appeals decided whether defense counsel, in a negligent misrepresentation case, could cross-examine a witness as to whether the witness had been charged with fraud in a previous lawsuit. *Id.* at 338-39, 439 A.2d at 540-41. In holding that the introduction of the question constituted reversible error, the court stated that Maryland courts have firmly adhered to the rule forbidding evidence of specific acts for impeachment purposes, particularly when the evidence amounts to a mere accusation. *Id.* at 340, 439 A.2d at 541.

38. 11 Md. App. 676, 276 A.2d 417 (1971).

39. *Id.* at 680-81, 276 A.2d at 419.

40. *Id.* A similar case to *DeLilly* is *Mulligan v. State*, 18 Md. App. 588, 308 A.2d 418 (1973). In *Mulligan*, the court of special appeals held that it was reversible error to disallow cross-examination of the state's main witness, a police officer, concerning the officer's having been found guilty in a police disciplinary proceeding for falsifying police reports. *Id.* at 597, 308 A.2d at 423. The court held that although it was

prior bad acts for impeachment purposes. Extrinsic evidence of prior bad acts was clearly prohibited, but the propriety of inquiry directed at the witness himself was undecided.

The case of *State v. Cox*⁴¹ presented the issue whether the testimony of a prosecuting witness in a rape case could be impeached on cross-examination by inquiry into specific acts of prior misconduct.⁴² The Court of Appeals of Maryland held that inquiry into prior bad acts was permissible provided there was a reasonable basis for the question and the misconduct was probative of the witness's credibility.⁴³ In reaching this conclusion, the court first referred to the general rule that a witness may be cross-examined as to any matter that would be likely to affect his credibility.⁴⁴ In analogizing to the rule that extrinsic evidence of prior convictions is permitted to impeach provided the conviction is relevant to credibility,⁴⁵ the *Cox* court concluded that a witness could also be asked about prior bad acts not resulting in conviction, so long as they were relevant to credibility.⁴⁶ Such inquiry could only be conducted, however, when there was a reasonable basis for the question, there was little likelihood that confusion of the issue would result, and the purpose of the inquiry was not to embarrass or harass the witness.⁴⁷

The admissibility of prior bad acts was distinguished from the admissibility of a mere accusation of misconduct on the ground that evidence of prior bad acts established a fact rather than an accusation; here the evidence established that the witness had lied under oath in a similar situation.⁴⁸ The court buttressed its reasoning by distinguishing *Martens Chevrolet v. Seney*,⁴⁹ a fraud case relied on by the prosecution. In *Martens*, the court of appeals held that questioning a witness regarding whether he had previously been charged with fraud constituted reversible error.⁵⁰ In distinguishing *Martens*, the *Cox* court emphasized that for

not authorizing a "baseless fishing expedition" into the witness's alleged misconduct, such inquiry was crucial because it indicated the officer's lack of veracity. *Id.*

41. *State v. Cox*, 298 Md. 173, 468 A.2d 319 (1983).

42. *Id.* at 180-81, 468 A.2d at 322. Maryland's rape shield law prohibits the introduction of evidence relating to a prosecutrix's reputation for unchastity in rape cases. Specific acts of sexual conduct are generally inadmissible, although previous consensual encounters with the accused are admissible as evidence of the probability of consent. MD. ANN. CODE art. 27, § 461A (1957). See generally Note, *Rape And Other Sexual Offense Law Reform in Maryland, 1976-1977*, 7 U. BALT. L. REV. 151 (1977). *Cox* dealt with none of these issues. *State v. Cox*, 298 Md. 173, 468 A.2d 319 (1983).

43. 298 Md. at 184, 468 A.2d at 324.

44. *Id.* at 178, 468 A.2d at 321 (citing *Harris v. State*, 237 Md. 299, 302, 206 A.2d 254, 256 (1965); *Kantor v. Ash*, 215 Md. 285, 290, 137 A.2d 661, 664 (1958)).

45. See *supra* text accompanying note 12.

46. *Cox*, 298 Md. at 178-79, 468 A.2d at 321-22.

47. *Id.* at 179, 468 A.2d at 322.

48. *Id.* at 183, 468 A.2d at 323.

49. 292 Md. 328, 439 A.2d 534 (1982).

50. *Id.* at 340, 439 A.2d at 541. The witness in *Martens* was not a party to the action. Courts generally will apply stricter scrutiny when the witness is a party, especially when the witness is the defendant. See *United States v. Schiller*, 187 F.2d 572, 576

impeachment purposes, the proper inquiry was whether the witness actually committed the act, not whether he had been merely accused of committing it.⁵¹ Accusations of guilt are hearsay and therefore have little bearing on a witness's credibility. Hence, the court concluded that the inquiry in *Martens* did not purport to elicit information probative of the witness's truth telling.⁵² In *Cox*, the prosecutrix had lied under oath. This act related directly to her character for veracity and therefore aided the jury's assessment of her credibility. In addition, the court noted that the witness was not disadvantaged by unfair surprise because the examiner was bound by her answer; if the prosecutrix denied the prior misconduct, extrinsic evidence could not be introduced to contradict her.⁵³

The court also distinguished the rule set forth in *Rau v. State*⁵⁴ forbidding the introduction of extrinsic evidence as to prior bad acts. In *Rau*, a statutory rape case, the prosecutrix's father was asked on cross-examination whether his daughter had once told him that she had had sexual relations with a neighbor, and then later recanted her accusation. Although the specific act was probative of the witness's credibility, the *Cox* court noted that the inquiry was made to one who had not committed the act, and therefore constituted inadmissible extrinsic evidence.⁵⁵ Thus, the *Cox* decision interpreted *Rau* as establishing a general rule that although extrinsic evidence of prior bad acts is inadmissible for impeachment purposes, the witness may be questioned on cross-examination about prior bad acts that are probative of his own credibility.⁵⁶

The *Cox* court then determined that although the scope of cross-examination is ordinarily within the sound discretion of the trial judge, the judge may not limit examination so that the accused is clearly prevented from obtaining a fair trial.⁵⁷ Thus, inquiry into a prior false accusation of assault made by the prosecutrix was relevant to determining her credibility, particularly when the prosecution's case depended upon her identification of the defendant. The court held that the trial judge's prohibition of the defense counsel's inquiry was reversible error.⁵⁸

Under our adversarial system of justice, a trial is characterized as a search for the truth.⁵⁹ In order to obtain this result, the fact finder must often choose between conflicting testimony. It is therefore essential that the witness's veracity, and hence his credibility, be subject to cross-exam-

(2d Cir. 1951) (Frank, C.J., concurring); *Ricketts v. State*, 291 Md. 701, 436 A.2d 906 (1981); *Ross v. State*, 276 Md. 664, 350 A.2d 680 (1976). See generally Note, *Limiting The Use of Prior Bad Acts and Convictions to Impeach the Defendant-Witness*, 45 ALB. L. REV. 1099 (1981).

51. 298 Md. at 181, 468 A.2d at 322-23.

52. *Id.*

53. *Id.* at 179, 468 A.2d at 321-22.

54. 133 Md. 613, 105 A. 867 (1919).

55. *Cox*, 298 Md. at 182-83, 468 A.2d at 323.

56. *Id.*

57. *Id.* at 183-84, 468 A.2d at 324.

58. *Id.* at 184-85, 468 A.2d at 324-25.

59. *Id.* at 178, 468 A.2d at 321.

ination. Although the risk of undue prejudice to the witness exists, impeachment by the introduction of prior bad acts is necessary to further the goal of determining the truth.

Cox clarified the Maryland rule concerning use of prior bad acts for impeachment purposes, and aligned Maryland with the majority of jurisdictions.⁶⁰ The *Cox* court recognized the balance that must be struck between the right to cross-examine a witness and assess his credibility, and the possible unfair prejudice that could result from admitting specific instances of misconduct. The jurisdictions prohibiting any cross-examination into prior misconduct⁶¹ demonstrate more concern with preventing abuses resulting from the admission of prior bad acts than with properly assessing a witness's credibility. In wisely rejecting this blanket prohibition, *Cox* emphasizes that allowing relevant cross-examination to rebut any assumption of the witness's veracity is necessary to further the search for the truth.

Although *Cox* provides some guidelines as to what types of prior bad acts are admissible, its holding is limited by the narrow issue considered by the court. The *Cox* court restricted the issue to whether a prosecutrix in a rape case could be impeached by prior bad acts. The court therefore left open whether a character witness or defendant could also be impeached by prior bad acts.⁶² A case decided by the court of appeals the day after *Cox*, however, interpreted *Cox* as applying to all witnesses.⁶³ *Robinson v. State*⁶⁴ provided a clear test for determining when prior bad acts are admissible for impeachment purposes.⁶⁵ Relying on *Cox*, the court established a two-pronged test that permits a witness to be questioned only about prior bad acts that: (1) were closely related to the witness's veracity; and (2) contained a reasonable basis for believing that the conduct has actually occurred.⁶⁶ This two-pronged test provides a useful guide to Maryland attorneys by preventing the confusion that would have resulted from the narrow holding in *Cox*.

Because of the obvious dangers of insufficient proof, the probative value of admitting prior bad acts should be subject to greater scrutiny than the probative value of prior convictions. The *Robinson* court, following this reasoning, indicated that in certain instances inquiry about

60. See *supra* note 14 and accompanying text.

61. See *supra* note 18 and accompanying text. There is, however, at least one exception recognized in California: prior false claims brought by juvenile girls in sex offense cases. See *People v. Hurlburt*, 166 Cal. App. 2d 334, 333 P.2d 82 (1958). For a discussion of the admissibility of accusations against others similar to charges now brought in sex offense cases, see Annot., 75 A.L.R.2d 500 (1961).

62. *Cox*, 298 Md. at 180-81, 468 A.2d at 322.

63. *Robinson v. State*, 298 Md. 193, 468 A.2d 328 (1983).

64. *Id.*

65. The court in *Robinson* rejected the argument that a character witness's alleged assault, arson, and unauthorized departure from a mental institution were proper grounds of inquiry on cross-examination. *Id.* at 198-200, 468 A.2d at 331.

66. *Id.* at 201, 468 A.2d at 333. The *Robinson* court held that the previous acts of misconduct failed the first prong of the test. *Id.* at 198-200, 468 A.2d at 331-32.

prior bad acts not resulting in convictions should not be allowed even though the same inquiry should be allowed if conviction had resulted.⁶⁷ Thus, under *Cox* and *Robinson*, particular acts of dishonesty such as falsifying reports,⁶⁸ lying on applications,⁶⁹ and bringing false claims⁷⁰ will be admissible because they are probative of a witness's veracity. In comparison, accusations of misconduct,⁷¹ drug addictions,⁷² and indecent and unchaste acts⁷³ will be inadmissible because they do not aid the factfinder in determining whether the witness is telling the truth. *Robinson* also indicated that assaults not resulting in convictions will be inadmissible because acts committed in the heat of passion have little bearing on a witness's tendency to tell the truth.⁷⁴

Maryland courts have admitted prior bad acts for impeachment purposes only when the prior acts were documented. Previous documentation therefore seems to be required by the "reasonable basis" prong of the *Robinson* test. Thus, trial transcripts,⁷⁵ state records,⁷⁶ and administrative reports⁷⁷ have been deemed to establish a sufficient basis for inquiry into prior bad acts.

Whether undocumented evidence of prior bad acts may be used to impeach is left unanswered by both *Cox* and *Robinson*. The reasonable basis prong of the *Robinson* test should be limited to only those acts that are documented, however, in order to prevent unfounded questions from being asked. This interpretation also facilitates formation of more specific questions, which diminishes the impact of a witness's denial of the prior bad act. As noted in *Cox*, a witness's denial of a prior bad act requires counsel to accept the answer and thus precludes him from further efforts to impeach through that particular bad act.⁷⁸ The more detailed the cross-examiner's question, however, the greater the possibility that the jury will believe the witness committed the act, because the specific nature of the inquiry suggests that a reasonable basis exists for believing the conduct actually took place.⁷⁹ Moreover, if the jury believes

67. *Robinson v. State*, 298 Md. 193, 200, 468 A.2d 328, 332 (1983).

68. See *Mulligan v. State*, 18 Md. App. 588, 308 A.2d 418 (1973).

69. See *Mahan v. State*, 172 Md. 373, 191 A. 575 (1937).

70. See *State v. Cox*, 298 Md. 173, 468 A.2d 319 (1983).

71. See *Martens Chevrolet v. Seney*, 292 Md. 328, 439 A.2d 534 (1982).

72. See *Neam v. State*, 14 Md. App. 180, 286 A.2d 540 (1972).

73. See *Ricketts v. State*, 291 Md. 701, 436 A.2d 906 (1981); *Richardson v. State*, 103 Md. 112, 63 A. 317 (1906).

74. *Robinson v. State*, 298 Md. 193, 198-99, 468 A.2d 328, 331 (1983); cf. *Thomas v. State*, 29 Md. App. 45, 349 A.2d 384 (1975) (prior assault conviction inadmissible on issue of credibility), *cert. denied*, 278 Md. 736 (1976).

75. See *State v. Cox*, 298 Md. 173, 468 A.2d 319 (1983).

76. See *Mahan v. State*, 172 Md. 373, 191 A. 575 (1937).

77. See *Mulligan v. State*, 18 Md. App. 588, 308 A.2d 418 (1973).

78. *State v. Cox*, 298 Md. 173, 179, 468 A.2d 319, 321-22 (1983).

79. See 3A J. WIGMORE, *supra* note 10, § 981, at 838. For example, consider the following cross-examination: "Q: Witness, is it true that on October 1, 1981, at approximately 5:00 p.m., you were arrested by an Officer Homes for allegedly stealing a Jensen car stereo model number 4477 from a 1970 Blue Volkswagon Beetle Mary-

the prior bad act occurred, and then the witness denies the act under oath, they will be even more likely to distrust the witness's testimony concerning the case. In comparison, asking a highly detailed question for which no reasonable basis exists causes undue prejudice to the witness, and, as *Cox* indicated, is prohibited.

In accordance with the rule forbidding use of extrinsic evidence for impeachment, the introduction of documents proving prior bad acts should be prohibited. One Maryland court has permitted the introduction of documents that formed the reasonable basis for the inquiry in order to contradict the witness's denial of the act.⁸⁰ This practice is unacceptable under *Cox*, because the theory behind the rule requiring counsel to accept the witness's answer is that unfair surprise is avoided because the witness does not have to produce rebuttal evidence.⁸¹ In order to prevent unfair surprise, encourage judicial economy, and avoid confusion of the issues, the introduction of such documents should be forbidden.

An inconsistency results from *Cox's* adoption of the majority rule that inquiry into prior bad acts for impeachment is permitted when the inquiry is probative of veracity, but prohibited when it involves mere accusations or charges of misconduct. A conflict arises between the two principles when the witness has been charged with, but not convicted of, some alleged misconduct, and the inquiry satisfies the *Robinson* two-prong test.⁸² When such an overlap of the rules occurs, inquiry concerning the prior bad act should be permitted. Under the present Maryland rule, inquiry into charges or accusations of misconduct is forbidden because proof that the act was actually committed is lacking. Yet as long as the reasonable basis prong of the two-prong test is satisfied, the danger of lack of proof is eliminated.

The *Cox* decision makes it clear that prior bad acts may be used to impeach a witness's credibility so long as the act is probative of veracity and is readily provable. *Cox* provides greater latitude to the cross-examiner to inquire into prior misconduct, and sets forth adequate standards to determine when inquiry should be permitted.⁸³ While the need to as-

land License E.C. from the parking lot at 800 Charles St. in Baltimore, Md.? A: No." In such a situation, the jury may tend to believe that the theft actually occurred.

80. *Mahan v. State*, 172 Md. 373, 379, 191 A. 575, 578-79 (1937) (certified copy of license application admitted to show defendant lied on the application). *But see supra* text accompanying notes 24-25.

81. *Cox*, 298 Md. at 199, 468 A.2d at 322.

82. For example, the inquiry in *Cox* would be admissible under the two-prong test because there was a reasonable basis for asking the prosecutrix about bringing a false claim, and the act was probative of the prosecutrix's veracity. If, before the *Cox* case, the state had brought a perjury charge against the prosecutrix for lying under oath, and that charge was pending when *Cox* was tried, then the inquiry would apparently not be admissible because of the rule prohibiting inquiry into mere accusations or charges of misconduct.

83. One indication that *Cox* represents a significant change in Maryland law is that the

sess accurately a witness's credibility is great, that need must be weighed against the prejudice to the witness and confusion to the fact finder caused when specific acts are admitted to impeach. The problem of determining whether certain specific acts are probative of truth-telling is reflected in the difficulty Maryland courts have encountered in determining which prior convictions are probative of veracity.⁸⁴ Maryland's rule, which allows impeachment by prior convictions ranging from the vague "crimes of moral turpitude"⁸⁵ to lesser crimes that go to truth-telling,⁸⁶ is too ambiguous a standard to determine properly which prior convictions are admissible to assess a witness's credibility. In comparison, the two-pronged test as to specific acts not resulting in conviction, as established in *Cox* and *Robinson*, provides Maryland courts with a much needed standard of strict scrutiny for determining what prior bad acts can be used to impeach.

John Jude Hathway

Maryland Judges' Benchbook, a quick reference for trial judges compiled prior to the *Cox* decision, stated: "[c]redibility of a witness may not be attacked or supported by evidence of specific instances of conduct of a witness Maryland has not followed those jurisdictions which permit a witness to be cross-examined as to specific conduct not resulting in criminal conviction." MARYLAND TRIAL JUDGES' BENCHBOOK, EV-18 (1977).

84. See *supra* note 12.

85. See *Ricketts v. State*, 291 Md. 701, 706-07, 436 A.2d 906, 909 (1981).

86. *Id.* at 708, 436 A.2d at 910.