

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2259

September Term, 2015

CORTEZ A. RHEA

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: August 18, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Cortez Rhea was convicted by a jury in the Circuit Court for Montgomery County of distributing heroin. As the court finalized the jury instructions, Mr. Rhea requested an instruction on missing evidence, specifically the videotape of the police station interview during which he confessed. The court denied his request. Mr. Rhea challenges this decision on appeal, and argues as well that the State failed to present sufficient evidence to prove that he distributed heroin. We affirm.

I. BACKGROUND

On the night of April 1, 2014, Montgomery County Police Sergeant Paul Reese, an expert in drug investigation and trafficking, was conducting surveillance of a Wendy's parking lot. Sometime between 8 and 10 p.m., Sergeant Reese observed a brown Mercury parked in the lot, far from the restaurant's entrance. Inside the vehicle he saw a man later identified as Michael James, who appeared to be "extremely nervous" and watched every car as it drove into the shopping center.

Approximately twenty minutes later, Sergeant Reese saw a Toyota SUV driven by Mr. Rhea park beside the Mercury so that their drivers' windows were parallel to one another. Sergeant Reese testified that within ten to twenty seconds, Mr. Rhea passed a "white golf ball sized object" to the interior of Mr. James's vehicle. Mr. James later testified that he had arranged to meet Mr. Rhea to buy heroin from him. He explained that he threw an empty film canister to Mr. Rhea, who placed two bags of heroin inside it and threw it back. Mr. James then threw \$140 to Mr. Rhea before departing. Although Sergeant Reese only witnessed the initial exchange, he did see Mr. Rhea looking down toward the

floorboard of his vehicle. Immediately after the exchange, Mr. James drove out of the parking lot.

Suspecting that a drug deal had taken place, Sergeant Reese and Officer Jonathan Greene followed Mr. James's vehicle and pulled him over after he failed to come to a complete stop at a stop sign. Mr. James told the officers that he had met with Mr. Rhea to buy heroin and that he had heroin in his jacket pocket, hidden in a white film canister. The officers arrested Mr. James, and he gave a statement to police that he bought heroin from Mr. Rhea.

Shortly after, police vehicles surrounded Mr. Rhea's vehicle, approached it, and ordered Mr. Rhea to exit his vehicle. When he didn't respond, Officer Abraham Groveman, with the assistance of another officer, pulled him out of his vehicle and onto the ground. After placing Mr. Rhea under arrest, Officer Groveman searched him and found a fold of \$140, all in twenty-dollar bills, and another fold of \$60, in Mr. Rhea's jacket pocket.

Sergeant Reese and Officer Greene conducted a strip search of Mr. Rhea at the police station. When Officer Greene entered the interview room Mr. Rhea was uncooperative and yelled at Sergeant Reese. Seconds later, Officer Greene saw Mr. Rhea stand up and begin to move toward Sergeant Reese, which prompted Officer Greene to grab Mr. Rhea by the back of his shirt and pull him to the ground. The officers then performed the strip search of Mr. Rhea, who soon became combative when ordered to remove his socks, and the officers wrestled him down. Mr. Rhea then calmed down and

removed his socks, which contained eight bags (2.17 grams) of heroin. The officers also found (and seized) another \$354 and two straws on Mr. Rhea during the search.

The police station had been at that location for about eighteen months and, according to Sergeant Reese, was “still in transition.” The interview room where Mr. Rhea’s strip search took place did have a surveillance camera installed, but Sergeant Reese was unclear whether the camera recorded anything. He stated initially that the surveillance cameras didn’t record. He testified later, though, that he believed the cameras did record, “but they only keep [recordings] for so long in a database,” he thought thirty to ninety days.

After the strip search, Mr. Rhea gave a statement to Officer Paul Bandholz. He admitted that he had a heroin problem and that he occasionally sold heroin to Mr. James to support his own habit. He said that on the night of the transaction, he did not sell heroin to Mr. James, but rather “gave him a bag for a favor.” Officer Bandholz wrote the statement for Mr. Rhea at his request.

The State called Sergeant Jason Cokinos, who had not participated in the investigation, as an expert witness in narcotics trafficking and sales. Sergeant Cokinos testified that this particular Wendy’s restaurant was a hot spot for a variety of crimes, including drug transactions. Sergeant Cokinos concluded that the behaviors of Mr. James and Mr. Rhea, as well as the evidence found on each of them, were consistent with the State’s allegation that Mr. Rhea was the distributor in the exchange. The State also introduced cell phone messages between Mr. James and Mr. Rhea discussing when and where they were going to meet.

Sheryl Elliot, Mr. Rhea's wife, testified (for the defense) that the money found on Mr. Rhea came from their job cleaning houses. She acknowledged that Mr. Rhea was using heroin in 2014 and said that she knew Mr. James had sold heroin in the past. Mr. Rhea also introduced several photos that his wife took of him three days after the arrest, in which his face was swollen and capillaries in his left eye had burst.

As the parties and the court finalized the jury instructions, Mr. Rhea asked the court to give a "missing evidence" instruction regarding the absence of video of Mr. Rhea's confession. The State opposed the request on the grounds that, at most, any recording took the form of security video rather than a recorded interview and that the defense didn't request any video until eight months after the incident. The court denied the request, and a jury found Mr. Rhea guilty of distributing heroin. Mr. Rhea filed a timely Notice of Appeal.

II. DISCUSSION

Mr. Rhea raises two issues on appeal. *First*, he argues that the lack of surveillance footage entitled him to a jury instruction on missing evidence and that the trial court abused its discretion in refusing to give that instruction. *Second*, Mr. Rhea argues that the evidence on which the jury relied was not legally sufficient to prove that he distributed heroin because the State failed to eliminate any reasonable doubt that Mr. Rhea, rather than Mr. James, was the distributor of heroin. The State responds that not only was the trial court within its discretion to deny the jury instruction, but also that any error in failing to give the instruction was harmless. The State also contends that the evidence was indeed sufficient to support Mr. Rhea's conviction. We agree with the State on both points.

A. The Trial Court Did Not Abuse Its Discretion in Denying Mr. Rhea’s Request for A Missing Evidence Instruction.

Before trial, Mr. Rhea asked the State to produce surveillance video footage of the police station’s interview room where he was searched and interrogated to support his contention at trial that his confession had been coerced by physical violence on the part of the police. The State responded that it had no video footage to produce—it was unclear whether the cameras recorded anything in the first place, but even if they had, eight months had passed by the time Mr. Rhea asked for it, and anything they did record had been deleted routinely after thirty to ninety days. As a result, Mr. Rhea asked the court to give a missing evidence instruction, which permits the jury to draw an inference that missing or destroyed evidence would have been unfavorable to the State. *Cost v. State*, 417 Md. 360, 381 (2010). The trial court declined to give the instruction, and found that even if the footage had been recorded, Mr. Rhea’s request for the State to produce it exceeded any period of time during which the State would normally have retained it.

Generally speaking, the State has no duty to preserve potentially useful evidence, except when the evidence could exonerate the defendant. *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988). Absent bad faith, then, a trial court is not required by the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights to give a jury instruction on the State’s failure to produce evidence. *Patterson v. State*, 356 Md. 677, 694-99 (1999). Maryland Rule 4-325(c) requires courts to instruct the jury on the applicable law, not factual matters or inferences. *Id.* at 684. A court *must* give a requested evidence instruction when: “(1) the instruction is a correct statement of law;

(2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given.” *Cost*, 417 Md. at 368-69 (quoting *Dickey v. State*, 404 Md. 187, 197-98 (2008)). Still, a court need not grant a missing evidence instruction “whenever the defendant alleges non-production of evidence that the State might have introduced.” *Id.* at 382. We review a decision to give or decline a missing evidence instruction for abuse of discretion. *Cost*, 417 Md. at 382; *Patterson*, 356 Md. at 694; *Gupta v. State*, 227 Md. App. 718, 738 (2016). And we will not disturb the trial court’s decision on appeal so long as any reasonable person would accept the trial court’s view. *Metheny v. State*, 359 Md. 576, 604 (2000); *Fontaine v. State*, 134 Md. App. 275, 287-88 (2000).

As Mr. Rhea notes, the Court of Appeals in *Cost* carved out an exception to the general rules of *Youngblood* and *Patterson*. In that case, the Court held that a missing evidence instruction may be warranted where the missing evidence is “highly relevant” and “goes to the heart of the case.” 417 Md. at 380. In *Cost*, the missing evidence *was* critically relevant to the crime and was evidence the State normally would retain—the bloody bedding and clothing that resulted from the alleged assault—whereas “[i]n another case, where the destroyed evidence was not so highly relevant, not the type of evidence usually collected by the state, or not already in the state’s custody, as in *Patterson*, a trial court may well be within its discretion to refuse a similar missing evidence instruction.” *Id.* at 382.

The potential video footage here—which might never have existed in the first place—is neither “highly relevant” nor lies at “the heart” of this case. Mr. Rhea was

arrested and charged with distribution of heroin. Officers had witnessed the exchange between Mr. Rhea and Mr. James, documented text message communications between the two, and collected statements, drugs, and paraphernalia from both. The video footage Mr. Rhea sought would have related to whether his *Mirandized* confession was voluntary, and would not have exculpated him. And there was no suggestion that the State had disposed or withheld the video footage—again, if it existed at all—in bad faith, or even negligently. Sergeant Reese testified that it is not common practice to record confessions or statements for simple drug investigations. So even if the police had recorded the interview, that recording is not the type of evidence they would typically retain for a common, everyday case of drug distribution. And with confiscated drugs and signed statements from both parties to the exchange in hand, the State was justified in believing that footage would not be necessary.

Mr. Rhea argues that the police department’s policy of routinely deleting surveillance footage did not obviate the need for a missing evidence instruction. He cites *People v. Handy*, which held that a missing evidence instruction was appropriate when evidence was destroyed pursuant to the jail’s policy of recording over cell surveillance footage after thirty days. 988 N.E.2d 879 (N.Y. 2013). The court in *Handy* reasoned that “[a]n adverse inference charge mitigates the harm done to defendant by the loss of the evidence, without terminating the prosecution.” *Id.* at 882. But *Handy*, like *Cost*, involved an alleged crime that occurred in a correctional facility, and the video evidence at issue related directly to whether the incident (an altercation between an inmate and an officer) happened at all. 988 N.E.2d at 665. The centrality of the missing evidence matters

because, as the Court of Appeals recognized in *Cost*, a missing evidence instruction “will naturally be imbued with a greater gravitas when it is supported by a instruction on the same point issued from the bench,” and that “an instruction which informs a jury that it may consider a particular inference runs the risk of ‘creating the danger that the jury may give the inference undue weight . . . [or of] overemphasizing just one of the many proper inferences that a jury may draw.’” 417 Md. at 381 (quoting *Davis v. State*, 333 Md. 27, 52 (1993)).

This case did not involve the sort of “exceptional circumstance” that compels a missing evidence instruction, *id.* at 378-79, nor was the missing evidence that Mr. Rhea sought “highly relevant” or went to the heart of the case. We disagree, then, that “no reasonable person would take the view adopted by the [trial] court.” *Metheny*, 359 Md. at 604 (citations omitted).

B. The Evidence Was Sufficient for a Jury to Find Mr. Rhea Guilty of Distributing Heroin.

Mr. Rhea argues that the State’s evidence was insufficient as a matter of law because it failed to eliminate reasonable doubt that Mr. James, not Mr. Rhea, was the true distributor in the transaction. We review the sufficiency of the evidence *de novo*, *Wilder v. State*, 191 Md. App. 319, 335 (2010), but we don’t re-weigh it: the jury’s verdict will be upheld if, “after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original) (citation omitted); *see also Hobby v. State*, 436 Md. 526 (2014).

The State bore the burden of proving that Mr. Rhea distributed heroin. Md. Code (2002, 2012 Repl. Vol.) § 5-602 of the Criminal Law (“CL”) Article.¹ Mr. Rhea attempts to cast doubt on Sergeant Reese’s identification of him as the seller by pointing out that Sergeant Reese was parked fifty to seventy yards away from the two vehicles and was not using binoculars when observing the exchange. But the trial court accepted Sergeant Reese as an expert in the field of drug investigations and transactions (he is the leader of a special assignment team and had observed over five hundred drug transactions over the course of his career). The parking lot where he was investigating that night was known as a hot spot for drug transactions, having been the site of “hundreds of arrests,” and where Sergeant Reese had parked “hundreds of times[,] [i]f not thousands.” He testified that the Wendy’s parking lot was particularly well lit. Even though Sergeant Reese was not using binoculars, a reasonable jury would be justified in believing his testimony.

The jury could also rely on Sergeant Cokinos’s conclusion that Mr. Rhea was distributing heroin. He testified that the buyer will initiate a transaction via phone call or text message, arrange a place to meet, and is typically the first to arrive at the designated location. Mr. James exchanged texts and calls with Mr. Rhea, and arrived at the Wendy’s at least twenty minutes prior to Mr. Rhea’s arrival. Sergeant Cokinos also observed that the behavior that Mr. James was exhibiting was “consistent with somebody who is waiting there to buy,” which, according to Sergeant Cokinos, officers are trained to observe.

¹ “Distribute” means “to deliver other than by dispensing.” CL § 5-101(m). “Dispense” “means to deliver to the ultimate user or the human research subject by or in accordance with the lawful order of an authorized provider.” CL § 5-101(l).

Mr. Rhea raises three arguments as to why the evidence submitted by the State was insufficient to support a conviction. *First*, although Mr. Rhea argues that Mr. James's possession of methadone indicates that Mr. James was the seller, Sergeant Cokinos testified that it is common for *buyers* to possess methadone, as it is a drug that is common among opiate users. This fact could support either contention, perhaps, and both Mr. Rhea and his wife testified that Mr. Rhea used heroin himself. But the jury was free to draw inferences either way, and that possibility doesn't render the evidence insufficient.

Second, Mr. Rhea contends that the straws found on his person, presumably used for snorting heroin, indicate that he was the buyer. But this claim can be refuted by Mr. Rhea's own statement, in which he admitted that he often sold heroin to Mr. James to offset the costs of supporting his own use. Additionally, Sergeant Cokinos testified that using a straw is an uncommon and ineffective method of ingestion for heroin users and suggested that Mr. Rhea's possession of straws could be completely unrelated to drug use. Again, the jury was welcome to draw inferences from the evidence and testimony on these matters.

Third, Mr. Rhea argues that the State failed to eliminate reasonable doubt that police coerced Mr. Rhea's confession to distributing heroin. At trial, Mr. Rhea presented photographs taken three days after his arrest, showing swelling in his face and burst capillaries in his left eye. The State noted that there was nothing on the photographs to indicate when they were taken, and that Mr. Rhea could have gotten in a fight with another inmate prior to his release. The jury was welcome to take this evidence, along with the State's theories regarding it, into consideration during its deliberation. When combined with the officers' eyewitness testimony, Mr. James's participant testimony, and the

evidence found on Mr. Rhea's person when he was searched, the evidence offered at trial by the State was more than sufficient to allow the jury to determine beyond a reasonable doubt that Mr. Rhea was guilty of distributing narcotics.

**JUDGMENT OF THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**