Circuit Court for Baltimore City
Case No. 116222021–22

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 499

September Term, 2018

FRANK BARNETT

v.

STATE OF MARYLAND

Meredith,
Graeff,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: October 25, 2019

Appellant Frank Barnett was convicted by a jury in the Circuit Court for Baltimore City of wear, carry, and transport of a handgun on person; possession of a regulated firearm; and conspiracy to wear, carry, and transport a handgun on person. Appellant presents the following questions for our review:

> "1. Did the State withhold material evidence favorable to Appellant in violation of *Brady v. Maryland*, and deny Appellant due process by withholding evidence pertaining to the impeachment of its key witness, Charlene Davis, in conjunction with the presentation of false testimony by and about Charlene Davis relative to such evidence, in violation of *Brady*?
>
> 2. Was the evidence insufficient to sustain Appellant's convictions?"

Finding no error, we shall affirm.

I.

Appellant was indicted by the Grand Jury for the Circuit Court for Baltimore City on charges of first-degree murder; second-degree murder; use of a handgun in the commission of a crime of violence; wear, carry, and transport of a gun on person; possession of a regulated firearm after conviction for a disqualifying crime; conspiracy to murder; conspiracy in the use of a handgun in commission of a crime of violence; and conspiracy to wear, carry, and transport a handgun on person. The jury convicted him of wear, carry, and transport of a handgun on person; possession of a regulated firearm; and conspiracy to wear, carry, and transport a handgun on person. The court sentenced him to a term of incarceration of eighteen years in total: fifteen years for possession of a regulated

firearm (without the possibility of parole for the first five years), three years for wear, carry, and transport of a handgun on person, and three years for conspiracy thereof, to be served concurrently.

On July 9, 2016, William Johnson was sitting in the living room of Charlene Davis's house with Ms. Davis and three other people—Octavius Bowens, James Koritzer, and Walter Hall, Jr. Ms. Davis's house was known as a "drug house," and some or all of the individuals present used drugs that day. Late that night or early the next morning, two men entered Ms. Davis's house without warning and physically assaulted Mr. Johnson. One of them then shot and killed Mr. Johnson.

Ms. Davis, Mr. Bowens, Mr. Koritzer, and Mr. Hall testified at trial. Ms. Davis was the only witness who claimed to know Mr. Johnson's assailants prior to the incident. Ms. Davis testified that she met appellant through a friend one or two months before the shooting. She identified appellant and Carrington Sturgis as the men who entered her home. She testified that appellant was initially armed with a handgun and that Sturgis shot Mr. Johnson using appellant's handgun.[1]

During direct examination of Ms. Davis on January 29, 2018, she admitted to having several prior convictions of theft and one conviction for making a false statement to police. She testified that she previously used drugs almost on a daily basis, that she was high the night Mr. Johnson was killed, and that she only remembered "bits and pieces" of events

[1] Appellant and Sturgis were tried together. Sturgis's convictions are on appeal before the same panel as in this case.

when she was high. She testified that she was no longer addicted because she attended "a program for 11 months" that the State's Attorney's Office ("SAO") helped her find. She testified that the SAO "paid for [her] initial getting in there" and stated that she did not promise the SAO that she would testify a certain way to receive this assistance.

At this point, defense counsel asked for a bench conference and drew the court's attention to a supplemental disclosure form he received from the State seven days prior on January 22, 2018. The form purported to detail the SAO's witness assistance to Ms. Davis. On the form, the SAO answered "unknown" to the question "Does witness have a history of substance abuse?" and did not check off "drug rehabilitation" as a form of assistance provided. At the bench, the State acknowledged the error and admitted that Ms. Davis was placed in an in-patient drug treatment program. The State explained that an employee with the SAO's Victim & Witness Unit had prepared the form and that the State neglected to review it before sending it right away to defense counsel.[2] Defense counsel then stated that "[he] would just like more details before [Ms. Davis] finishes her testimony on this point before the jury, that's all."

The court called Heather Courtney, a witness assistance coordinator with the SAO who was present in the courtroom, to approach the bench. Ms. Courtney informed the court that the SAO provided Ms. Davis with temporary housing, financial assistance with food cards, and financial assistance to pay the initial fee for a drug treatment program. Ms.

[2] It is not clear from the record whether the State disclosed its assistance to Ms. Davis in an earlier disclosure to defense counsel or whether this supplemental disclosure was the State's first production of a witness assistance document.

Courtney stated that the SAO paid the initial fees for Ms. Davis to start the in-patient program and that after some time, Ms. Davis assumed financial responsibility for the rest of the program, per the SAO's protocol. Ms. Courtney stated that the SAO spent $18,000 in total on these services for Ms. Davis, as indicated correctly on the disclosure form. She stated that she had simply neglected to check off "drug rehabilitation" on the form as a service provided.[3] Ms. Courtney confirmed that the SAO did not obtain Social Security benefits on Ms. Davis's behalf and did not provide her with financial assistance besides the initial fee. When the court asked the parties for anything else, defense counsel responded, "No."

On further direct examination, Ms. Davis testified that once she was in the in-patient program, she paid for it with Social Security benefits. On cross-examination, defense counsel briefly asked Ms. Davis about the SAO's assistance to her as follows:

> "[DEFENSE COUNSEL]: How much money did you get from the State's Attorney's Office since [Mr. Johnson's death] occurred?
>
> MS. DAVIS: I personally have gotten no money.
>
> [DEFENSE COUNSEL]: But the State's Attorney's Office has helped you, haven't they?
>
> MS. DAVIS: Yes, sir, they have."

Defense counsel did not ask follow-up questions.

Although the three others present at Ms. Davis's house—Mr. Bowens, Mr. Koritzer,

[3] Ms. Courtney did not bring up incorrectly checking off Ms. Davis's history of drug use as "unknown" at the top of the form.

and Mr. Hall—claimed not to know and did not identify as perpetrators appellant and Sturgis, they provided detailed testimonies of the incident that were consistent with Ms. Davis's account. On not being able to identify the assailants, Mr. Bowens testified that he did not remember anything distinctive about the faces or clothing of the two assailants because he was trying not to look at them. Mr. Koritzer testified that one man was wearing a striped blue-and-white shirt and that one was taller than the other. Mr. Hall, who is physically disabled, testified that after the two men entered Ms. Davis's house and started assaulting Mr. Johnson, he initially put his head in his lap because he did not want to involve himself. Mr. Hall further testified that he subsequently spent much of the incident looking at the floor after the perpetrators kicked him. The primary police officer on the case testified that no DNA or fingerprint evidence was taken from the crime scene.

The jury convicted appellant, and this timely appeal followed.

II.

Before this Court, appellant argues (1) that the State withheld, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), evidence favorable to him regarding Ms. Davis's motivation to testify for the State and (2) that the Court should review this admittedly unpreserved violation for plain error. According to appellant, the SAO concealed from the jury, in violation of *Brady*, the fact that it paid $18,000 for Ms. Davis's temporary housing, food cards, and an eleven-month in-patient drug program. While no amount was deposited directly into Ms. Davis's bank account, appellant argues, it was disingenuous and

misleading for Ms. Davis to testify that "I personally have gotten no money" and that she paid the subsequent fees for the program using her Social Security benefits. In appellant's view, Ms. Davis received $18,000 from the SAO as compensation for her testimony and cooperation, and the State knew or should have known that Ms. Davis testified falsely regarding her ability to pay for the program because Social Security income could not possibly cover the costs.

Appellant argues that this alleged *Brady* violation rises to the level of plain error. According to appellant, the State's "belated and erroneous disclosure of financial payments" to Ms. Davis, the only witness to identify appellant as a perpetrator, deprived appellant of impeachment evidence affecting her credibility and was hence a material violation of appellant's right to a fair trial. Appellant argues further that he failed to preserve the issue for review because the State ambushed him with this information at trial.

In addition, appellant argues that the evidence was insufficient to convict him because the State's witnesses were so lacking in credibility, like in *Kucharczyk v. State*, 235 Md. 334, 337 (1964). Appellant contends in particular that Ms. Davis lacked credibility because she was a drug addict until recently, sold drugs at the time of the shooting, was high during and after the shooting, and had multiple prior criminal convictions. Appellant argues further that Ms. Davis had a motive to kill Mr. Johnson and that she acted suspiciously after his death.

The State argues that appellant waived his appellate claim regarding the disclosure of the SAO's assistance to Ms. Davis by not asking further questions of Ms. Courtney or

Ms. Davis. In addition, the State argues that appellant's unpreserved claim does not meet the high threshold for plain error review. Even if the Court considers the issue under plain error review, argues the State, there is no *Brady* violation because (1) the evidence was revealed at trial, *see Williams v. State*, 416 Md. 670, 691 (2010); and (2) the evidence would not have led to a different result and was hence not material. The State argues that the alleged violation was at most a discovery violation, which appellant does not argue on appeal and which does not call for anything but the least severe sanction.

The State next argues that the evidence was sufficient to convict appellant. The State points out that Ms. Davis testified unequivocally that appellant and Sturgis, both of whom she knew before the incident, entered her house and assaulted Mr. Johnson. The State argues that, although the other three witnesses to the shooting did not identify appellant or Sturgis, their detailed testimonies corroborated Ms. Davis's. Despite appellant's efforts to attack the credibility of Ms. Davis and the three others, the State argues that assessing a witness's credibility is a matter solely for the jury. *See Devincentz v. State*, 460 Md. 518, 529 (2018).

III.

We decline to conduct plain error review of appellant's unpreserved *Brady* violation claim. Maryland Rule 8-131(a) limits the scope of appellate review ordinarily to matters that "plainly appear[] by the record to have been raised in or decided by the trial court." For an issue that was not raised in or decided by the trial court and was therefore not

preserved for appellate review, the Court has the discretion to determine whether to review for plain error. *Williams v. State*, 34 Md. App. 206, 211–12 (1976). It is only for an extraordinary error that we will exercise plain error review. *Martin v. State*, 165 Md. App. 189, 195 (2005) (quoting *Williams*, 34 Md. App. at 212); *see also Hammersla v. State*, 184 Md. App. 295, 306 (2009) (stating that "[p]lain error is error that vitally affects a defendant's right to a fair and impartial trial" and that review under the plain error doctrine "1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon"). Unpreserved issues resulting from "bald inattention" do not merit plain error review. *State v. Hutchinson*, 287 Md. 198, 203 (1980). Even the likelihood of reversible error is not dispositive in determining whether we exercise our discretion. *Morris v. State*, 153 Md. App. 480, 513 (2003).

We decline appellant's request for plain error review because we hold that there was no *Brady* violation. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material . . . to guilt . . . , irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87; *see also* Md. R. 4-263(d)(5)–(6) (requiring the State to disclose exculpatory and impeachment information to the defendant without the necessity of a request from the defendant). "Suppression" of evidence in the *Brady* context means *complete* suppression *before and during* trial that prevents the defendant from meaningfully presenting the evidence to the fact finder. *Williams*, 416 Md. at 691. Delayed disclosure during trial that still enables the defendant to use the evidence to his advantage is not "suppression" under *Brady*. *Id.* (citing

federal and state cases holding that untimely disclosures do not generally amount to "suppression" under *Brady*).

In the case at hand, there was no complete suppression of evidence because the State and Ms. Davis disclosed at trial that one of the services that Ms. Davis received from the SAO was financial assistance for an in-patient drug program. This disclosure was added to the supplemental form that the State had sent to defense counsel seven days earlier, which listed correctly $18,000 as the total amount of services the SAO had provided to Ms. Davis. Defense counsel thus had multiple opportunities during trial to inquire into and meaningfully present the newly disclosed detail to the jury.[4]

On the issue of legal sufficiency, we hold that the evidence was legally sufficient to convict appellant. Evidence is legally sufficient if, after viewing it in the light most favorable to the State, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Derr v. State*, 434 Md. 88, 129 (2013). We do not second-guess the jury's assessment of a witness's credibility. *Id.* The Court of Appeals and this Court have repeatedly held that testimony of a *single* witness to a crime, if believed, is legally sufficient to support a conviction. *See, e.g.*, *Turner v. State*, 242 Md. 408, 416 (1966); *Rodgers v. State*, 4 Md. App. 407, 414 (1968). This Court has also rejected comparisons to *Kucharczyk*, a "microscopically narrow holding that has never

[4] Given that defense counsel received the supplemental disclosure form seven days before Ms. Davis's direct examination and that appellant was likely familiar with Ms. Davis's drug history, defense counsel had an opportunity *prior* to trial to consider the inaccuracy or incompleteness of the form as well.

been repeated" in the past fifty-five years since the case was decided. *Rothe v. State*, 242 Md. App. 272, 276 (2019).

We decline, as we have done repeatedly, to extend *Kucharczyk* to a case merely of damaged credibility. Ms. Davis positively identified appellant as one of the two perpetrators. Although the three other witnesses did not claim to know appellant or Sturgis and did not identify them, their detailed testimonies corroborated Ms. Davis's account of the incident. The jury found her identification credible, and we will not second-guess that finding.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.