Circuit Court for Montgomery County
Case No. 138245C

UNREPORTED

IN THE APPELLATE COURT OF

OF MARYLAND*

No. 260

September Term, 2022

EDSON ROBERT MONDRAGON

v.

STATE OF MARYLAND

Kehoe,
Berger,
Arthur,

JJ.

Opinion by Kehoe, J.

Filed: April 6, 2023

* At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

After a jury trial in the Circuit Court for Montgomery County, appellant Edson Robert Mondragon was convicted of three counts of third-degree sex offense. He presents one question for our review:

> Did the trial court abuse its discretion and err in refusing to give a missing evidence jury instruction in this case?

We will reverse the convictions.

BACKGROUND

In February 2020, L.,[1] then aged 15, told her mother that appellant, then aged 21, had sexually assaulted her on several occasions. Her parents informed the police. On February 28th, Detective Kyle Conrad of the Montgomery County Police Department's Child Abuse and Sexual Assault Unit interviewed both L. and her parents. The interviews were audio and video recorded. It is Department policy that such recordings are stored in a digital format on the Department's computer system. How long the recording remains in the system depends upon how the recording is categorized, which is a decision made by the officer conducting the interview applying standards promulgated by the Department. In the present case, and in light of the information provided to him in the interviews, Detective Conrad intended to designate the recordings for indefinite storage,

[1] "L." is a pseudonym. Neither the victim's first name nor her surname begins with that letter.

but things went amiss. At trial, the following exchange took place between the prosecutor and Detective Conrad as to what happened and did not happen:

> [The State]: And what do you do with interviews once the recording is complete?
>
> [Detective Conrad]: Sure, so, in the beginning of the interview, I log on using my County username and it starts the recording process for the interview rooms that we have in our office. Afterwards, when I'm done, I go ahead and I tag the video with what kind of crime it is and that determines how long the recording will stay, depending on State laws and what the County determines for how long they're going to hold it in their servers. And then, after that, after it's tagged, I log off from the touch screens that are in the adjacent rooms from the recording rooms.
>
> [The State]: And where are those videos saved?
>
> [Detective Conrad]: They're saved on servers. I believe they're housed in our police headquarters.
>
> * * *
>
> [The State]: And in this case, did you tag the video recording.
>
> [Detective Conrad]: I believe I did. At this point, it's always a habit to tag them where I hit a touch screen for it and then I hit logout, but as we learned that day, the video showed up not tagged, which probably means that when I hit the touch screen, my finger probably didn't light up the tag, and so, when I hit and then hit logout, I believed it was tagged, but as it was found out later, that it was not tagged.
>
> [The State]: And what happens when a video is not tagged?
>
> [Detective Conrad]: It's sent for deletion.
>
> * * *
>
> [The State]: And was the video deleted at some point?
>
> [Detective Conrad]: Yes, it was.

Detective Conrad also testified that he took written notes during his interview with L. and that he interviewed her again on March 6, 2020. The March 6th interview was video recorded and was successfully designated to be retained indefinitely.

At the conclusion of the evidentiary portion of the trial, defense counsel requested that the trial court give a missing evidence instruction to the jury regarding Detective Conrad's failure to save the recording of his initial interview of L. The requested instruction was modeled on the proposed instruction in *Cost v. State*, 417 Md. 360 (2010)[2]:

> You have heard the testimony that the Division of Correction, a State agency, has destroyed evidence in this case by failing to preserve a crime scene and failing to retain the bed linens that were seized at the scene. If this evidence was peculiarly within the power of the State, but was not produced and the absence was not sufficiently accounted for or explained,

[2] Defense counsel's proposed instruction is not in the record. During oral argument, we asked the parties to stipulate as to what instruction was requested at trial. Following argument, counsel provided us with the following:

> You have heard testimony about ___, who was not called as a witness in this case. If a witness could have given important testimony on an issue in this case and if the witness was peculiarly within the power of the [State] [defendant] to produce, but was not called as a witness by the [State] [defendant] and the absence of that witness was not sufficiently accounted for or explained, then you may decide that the testimony of that witness would have been unfavorable to the [State] [defendant].

(Brackets in original.)

The stipulation notwithstanding, and for the reasons explained in our analysis, the record is clear that defense counsel presented the trial court with the instruction from *Cost.*

> then you may decide that the evidence would have been [favorable] to the defense.

Id. at 367.

The trial court declined defense counsel's request to give a missing evidence instruction (emphasis added):

> So, in this case, the testimony was that [Detective Conrad] did, the digital recording was obtained and *he followed the process necessary to preserve it and then he was unaware that when he hit the touch screen that it didn't register until a year later* when he went to look for it. So, I don't think that's the kind of neglect or accident that amounts to the inference that you would be entitled to had he not done that.
>
> If he had said, we finished the recording and I was busy, I had another case, I never took the steps necessary to preserve it, then I think that is a stronger case to impute a negative inference against the State for failing to do it.
>
> But when he's now described he followed the exact procedure required and it didn't register, I'm not sure that negative inference is appropriate.
>
> So, given his testimony, I agree with it that neglect can still be the basis for granting it, but I think *his description adequately explains why it is not here and I don't think that a negative inference is appropriate under the case.* You can certainly argue that, but I don't think it's worthy of a jury instruction.

Defense counsel did not object to the court's failure to give the missing evidence instruction after the court instructed the jury.

Appellant was subsequently convicted of three counts of third-degree sex offense and filed this timely appeal.

THE STANDARD OF REVIEW

The Supreme Court of Maryland[3] has recently explained that Maryland's appellate courts:

> review a trial court's decision to propound or not propound a proposed jury instruction under an abuse of discretion standard. . . . Where the decision or order is a matter of discretion it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.
>
> We accordingly consider the following factors when deciding whether a trial court abused its discretion in deciding whether to grant or deny a request for a particular jury instruction: (1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given.

Lawrence v. State, 475 Md. 384, 397–98 (2021) (cleaned up).

PRESERVATION

As we noted, defense counsel did not object to the court's failure to give the missing evidence instruction after the court instructed the jury. Md. Rule 4-325(f) states:

> (f) Objection. No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. . . . An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

[3] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

* * *

Rule 4-325(f) means what it says. *See, e.g.*, *Beckwitt v. State*, 477 Md. 398, 460 (2022). However, the Supreme Court of Maryland has recognized that strict compliance with subsection (e) is not always required. *Watts v. State*, 457 Md. 419, 427 (2018) ("Although strict compliance (based upon the record developed at trial) is preferred, an objection that falls short of that mark may survive nonetheless if it substantially complies with Rule 4–325(e))." For example, "[i]f the record reflects that the trial court understands the objection and, upon understanding the objection, rejects it, this Court will deem the issue preserved for appellate review." *Watts*, 457 Md. at 428.

In the present case, the record shows that: (1) defense counsel directed the court's attention to *Cost* at a pre-trial conference, (2) the court recessed in order to review the opinion, and (3) the court then discussed the opinion and its holding with counsel. After the close of evidence, defense counsel again presented the trial court with a copy of the *Cost* opinion and the court and counsel discussed the applicability of a *Cost* instruction. The trial court then denied the request for a *Cost* instruction with a thorough explanation of its reasoning. We hold that there was substantial compliance with Md. Rule 4-325(e).

ANALYSIS

Cost v. State

In order to provide context to the parties' contentions, we will first discuss *Cost.*

Ashanti Cost was convicted of reckless endangerment for an alleged stabbing of fellow prison inmate Michael Brown. 417 Md. at 363. At trial, Brown testified that "Cost grabbed [his] clothing through a food slot in [Brown's] cell door, pulled him close to the door, and stabbed him in the abdomen." *Id*. at 365. The State also introduced photographs of Brown's cell, which showed a red stain on the floor that Brown identified as his blood. *Id*. at 365–66. Brown further testified that the photographs depicted an apparently blood-stained towel, which Brown had used to try and stop bleeding from his abdomen. *Id*. at 366.

Cost elicited testimony regarding a series of evidence and chain of custody issues. *Id*. at 365. Major Donna Hansen, who investigated the attack on behalf of the prison and took the photographs that were entered into evidence, testified that she observed "a large amount of what appeared to be blood and smelled like blood on the floor[,]. . . the mattress," and on what she believed to be towels. *Id*. (cleaned up). However, Major Hansen did not collect any physical evidence. *Id*. It is unclear exactly what transpired next, but ultimately, prison authorities discovered that the towels and bedding had not been preserved as evidence, and that Brown's cell had been unsealed and cleaned before the investigation could conclude. *Id*. at 366–67.

In light of the State's failure to preserve the evidence, Cost requested the following jury instruction:

> You have heard the testimony that the Division of Corrections, a State agency, has destroyed evidence in this case by failing to preserve a crime scene and failing to retain the bed linens that were seized at the scene.
>
> If this evidence was peculiarly within the power of the State, but was not produced and the absence was not sufficiently accounted for or explained, then you may decide that the evidence would have been [favorable] to the defense.

Id. at 367.

The trial court refused to give the proposed instruction because of the "absence of any testimony to support that the State deliberately destroyed the evidence[.]" *Id*. at 367 (Cleaned up.) On appeal, this Court affirmed, holding that "the State's failure to preserve evidence, or the actual destruction of evidence, may . . . give rise to inferences against the State . . . ." However, "a defendant is not entitled to an instruction where that instruction relates to *permissible inferences of fact*[,]" as opposed to an instruction on governing law. *Id*. at 368 (emphasis added in *Cost*).

The Supreme Court of Maryland reversed. The Court began its analysis by drawing a distinction between the concepts of "spoliation" in Maryland's civil law context and what the Court termed "missing evidence" in the criminal law context:

> "[S]poliation" is often used in civil cases, where parties withhold or destroy evidence strategically. The term "spoliation," moreover, is often associated with egregious or bad faith actions, and not for cases involving negligent destruction or loss. Yet here, in the criminal context, "spoliation" is an imprecise term. Instead, Cost's claim is more accurately titled as "*missing*

> *evidence," which can include situations where the State intentionally or negligently destroyed—or merely failed to produce—relevant evidence*.

Id. at 369–70 (footnote omitted; emphasis added).

The Court then discussed, and elaborated upon, its reasoning in *Patterson v. State*, 356 Md. Md. 677, 682 (1999):

> *Patterson* presented the "general" or "typical" case, likely to be repeated, in which some piece of crime scene evidence, not of major import, was not retained or analyzed. It makes sense to hold, as *Patterson* did, that juries should not be instructed by the judge to wander down most pathways of evidentiary inference negative to the state *based on evidence that is cumulative or not material and not usually collected by the police*.

Id. at 379–80 (emphasis added).

In the Court's view, *Cost* presented a different problem:

> Here, by contrast, the crime scene, allegedly containing blood-stained linens and clothing, and dried blood on the floor, *certainly would contain highly relevant evidence* with respect to the crime for which Cost is charged, which normally would be collected and analyzed. Indeed, Brown's cell was sealed off from use, with the alleged crime scene left intact, pending IIU's investigation. Moreover, *the missing items were actually held as evidence, completely within State custody*. In fact, it appears from the record that at least some of these items were eventually submitted for laboratory examination, but were rejected because they were not submitted quickly enough, and because chain of custody was not properly preserved.
>
> The evidence destroyed while in State custody was highly relevant to Cost's case. . . . *This missing evidence could not be considered cumulative, or tangential—it goes to the heart of the case*. We are persuaded that under these circumstances a "missing evidence" instruction, which would permit but not demand that the jury draw an inference that the missing evidence would be unfavorable to the State, should have been given.

Id. at 380–81 (emphasis added).

Having framed the problem, the Court provided the solution:

> If Cost had somehow destroyed the missing evidence here, the court would have likely instructed the jury that they may infer from this action that the evidence would have been favorable to the State. For the judicial system to function fairly, one party in a case cannot be permitted to gain an unfair advantage through the destruction of evidence. *The application of the "missing evidence" inference against the State in this case, as promulgated through a jury instruction, will help ensure that the interests of justice are protected*. . . .
>
> Our holding does not require a trial court to grant a missing evidence instruction, as a matter of course. . . . *In 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 . . . a trial court may well be within its discretion to refuse a similar missing evidence instruction*.

Id. 381–82 (emphasis added and footnote omitted).

The parties' contentions

Returning to the case before us, appellant asserts that his case falls within the purview of *Cost.* He states:

> The victim's own recorded statement taken at a time in close proximity to the underlying events is highly relevant. The recorded statement of the victim is routinely collected in a sexual assault case. The failure to provide the recorded statement to Appellant foreclosed all sorts of avenues of investigation by Appellant prior to the trial and left Appellant [with] no ability to effectively cross-examine the victim on credibility, recollections, inconsistencies, demeanor, etc. All of these areas are where reasonable doubt can be created in the mind of the juror. Lastly, the recorded statement could not be considered cumulative or tangential. . . .
>
> Finally, as *Cost* makes abundantly clear, the missing evidence instruction can arise in situations where the State intentionally or negligently destroys evidence or merely fails to produce relevant evidence.

In arguing that *Cost* is inapplicable to the present case, the State points to the following passage in *Cost*:

> Our holding does not require a trial court to grant a missing evidence instruction, as a matter of course, whenever the defendant alleges non-production of evidence that the State might have introduced. Instead, we recommit the decision to the trial court's discretion, but emphasize that it abuses its discretion when it denies a missing evidence instruction and the jury instructions, taken as a whole, do not sufficiently protect the defendant's rights and cover adequately the issues raised by the evidence. In 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 . . ., a trial court may well be within its discretion to refuse a similar missing evidence instruction.

417 MD. at 382.

The State asserts that the facts in the present case are "strikingly similar" to those in *Gimble v. State*, 198 Md. App. 610 (2011). In that case, a high-speed chase of the defendant's motor vehicle ended when Gimble lost control of his vehicle and it ran off the road and overturned. As this occurred, a number of items, including a backpack, flew out of the car. The police found cocaine, marijuana, a digital scale with narcotics residue, as well as a comb and a cell phone charger inside the backpack. *Id.* Additionally, an EMT took photographs of the accident scene, which were eventually turned over to the police. *Id.* at 615. Trial took place 19 months after the accident occurred,[4] and by that time, the police had inadvertently destroyed the EMT photographs, the backpack, as well as a

[4] It appears that Gimble was seriously injured in the accident.

comb and a cell phone charger that were in the backpack. *Id.* at 615. Relying on *Cost,* Gimble asked the trial court to give a missing evidence instruction, which the court declined to do. On appeal, he asserted that the trial court had erred. *Id.* at 630–31. This Court did not agree:

> Although [Gimble] is correct that the evidence in question was in police possession before it was destroyed, that fact alone is not sufficient to put this case in the category of *Cost*. To be sure, the destroyed evidence was potentially useful. It was neither central to the appellant's defense, nor the type of evidence that would ordinarily be tested and utilized at trial, as the evidence in *Cost* was. Unlike *Cost*, this was a "'typical' case, likely to be repeated, in which some piece of crime scene evidence, *not of major import*, was not retained or analyzed." Accordingly, the trial court did not abuse its discretion in declining to give the requested instruction on destruction of evidence.

Id. at 632 (emphasis added in *Gimble*).

Appellant contends that the outcome of this appeal is governed by the Supreme Court of Maryland's reasoning and holding in *Cost*, 417 Md. at 382. We agree.

In *Cost*, our Supreme Court stated that its holding did not extend to cases in which "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[.]" 417 Md. at 382. As in *Cost*, the recordings of the statements by the victim and her parents were highly relevant: the State's case against appellant relied heavily on the testimony from the victim. Review of such a recording could have presented appellant with opportunities to call the victim's account of events into question and to point out inconsistencies to the jury. Further, interviews of crime victims are normally recorded, and those recordings are retained for

purposes of trial, as Detective Conrad testified. The fact that this evidence was highly relevant and was of the kind typically maintained by the State separates this case from *Gimble*.

In its brief, the State develops two themes. The first is that the evidence in the present case, like the evidence in *Gimble*, was merely "potentially useful." *See Gimble*, 198 Md. at 621. The second is that, if the evidence in question was not preserved as the result of negligence, a missing evidence instruction should not be given. The State is wrong on both counts.

The missing recordings were not simply "potentially useful" to the defense—they might well have been critical. Because the recordings of the initial interviews were not preserved, defense counsel was deprived of the opportunity to explore whether the victim's trial testimony was consistent with her initial statement and with what her parents told the police. Further, the State's suggestion that a missing evidence instruction is inappropriate when the evidence in question is destroyed through mere negligence is not consistent with our reading of the Court's analysis in *Cost*.

In *Cost,* our Supreme Court explained that a missing evidence instruction would be appropriate "where the State intentionally or negligently destroyed—or merely failed to produce—relevant evidence." 417 Md. at 370. We read this statement to mean that *Cost's* holding extends to cases where the destruction of evidence was negligent. In this case, the trial court commented that "neglect is the way I can describe" the detective's failure to

preserve the recordings of the initial interview with L. and his interview of her parents. October 19, 2021,

We recognize that the facts of this case are different from those of *Cost*. In that case, the reasons for the failure to properly preserve the evidence were never established. In the present case, the court specifically characterized the State's failure to preserve the evidence as the result of neglect. However, we read the Court's analysis in *Cost* as indicating that the holding extends to cases where the destruction of evidence was intentional, where it occurred for unknown reasons, and, relevant to our case, where the destruction was merely negligent. 417 Md. at 370. For these reasons, we reverse the convictions and remand this case for a new trial.

THE JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY ARE REVERSED AND THIS CASE IS REMANDED FOR A NEW TRIAL.

COSTS TO BE PAID BY MONTGOMERY COUNTY.