UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0135

September Term, 2014

ANDRE LIONEL BOWMAN

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Kehoe,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: October 30, 2015

Following a three day trial, a jury in the Circuit Court for St. Mary's County convicted Andre Lionel Bowman, appellant, of first-degree murder, first-degree burglary, robbery with a dangerous weapon, conspiracy to commit burglary in the first degree, and use of a handgun in the commission of a felony. Prior to sentencing, appellant filed a motion for a new trial and a motion seeking to compel the State to conduct DNA testing of certain evidence. Before ruling on the motion for a new trial, the trial court granted appellant's motion to compel further DNA testing. At a subsequent sentencing hearing, following DNA testing, appellant sought to have the DNA results compared to the national CODIS database.[1] The court denied this request and also denied appellant's motion for a new trial. Following sentencing, appellant appealed and presents the following questions, which we have rephrased as:

> 1. Did the court abuse its discretion in denying appellant's motion for a new trial?
>
> 2. Did the court abuse its discretion in denying appellant's motion to order the State to compare DNA samples to the CODIS database?[2]

[1] The CODIS database is the Federal Bureau of Investigation's "Combined DNA Index System" of DNA records submitted by federal, state, and local labs. *See Allen v. State*, 440 Md. 643, 651 n.5 (2014).

[2] Appellant phrased the questions as:

> Whether the trial court erred in denying Appellant's motion for new trial and denying Appellant's motion to order a comparison of DNA test results to the State or national databases based on post-trial DNA testing that excluded Appellant as a contributor of the DNA collected from the crime scene and revealed DNA belonging to other unknown persons on items within a residence which Appellant allegedly touched?

For the reasons stated below, we answer both questions in the negative and affirm the judgments of the circuit court.

FACTS AND PROCEDURAL HISTORY

On the afternoon of February 7, 2013, Oshia Lewis received a call from appellant, a friend of hers, asking her to give his cousin, James Clay, and him a ride to St. Mary's County. Ms. Lewis was accustomed to giving appellant rides, and she assumed appellant wanted to visit his grandmother who lived in St. Mary's County. Shortly before 7:00 p.m., Ms. Lewis pulled her silver Ford Fusion into the Shell gas station on Pegg Road in Lexington Park, where appellant went into the store to purchase a snack.

Approximately five minutes later, another vehicle, driven by a Mr. Medley,[3] pulled into the Shell. At trial, Ms. Lewis testified that she had never met Mr. Medley before this encounter, and she assumed that he was a friend of appellant's. Mr. Medley walked to the passenger side of Ms. Lewis's vehicle, where appellant was then sitting. Ms. Lewis overheard Mr. Medley speaking with appellant for a minute or two, and she understood from the conversation that Mr. Medley, Mr. Clay, and appellant were discussing robbing someone. Mr. Medley asked appellant to meet him later. Ms. Lewis, appellant, and Mr. Clay then followed Mr. Medley to an apartment where they remained while Mr. Medley dropped off his girlfriend.

[3] The record does not indicate Mr. Medley's first name.

Meanwhile, around 6:30 p.m., Alisha Marshall left work to return to her home in St. Inigoes, where she resided with her boyfriend, Robert Lee McDowney. Mr. McDowney came home from work around 8:30 p.m.

After dropping off his girlfriend, Mr. Medley contacted appellant and said he was parked outside the apartment where appellant, Ms. Lewis, and Mr. Clay were waiting. Mr. Medley hopped into the backseat of Ms. Lewis's car and gave her directions on where to drive. When Ms. Lewis passed Mr. McDowney's house, Mr. Medley pointed it out and said, "That's the house." Shortly afterwards, Mr. Medley exited the vehicle, told appellant and Mr. Clay to contact him later, and left in another car that had followed Ms. Lewis. Appellant, Mr. Clay, and Ms. Lewis then drove back to Mr. McDowney's residence. Ms. Lewis testified that they pulled into Mr. McDowney's driveway, and she observed a man and a woman in a parked vehicle in the neighboring driveway, who then went into the neighboring residence. When Ms. Lewis stopped her car, appellant put a mask on, and he and Mr. Clay exited the vehicle.

Ms. Marshall testified that shortly before 9:00 p.m., as she and Mr. McDowney were sitting at the kitchen table, she was startled by two men kicking down the front door. She described one assailant as 5'7" or 5'8", around 180 pounds, African-American, wearing a mask; the other man was 6'2", African-American, and was not wearing a mask. Ms. Marshall ran to the bedroom, and the masked man followed her. The other man stayed in the kitchen with Mr. McDowney.

In the bedroom, the masked man demanded to know where the money was. Ms. Marshall testified that she did not know what money the masked man was referring to, but she told him to move various pieces of furniture in the bedroom and to look in the heat registers. Eventually, the masked man found and took $700 from a pocket of a coat hanging in the closet and some drugs. Ms. Marshall testified that the $700 was rent money, and she admitted that Mr. McDowney was a drug dealer. Ms. Marshall stated that the man who had remained in the kitchen definitely had a gun, but she was unsure if the masked man carried one. Nevertheless, she pleaded with the masked man not to hurt her.

While still in the bedroom with the masked man, Ms. Marshall heard a noise that sounded like a chair scooting back, followed by a "pop". The masked man and Ms. Marshall then ran to the kitchen and found Mr. McDowney lying in a pool of blood and the other assailant saying, "I wasn't going to do it." Ms. Marshall kicked Mr. McDowney and discovered that he was still breathing. The masked man ordered Ms. Marshall to sit on the floor, grabbed her keys and cell phone, and told her not to move. The men then left. Ms. Marshall waited twenty or thirty seconds before running next door for help.

While these events unfolded, Ms. Lewis stayed in her car. At trial, when asked why she remained at the scene, Ms. Lewis testified that she was in shock, that she feared for her life because she was a small woman, and that she did not know where she was. She saw appellant and Mr. Clay break down the door and enter the residence. Shortly afterwards, she

heard a gunshot, followed by appellant and Mr. Clay leaving the residence and returning to her vehicle. At appellant's command, Ms. Lewis then drove away.

As Ms. Lewis drove away from Mr. McDowney's residence, she saw appellant throw something from the car. Suddenly, appellant noticed that he did not have his cell phone. Appellant used Ms. Lewis's phone to call his phone in an attempt to locate it, but the phone was not in the car. Ms. Lewis then drove, with appellant and Mr. Clay, to her home in Laurel.

Melvin Fenwick testified that around 9:00 p.m., he pulled into the driveway of his girlfriend's house, which was next door to Mr. McDowney's. He observed a silver Ford Fusion with its lights on sitting in Mr. McDowney's driveway, but he could not tell if there was anyone in the vehicle. After three or four minutes, he and his girlfriend went into her residence. A short time later, Ms. Marshall banged on their door and told them that Mr. McDowney had been shot. While Mr. Fenwick's girlfriend called the police, he rushed next door to help Mr. McDowney, who at that time had no pulse.

Sergeant Robert Russell arrived at the McDowney residence at approximately 9:35 p.m.[4] He observed that the front door had been broken down, and he saw Mr. McDowney's body on the kitchen floor. Sergeant Russell recovered a .40 caliber shell casing from the kitchen.

[4] All of the law enforcement officers in this case work for the St. Mary's County Police Department, unless otherwise noted.

Deborah Drury, Chief of the Ridge Volunteer Rescue Squad, was dispatched to the scene. When she arrived, Mr. McDowney had already been pronounced dead. While there, Ms. Drury found a cell phone on the ground, which she gave to a police officer on the scene.

Lieutenant David Yingling arrived at the scene around 9:40 p.m. At this time, technicians from the St. Mary's County crime lab were processing the scene and searching for evidence. Summer Porter, one of the technicians, testified that she was unable to recover any shoe prints from the broken door or fingerprints from the residence. Ms. Porter swabbed various pieces of furniture, the heat registers of the bedroom, and the recovered cell phone for DNA.

In a search of the area surrounding the McDowney residence, Officer Richard McCoy recovered another cell phone – this one had a distinctive case – from the side of the road around the location where Ms. Lewis observed appellant toss an item from her car. Ms. Marshall identified it as the phone the masked man took when he fled the house.

Ms. Lewis testified that a few days after this event, appellant told her what had happened inside the house and that they had killed someone. Appellant elaborated and said that the woman ran into the bedroom where he followed her, while Mr. Clay stayed with the man. Appellant told Ms. Lewis that he heard a gunshot and saw the body laying on the floor. After relating the night's events to Ms. Lewis, appellant told her that if anyone asked about that night, she should say that they went to St. Mary's County, and while there, someone stole his phone.

The cell phone recovered near Mr. McDowney's house led police to appellant, Mr. Clay, and Ms. Lewis. In meeting with police, Ms. Lewis initially told investigators that someone had stolen appellant's phone, as appellant had requested, but she eventually told police everything that had occurred.

Appellant was charged with first-degree murder, second-degree murder, and related offenses. At trial, the State introduced Teri Zerbe from the Maryland State Police Crime Laboratory as an expert in forensic DNA analysis. Ms. Zerbe testified that she tested the recovered cell phone for DNA; she stated that appellant's DNA profile matched the DNA profile of the major contributor of DNA to the cell phone, and there were two other minor contributors. Indeed, Ms. Zerbe stated that the probability of someone else in the African-American population matching the DNA profile of the major contributor to the cell phone was one in 390 million. Regarding the swabs taken inside and around the residence, Ms. Zerbe tested the heat registers and the screen door handle and testified that the DNA evidence was too incomplete to offer any sort of comparison. Accordingly, Ms. Zerbe admitted that appellant's DNA was not found inside the home. She also stated that not all of the swabs taken from inside the residence were tested.

The jury convicted appellant of first-degree murder, first-degree burglary, conspiracy to commit first-degree burglary, robbery with a dangerous weapon, and use of a handgun in the commission of a felony. As noted, appellant moved for a new trial and also asked the court to test the DNA samples taken from inside the residence that were not tested. The court

ordered the State to test the DNA samples that had not previously been tested. As with the other, tested samples, the DNA evidence was too incomplete to offer any sort of useful comparison or else indicated the DNA of someone known to live in the residence. The court subsequently denied appellant's motion to compel a comparison with the CODIS database, and also denied his motion for a new trial.

The court sentenced appellant to: life imprisonment, with all but forty years suspended, for first-degree murder; a concurrent sentence of twenty years, with all but ten years suspended, for conspiracy to commit first-degree burglary; and a concurrent sentence of twenty years, with all but fifteen years suspended, for use of a handgun in the commission of a felony. The other convictions were merged for sentencing purposes.

STANDARD OF REVIEW

"'The question whether to grant a new trial is within the discretion of the trial court. Ordinarily, a trial court's order denying a motion for a new trial will be reviewed on appeal if it is claimed that the trial court abused its discretion.'" *Arrington v. State*, 411 Md. 524, 551 (2009) (quoting *Cooley v. State*, 385 Md. 165, 175 (2005)). As to the abuse of discretion standard, the Court of Appeals has said:

> "Abuse of discretion is one of those very general, amorphous terms that appellate courts use and apply with great frequency but which they have defined in many different ways. . . . [A] ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling. The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. That kind of distance can arise in a number of ways, among which are that the ruling

> either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective. That, we think, is included within the notion of 'untenable grounds,' 'violative of fact and logic,' and 'against the logic and effect of facts and inferences before the court."

Id. at 551-52 (quoting *Gray v. State* 388 Md. 366, 383-84 (2005)).

DISCUSSION

Appellant contends that the court's decision to deny both the motion for a new trial and the post-trial motion to compel the State to compare the DNA to the CODIS database defies logic because the court, having already ordered the State to test the previously untested DNA samples, "stopped short" of discovering the identity of whomever left DNA inside the house. Appellant asserts that had the court ordered the State to compare these DNA samples with the national CODIS database, it could have revealed a contributor of the DNA who actually committed the crimes.

The State counters that if the court granted a new trial, it would incentivize criminal defendants who know that the State has in its possession DNA samples, to avoid suggesting testing for fear that it would lead to an incriminating result and then seek testing after conviction, when a positive result would not harm them. Furthermore, the State asserts that it is not required to create evidence for appellant, especially in a case where there was not enough DNA on the untested samples to offer any sort of useful comparison. Finally, the State points out that appellant's argument is premised on his assertion that his DNA was not found inside the residence – a fact which was brought out at trial from the State's DNA

expert. Accordingly, the State contends that it cannot be an abuse of discretion to deny a new trial for appellant to assert a fact in the new trial which was already in evidence at trial.

At the outset, we note that appellant has not sought relief pursuant to Maryland Code (2001, 2008 Repl. Vol., 2015 Suppl.), Criminal Procedure Article ("Crim. Pro."), § 8-201, which permits convicted persons the right to petition a court for review of DNA evidence in certain cases. The State also asserts that appellant cannot base his argument on Rule 4-331(c), which allows defendants to move for a new trial on the basis of newly discovered evidence, because the DNA evidence is not newly discovered as it was known to appellant prior to trial. Moreover, as the State points out, appellant did not invoke Rule 4-331(c) in his new trial motion below.

We agree with the State that the DNA evidence is not newly discovered as appellant was aware of it prior to trial. Moreover, in order for newly discovered evidence to lead to a new trial, a court needs to determine that it may have resulted in a different result at trial. *See Jackson v. State*, 358 Md. 612, 626 (2000) (citing *Yorke v. State*, 315 Md. 578, 588 (1989)). As explained *infra*, we are not persuaded that the DNA evidence would have led to a different result at trial. Accordingly, appellant's motion for a new trial falls to the court's general revisory power pursuant to Rule 4-331(a).[5]

[5] Rule 4-331(a) permits a court to grant a new trial "in the interest of justice." This Court has noted that "in the interest of justice" is "'virtually open-ended'" and can include "'that the verdict was contrary to the evidence; newly discovered evidence; accident and surprise; misconduct of jurors or the officer having them in charge; bias and disqualification of jurors . . .; misconduct or error of the judge; [or] fraud or misconduct of the prosecution.'" *Gray v. State*, 158 Md. App. 635, 646 n.3 (2004) (quoting *Love v. State*, 95 Md. App. 420, (continued...)

The State asserts that this case is similar to *Brown v. State*, 431 Md. 576 (2013). Leaving aside the fact that Brown sought review of his case pursuant to Crim. Pro. § 8-201, we agree. In that case, Brown was convicted of rape, kidnapping, and other related charges. The State had established that Brown had participated in a gruesome attack of a woman, which involved, in part, Brown sodomizing the woman with a broomstick. *Id.* at 578-79. As was elicited at trial, however, there was no physical evidence tying Brown to the crime, as neither his hair nor blood was found on the broomstick, victim, or crime scene, despite testimony that Brown had a bleeding wound on his hand. *Id.* at 580. Nonetheless, the jury convicted him. *Id.* Brown thereafter sought to have the broomstick tested for DNA, arguing that if the victim's testimony was accurate, then his and her DNA would be on the broomstick. *Id.* at 581. Indeed, testing revealed that Brown's DNA was not found on the broomstick, but the victim's was. *Id.* Brown sought a new trial, asserting that the lack of his DNA on the broomstick demonstrated that the victim was lying about his involvement. *Id.* at 581-82. The court's denial of the motion was affirmed on appeal.

Like Brown, appellant contends that if the events occurred as described by Ms. Marshall, then his DNA would have been found inside the home, and the testing indicating that his DNA was not found demonstrates that he should be given a new trial to present this evidence. We are not persuaded. The State never argued at trial that appellant's DNA was

[5](...continued)
427 (1993)), *aff'd*, 388 Md. 366 (2005). New trials could also be granted "if the evidence was legally insufficient or the verdict was 'so against the weight of the evidence as to constitute a miscarriage of justice.'" *Id.* (quoting *Love*, *supra*, 95 Md. App. at 427).

found inside the home. In fact, Ms. Zerbe testified explicitly in response to questioning from appellant's counsel that appellant's DNA was not found in the residence.

At trial, appellant referred to Ms. Zerbe's testimony in closing argument. If a new trial had been granted, appellant would simply be able to show that there were more things inside the home that did not have his DNA on them. That new evidence, however, would not diminish the significant other evidence linking appellant to the events at Mr. McDowney's residence, including the testimony of Ms. Lewis and the presence of his cell phone outside the home.

We also find no abuse of discretion in the court's decision to deny appellant's motion to compel the State to compare the DNA samples to the CODIS database. Ms. Zerbe testified that these DNA samples did not have sufficient information to be compared to other samples, much less the CODIS database. Although appellant avers that someone else's DNA was found on the previously untested samples, the State asserts that they ran every sample, and the results were either inconclusive or associated with someone who lived at the residence. As the Court of Appeals has noted, the State is not obligated "to conduct a significant research project that could potentially create" useful evidence for a defendant. *Derr v. State*, 434 Md. 88, 124 (2013). As the circuit court stated below, "[n]othing points to [appellant], and nothing points away from [appellant]. To suggest that there is DNA there that helps him or a comparison might, is now speculative." *Accord Ex parte Gutierrez*, 337 S.W.3d 883, 895-96 (Tex. Crim. App. 2011) ("If trial counsel declines to seek testing as a

matter of reasonable trial strategy, then post-trial testing is not usually required in the interest of justice. 'To hold otherwise would allow defendants to lie behind the log by failing to seek testing because of a reasonable fear that the results would be incriminating at trial but then seeking testing after conviction when there is no longer anything to lose.'" (quoting *Skinner v. State*, 293 S.W.3d 196, 202 (Tex. Crim. App. 2009)).

JUDGMENTS OF THE CIRCUIT COURT FOR ST. MARY'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.