

Circuit Court for Montgomery County
Case No. 136547C

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 610

September Term, 2020

JASHAWN MCMILLIAN

v.

STATE OF MARYLAND

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

JJ.

Opinion by Raker, J.

Filed: August 26, 2021

*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.

Appellant Jashawn McMillian was convicted by a jury in the Circuit Court for Montgomery County of robbery. Appellant presents the following questions for our review:

- “1. Where the State disclosed its key witness thirteen days before trial, did the trial court err by finding that the State did not violate the discovery rule?
2. Did the trial court err and/or abuse its discretion in deciding the defense’s motion for sanctions?
3. Did the trial court plainly err by conducting *voir dire* in a manner that failed to uncover bias?”

We shall find that appellant’s second allegation of error constitutes reversible error and therefore we reverse and remand for a new trial. The combined actions of the State in failing to comply with the discovery rules and the trial judge in denying defense counsel the full opportunity to impeach a material witness amounts to reversible error.

I.

Appellant was indicted by the Grand Jury for Montgomery County on charges of robbery and conspiracy to commit robbery. The jury acquitted him of conspiracy but convicted him of robbery. The court sentenced appellant to a term of incarceration of five years.

On September 6, 2018, the CVS pharmacy in Olney, Maryland, was robbed. At around 4 a.m., two masked men breached the employee area behind the pharmacy counter. One man ran at the counter and jumped over it; the running caught the attention of

pharmacist Frank Odame, who had been filling prescriptions. As the running man jumped over the counter, Mr. Odame turned and saw a second man in the pharmacy area, pointing at safes. The men pressed Mr. Odame to open two safes containing controlled substances, and they grabbed multiple bottles of Percocet and of promethazine with codeine.¹ Apparently, two other men also had entered the CVS and worked with the robbers who were behind the pharmacy counters. At first, the men all successfully fled.

Detective Charles Horwitz of the Montgomery County Police responded to the CVS. He interviewed three CVS employees, including Mr. Odame. He reviewed the CVS surveillance video where he saw an unmasked man. From the video, Det. Horwitz later identified the unmasked man as Al Snider. The footage of the robbery itself apparently showed four men in the store, who were not immediately identifiable and who did not include Snider.

Det. Horwitz obtained a search warrant for Snider's Instagram account. After reviewing records of that account, he developed a list of other suspects, including appellant. He learned that Snider and appellant are cousins and that they lived on the same block as the three other suspects. Det. Horwitz then obtained search warrants for the Instagram accounts of other suspects, and he investigated further.

By April 2019, the month that he would plead guilty in Montgomery County, Snider admitted that he was one of the individuals involved in robbing the CVS. According to

¹ Percocet is a trade name for a mixture of acetaminophen and oxycodone, an opioid. Promethazine and codeine are generic chemicals sometimes combined in a cough syrup. Because codeine is a mild narcotic, this cough syrup can be addictive.

Snider, he robbed the pharmacy with four others: Alonzo Lover, Kemoni Ware, James Hester, and appellant. Snider stated that all five lived in Southeast D.C. and that he drove them from Southeast to Olney. Snider parked the car and entered before everyone else to see if anyone was inside. He bought a case of water and returned to the car. The other four soon went inside and returned with stolen pharmaceuticals, which they divided among themselves.

In the investigation, Det. Horwitz learned from Instagram that Lover posted a photo of himself with appellant, who in the photo was wearing a gray sweatshirt that appeared to be identical to a shirt worn by one of the robbers in the surveillance video. Det. Horwitz testified that the photo was posted four days after the robbery; he did not know when the photo was taken, and it was later deleted by the account holder.

Det. Horwitz found messages from several hours before the robbery in which Hester asked Ware if they were scoring that night. Ware asked Hester if it was happening, and Hester told him to come out because they were all together, mentioning appellant by his nickname. In the days following the robbery, a video was posted of Lover and Snider, captioned “early bird gets the pill.” Eleven or twelve days after the robbery, a video was posted of Lover and appellant in which appellant seems to take a bag of white pills out of his pocket. Det. Horwitz reviewed appellant’s Instagram messages but did not find messages related to the robbery.

In Snider’s statements to investigators and later at trial, Snider identified appellant as one of the five robbers of the Olney CVS, and said that appellant was identifiable in the

surveillance video by his gray sweatshirt. Snider stated that the gray sweatshirt was the same one as that worn in the Instagram photo posted by Lover. Based on this identification and the rest of his narrative, Snider was the prosecution's star witness.

Appellant proceeded to trial before a jury in the circuit court on March 2, 2020. On February 18, 2020, thirteen days before trial, the State disclosed to defense counsel that it would call Snider as a witness and the State then disclosed notes from a 2018 proffer.²

On February 19, 2020, defense counsel filed a motion to exclude Snider as a witness at trial. The motion presented the following timeline, to which the State agreed.

- In October 2018, the State charged Snider.
- In April 2019, Snider pled guilty in Montgomery County.
- In August 2019, Snider pled guilty in Anne Arundel County and was sentenced for charges arising from both counties.
- In October 2019, the State charged appellant.
- In November 2019, defense counsel was appointed for appellant.
- In January 2020, the court held a bond review, involving counsel for the State and appellant.
- On February 7, 2020, the court held a bond review at which the State told defense counsel that the State would call one of the co-conspirators.
- On February 18, 2020, the State told defense counsel that it would call Snider at trial and then disclosed notes from a 2018 proffer.
- On March 2, 2020, appellant was tried before a jury.

Defense counsel stated in the motion that he had not received discovery information necessary to impeach Snider. The defense requested the court schedule a hearing on the

² Before a proffer session, a defendant or prospective defendant (*i.e.*, profferor) agrees with a prosecutor to provide useful information to the prosecutor and that the prosecutor will not use the statements made during the session directly against the profferor in a later criminal proceeding. Commonly, exceptions exist for impeachment, cross-examination, or investigation. *See United States v. Melvin*, 730 F.3d 29, 36 (1st Cir. 2013).

motion the week before trial, but the motion was heard on the morning of trial.

On the morning of trial, defense counsel argued that the State had known of Snider for over a year but told defense counsel that it would be calling Snider as a witness only thirteen days before trial. Defense counsel argued that the late disclosure of Snider as a witness inhibited preparation of the defense. First, he stated that he did not have adequate time to send an investigator to speak with Snider, undermining his ability to impeach Snider. Second, defense counsel would have called the other co-conspirators if he had known that the State would be calling Snider because one of those co-conspirators had given a statement to police that appellant was uninvolved.

The State argued that the delay in disclosing Snider as a witness was justified and that the reason for earlier non-disclosure was two-fold: that the State did not intend to call Snider until February 20, and the State was concerned for the safety of Snider. The State told the court that when it realized in late January 2020 that it might need to call Snider, the State first tried to contact Snider's lawyer and had trouble reaching him. The State did not tell defense counsel at the bond hearing on February 7 because the prosecutor had not yet served the witness with a subpoena. The State added that it had included Snider's name and a videotaped statement by Snider in the initial discovery disclosures.

In rebuttal, defense counsel asserted that, along with the disclosures, he received twenty thousand pages of discovery. He listened to the taped statements of the four alleged co-conspirators; he saw that those statements did not implicate appellant, and believed that he would not need to call other witnesses. Defense counsel rebutted the State's assertion

that the State was concerned for Snider’s safety by pointing out that the State could have disclosed the name under seal or placed Snider in protective custody. Defense counsel rebutted the State’s assertion that the State was not sure it would need Snider’s testimony by arguing that the State never could have believed it could get beyond a motion for judgment of acquittal without Snider’s testimony.

The trial court denied the motion to exclude Snider’s testimony. The court concluded that defense counsel was aware of Snider as an alleged co-conspirator and yet had not reviewed the audiotape or transcript of Snider’s guilty plea or sentencing. The court accepted the State’s assertion that there was no State intent to call Snider as a witness until January 2020. The court found that, once the State realized it needed to call Snider, the State made every reasonable effort to secure his testimony timely. The court found that the State gave logical reasons for why the State identified Snider as a witness when it did. The court found that defense counsel had the information necessary to cross-examine Snider.³

³ The judge said:

“[Defense counsel] knew for many, many months that Mr. Snider was an alleged – I’m going to stop using the word alleged because we’re not dealing with a jury at this point, a co-defendant in the case and that he had pled guilty. Since that time, [counsel] has been given the recent statement in writing as to what Mr. Snider has told the State. And what I heard on the phone from you folks [in a pretrial conference], that he signed it – he, Mr. Snider. So [counsel] is armed with that statement. He’s also armed with a video statement, or aware of what was said the first time when I was told that Mr. Snider originally denied involvement. So, he has impeachable information. How he chooses to use it is up to him. He’s also been given any record that Mr. Snider might have, and he’s also aware of any benefits Mr. Snider was

[Footnote continued....]

Discussing the discovery ruling the judge stated as follows:

I accept the State's proffer as officers of the Court that they didn't intend to call [Snider] and they didn't really want to call [Snider], but they made a strategic decision at some point that they needed him. And I find that they've made every reasonable effort to try and secure him to testify. . . . The question is fairness and what's the State's duty. The duty of the State is to disclose the witness under the rules when they make a determination that they're going to use a witness, which they did. They've given the Court logical and reasonable reasons why they recently disclosed it to [defense counsel].

In the same hearing, the judge ruled as follows:

I think it's real clear. I don't find that the State dragged its feet or in any way tried to deceive the defense; that they acted reasonably when they made that determination that they were going to use them. And it wasn't the night before that they disclosed, it's been, as I said...thirteen days ago, roughly. And, as I said, [defense counsel] had the chance to talk to [Snider], and as I repeat, we haven't heard anything that [Snider] is recanting from his most recent statement. So, having factored all that in, had the benefit of talking to our administrative judge and review everything, I'm going to deny the — and there, again, I'll just even add parenthetically the defense is just saying, well, he shouldn't be allowed to testify. He's not saying, 'Judge, if he's going to testify, we need a postponement.' He's saying he couldn't testify. I don't know of any authority for that, but I guess the court would have the intrinsic power to deny him from testifying at any time. But I'm going to deny the motion to preclude [Snider] from testifying in this trial starting today.

After the court ruled, defense counsel moved to postpone trial for numerous reasons, including the need to subpoena the other co-conspirators. Defense counsel explained that one of the co-conspirators stated to the police on video that appellant was not involved in

offered to give his statement, which I'm told were none, but that certainly can be flushed out on cross-examination by [counsel].”

The judge's understanding later changed, however, at least somewhat, with respect to availability of certain impeachment information, as recited *infra*.

the robbery. The court denied the postponement, and trial began.

At trial, Snider testified on cross-examination that he was charged initially with four robberies of four different CVS pharmacies and that he had prior convictions for armed robbery and receiving stolen property. He participated in a proffer session with the State before he pled guilty; during the proffer session, the State extended Snider a plea agreement on the condition that he would testify at future trials involving this robbery. He understood that the maximum sentence for each of the four robberies was fifteen years and that the State would ask for only eighteen months incarceration if he entered into the plea agreement. Snider pled guilty and he was sentenced to fifteen years, all suspended except for eighteen months.

During cross-examination regarding the plea agreement, defense counsel asked Snider if the agreement involved him pleading guilty to two charges of robbery and the State dropping two charges of robbery. Snider confirmed that the plea agreement involved pleading guilty to two charges of robbery but stated that he was only charged with two robberies: “the two robberies that I was charged with were the two robberies that I pled guilty to.” Defense counsel again asked if Snider was charged with two robberies in Montgomery County and two robberies in Anne Arundel County, and Snider stated:

I was offered, I was offered to plead guilty to the two robberies that I was charged with. There was, the other two robberies were just in question. *They were never, I was never charged with them.* They w[ere] never a part of no plea deal that if I pled guilty to two—it was never nothing like that.

Defense counsel moved on, saying, “We’ll get back to that.”

After the State rested its case, defense counsel requested sanctions relating to Snider's testimony, asserting two grounds. First, defense counsel pointed out that Snider testified that the State offered him a plea deal on the condition that he testify, and the State did not rebut that testimony during redirect examination. Defense counsel said that the State never provided a copy of its offer to Snider or of the plea agreement. When the judge sought clarification, this exchange followed:

THE COURT: What were provided with respect to Mr. Snider before trial?

DEFENSE COUNSEL: Last week I was provided with his criminal convictions.

THE COURT: Before that in the original package?

DEFENSE COUNSEL: In the original packet, there was a videotaped interview with the police; there were 10,000 pages, or maybe 5,000 pages of Instagram messages, [and] cellphone dump.

THE COURT: Well, what about his indictments in this case? You were provided with the fact that he pled guilty, because it was about a year ago?

DEFENSE COUNSEL: No, I was not. Last week –

THE COURT: No?

DEFENSE COUNSEL: -- I was provided with, the State sent me an e-mail with the report from Pretrial Release that they do on a person's background. That is all the charging information I was provided concerning Mr. Snider.

THE COURT: If true, Mr. [prosecutor], that's — it seems to me that you should have provided to him, the defense, what Mr. Snider was charged with and what he pled to, and what was nol prossed, right?

THE STATE: So, I provided, my understanding of the criminal record is

the criminal convictions and so —

THE COURT: Yeah, but I'm looking at [Rule 4-263(d)(6)], 'all material or information in any form that tends to impeach' – well, that certainly goes to the benefit of his plea.

THE STATE: Your Honor, I didn't look at it that way, and, certainly —

THE COURT: Well, I'm not suggesting you did it intentionally. I'm inclined to try and correct it at this point.

THE STATE: Your Honor, this is the thing. There has to be some sort of prejudice gleaned from that. The information that [defense counsel] attempted to elicit was information known to him at the time of cross-examination. . . . We have to talk about the prejudice here. What's the prejudice? That's the risk you run when you try to impeach somebody.

THE COURT: Well, he's saying is, I could show the jury that he got a bigger benefit than Snider admitted to.

Defense counsel argued that he was unable to impeach Snider on his hope or expectation of a benefit as a result of his testimony. Second, counsel argued that the State failed to correct at any time Snider's inaccurate testimony that he was charged only with two robberies when he was in fact charged with four. Counsel proffered that, in Montgomery County, Snider was charged with two counts of robbery and two counts of conspiracy, and in Anne Arundel County he was charged with twenty-nine offenses (including two robberies), with all but one dismissed pursuant to a plea agreement.

As a remedy, defense counsel asked the court to dismiss the charges against appellant, to strike Snider's testimony, or to allow defense counsel to enter into evidence proof of the charges against Snider in both Montgomery County and Anne Arundel County. Prior to arguing this motion on the second morning of trial, defense counsel obtained from

the Montgomery County Clerk's Office a certified copy of the Montgomery County indictment. Defense counsel was unable to retrieve that morning a certified copy of the Anne Arundel County indictment, but he printed out those charges from Maryland Case Search.

Regarding the first alleged violation, the plea agreement, the State asserted that it never offered Snider a benefit for his testimony. The trial court accepted the State's representation that it did not offer Snider a benefit. Accordingly, the court found no violation on the first ground.

Regarding the second alleged violation, the charges and charging documents, the State acknowledged that Snider's testimony was inaccurate and suggested that Snider may have confused having two cases, one in Montgomery County and one in Anne Arundel County, as only having two charges (as opposed to more than thirty charges relating to four robberies). The State argued that it did not have a duty to correct the misstatements of its witnesses when the misstatements were made during cross-examination because defense counsel could have impeached the witness by introducing substantive evidence of the charges after the witness denied the charges.

Defense counsel responded that the State had an obligation to disclose Snider's charges and charging documents pre-trial, which it never did. Indeed, the State never produced to appellant the full charges that Mr. Snider had faced nor the ones that were not pressed. The defense received only Snider's prior criminal convictions, a report from Pretrial Release, a video-recorded police interview, and Instagram records.

Relying on Rule 4-263(d),⁴ the trial court found that the State should have provided defense counsel with Snider’s charging documents. Specifically, the court found that the State should have provided “what [Snider] was charged with and what he pled to, and what was not pressed.” After the court’s finding that the State failed in its discovery obligations, the State consented to admitting into evidence the certified copy of the Montgomery County indictment charging Snider with two different robberies in Montgomery County. The court admitted that copy of the Montgomery County indictment. Defense counsel asked the court to admit the Anne Arundel County charges, but the trial court “ruled out” admitting those charges, without further explanation.

During jury deliberations, the jury sent the judge a note, which included the following evidentiary questions: “Can we get a copy of [Snider’s] letter to [appellant]?” and “Which two offenses was [Snider] talking about in his letter to [appellant]?” The judge replied that he could not answer substantive questions about the evidence. Defendant’s exhibit #1 was a letter from Snider to appellant that was admitted as a prior inconsistent statement. From the witness stand, Snider authenticated that he wrote the letter, drafted it

⁴ Rule 4-263(d) establishes obligations for discovery and disclosure by the State’s Attorney in cases before a circuit court. In pertinent part, §4-263(d)(6) mandates disclosure to the defense, without the necessity of a request, of:

“Impeachment Information. All material or information in any form, whether or not admissible, that tends to impeach a State’s witness, including...(B) a relationship between the State’s Attorney and the witness, including the nature and circumstances of any agreement, understanding, or representation that may constitute an inducement for the cooperation or testimony of the witness[.]”

Rule 4-263(d)(2) additionally requires disclosure of any prior criminal convictions, pending charges, and probationary status of the defendant and of any co-defendant.

in his handwriting, and that he wrote it in October or November 2019. In one part of the letter, Snider wrote:

They fake dropped them 2 cases, even though I was gon beat them anyway. And made it seem like they was giving me a deal, By givin me 18 months for the Olney and Anne Arundel case, Running them together Most of the paperwork I got is really on the Anne Arundel case. As far as I knew, you ain't have shit to do wit either case. Olney and I knew for dam sure you wasn't gon get charged or brought in on the Anne Arundel case.

Appellant was convicted and sentenced as above, and this timely appeal followed.

II.

Before this Court, appellant argues first that the trial court erred by finding that the State did not violate the discovery rule in its late disclosure of witness Snider. Rule 4-263 requires the State to provide the defense, at minimum, the name of each witness the State intends to call and all written statements of the witness that relate to the offense charged—and to do so without a request. Rule 4-263(d)(3). The State “shall make disclosure . . . within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court[.]” Rule 4-263(h)(1).

Appellant maintains that the State violated Rule 4-263 by not listing Snider on its witness list within thirty days of the earlier of the appearance of defense counsel or the first appearance of McMillian, as required by the Rule. Appellant appeared initially in court on November 8, 2019, and defense counsel entered his appearance three days later. Therefore, according to appellant, the discovery disclosure deadline under Rule 4-263 was December

8, 2019. The State disclosed to the defense that it would call Snider as a witness on February 18, 2020, and disclosed relevant discovery materials on the same date. Appellant argues that the trial court found implicitly that the State did not violate the discovery rule, which in appellant's view was error. By doing so, the court never reached the question of an appropriate sanction.

According to appellant, even assuming the State did not intend to call Snider when it made the initial disclosures, then under the Rule the State should have disclosed Snider as soon as it *intended* to call him as a witness. In appellant's view, the State intended to call Snider as a witness in January 2020 because the State contacted Snider's attorney at that time, yet the State did not disclose Snider until February 18, 2020. Appellant argues that the prosecutor failed to exercise due diligence by not timely recognizing the importance of Snider's testimony and by declining to notify the defense that it intended to call Snider in January 2020.

As to prejudice, appellant maintains that without Snider's testimony, the State could not have established appellant's involvement in the crimes. Because Mr. Odame, the pharmacist, did not identify appellant, and Det. Horwitz acknowledged that he found no evidence related to the robbery in appellant's Instagram account, the State's case depended upon Snider. The photo of appellant in a gray sweatshirt would not establish that appellant was in the CVS surveillance footage without Snider identifying appellant as the person in the gray sweatshirt in the CVS. Appellant maintains that the State's delay in disclosing Snider undermined the purposes of the discovery rule, causing unfair surprise and

undermining the defense’s preparation. Until thirteen days before trial, the defense did not know how the State planned to prove that appellant was present at the scene of the crime or whether appellant had any involvement in the crime. The defense was left to file a last-minute motion *in limine* about violation of discovery rules and constitutional due process, resulting in a hearing the morning of trial.

This error, according to appellant, was not harmless. Appellant points to the express contemplation in Rule 4-263(n) of postponement as a remedy for a discovery violation. Because the court did not find a discovery violation, the court did not consider postponing trial as a remedy. Because the court did not find a discovery violation, the court did not weigh the prejudice that would result from denying defense counsel’s request for a postponement so he could subpoena the co-conspirators and send an investigator to interview Snider. In sum, appellant argues that he lost the opportunity to attempt to impeach Snider, and he lost the opportunity to call the other co-conspirators to testify.

Appellant adds that the other co-conspirators had not implicated him in their previous statements, but he had not subpoenaed the co-conspirators because he did not have appropriate notice that Snider would testify and, for that reason, he did not know that he would need the other co-conspirators until thirteen days before trial. Because Rule 4-265(d)⁵ requires counsel to request a subpoena at least nine business days before trial, and because the State disclosed Snider only eight business days before trial, the late disclosure

⁵ Rule 4-265(d) provides that “[u]nless the court waives the time requirements of this section, a request for subpoena shall be filed at least nine days before trial in the circuit court, . . . not including the date of trial and intervening Saturdays, Sundays, and holidays.”

impacted trial and was not harmless.

As to any sanctions related to Snider’s plea agreement specifications or charging documents, appellant argues that: (1) the trial court erred by finding that the State did not violate the discovery rule in failing to disclose details of Snider’s plea agreement; and (2) the trial court found properly that the State failed to disclose charging information related to a witness and co-defendant, Snider, but the court erred and abused its discretion by fashioning a remedy that addressed only half the discovery violation.

Appellant asserts that the State violated the discovery rule by not disclosing the details of the plea agreement with Mr. Snider, citing Rule 4-263(d) as requiring disclosure of any prior criminal convictions, pending charges, and probationary status “of the defendant and of any co-defendant[.]” Appellant cites the same Rule for the State’s failure to disclose all impeachment information, including any information that tends to impeach a State’s witness, particularly any relationship between the State’s Attorney and the witness—including the nature and circumstances of any agreement, understanding or representation that may constitute an inducement for the cooperation or testimony of the witness.⁶ Appellant argues that even if the State did not offer an explicit benefit to Snider, the State should have disclosed the plea agreement and/or any documents related to the agreement.

Appellant further argues that the circuit court erred on the motion for sanctions

⁶ Rule 4-263(d)(6). *See supra* note 3.

because, where that court found the State failed to disclose information related to Snider,⁷ the court abused its discretion by fashioning a remedy that only addressed half of the discovery violation. The court found that the State violated Rule 4-263(d) by failing to provide the defense with Snider’s charges, including both the charges to which he pled guilty and the charges that were nol prossed. Defense counsel asked the court to admit into evidence the charges from both Montgomery County and Anne Arundel County to show the full extent of the charges that Snider faced—including four in Montgomery County and twenty-nine in Anne Arundel County—at the time he pled guilty to two charges of robbery. Defense counsel offered the certified copy of the Montgomery County indictment, which he obtained from the Clerk’s Office that morning, but he was unable to get a certified copy of the Anne Arundel County indictment that morning. Instead, he printed a copy of the Anne Arundel charges from Maryland Case Search. The court admitted the Montgomery County indictment and did not admit the Case Search document or any substantive evidence related to the Anne Arundel charges.

Finally, appellant asks us to review the circuit court’s management of *voir dire* for plain error, presenting various arguments we do not recount because, inasmuch as we shall reverse on other grounds, we will not address this issue in our legal analysis.

In response, the State argues that the trial court properly addressed appellant’s claim

⁷ Appellant characterizes Snider, the witness whom the State alleges was appellant’s co-conspirator, as a “co-defendant,” tracking the language of Rule 4-263(d)(2) in that sub-rule’s reference to disclosure of criminal convictions, pending charges, and probationary status. Rule 4-263(d)(6)(C), however, applies the same language to any State’s witness.

that the State failed to timely disclose the plan to call Mr. Snider as a witness. The State argues that to the extent that the trial court determined that there was no violation of the discovery rule, that determination was proper, because Rule 4-263(d)(3) refers to whether the State *intends to call* a witness as a predicate for the disclosure obligation to take effect. “In cases in which a prosecutor does not develop the intent to call a witness within the first 30 days after the appearance of counsel or the defendant, it would not make sense to say that any notice provided after 30 days is an automatic violation of the rule[,]” the State argues. Brief for appellee at 13.

As to the discovery disclosure timeline, the State disputes appellant’s assertion that the prosecutor intended to call Snider by January 2020 at the latest, because the State began to contact Snider’s attorney at that time. That fact “does not mean that a final decision had been made at that time to call him as a witness.” More likely, the State argues, the prosecutor was doing the preparation necessary to make an informed determination whether to call him as a witness. In addition, the State discusses the prosecutor’s concern for the witness’s safety and asserts that, because Snider had received threats, the concern for his safety was genuine. The State argues that the judge considered remedies for any discovery violation, explicitly rejecting exclusion of Snider’s testimony or trial postponement. Maintaining that the standard of review is not *de novo*, but instead abuse of discretion, the State maintains that this Court should review this decision for abuse of discretion and defer to the trial court’s determination.

As to appellant’s claim of prejudice in lacking the ability to interview and subpoena

witnesses, the State argues harmless error and points to defense counsel's failure to take steps in response to notice he had regarding Snider, appellant's co-conspirator/cousin. Appellant knew for over six months that Snider was an alleged co-conspirator, and counsel took no steps to interview the other co-conspirators or to request the court to shorten the nine-day requirement for subpoena issuance.

As to the plea agreement and the indictments from Montgomery County and Anne Arundel County that contradicted Snider's testimony, the State argues that the trial court found properly that the State did not offer Snider a benefit, and that the State did not fail to disclose the details of a plea agreement. The State points to the colloquy between the court and the prosecutor, where the prosecutor told the court that neither he nor anyone in the Montgomery County State's Attorney's Office offered anything to Snider in return for his testimony at trial. The court accepted that representation and, according to the State, appellant was accorded full opportunity to cross-examine Snider as to his hope or expectation of a benefit.

As to the court's remedy for the State's failure to provide Snider's charges in the Anne Arundel County robbery cases, the State argues non-preservation. Because defense counsel did not object to the trial court's exclusion of the Anne Arundel document, the State argues that the issue is not preserved for our review. If preserved, the State argues that the trial court did not abuse its discretion, in that there was a logical basis for distinguishing between the Montgomery County case and the Anne Arundel case: the Montgomery County case was reflected in a certified copy while the Anne Arundel record

was “just printouts from Case Search”

The State points out that Snider testified that he was charged with “robbing four different CVS stores” and that defense counsel was able to address the Anne Arundel robberies in opening and closing statements. The State suggests that the additional evidence admitted as to the Montgomery County robbery charges was an adequate remedy for the discovery violation with respect to the various charges in Montgomery County and Anne Arundel County.

III.

The State and appellant spar over the standard of review to be applied in this case. According to appellant, the standard of review is *de novo*, because the trial judge did not rule that a discovery violation occurred. According to the State, the standard of review is abuse of discretion. We agree with appellant and find that, where, as here, a trial court does not determine that a discovery violation occurred, an appellate court reviews the issue *de novo*, although we do give deference to credibility determinations. *Green v State*, 456 Md. 97, 100 (2017). *See also Williams v. State*, 364 Md. 160, 169 (2001) (“Where the trial [court] made no specific finding as a matter of law that the State violated the discovery rule, we exercise independent *de novo* review to determine whether a discovery violation occurred.”); *State v. Graves*, 447 Md. 230, 240 (2016). The Court of Appeals noted in *Cole v. State*, 378 Md. 42 (2003), the following remedy for a discovery violation:

[I]n the first instance, within the sound discretion of the trial judge. The exercise of that discretion includes evaluating whether a

discovery violation has caused prejudice. Generally, unless we find that the lower court abused its discretion, we will not reverse.

Id. at 55-56 (cleaned up); *see also Thomas v. State*, 397 Md. 557, 570 (2007); Rule 4-263(n). An abuse of discretion occurs when the trial court acts in an “arbitrary or capricious manner” or acts “beyond the letter or reason of the law.” *Johnson v. State*, 228 Md. App. 391, 433 (2016). As to the propriety of any sanction imposed for a discovery violation, we review that decision for abuse of discretion. *See Thomas*, 397 Md. at 570–71.

IV.

Discovery in criminal cases is governed by the United States Constitution, *see Brady v. Maryland*, 373 U.S. 83 (1963), its progeny, and the Maryland Rules, particularly Rule 4-263. This case involves primarily two obligations of the State’s Attorney under the Rule: (1) the timing of the disclosure of any witness the State intends to call at trial; and (2) the obligation of the State to disclose any plea agreements or benefits the State may have offered to any witness or co-defendant.

The United States Supreme Court, in *Brady v. Maryland*, held that the Due Process Clause of the Fourteenth Amendment to the United States Constitution imposes upon the State a duty to disclose “evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* at 87. This obligation applies to both exculpatory evidence and impeachment evidence. *Giglio v. United States*, 405 U.S. 150 (1972). The duty to disclose this evidence applies without any request from the defense. *United States v. Agurs*, 427

U.S. 97, 107 (1976). Moreover, even when the State does not solicit false evidence, if the State allows false evidence to go uncorrected when it appears, “it is incompatible with ‘rudimentary demands of justice.’” *Giglio*, 405 U.S. at 153.

The *Giglio* Court was very clear:

As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with ‘rudimentary demands of justice.’ This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213 (1942). In *Napue v. Illinois*, 360 U.S. 264 (1959), we said, ‘the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.’ *Id.*, at 269. Thereafter *Brady v. Maryland*, 373 U.S., at 87, held that suppression of material evidence justifies a new trial ‘irrespective of the good faith or bad faith of the prosecution.” See American Bar Association, Project on Standards for Criminal Justice, ‘Prosecution Function and the Defense Function § 3.11 (a). When the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within this general rule. *Napue, supra*, at 269. We do not, however, automatically require a new trial whenever ‘a combing of the prosecutors’ files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict’ *United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968). A finding of materiality of the evidence is required under *Brady*. A new trial is required if ‘the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury’ *Napue, supra*, at 271.

Id. at 153.

Rule 4-263 implements the constitutional requirements, and specifically, § 4-263(d) provides for disclosure to the defense, by the State’s Attorney, of the following information:

(1) *Statements*. — All written and all oral statements of the defendant and of any co-defendant that relate to the offense charged and all material and information, including documents and recordings, that

relate to the acquisition of such statements;

(2) *Criminal Record.* — Prior criminal convictions, pending charges, and probationary status of the defendant and of any co-defendant;

(3) *State's Witnesses.* — As to each State's witness the State's Attorney intends to call to prove the State's case in chief or to rebut alibi testimony: (A) the name of the witness; (B) except as provided under Code, Criminal Procedure Article, § 11-205 or Rule 16-934, the address and, if known to the State's Attorney, the telephone number of the witness; and (C) all written statements of the witness that relate to the offense charged;

(4) *Prior Conduct.* All evidence of other crimes, wrongs, or acts committed by the defendant that the State's Attorney intends to offer at a hearing or at trial pursuant to Rule 5-404(b);

(5) *Exculpatory Information.* All material or information in any form, whether or not admissible, that tends to exculpate the defendant or negate or mitigate the defendant's guilt or punishment as to the offense charged;

(6) *Impeachment Information.* All material or information in any form, whether or not admissible, that tends to impeach a State's witness, including:

(A) evidence of prior conduct to show the character of the witness for untruthfulness pursuant to Rule 5-608 (b);

(B) a relationship between the State's Attorney and the witness, including the nature and circumstances of any agreement, understanding, or representation that may constitute an inducement for the cooperation or testimony of the witness;

(C) prior criminal convictions, pending charges, or probationary status that may be used to impeach the witness, but the State's Attorney is not required to investigate the criminal record of the witness unless the State's Attorney knows or

has reason to believe that the witness has a criminal record;

(D) an oral statement of the witness, not otherwise memorialized, that is materially inconsistent with another statement made by the witness or with a statement made by another witness;

(E) a medical or psychiatric condition or addiction of the witness that may impair the witness's ability to testify truthfully or accurately, but the State's Attorney is not required to inquire into a witness's medical, psychiatric, or addiction history or status unless the State's Attorney has information that reasonably would lead to a belief that an inquiry would result in discovering a condition that may impair the witness's ability to testify truthfully or accurately;

(F) the fact that the witness has taken but did not pass a polygraph examination; and

(G) the failure of the witness to identify the defendant or a co-defendant;

Of particular importance to the instant case are subsections 4-263(d)(6)(B), impeachment information, and 4-263(d)(3), discovery of witnesses the State intends to call at trial. *See also* 4-263(h) (timeliness requirement).

In *State v. Williams*, 392 Md. 194, 210–11 (2006) (cleaned up), the Court of

Appeals recognized:

When the core of the State's argument relies on the testimony of an essential witness, the State has a duty to discover anything, and everything, that concerns that witness's credibility and, thus, potential for impeachment. The State admits that, under *Giglio*, 405 U.S. at 154, when the reliability of a witness is determinative of guilt or innocence,

nondisclosure of such evidence falls within *Brady*. In that case, where the entire State’s case relied upon the credibility of the testimony of a key State witness, the Supreme Court held that evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility. 405 U.S. at 154–155. See also *Ware v. State*, 348 Md. 19, 41 (1997) (‘The prosecutor’s duty to disclose applies to any understanding or agreement between the witness and the State’).

In an unrelated case with a similar name, *Williams v. State*, 364 Md. 160 (2001), the Court of Appeals enunciated the policies underlying Rule 4-263 as applying broadly, and the benefits include as follows:

Inherent benefits of discovery include providing adequate information to both parties to facilitate informed pleas, ensuring thorough and effective cross-examination, and expediting the trial process by diminishing the need for continuances to deal with unfamiliar information presented at trial. Specific to the mandatory disclosure provisions of Rule 4-263(d), the major objectives are to assist defendants in preparing their defense and to protect them from unfair surprise.

Id. at 172.

A party’s failure to comply with Rule 4-263 does not, however, require automatic exclusion of the witness’s testimony. “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. An important consideration is “whether the disclosure violation was technical or substantial, the timing of the ultimate disclosure,” and “the overall desirability of a continuance.” *Taliferro v. State*, 295 Md. 376, 390-91 (1983).

V.

Because the outcome of this case follows from our analysis of the second question presented, we will answer that question first: Did the trial court err or abuse its discretion in deciding the defense’s motion for sanctions? We answer that question in the affirmative.

As a threshold matter, the State argues non-preservation of appellant’s claim that the trial court abused discretion in denying evidence of Snider’s Anne Arundel charges. We hold that the issue was preserved for our review. For purposes of preservation, “it is sufficient that a party . . . makes known to the court the action that the party desires the court to take[.]” Rule 4-323(c). Defense counsel was clear that he wanted evidence admitted of the twenty-nine crimes charged by the State in Anne Arundel County. Defense counsel provided the judge with documentation of the Anne Arundel charges as well as the Montgomery charges. When the court admitted only the Montgomery County charges, defense counsel again asked to introduce evidence of the Anne Arundel charges.

The trial court found that the State violated its discovery obligations under Rule 4-263 by failing to produce the charges against Snider. The discovery violation became more harmful in light of Snider’s inaccurate testimony. Defense counsel then needed the ammunition to impeach the witness. This was the context when the circuit court had to devise a remedy for the discovery violation. The court permitted the admission of the Montgomery County charges but did not admit any documents as to the Anne Arundel

offenses and charges.⁸ Simply admitting the Montgomery County indictments was insufficient to show adequately Snider’s bias or to correct his trial misstatements. *See Giglio*, 405 U.S. at 155.

Appellant was prejudiced in several ways. The State’s late disclosure of Snider as a witness, while not a discovery violation, impacted appellant’s preparation for trial. The State’s discovery violation in failing to fully disclose Snider’s plea arrangements limited appellant’s ability to impeach Snider. The State’s argument that any error was harmless because the jury heard about the Anne Arundel charges in opening and closing argument runs counter to black letter law that opening statements and closing arguments are not evidence. The State fares no better with its argument that the trial judge remedied the State’s discovery violation adequately because the jury had the certified copy of the Montgomery County charges. The jury lacked any documentation regarding the Anne Arundel robberies. That is exactly the problem, under *Giglio*. Applying the logic of *Giglio*, because Snider’s testimony was essential to the State’s case, his “credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was

⁸ The trial court did not offer a reason for declining to admit the Case Search printout of the Anne Arundel charges. If the reason was that the document was inadmissible hearsay, defense counsel did the best that he could under the circumstances created by the State’s failure to disclose Snider’s plea agreements. We are not suggesting that the trial court was obligated to admit the Case Search printout, but the remedy was insufficient. There were other options: the court could have elected to admit the document, the State could have stipulated to the correct information, or the State could have facilitated securing competent evidence of the charges.

entitled to know of it.” 405 U.S. at 154–55. The jury interest in the exact nature of the charges against Snider was demonstrated by a jury note. The jurors wrote, “Which two offenses was [Snider] talking about in his letter to [appellant]?” The impact of the discovery violation related to the charging documents and the plea agreement upon appellant’s ability to mount a defense was exacerbated because of the late disclosure of Snider as a witness.

As to the circuit court’s determination that there was no discovery violation where the State failed to produce the plea agreement or any documents related thereto, we agree with appellant that the circuit court erred. The Rule makes clear that the State was obliged to disclose all material “in any form, whether or not admissible, that tends to impeach a witness,” such as any “relationship between the State’s Attorney and the witness, including the nature and circumstances of any agreement, understanding, or representation that may constitute an inducement for the cooperation or testimony of the witness.” Rule 4-263(d)(6)(B). The State’s failure to disclose a plea agreement with a key witness violates Rule 4-263 and due process protections under *Brady* and *Giglio*, because the terms of the agreement might provide evidence regarding the witness’s motivation to testify. *Conyers v. State*, 367 Md. 571, 607 (2002). We agree with appellant that the State was obliged to disclose the terms of the plea agreement regardless of whether the State offered Snider a benefit and regardless of whether that agreement included an agreement to testify.

The court’s failure to recognize this discovery violation (the plea agreement) was prejudicial. The reason that appellant moved for sanctions after the State presented its case

was because of the challenge of impeaching Snider in the face of inaccurate testimony. Failure to remedy late disclosure of impeachment information for a key witness commonly warrants reversal. *See, e.g., Pantazes v. State*, 141 Md. App. 422, 439–40 (2001). Where the State’s case rests upon the credibility of a key witness and the State fails to disclose a document that could shed light upon that witness’s credibility, the error is not harmless. *Riggins v. State*, 223 Md. App. 40, 59 (2015).

Chief Judge Bell expounded eloquently on the additional duties that attach when there is courtroom awareness of inaccurate testimony or inaccurate evidence. We quote his opinion in *Williams*, 392 Md. at 222, at length:

The State has a unique role in the criminal justice process. Although it is indeed the prosecutor of all criminal charges, the State should not just be in the business of obtaining guilty verdicts. The Supreme Court has articulated, instead, that there is a ‘special role played by the American prosecutor in the search for truth in criminal trials.’ *Strickler*, 527 U.S. at 281. Further, in *United States v. Berger*, the Supreme Court opined: ‘The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.’ 295 U.S. 78, 88 (1935)....

Further, ‘Neither the individual nor the institutional responsibility of government counsel may be sloughed off so easily. . . . And in this prosecution, the government as such a joint enterprise plainly did not provide known impeachment information about [the key witness] as soon as it became aware of it.’ *United States v. Osorio*, 929 F.2d 753, 760–61 (1st Cir. 1991). . . .

In *State v. Siano*, the Connecticut Supreme Court was critical of the scenario in which the State blatantly could violate its *Brady* duty without consequence. It articulated the harmful repercussions of allowing that to occur:

‘If the state has no responsibility . . . to take affirmative steps to gain knowledge of the criminal records of its witnesses, a defendant in many instances would be placed in the anomalous position, as was the defendant here, of having to depend on the witness whom he seeks to impeach for reliable information to accomplish that impeachment. . . . To force the defendant to rely on the very witness he is endeavoring to impeach for an accurate account of his criminal record is illogical and would be antithetic to what the rule was intended to accomplish. . . . That conclusion requires that a prosecutor is at least obligated to make known to a defendant, at the proper time, information concerning the criminal record of a state’s witness that is known to the prosecutor or is contained in the prosecutor’s own case file, information that can be gained through reasonable inquiry of other prosecutorial personnel in the prosecutor’s office, and information that is reasonably available to the prosecutor through his access to state and federal computerized criminal information systems. Anything less, we believe, would compromise the effectiveness of [the State’s *Brady* obligation] and in many instances would render it a nullity.’ 579 A.2d 79, 82-83 (Conn. 1990).

Williams, 392 Md. 222–26 (cleaned up).

In sum, the combined actions of the State in failing to comply with the discovery rules and the trial judge in denying defense counsel the full opportunity to impeach a material witness amounts to reversible error. Appellant was entitled under *Giglio* and Rule 4-263 to discovery of the plea agreement, and appellant was entitled to impeach Snider as to the Anne Arundel charges as well as the Montgomery charges.

VI.

As guidance, we address the issue of whether the late disclosure of Snider as a witness violated Rule 4-263. We do not find that the trial court erred in its finding no

discovery violation in the State’s disclosure of its intention to call Snider as a witness. The court addressed the issue, heard from counsel for both sides, and most significantly, made a credibility determination. The court accepted the word of the prosecutor that the State did not form the intent to call Snider as a witness until February, when the State promptly disclosed Snider as a witness to defense counsel.

Rule 4-263 requires the State to disclose the names of the witnesses it *intends* to call, without any request, within thirty days of the first appearance of the defendant before the circuit court. The duty to disclose the witnesses is a continuing duty and when the State determines to add an additional witness, the State has the obligation to update the witness list. The State here represented that it disclosed its intent to call Snider as soon as it decided to call him as a witness. The trial court found that the prosecutor acted in good faith and the disclosure timing was not for tactical gain. Although it would have been better had the disclosure been made sooner, we recognize that prosecutors have heavy trial loads and may not focus on particular cases as early as we might like. The problem here is how the late disclosure impacted appellant’s ability to prepare for trial and to impeach the witness in combination with the Rule violation found by the court.

The ABA Standards for Criminal Justice Discovery and Trial by Jury, Third Edition, address both the prosecutorial and defense obligations regarding discovery and provide salient guidance on the disclosure timeliness requirements. The Standards similarly call for the prosecutor to disclose to the defense “the persons it intends to call as witnesses at trial.” Standard 11-2.1(a)(ii). In Commentary, the Standards reflect as follows:

Once the initial disclosure of the prosecution’s trial witnesses have been made, the prosecutor should inform the defense immediately if it determines that additional trial witnesses may be called. While the prosecution is required to identify all trial witness, whether for direct or rebuttal, at the time initial discovery disclosures are made, in some cases the prosecutor may determine only later that certain witnesses are necessary. If the prosecutor, acting in good faith, concludes that trial witnesses not identified in pretrial discovery are necessary to its case, the court should permit the government to amend its witness list and if necessary provide the defense with additional time to investigate any new witnesses. Permission to add witnesses may be denied, however, if in the court’s judgment the prosecutor’s failure to identify the witness at an appropriate time before trial reflect bad faith conduct or a deliberate and strategic omission.

Other courts have considered the issue of whether to exclude the testimony of a late-disclosed witness. In *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977), the federal district court considered the exercise of its discretionary power to exclude the testimony of undisclosed witnesses. The court concluded, under its discovery rule, and looking to the Advisory Committee Notes on Rule 16 of the Proposed Federal Rules of Criminal Procedure 39 F.R.D. 69 (1966) as guidance, that a trial court should consider:

- (1) the amount of prejudice that resulted from the failure to disclose,
- (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case.

Myers, 550 F.2d at 1043.

We find that the trial court did not err or abuse its discretion in not excluding the witness and in not finding a discovery violation by the State. Appellant knew of Snider from the beginning of this case. He had interviewed Snider during his preparation for the

case. The State had provided a statement from Snider to appellant's counsel in discovery early on. Counsel could have asked the court to excuse the nine-day subpoena requirement, which he did not do.

We give great deference to the trial court's credibility findings and conclusions and will not disturb them unless the court abused its discretion. We conclude that the court did not err in finding no discovery violation where the State failed to amend the witness designation and to disclose the name of the additional witness sooner.

**JUDGMENTS OF THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
REVERSED; CASE REMANDED TO THAT
COURT FOR A NEW TRIAL. COSTS TO
BE PAID BY MONTGOMERY COUNTY.**