UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0520

September Term, 2015

STEPHEN EARL SMITH

v.

STATE OF MARYLAND

Meredith,
Nazarian,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: July 7, 2016

A jury in the Circuit Court for Baltimore City convicted Stephen Earl Smith,

appellant, of theft of property valued between $1,000 and $10,000. Appellant was sentenced to ten years with all but five suspended, plus five years supervised probation. He raises the following issue for our review:

> Did the trial court err in allowing Phillip Elswick to testify and/or in admitting Appellant's oral statement through the testimony of Phillip Elswick?

We conclude that the trial court did not abuse its discretion in denying appellant's request that the court sanction the State for late disclosure of a fact witness by excluding either that witness or parts of his testimony.

FACTS AND LEGAL PROCEEDINGS

At trial, the State presented evidence that appellant stole cash from a bar. Appellant disputed the bar manager's identification of him as the masked thief. Because the sole issue in this appeal relates to discovery, a brief summary of the evidentiary record regarding the theft will suffice.

Verna Hartlove manages Pennington Station, a family-owned bar in the Curtis Bay area of Baltimore. On the morning of February 5, 2015, she was seated at a table in the back of the barroom, preparing "banks" that would provide operational funds for the upcoming days. On the table were over $2,000 in one bag and another $220 in a separate bag. As Ms. Hartlove was occupied with her smartphone, the money remained on the table.

During that time, several regular customers were seated at the bar. Shortly after 10 a.m., appellant, whom Ms. Hartlove had recently seen in the bar "a couple other times," came in for a beer, chatted with Hartlove, then left by 10:30.

A short time later, appellant came back into the bar with a hoodie pulled over his head and a scarf-style mask covering the bottom of his face. He walked directly to the table where Ms. Hartlove and the money were still sitting, grabbed the two bags of cash, and ran out. The entire theft took only a few seconds. Ms. Hartlove identified appellant as the masked thief, explaining that "it looked like his eyes," that he "did not look anywhere else other than at me," and that the thief wore the same shoes that appellant had been wearing.

Although some of the bar patrons gave chase, the thief got away. Ms. Hartlove called the police, who were on the scene when appellant walked back into the bar and "just stood there." Ms. Hartlove confronted appellant, and he was arrested. A consent search of appellant's car and person yielded no money.

Over defense objection that the State failed to disclose, until the first day of trial, either the witness or the substance of appellant's statement to him, Phillip Elswick, who is married to appellant's cousin, testified that he had known appellant "practically all his life" and that he is familiar with Verna Hartlove and Pennington Station. Mr. Elswick recounted that the Saturday after the theft, on February 8, appellant phoned him and said: "Uncle Flip, I will give back every dollar that I took from Verna, as long as she drops the charges against me."

DISCUSSION

Appellant contends that "the trial court erred in allowing Phillip Elswick to testify and/or in admitting appellant's oral statement through the testimony of Phillip Elswick." In appellant's view, the State's belated disclosure should have resulted in exclusion of the witness and the statement. For the reasons explained below, we disagree.

Discovery Sanctions

Maryland's discovery rule requires the State to disclose the name and address of prosecution witnesses "within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court." Md. Rule 4-263(d)(3), –(h)(1). "Each party is under a continuing obligation to produce discoverable . . . information to the other side. A party who has responded to a request for discovery and who obtains further material information shall supplement the response promptly." Md. Rule 4-263(j).

If the State makes a late disclosure, the trial court may "strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances." Md. Rule 4-263(n). Nevertheless, "[t]he failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying." *Id.*

"Deciding whether to order any sanction for a discovery violation, and if so, which one, lies within the broad discretion of the trial court. *See Silver v. State*, 420 Md. 415, 433 (2011); *Thomas v. State*, 397 Md. 557, 570 (2007); *Morton v. State*, 200 Md. App. 529, 542 (2011). Abuse of discretion must be evaluated "'in the context in which the discretion was exercised'" and requires a showing that the court's decision is so far "'removed from any center mark'" that it is "'beyond the fringe of what [the reviewing] court deems minimally acceptable.'" *King v. State*, 407 Md. 682, 696-97 (2009) (citations omitted).

"In exercising its discretion regarding sanctions for discovery violations, a trial court should consider: (1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances." *Thomas*, 397 Md. at 570-71. When "fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules[,]" which is "to give a defendant the necessary time to prepare a full and adequate defense[.]" *Id.* at 571; *see Francis v. State,* 208 Md. App. 1, 25 (2012).

Thus, "[t]he exercise of discretion contemplates that the trial court will ordinarily analyze the facts and not act, particularly to exclude, simply on the basis of a violation disclosed by the file." *Taliaferro v. State*, 295 Md. 376, 390 (1983). Indeed, because exclusion of evidence is "one of the most drastic measures that can be imposed," it is "not

a favored sanction." *Thomas*, 397 Md. at 572. Instead, when a criminal defendant's trial preparation is hindered by the State's belated disclosure of evidence, a continuance is generally the preferred remedy. *Id.* at 573.

Moreover, because "[t]he discovery law is not an obstacle course that will yield a defendant the windfall of exclusion every time the State fails to negotiate one of the hurdles[,]" courts are skeptical of defendants who seek "a sanction which is excessive." *Ross v. State*, 78 Md. App. 275, 286 (1989). As the Court of Appeals has recognized:

> Although the purpose of discovery is to prevent a defendant from being surprised and to give a defendant sufficient time to prepare a defense, defense counsel frequently forego requesting the limited remedy that would serve those purposes because those purposes are not really what the defense hopes to achieve. The defense, opportunistically, would rather exploit the State's error and gamble for a greater windfall. As Chief Judge Gilbert explained . . . in *Moore v. State*, 84 Md. App. 165, 176 (1990), however, the "double or nothing" gamble almost always yields "nothing."

Thomas, 397 Md. at 575 (citations omitted).

The Record

On the first day of trial, defense counsel moved to preclude Mr. Elswick's testimony on two grounds: (1) that the State did not disclose Mr. Elswick as a witness until that day, and (2) that the State also failed to disclose the oral statement purportedly made by appellant to Mr. Elswick. The State maintained that "there was no discovery violation," but admitted that it did not disclose Mr. Elswick as a witness until that day, which was a Monday. The

prosecutor explained that Mr. Elswick "is a patron of the bar, where this incident happened," who "is married to the Defendant's aunt" [sic] and "would testify as to statements the Defendant made to him two days after this incident." According to the prosecutor, defense counsel "essentially learned of this witness when I learned of this witness, which was today[,]" when the prosecutor "had a conversation with" Verna Hartlove, the victim and bar owner, "advising her of the status of the case." "[S]he says, well I've finally gotten to Mr. Elswick – Mr. Phillip Elswick – he's coming with me to court today. . . . And he would testify that the Defendant made statements to him a few days after this incident." Furthermore, the prosecutor argued, "there really is no prejudice to the Defendant by having this witness testify today. Because [defense counsel] was aware of this witness, and exactly what he would say as early as" the preceding Friday, when the defendant's own investigators spoke with Mr. Elswick. "Mr. Elswick explained . . . exactly what he would testify to today," which the prosecutor believed would be that appellant had called him to "ask[] whether or not he could help and contact Ms. Hartlove, to make sure the case go [sic] away, in exchange for him paying back the money."

Defense counsel admitted that she "did have investigators go out" the previous week. An interview with Ms. Hartlove led to Mr. Elswick, with whom "they had a conversation." Counsel pointed out that "there have been various points in the life of this case, in which both parties have had discussions about what amount of money it would take for essentially

. . . Ms. Hartlove to be satisfied" in terms of restitution. Although counsel "was aware that those discussions had taken place," she did not learn until 1:30 that day "the name of the witness the State was intending to call[.]"

When the trial court pointed out "it's the same . . . person that you learned of on Friday[,]" defense counsel refocused her objection, asserting that "[w]hat concerns the Defense more is the content of the statements, and the fact that the statements weren't disclosed as part of discovery." The court then clarified the defense position in the following colloquy:

> THE COURT: All right. So, you're asking me to exclude the witness?
>
> [Defense Counsel]: Yes.
>
> THE COURT: And that's equitable because, why?
>
> [Defense Counsel]: Because this case has been around since the beginning of February. . . . I'm not certain that it was postponed in the district court, but it's been postponed at least once in circuit court. And this is the first time the State has made reference to the fact that they would be calling this witness.
>
> Because there are – just because there are witnesses in the universe who may exist, does not necessarily mean that the discovery obligations of the State have been complied with. The State is –
>
> THE COURT: Well, let me ask you a question – let me just cut to the chase. . . . You're not making any assertion, are you, that Mr. [Prosecutor] or anyone else in the State's Attorney's Office withheld information known to it before Friday? Is that correct, or am I wrong?
>
> [Defense Counsel]: That doesn't appear to be the case. I don't know –

THE COURT: You don't have any basis to make that –

[Defense Counsel]: – I don't have any basis for that. . . .

THE COURT: Okay. . . . Did the State in your view comply with its duty to disclose upon learning the information?

[Defense Counsel]: Mr. [Prosecutor] did advise me this morning, yes. If he first spoke to the witness after we had entered the not guilty plea this morning, and he immediately came and did tell me.

The trial court ruled that it would not preclude the witness from testifying, explaining:

I certainly don't have any reason not to believe Mr. [Prosecutor]. I understand the Defense's consternation about this late information. But I'm not going to exclude the witness. I'm not finding that that's an appropriate sanction, because I don't find any failure on the State's part.

In fact, to the contrary, I do find that the State made efforts to promptly disclose the identity of this witness upon learning of it. That said, [Defense Counsel], I certainly don't wish to put Mr. Smith in the cross-hairs of a late-identified witness. Although, I want to declare I'm not finding fault of either party. . . .

But I want to do the equitable thing. And so, I'm going to allow the State to call the witness. And I will give you a wide berth . . . . to cross-examine within the rule, obviously, but I'll let you go down a path that I might not ordinarily had let you go down. Because I realize you haven't had time to sit with that witness. And certainly, if there's an appropriate time to do so, you know, you'll have some time to have a recess and --

[Defense Counsel]: And I have asked the State if I could speak with their . . . . witness.

THE COURT: So, and . . . if there's a time for that to happen, the Court's happy to be flexible to allow you an opportunity to do that.

The trial court then asked if there was "[a]nything else," and defense counsel indicated there was another "motion in limine" regarding what "the State wishes to call this witness to testify" about. Defense counsel sought to preclude Mr. Elswick from recounting appellant's statement to him on the ground that the statement failed to support a "consciousness of guilt" inference. In response, the State anticipated that Mr. Elswick would testify that:

> the Defendant called him approximately two days after the incident, and said, would you please relay to Verna Hartlove, the victim in this case, that *I would give her every cent of the money that was stolen, if you all will not prosecute me.* If you all will make this case go away. That's the sum and substance of the testimony.

(Emphasis supplied.)

The next day, the trial court heard Mr. Elswick's testimony before ruling on the consciousness of guilt objection. Outside the presence of the jury, Mr. Elswick testified, unexpectedly, that appellant admitted taking the money, when appellant phoned him two days after the theft and asked: "is there any way that I could talk to Verna, *that he would pay her back all the money that he had taken*, as long as she did not have him locked up." (Emphasis added.)

The trial court ruled that appellant's statement to Mr. Elswick was "more probative than prejudicial" because it supported a consciousness of guilt inference:

> For Mr. Smith's offer to pay restitution in the amount stolen – and I do find that Mr. Elswick did testify . . . in the amount that Mr. Smith said he took

from the bar on the date of the incident, we find satisfaction of criminal charges being dismissed.

From satisfaction of the criminal charges being dismissed, the inference is led to a consciousness of guilt. From consciousness of guilt, we have consciousness of guilt of theft. And from a consciousness of guilt of theft, actual guilt of theft.

The chain of inferences . . . is not upheld if the conduct is deemed too ambiguous and equivocal to be admissible as evidence of consciousness of guilt. There's no issue of that in this case . . . .

The Defense . . . argues that it's equally possible that Mr. Smith was driven by his status as a parolee, and a desire not to be re-incarcerated as a result of such status and a new conviction. . . .

I do understand [defense counsel's] argument that . . . admission of Mr. Elswick's testimony would force the Defense to elicit testimony that Mr. Smith is on parole, to establish an alternative reason for the offer to pay restitution. I think that this argument fails for two reasons.

First, it seems to contemplate a requirement that Mr. Elswick's testimony is conclusive proof that Mr. Smith is guilty of theft and that there's no other conceivable explanation for his actions. Rather, Mr. Elswick's testimony would tend to show that Mr. Smith is guilty of the theft, which is all that is required.

Additionally, Mr. Smith testifies that he was on parole, and that's the reason he made the offer to pay restitution, even though he's not guilty of the crime, is an issue of trial strategy. [Sic] I do feel . . . it's up to Mr. Smith and Ms. [Defense Counsel] whether to elicit that testimony from Mr. Smith.

I do not find that I'm removing from Mr. Smith the privilege of avoiding self-incrimination, or . . . to invoke his right to remain silent. I don't think that putting him between a rock and a hard place, while I appreciate that this may, is tantamount to unfair prejudice.

> And so, I will deny the Defense's motion, Mr. Elswick is entitled to testify. And of course, Ms. [Defense Counsel], you are free to cross in a hearty fashion. And I will entertain the admission of impeachment evidence when it comes up, if it comes up.

Appellant's Challenge

Appellant asserts that the trial court "made no specific finding as to the discovery violation[,]" so that it "exercised no discretion in fashioning a remedy." (Ant.5 n.3) We disagree. As the excerpted transcript shows, the court expressly ruled that there was no discovery violation because the State, in good faith, discovered and disclosed on the same day the existence of Mr. Elswick and what it believed his testimony would be regarding appellant's statement. Accordingly, our task is to decide whether the court erred in ruling that there was no discovery violation, and, if so, whether the court abused its discretion in refusing to exclude, as a discovery sanction, either the late-disclosed witness or the substance of his testimony that appellant admitted the theft.

With respect to the alleged discovery violation, appellant maintains that the State failed to disclose a witness and a statement that it should have identified earlier, in sufficient time for appellant to prepare for trial. With respect to the decision not to strike the witness or his testimony about appellant's inculpatory statement, appellant contends that, because "the State did not know the nature and extent of its own evidence until after the jury had been selected and trial proceedings were underway, [appellant] was forced midstream to consider and then re-consider testifying to explain his status on parole as an alternative

motive for making the offer" to repay the stolen money. In appellant's view, "[b]eing forced to develop trial strategy in this manner is patently unfair, and the trial court erred in finding no prejudice in the result."

In our view, the State misinterprets the latter argument as a challenge to the court's ruling that appellant's oral statement was admissible as consciousness of guilt evidence. As we understand appellant's argument, he complains that the prejudice caused by having to prepare for this last-minute witness was compounded by having to prepare for the even later disclosure, during voir dire of the witness, that he would testify that appellant offered to repay money that he admitted to taking.

In support of his claim that the trial court erred in failing to find that the State violated its discovery obligations, appellant relies on *Williams v. State*, 364 Md. 160 (2001), a case involving a surprise change in a prosecution witness's testimony. Although the State proffered that a police officer could not identify Williams, at trial, the officer surprisingly did so. The Court of Appeals held that the trial court erred in admitting that testimony because "when information is disclosed in discovery, it must be substantially complete and accurate." *Id.* at 175. The Court rejected the State's argument that there was no discovery violation due to the "surprise" nature of the officer's identification testimony, noting that "'surprise' does not excuse or mitigate the prejudice to the defendant.'" *Id.* at 176.

Williams is inapposite because the witness who gave the surprise testimony was a police officer who was available to the prosecution at all times. Under the discovery rule, "[t]he State's Attorney was accountable for information held by [the police officer], as he both 'participated in the investigation' and 'reported to the office of the State's Attorney.'" *Id.* at 177. Thus, the fact that the officer could identify the defendant was information that could and should have been discovered and disclosed long before the officer testified. *Id.* The *Williams* Court held that the State, having failed to conduct an adequate investigation of a readily available prosecution witness, violated its discovery obligation. *Id.*

Unlike the police officer who reported to the prosecutor in Williams, the surprise witness in this case was not readily available to the State. The State was surprised, first by the existence of Mr. Elswick as a witness, and then by his claim that appellant offered to repay the money he "took." Because Mr. Elswick was not present during the theft, and the call he received from appellant was not made until days after that crime, he was not someone whom police or State investigators could have discovered without the aid of the victim. The prosecutor first learned about Mr. Elswick and the phone call he received from appellant, when reviewing the case with the victim on the Monday trial began.

In contrast, defense counsel acknowledged that she became aware of Mr. Elswick and his telephone conversation with appellant even before the prosecutor, as a result of defense investigators interviewing both the victim and Mr. Elswick on the Friday before trial began.

Moreover, neither the prosecutor nor defense counsel were aware, until Mr. Elswick testified outside the presence of the jury, that appellant called to say that he would pay back the money he "took," thereby admitting his guilt. In these circumstances, we cannot say that the State violated discovery rules by failing to use reasonable diligence to discover and disclose the belatedly disclosed witness and statement.

Moreover, even if the State's belated disclosure had been a discovery violation, we would not be persuaded that the trial court abused its discretion in refusing to exclude the witness or appellant's statement to him. To be sure, this surprise witness and appellant's surprise statement to him presented a significant challenge for the defense and required appellant to reconsider whether to testify. But neither surprise unfairly prejudiced appellant's defense. As defense counsel admitted, her investigators had an opportunity to interview Mr. Elswick one business day (and three calendar days) before trial began, which was before the prosecutor learned of his existence. The trial court offered defense counsel another opportunity to interview the witness during trial, as well as broad latitude in cross-examining him. *See, e.g., Thomas*, 397 Md. at 572 (trial court did not abuse discretion in admitting evidence that was disclosed immediately upon receipt and in sufficient time to interview witness and prepare for cross-examination, where defendant requested only exclusion and "was not interested in a continuance nor an opportunity to talk to" the witness). The trial court was entitled to view appellant's insistence on the drastic and disfavored remedy of

exclusion, rather than a proffered opportunity to talk with Mr. Elswick during a recess, as an unjustified demand for "double or nothing" discovery sanctions. *See id.* at 575. Although defense counsel complained that appellant had to reconsider whether he should testify in order to explain that he made the payment offer in an effort to avoid a parole violation, she had alternative methods of proving appellant's parole status, such as by stipulation or court record. On this record, we cannot say that, even if the State violated its discovery obligations, the court abused its discretion in denying appellant's requests for exclusion.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.