Circuit Court for Caroline County
Case No. C-5-CR-16-000030

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 544

September Term, 2017

CHARLES B. HENRY

v.

STATE OF MARYLAND

Wright,
Kehoe,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: September 12, 2018

Appellant, Charles Blaine Henry, was convicted on January 25, 2017, following a bench trial in the Circuit Court for Caroline County, of possession of a controlled dangerous substance ("CDS"), to wit, heroin, in violation of Maryland Code (2002, 2012 Repl. Vol.), § 5-601 of the Criminal Law Article ("CR"), and of possession with intent to distribute CDS in violation of CR § 5-602. The court merged appellant's sentence pursuant to CR § 5-601 with that pursuant to CR § 5-602, sentencing him to ten years' incarceration, with all but 234 days suspended (less 30 days for time served), to be served on consecutive weekends, and five years' probation.

Appellant timely appealed, and presents three issues for our review, which we have recast as follows:

> 1. Did the motions court err in ruling that the visual body cavity search of appellant was conducted in furtherance of a search incident to lawful arrest?
>
> 2. Did the motions court err in ruling that the police had reasonable particularized suspicion that contraband had been concealed on appellant's person so as to justify a visual body cavity search?
>
> 3. Was the trial court's factual finding that the State properly served appellant with an expert witness notice clearly erroneous?[1]

[1]The issues posed in appellant's brief are as follows:

> "I. Did the motions court err in denying Appellant's Motion to Suppress the evidence obtained from a strip search of the Appellant?
>
> "II. In light of the change in the Maryland Statute since 2003, does a positive K-9 alert on a vehicle provide probable cause to arrest the operator of the vehicle?
>
> "III. Did the trial court err in admitting expert testimony when proper notice of an expert and expert opinion were not properly served by the State?"

We shall answer each of these questions in the negative and affirm.

Facts

For two weeks in early June 2016, appellant was the target of a "concentrated surveillance effort" on the part of the Caroline County Drug Task Force ("the Task Force"), which had received reports during the preceding two years that he had distributed heroin. One such report was made by an arrestee to State Police Sergeant Leonard Nichols in September 2015. That arrestee informed Sergeant Nichols that (i) "Blaine" (later identified as appellant) had supplied him with heroin, and (ii) in order to replenish his heroin supply "Blaine" traveled "across the Bay Bridge to the Annapolis area."[2] During a police interview in May 2016, another individual reported having overdosed on heroin supplied by appellant. In addition to these tips, the Task Force "received … numerous anonymous tips regarding [appellant's] selling heroin."

Working in concert with fellow Task Force members Corporal Eric Peterson and Sergeant Nichols, Corporal Eric Masaracchia surveilled appellant on the afternoon of June 15, 2016. Corporal Masaracchia followed appellant as he drove a blue Ford pickup truck eastbound on Route 50, crossed the Bay Bridge, through Kent Island, over the Narrows, past the outlets in Queenstown, and continued eastbound on Route 404.

Later that evening appellant was pulled over by State Trooper Kevin Caraballo for driving 62 miles per hour in a posted 55 mile per hour zone and for having an inoperable

[2]At the suppression hearing, Sergeant Nichols testified that this arrestee had provided reliable information regarding individuals other than appellant.

brake light. Trooper Caraballo executed the stop on eastbound Route 404 in Caroline County. Within a minute of the stop, Trooper Caraballo was joined first by Corporal Peterson and his trained drug-detection dog, Rebel, and then by Sergeant Nichols.

After handing Trooper Caraballo his license and registration, appellant, at police request, exited the vehicle. After he did so, Rebel scanned it. Corporal Peterson made two passes of the vehicle with Rebel. Both passes resulted in positive alerts, indicating the presence of narcotics in "the driver's door seam and the rear seam of the driver's side of the cab."

While Sergeant Nichols questioned appellant, Corporal Peterson and Trooper Caraballo initiated a search of appellant's vehicle. When Sergeant Nichols joined in the ten to fifteen minute search of appellant's vehicle, a fourth officer remained with appellant. The search of the vehicle produced neither narcotics nor any other contraband.

Following the search of the vehicle, the fourth officer conducted a road-side search of appellant. During that search, the officer placed appellant's hands behind his back, "searched [his] pockets inside and out[,]" "[p]ulled [his] pants away from [his] body …[,] looked down [at his] crotch area[,] … told [him] to take [his] shoes off one at a time, [his] socks off one at a time[,] and searched [him] after that." Sergeant Nichols conducted a second "[c]omplete search of [appellant's] pockets, waistband area, any other location, [and] an outer feel of [the] crotch area and buttocks." Neither search produced contraband.

Sergeant Nichols decided "to transport [appellant] to the Caroline County Sheriff's Office about … three quarters [of a] mile[] away, along with his vehicle, to do a more

thorough … search of the vehicle in a safer location, as well as a strip search of [appellant]." Appellant was handcuffed and Corporal Peterson transported him to the station in the back of Peterson's SUV.[3]

Upon arriving at the station, appellant was escorted to a windowless room. Once Corporal Peterson, Sergeant Nichols, Trooper Caraballo, and appellant had entered the room, the door was closed behind them. Sergeant Nichols conducted the strip search, ordering appellant to remove one article of clothing at a time, and to hand him each article so that it could be searched. When appellant had completely disrobed, Sergeant Nichols ordered him to "[t]urn around, bend over[,] and to spread his buttocks apart[.]" As appellant did so, Sergeant Nichols observed a "plastic baggie containing an off-white rock[-like] substance … in between his buttocks." No part of the baggie was secreted in appellant's anal cavity. Sergeant Nichols proceeded to dislodge the baggie, which fell to floor. After seizing the baggie, which contained approximately 9.5 grams of suspected heroin, Sergeant Nichols informed appellant that he was under arrest. Forensic analyses confirmed that the baggie contained heroin.

Appellant filed a timely motion to suppress the fruit of the strip search. At a hearing on that motion the parties adduced the facts delineated *supra*. Appellant argued that the strip search was not justified as a search incident to arrest because (i) the police lacked

[3]Though Corporal Peterson testified that he "didn't handle the transport," appellant provided detailed testimony regarding his transport to the Sheriff's station. According to that testimony, appellant was transported to the Sheriff's station in the rear, passenger side seat of Corporal Peterson's SUV, with Rebel to his left and a metal partition between appellant and Rebel's "dog cage."

probable cause to arrest, (ii) appellant had not been arrested, and (iii) the police lacked reasonable particularized suspicion that contraband had been concealed on appellant.

In a memorandum opinion filed January 20, 2017, the court made factual findings consistent with those above. In denying appellant's motion to suppress, the court held:

> "[T]he positive K-9 alert indicating the presence of Controlled Dangerous Substances coupled with the fact the Defendant was then handcuffed while being transported to the Sheriff's Office is indicative of the Defendant being placed under arrest. For the Defendant's alternative argument, the court found that not only was there probable cause for the Officer to believe that a crime involving CDS was being committed, but that the Officer had a particularized reasonable belief that evidence of the crime would have been found on the body of the suspect, thus resulting in the strip search."

Additional facts will be introduced for the resolution of particular issues.

Discussion

I

Appellant contends that the motions court erred in denying his motion to suppress the fruit of the visual body cavity search[4] ("the Search"), arguing that because appellant had not been lawfully arrested, the Search was not conducted in furtherance of a search incident to lawful arrest. Specifically, appellant argues that at the time of the Search (i) the

[4]While a "strip search" "generally refers to an inspection of a naked individual, without any scrutiny of the subject's body cavities," a "'visual body cavity search' extends to a visual inspection of the anal and genital areas." *Paulino v. State*, 399 Md. 341, 352 (citations omitted), *cert. denied*, 552 U.S. 1071 (2007). In contrast to the more intrusive "manual body cavity search," a "visual body cavity search" "does not involve the police probing into such a cavity." *Williams v. State*, 231 Md. App. 156, 176 (2016) (quotation marks and citation omitted), *cert. granted*, 452 Md. 3, *and cert. dismissed*, 452 Md. 47 (2017).

police lacked probable cause to arrest appellant, (ii) the police had not intended to arrest appellant, and (iii) appellant had not understood that he was under arrest.

Standard of Review

> "Our review of a circuit court's denial of a motion to suppress evidence under the Fourth Amendment, ordinarily, is limited to the information contained in the record of the suppression hearing and not the record of the trial. When there is a denial of a motion to suppress, we are further limited to considering facts in the light most favorable to the State as the prevailing party on the motion. Even so, we review legal questions *de novo*, and where … a party has raised a constitutional challenge to a search or seizure, we must make an independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case. We will not disturb the trial court's factual findings unless they are clearly erroneous."

State v. Wallace, 372 Md. 137, 144 (2002) (internal citations omitted), *cert. denied*, *Maryland v. Wallace*, 540 U.S. 1140 (2004).

Probable Cause to Arrest

Appellant argues that "[a]ny probable cause that may have resulted from the positive K-9 alert was obviated by the extensive [roadside] searches [of appellant and his vehicle] which yielded no contraband."[5] In the alternative, appellant contends that because possession of fewer than ten grams of marijuana was decriminalized in 2014, "the alert does not provide the probable cause that would permit an officer to arrest the driver."

"A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in an officer's presence, is consistent with the Fourth Amendment

[5]Appellant does not cite any case law or academic authority in support of the proposition that probable cause to arrest can be "obviated" as the result of a fruitless search.

if the arrest is supported by probable cause." *Longshore v. State*, 399 Md. 486, 501 (2007) (citations omitted). "Our determination of whether probable cause exists requires a nontechnical, common sense evaluation of the totality of the circumstances in a given situation in light of the facts found to be credible by the trial judge." *Wallace*, 372 Md. at 148 (citations omitted). In making that determination, we consider whether "the facts and circumstances within the knowledge of the officer at the time of the arrest … are sufficient to warrant a prudent person in believing that the suspect had committed or was committing a criminal offense." *Haley v. State*, 398 Md. 106, 133 (2007) (citations omitted).

Rebel's alerts indisputably furnished probable cause to arrest appellant. *Stokeling v. State*, 189 Md. App. 653, 666 (2009) ("[W]hen a certified K-9 alerts to the presence of narcotics in a vehicle in which there is more than one occupant, 'probable cause to search the vehicle is, *ipso facto*, probable cause to arrest[,] at the very least, the driver.'") (quoting *State v. Ofori*, 170 Md. App. 211, 229, *cert. denied*, 396 Md. 13 (2006)); *State v. Funkhouser*, 140 Md. App. 696, 721 (2001) ("The probable cause developed by the initial canine 'alert' was at one and the same time probable cause to believe both 1) that drugs were probably then in the car and 2) that its driver and sole occupant probably was then or recently had been in unlawful possession of those drugs.").

Assuming without deciding that probable cause may dissipate upon the investigating officers' discovering exculpatory evidence, probable cause was not dissipated in this case. A search that is fruitless, but incomplete, is not, in and of itself, exculpatory. In fact, the fruitless search of appellant's vehicle *increased* the likelihood that the scent had

been transferred from appellant's body to the driver's side of the vehicle. *See United States v. Chartier*, 772 F.3d 539, 545 (8th Cir. 2014) ("[T]he fact that Reso alerted to the vehicle, coupled with the fact that a thorough search of the vehicle revealed no obvious source of the scent to which he alerted, made it more likely that the scent had come from one of the vehicle's occupants."); *United States v. Anchondo*, 156 F.3d 1043, 1045 (10th Cir. 1998) ("[T]he … fruitless search of the car … increased the chances that whatever the dog had alerted to was on the defendants' bodies."). *See also Florida v. Harris*, 568 U.S. 237, 249 (2013) ("A well-trained drug-detection dog *should* alert to" odors transferred from a driver to his or her vehicle.).

Appellant's decriminalization argument also lacks merit. In *Barrett v. State*, 234 Md. App. 653, 671 (2017), *cert. denied*, 457 Md. 401 (2018), this Court expressly held that:

> "[A] police officer who has reason to believe that an individual is in possession of marijuana has probable cause to effectuate an arrest, even if the officer is unable to identify whether the amount possessed is more than 9.99 grams."

(Footnote omitted). *See also Bowling v. State*, 227 Md. App. 460, 476 ("[T]he Maryland General Assembly intended that marijuana remain classified as 'contraband,' and that the decriminalization of small amounts of marijuana would not affect existing case law allowing officers to search a vehicle based upon a K-9 alert to the smell of marijuana."), *cert. denied*, 448 Md. 724 (2016).

Intent to Arrest

The Court of Appeals provided the following general definition of an "arrest" in *Bouldin v. State*, 276 Md. 511 (1976):

> "It is generally recognized that an arrest is the taking, seizing, or detaining of the person of another (1) by touching or putting hands on him; (2) or by any act that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest; or (3) by the consent of the person to be arrested. It is said that four elements must ordinarily coalesce to constitute a legal arrest: (1) an intent to arrest; (2) under a real or pretended authority; (3) accompanied by a seizure or detention of the person; and (4) which is understood by the person arrested."

Id. at 515-16 (citations omitted). *See also Belote v. State*, 411 Md. 104, 114 (2009); *Longshore*, 399 Md. at 502.

At the motions hearing, the court admitted in evidence Sergeant Nichols's "Application & Affidavit for Search and Seizure Warrant," in which he averred that (i) appellant had been transported to the Sheriff's Office for the purpose of conducting a strip search and (ii) appellant was told that he was under arrest after CDS was discovered. Sergeant Nichols reiterated the latter fact when testifying at the suppression hearing. Also during the hearing, Corporal Peterson testified that appellant was handcuffed because it is "standard procedure to handcuff anybody that's transported in a police vehicle …." Appellant urges us to infer from this evidence that, in handcuffing and transporting appellant, the officers had not subjectively intended to arrest appellant.

As the State rightly notes, the relevance of an officer's subjective intent to "arrest" "waxes and wanes depending on the officer's objective conduct." As the Court of Appeals explained in *Belote v. State*, 411 Md. 104, 117 (2009):

> "[W]hen an arresting officer's objective conduct, which provides significant insight into that officer's subjective intent, is unambiguous, courts need not allocate significant weight to an officer's subjective intent that is revealed partially in the form of his testimony at the suppression hearing; *the officer's objective conduct, in effect, will have made his subjective intent clear*. It is only when an arresting officer's objective conduct is ambiguous that his or her subjective intent increases in importance to a court's legal inquiry into whether a custodial arrest of the suspect occurred."

(Emphasis added). *See also Bouldin*, 276 Md. at 518-19.

When the search of appellant's vehicle did not produce any contraband, appellant was searched. After conducting a second search of appellant's person, Sergeant Nichols informed appellant he would be taken to the station for a strip search. When appellant objected, Sergeant Nichols told him that he "had no choice" but to go to the station for a strip search. On these facts and those delineated *supra*, the officers' objective conduct unambiguously bespoke an intent to arrest.

Even if we were to consider the testimony of the officers, we would hold that they had intended to arrest appellant. Sergeant Nichols's stated purpose for transporting appellant to the station (to wit, to conduct a strip search) evinces his intent to arrest. Just as an arrest is a necessary predicate for a search incident to arrest, so too is a search incident to arrest a necessary predicate for a visual cavity search. *State v. Harding*, 196 Md. App. 384, 425 (2010) ("It is only a search incident that could progress directly into a strip search."), *cert. denied, Harding v. State*, 418 Md. 398, *and cert. denied*, *Harding v. Maryland*, 565 U.S. 826 (2011). Insofar as Sergeant Nichols intended to conduct a visual body cavity search of appellant, so too must he have intended the necessary and indispensable predicates for doing so. This reasoning is equally applicable to the officers'

intent in handcuffing appellant. Granted, they may well have intended to comply with "standard procedure." That intent, however, was *incidental to* the intent to transport appellant to the station *in order to conduct a strip search*.

Arrestee's Understanding

Appellant further claims that he could not have understood that he was under arrest prior to or during the Search because he was not explicitly told as much until after CDS was discovered.[6]

As the Court of Appeals explained in *Bouldin* and reiterated in *Belote*, "'it is only where there is no actual manual seizure of the arrested person that his intention [to submit to the police] or understanding assumes controlling importance.'" *Belote*, 411 Md. at 115. This is so because, in determining whether a would-be arrestee understood that he or she was arrested, the general test is whether "'a reasonable person in the suspect's position would have understood that situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest.'" *United States v. Powell*, 451 F.3d 862, 869 (D.C. Cir. 2006) (quoting *Ochana v. Flores*, 347 F.3d 266, 270 (7th Cir. 2003)), *rev'd on other grounds*, 483 F.3d 836 (D.C. Cir. 2007). Under these circumstances, a reasonable person in appellant's position would have understood that the restraints on his freedom of movement were of such a degree as amounted to an arrest.

[6]The effectuation of an arrest does not require that the arresting officer inform the arrestee that he or she is "under arrest." *See, e.g., Morton v. State*, 284 Md. 526, 529-30 (1979) (holding that Morton had been arrested (albeit, unlawfully) when he was placed under guard in a patrol car—*prior to his having been told that he was "under arrest."*).

Even were we to probe appellant's subjective understanding of his detention, we would hold that he understood said detention to be tantamount to an arrest. During the motions hearing, appellant testified that, following the fruitless roadside searches of his vehicle and person, he requested to leave but was not permitted to do so. On cross-examination, he affirmed that during the roadside search he felt that he was in the officers' custody and "had no choice to leave."

II

Appellant next contends "the police lacked reasonable particularized [suspicion] to justify a visual cavity search," arguing that the investigative measures taken by the Task Force *prior to* the June 15 search of his vehicle and person did not "provide a particularized suspicion that appellant was concealing contraband on his person." We do not consider the pre-June 15 investigation. Probable cause to arrest appellant coupled with the fruitless searches of appellant's vehicle and person on June 15 yielded particularized suspicion that appellant had concealed contraband on his person.

The facts in this case are nearly identical to those in *State v. Harding*, 196 Md. App. 384 (2010), where we held that "the particularized suspicion standard for a strip search was satisfied[.]" *Id*. at 435. In *Harding* the police twice had been informed that the appellee sold crack cocaine. The first report was made two to three months prior to Harding's arrest, and indicated that "a man named Harding was selling crack cocaine at a liquor store on Perring Parkway and McClean Boulevard." *Id*. at 389. The second report was made eight days prior to Harding's arrest by a "'very reliable informant'" whose information had "'led

to numerous CDS arrests[.]'" *Id*. at 388-89. According to the latter tip, Harding had been selling crack cocaine "out of a blue Audi, with the Maryland tag number 7EPG15, in the Towson and Parkville areas." *Id*. at 388.

The officers observed appellant driving the (otherwise unoccupied) vehicle described by the informant, and conducted a valid traffic stop. During that stop, a trained drug-detection dog twice altered, first on the driver's side door and then on the driver's seat. Thereafter the officers conducted "a 'very thorough search' of the vehicle" followed by a search of appellant incident to his arrest. *Id*. at 394. Neither search produced contraband. A subsequent station-house strip search revealed contraband hidden in appellant's pants.

We held that there was ample particularized suspicion that Harding had drugs hidden on or in his person. In so holding, we noted that though "[m]uch of the necessary particularized suspicion … was already part and parcel of the probable cause for his arrest," *id*. at 435-36, "[i]t is not necessary in this case … to make a decision on the basis of what was known to the police at that precise moment of his arrest." *Id*. at 436. We explained that while the K-9 alerts furnished probable cause "that the appellee was in possession of CDS …[,] that was not necessarily particularized suspicion that the drugs were hidden on or in his body." *Id*. at 437. The probable cause to arrest ripened into a particularized suspicion to strip search when the officers had unsuccessfully searched appellant's vehicle and person. We explained:

> "[T]he process of elimination moved inexorably forward toward particularization. The pinpointing of location by both K-9 alerts focused

> upon the appellee and away from the farther reaches of the car. The painstakingly *Carroll* Doctrine search of the Audi eliminated it as the locus of the CDS. The initial and routine search incident of the appellee eliminated his pockets as the sinister situs. The K-9 alert had established that CDS was, in all probability, somewhere in the car proper or on the person of someone in the ca[r]. At each elimination of an alternate hiding place, the odds in favor of the appellee's body went up exponentially."

Id. at 437-38. *See also Moore v. State*, 195 Md. App. 695, 725 (2010) ("When a search of the vehicle from which appellant was known to distribute drugs and a search of his outer clothing did not reveal any drugs, we are persuaded that a strip search followed by a visual body cavity search was reasonable."), *cert. denied*, 418 Md. 192 (2011).

Just as in *Harding*, much of the particularized suspicion for the strip search preceded the searches of appellant's vehicle and person. The police had been apprised by multiple sources that appellant *distributed* heroin. *See Harding*, 196 Md. App. at 436 (Whether an individual is a seller of narcotics—rather than a mere user—"is a factor in the hiding of one's stash on or in the body."). One of those sources (who had proven reliable in other cases) reported that appellant purchased heroin in Annapolis, requiring him to cross the Bay Bridge—the same bridge that appellant had crossed less than an hour before the traffic stop. Appellant, moreover, had been the driver and sole occupant of the vehicle prior to Rebel's signaling to the "the *driver's door* seam and the rear seam of the *driver's side* of the cab." (Emphasis added).

Ultimately, however, the particularized suspicion was definitively established *following* Rebel's positive alerts. By process of elimination, the fruitless searches of appellant's vehicle and person, coupled with the likelihood that CDS was either in the

vehicle or on its lone occupant, yielded a reasonable particularized suspicion that CDS was hidden on or in appellant's body.

III

Finally, appellant contends that the trial court erroneously found that the State had notified defense counsel that Sergeant Nichols would testify as an expert witness as required by Maryland Rule 4-623 and that the court, therefore, erred in admitting Sergeant Nichols's expert testimony.[7]

Factual Background

At trial the State called Sergeant Nichols as an expert witness. Defense counsel moved to exclude Sergeant Nichols's expert testimony, claiming that "his expert opinion ha[d] never been produced to the Defendant in discovery." The State rejoined:

> "[Defense counsel] received the State's Notice of an Expert, which said that Officer Nichols would be testifying and about what he would base his opinion on and what his opinion would be. [Defense counsel] also received Officer Nichols'[s] police report, which … says ['']due to my training, knowledge[,] and experience I recognized the substance seized to be suspected heroin. I further recognize … the quantity of the suspected heroin, coupled with the manner in which it was packaged and concealed, along with the totality of the circumstances cited above, is indicative of the intent to distribute and not solely for personal use.['']"

[7]Appellant offers a variety of arguments in support of its contention that the State violated Maryland Rule 4-263. Each of those arguments, however, is premised on the supposition that the court's factual finding—to wit, that the State served appellant with the notice it read into the record—was clearly erroneous. We need not address the merits of these arguments, as the court's factual finding was *not* clearly erroneous.

The State also read its PWID (Possession with Intent to Distribute) Expert Notice ("the Notice") into the record:

> "[T]he State anticipates … calling [Sergeant] Nichols, Corporal Durham, Corporal Masaracchia[,] and Deputy Peterson of the Caroline County Sheriff's Department …. They will be offered as experts in narcotics evaluation and identification, controlled dangerous substance investigations, specifically heroin, common practices of users and dealers of controlled dangerous substance[s], specifically heroin. They will offer their opinions that the Defendant possessed heroin with the intent to distribute it. The facts in relying on that opinion include, but are not limited to, the amount of heroin, the street value of heroin, the packing of heroin, statements made by and to the Defendant and testimony elicited at trial."

When defense counsel asked the State to specify to whom the Notice had been sent, the State answered: "Well, in the certificate of service it says [defense counsel]."

In denying the motion, the court ruled: "[T]hat's why we have MDEC. …. And the Court is going to rely on what MDEC says."

The State proceeded to *voir dire* Sergeant Nichols. Thereafter it offered Sergeant Nichols as an expert in "narcotics evaluation and identification, controlled dangerous substance investigations, [and] common practices of users and dealers of CDS." Defense counsel declined to *voir dire* the witness and offered no argument. The court accepted Sergeant Nichols as an expert in those fields specified by the State.

The court recessed shortly after the State commenced its direct examination of Sergeant Nichols. When it had reconvened, defense counsel informed the court that the clerk's case summary made no mention of the Notice. The State explained that, while it had served the defense with the Notice, it had not filed it with the court. The State then offered to "pull up on MDEC where it shows I served it and it shows it went to [defense

counsel]." The State did so, and then showed the Notice to defense counsel, who reiterated "I do not have that." The court then asked defense counsel: "[M]ay we now recall [Sergeant] Nichols to the witness stand?" Counsel answered: "Yes, thank you, Your Honor."

Discussion

Whether a party has committed a discovery violation is a mixed question of law and fact. *Cole v. State*, 378 Md. 42, 56 (2003). While we review *de novo* "[t]he application of the Maryland Rules … to a particular situation," we will not disturb a trial court's factual findings unless those findings are clearly erroneous. *Id*. In reviewing a trial court's factual findings, therefore, "we must decide only whether there was sufficient evidence to support [those] findings." *Joyner v. State*, 208 Md. App. 500, 524 (2012) (internal quotation marks and citation omitted). In so doing, "we must assume the truth of all the evidence, and of all the favorable inferences fairly deducible therefrom, tending to support the factual conclusions of the lower court." *Id*. (Internal quotation marks and citation omitted).

There was, in this case, sufficient evidence from which the court could reasonable infer that the State had served appellant with the Notice. The State retrieved and read from a copy of the Notice. The certificate of service named defense counsel as the person to whom the Notice had been delivered on September 28, 2017. Thereafter, the State "pull[ed] up on MDEC where it shows I served it and it shows it went to [defense counsel]." It then showed the Notice to defense counsel. Rather than contesting the Notice's

authenticity, denying that its content was identical to what the State had read, or otherwise excepting, counsel merely responded "I do not have that."

The certificate of service appearing on the Notice created a rebuttable presumption of service. *See* Md. Rule 1-323 ("A certificate of service is prima facie proof of service."); *Murnan v. Joseph J. Hock, Inc.*, 274 Md. 528, 531-32 (1975). Defense counsel's mere denial of receipt was inadequate to rebut that presumption. *Id.* ("[S]omething more than a mere denial of receipt was necessary to rebut the presumption of service[.]"). *See also Henry v. Gateway, Inc.*, 187 Md. App. 647, 660 n.11 (2009).

The trial court's factual finding that the State had served defense counsel with the Notice was not clearly erroneous.

For the foregoing reasons, we affirm appellant's convictions.

JUDGMENTS OF THE CIRCUIT COURT FOR CAROLINE COUNTY AFFIRMED; COSTS TO BE PAID BY THE APPELLANT.