Circuit Court for Baltimore City
Case No. 118136001

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1091

September Term, 2019

AARON J. AUSBY

v.

STATE OF MARYLAND

Arthur,
Leahy,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: August 12, 2020

*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.

On the afternoon of April 2, 2018, in the 2300 block of Bryant Avenue in Baltimore City, Deandre Brown ("Deandre" or "the victim") was fatally shot. He was 23 years old at the time of his death. The appellant, Aaron J. Ausby ("Ausby" or "appellant"), was indicted, in the Circuit Court for Baltimore City, for the following crimes connected with the victim's death: first-degree murder; conspiracy to commit murder; use of a firearm in the commission of a crime of violence; wearing, carrying or transporting a firearm; and unlawful possession of a regulated firearm by a prohibited person. Ausby was tried by a jury for these crimes on June 4, 5 and 6, 2019. The jury convicted appellant of second-degree murder, conspiracy to commit murder, and all three of the firearm counts.

On July 26, 2019, appellant appeared for sentencing. The court vacated the conviction for conspiracy to commit murder on the grounds that it was an inconsistent verdict, but as to the other convictions imposed sentences as follows: second-degree murder – 40 years' imprisonment; use of a firearm in the commission of a crime of violence – 15 years consecutive (the first five years without possibility of parole); possession of a regulated firearm by a prohibited person – 10 years consecutive to the preceding two sentences. Appellant filed a timely notice of appeal on August 8, 2019.

In this appeal, appellant raises four questions which we have rephrased[1] and reordered, as follows:

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[1] As phrased by appellant, the questions presented were:

(continued)

(1) Did the State present sufficient evidence to convict appellant of any of the crimes for which he was sentenced?

(2) Did the trial judge abuse her discretion by denying appellant's motion for a mistrial?

(3) Did the trial judge abuse her discretion by denying appellant's "motion to disqualify witness and preclude testimony?"

(4) Did the trial judge abuse her discretion by declining to ask one of the appellant's proposed *voir dire* instructions?

For the reasons set forth below, we answer the first question in the affirmative, the remainder in the negative, and affirm appellant's convictions.

I.

EVIDENCE PRODUCED AT TRIAL[2]

A. Testimony of Barbara Brown-Harps

Barbara Brown-Harps is the mother of the victim. Prior to the murder of her son, Ms. Brown-Harps knew appellant because he was a friend of the victim's. Also, as Ms.

(continued)

(1) Did the trial court abuse discretion by denying [a]ppellant's "Motion to Disqualify Witness and Preclude Testimony"?

(2) Did the trial court abuse discretion by declining to ask proposed jury instruction number 18?

(3) Did the court below abuse discretion by denying [a]ppellant's motion for a mistrial?

(4) Is the evidence legally insufficient to sustain [a]ppellant's convictions?

[2] In part I of this opinion, we have summarized only the facts necessary to answer the question concerning sufficiency of evidence or to put those facts in context.

Brown-Harps explained, the victim had a girlfriend named Diamond Ausby who was appellant's sister. Diamond Ausby and the victim had one child together and Diamond was pregnant with another child of the victim's at the time the victim was murdered.

On the afternoon of April 2, 2018, Ms. Brown-Harps witnessed an altercation between appellant and appellant's sister, Diamond Ausby. The altercation took place at the bottom of the steps to Ms. Brown-Harp's house which was located in the 2300 block of Bryant Avenue. During the course of the altercation between the two siblings, Ms. Brown-Harps saw her son, Deandre, intervene in the altercation; this intervention resulted in appellant and Deandre engaging in a "tussle." When the tussle concluded, appellant "backed away" and "headed toward his vehicle" which was a "greyish looking van." Before appellant got to the van, however, he turned and grabbed his sister's (Diamond Ausby's) face and kissed her. Appellant then got into the van as did a woman named "Courtney." The two then drove away in the van.

About 20 or 25 minutes later, Ms. Brown-Harps saw the same van return. As the van approached, she descended to the bottom of her steps and for some reason, she didn't know why, fell. She then heard shooting. She remained "ducked down" until the shooting stopped. She then got to her feet and heard screaming and saw Deandre laying on the ground, face up, with a "hole in his leg." Two of her other sons, Charles Brown and Ryan Brown, then picked Deandre up and put him in Charles's car and drove away to a hospital. Ms. Brown-Harps also drove to the hospital where she learned that Deandre was dead.

On cross-examination, Ms. Brown-Harps admitted that she did not know who was in the van when it returned just before the shooting started. She also said on cross-

examination that she knew that her son, Deandre, played dice games and that people sometimes gathered in the area near her house where drug-dealing took place.

B. Testimony of April Brown

Deandre Brown, the victim, was the brother of April Brown ("April"). April was the daughter of Ms. Brown-Harps. She testified that appellant was like a brother to her.

On the afternoon of the murder, April was present when a dispute arose between Courtney Bird and Diamond Ausby. Appellant intervened in the dispute, which resulted in appellant and Diamond Ausby engaging in a "physical altercation." At one-point, appellant grabbed Diamond Ausby "by the throat." The victim, Deandre, then got involved by trying to separate the combatants. Deandre intervened because Diamond was pregnant with his child and Deandre didn't want the baby hurt. The altercation ended when appellant told Courtney Bird to get into the van. She did. Appellant also got into the van but, as he did so, he warned that "he would be back." The two then drove away.

Shortly thereafter, Courtney Bird and Courtney's sister returned to the scene in a burgundy colored car. Courtney began arguing once again with Diamond Ausby. Courtney then got into her vehicle and drove off. It was at about that time that the same van that appellant had driven away in returned. The van was blue in color and appellant was once again driving. There were two passengers in the van, one of whom had a scarf covering his face. All three occupants of the van had guns. When appellant got out of the van, April saw appellant "get down on one knee and shoot." She then saw the victim "catch the first bullet." Thereafter, she heard many more shots fired. Some of the shots were fired by the victim, Deandre Brown.

April went over to the place where her brother was lying and saw that he had three gunshot wounds in his abdomen. She called for a medic on her phone. As she was standing beside the victim, another bullet struck the victim in the leg. According to April, the two men who accompanied appellant in the van were also shooting their weapons. One of them fired his gun out of the back of the van, breaking the window of that vehicle.

The gun used by appellant to shoot the victim was "pink and silver" and was "[p]robably like a 9-mm, something like that."

On the evening of the murder, April and her boyfriend, Corey Lide, went to the police station and gave videotaped statements to the detective who interviewed them. April told the detective that her brother "got shot in the crossfire" but also said that appellant was the one who shot her brother. She told the police that appellant's gun was red in color and that there were four people with guns during the confrontation, i.e., the three men in the van and the victim. Besides the victim, two other persons were injured in the gun battle. One of those injured was appellant's brother, Stephen Ausby, who was shot by the victim.

C. Testimony of Corey Lide

Corey Lide was a "turncoat witness," i.e., he gave a full statement to the police in which he said that he had seen appellant shoot Deandre Brown but then, when called as a State's witness, he professed to have no memory of the events that took place on April 2, 2018.

At the commencement of the State's direct examination of Mr. Lide, he acknowledged that he was present with April Brown at her mother's house on April 2, 2018. He also admitted that he saw the victim, Deandre, there on that date. He claimed

not to remember any of the events that he witnessed on the day of the shooting and professed an inability to even recall that he had given a statement to Baltimore City detectives immediately after the murder. The trial judge found that Mr. Lide was feigning memory loss and, pursuant to Md. Rule 5-802.1(a)[3], allowed the State to introduce, as substantive evidence, the recorded statement that Mr. Lide gave to the police on the night of the murder.

In his statement to the police, Mr. Lide said that he was present when appellant arrived at the scene of the murder in a "smoke grey minivan." He had seen appellant at that address prior to the murder and was acquainted with him. He told the detectives that he saw appellant get out of the driver's side of the van; two other passengers also got out. Appellant held in his hand "a handgun with a drum on it," which allowed the gun to fire "a hundred rounds a minute." The three men, after firing their weapons, got in the van and drove off. At least one of the occupants of the van continued shooting as they drove away.

[3] Md. Rule 5-802.1. Hearsay exceptions – Prior statements by witnesses.

The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:

(a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and was signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement.

* * *

Mr. Lide was shown a photographic array with appellant's picture in that array by a homicide detective. He identified appellant from the array and wrote on the back of appellant's photograph the following words: "His nickname is Murdie. He is from Bryant Avenue and he was the shooter." The photographic array along with the picture of appellant were admitted into evidence.

D. <u>Testimony of Baltimore City Police Detective Michael Vodarick</u>

Detective Vodarick testified that he interviewed April Brown and Corey Lide on the evening of the shooting, and that during the interview, both identified appellant as the gunman who shot Deandre Brown. During his investigation, Detective Vodarick determined that two other men were shot in the same incident. One was Stephen Ausby and the other was Glen Turner. Mr. Turner was an innocent bystander.

E. <u>Testimony of Jennifer Ingbretson</u>

Jennifer Ingbretson, a forensic scientist employed by the Baltimore City Police Department, was accepted by the court as an expert in the field of firearms identification and examination. She examined one live cartridge, various bullets, bullet fragments, bullet jacket fragments, and 35 spent cartridges that were found at the scene of the murder. She determined that the cartridge cases had been fired by five different guns of three different calibers. One of the guns had fired 17 of the 35 cartridge cases recovered.

F. <u>Testimony of Pamela Ferreira, MD</u>

Dr. Ferreira was qualified as an expert in forensic pathology. She performed an autopsy on Deandre Brown on the day after he was shot. She observed three gunshot wounds, one of which injured the liver, kidney, diaphragm, heart and aorta and was

"rapidly fatal." She determined that the cause of death was multiple gunshot wounds and the manner of death was homicide.

II.

FIRST QUESTION PRESENTED

A. <u>Was the Evidence Sufficient to Sustain Appellant's Convictions</u>?

At the conclusion of the State's case, appellant's counsel made a motion for judgment of acquittal as to all counts. In support of that motion, defense counsel said:

> Even if [the evidence is viewed] . . . most favorable to the State, there is so much conflicting evidence regarding the details of the shooting. It can't possibly sustain a murder in the first-degree [or] second-degree. The assault charges for wearing, carrying a handgun. And therefore, the use of a handgun, in a commission of a crime of violence, would also fail and relate to all the charges.

Counsel did not specify the exact nature of the conflicts or what witness or witnesses gave "conflicting evidence."

The motion was denied. Defense counsel then rested and counsel renewed her motion for judgment of acquittal. With the permission of the court, defense counsel incorporated by reference her previous arguments. That motion was also denied.

Appellant contends that the trial judge committed reversible error when she denied his motion for a judgment of acquittal as to all counts.

As appellant acknowledges, the test for determining the sufficiency of the evidence is "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt.'" *Taylor v. State*, 346 Md. 452, 457 (1997) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

As just mentioned, the only ground counsel raised in the trial court in support of his motion was that the State's evidence was too "conflicting" to support a verdict of guilty as to any of the charges. In support of his contention concerning the alleged insufficiency of evidence, appellant argues in his brief:

> In this case, there was one eyewitness who identified [a]ppellant as the gunman who shot Deandre Brown. It was April Brown, the sister of the victim who died. Appellant acknowledges that a conviction may rest exclusively upon the testimony of an eyewitness. *Branch v. State*, 305 Md. 177, 183-84 (1986). Notwithstanding this, he asks this Court to take note of several discrepancies in the testimony of the witnesses. First, April Brown testified that [a]ppellant wielded a gun that was pink and silver. However, in her recorded statement to detectives, she described the gun as red. In addition, April Brown testified that she saw four people with guns during the incident, one of whom was her brother.
>
> Corey Lide, in his recorded statement to [the] detective, stated that there were two other men with [a]ppellant and that they were also shooting. Corey Lide identified [a]ppellant as one of the gunm[e]n, but he did not specify that he was the one whose bullets struck Deandre Brown in his recorded statement.

(References to record omitted.)

The fact that April Brown's trial testimony as to the color of the gun appellant fired was contradicted by what she had told the detectives on the date of the murder, plainly is not the type of contradiction that would allow an appellate court to rule that the trier of fact could not possibly render a guilty verdict based on her testimony.

April Brown did testify that she saw four people with guns but we fail to see how that testimony made her identification of appellant as the murderer unreliable. According

to her, the three occupants of the van all had guns as did her brother. It is true, according to the testimony of Jennifer Ingbretson, cartridge cases at the scene indicated that five different guns had been fired. But this would not necessarily contradict April Brown. In the confusion, someone else may have been firing a gun that April Brown did not see; alternatively, there were so many bullets fired that it is possible that one of the gunmen who fled in the van fired two weapons.

Lastly, the fact that Corey Lide did not know who fired the shots that hit the victim, in no way undercuts April Brown's testimony that she saw appellant shoot the victim.

III.

THE DENIAL OF APPELLANT'S MOTION FOR A MISTRIAL

As mentioned, Corey Lide claimed at trial that he had no recollection of witnessing the crimes for which appellant was charged. Under such circumstances, before Mr. Lide's prior recorded statement could be admitted as substantive evidence under Md. Rule 5-802.1, the trial judge was required to make a determination whether Mr. Lide's lack of memory was actual or feigned. *Corbett v. State*, 130 Md. App. 408, 426 (2000).

Because Mr. Lide claimed to have a complete lack of memory concerning events that had taken place only fourteen months (approximately) before he took the witness stand, he was asked the following questions:

> [PROSECUTOR]: Have you been—has anything happened to you since that time, to affect your memory?
>
> [Mr. Lide]: I don't want to say.
>
> THE COURT: Well, I'm afraid you have to say. Is there anything that has affected your memory?

[Mr. Lide]: Well, I'm in fear for my life, Your Honor.

Immediately thereafter, at a bench conference, defense counsel made a motion for mistrial on the basis that the jury was going to presume that appellant had threatened the witness. Counsel argued that the grant of a mistrial was the only way to "cure the problem." The trial judge said that she was going to deny the motion for mistrial but would instruct the jury to disregard the statement that the witness was in fear for his life.

After the bench conference concluded, the trial judge told the jury to disregard the witness's last answer. Appellant now contends that the trial judge abused her discretion by denying the motion for mistrial. His primary argument is that "[t]he court did not make an effort to weigh the possible impact of the witness's statement 'I'm in fear for my life' upon the jury." In his brief, appellant also asserts, ambiguously, that "[a]s a consequence of the possible impact of the statement on the members of the jury, who may have been influenced by fear to convict[.]" We interpret that incomplete sentence to mean that appellant contends that the jury may have convicted appellant of the crimes charged because the jurors were given reason to fear appellant.

"[W]e review a court's ruling on a mistrial motion under the abuse of discretion standard." *Nash v. State*, 439 Md. 53, 66-67 (2014). "[D]eclaring a mistrial is an extreme remedy not to be ordered lightly." *Id*. at 69. And, "[t]he determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 594-95 (1989)).

> The fundamental rationale in leaving the matter of prejudice vel non to the sound discretion of the trial judge is that the judge is in the best position to evaluate it. The judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able to ascertain the demeanor of the witnesses and to note the reaction of the jurors and counsel to inadmissible matters. That is to say, the judge has his finger on the pulse of the trial.

Washington v. State, 191 Md. App. 48, 103 (2010) (quoting *State v. Hawkins*, 326 Md. 270, 278 (1992)).

The Court of Appeals has identified five factors relevant to the determination of whether a mistrial is required. Those factors are:

> whether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists.

Rainville v. State, 328 Md. 398, 408 (1992) (*quoting Guesfeird v. State*, 300 Md. 653, 659 (1984)); *see also McIntyre v. State*, 168 Md. App. 504, 524 (2006) ("[N]o single factor is determinative in any case, nor are the factors themselves the test. . . . Rather, the factors merely help to evaluate whether the defendant was prejudiced.").

In the subject case, in regard to the factors mentioned in *Rainville*, appellant's motion for mistrial is quite unusual because the question that elicited the answer at issue was entirely proper and the answer that the witness gave was responsive to the question. Thus, the situation here is far different than the one in *Rainville*, where, although the question was appropriate, the witness's answer was non-responsive and highly prejudicial.

Rainville, 328 Md. at 401.[4] In short, here there was no "inadmissible evidence" in the subject case and, in any event, the isolated statement by Mr. Lide was thereafter never referenced again by anyone during the trial. We fail to see how appellant was so prejudiced that he could not get a fair trial.

We turn next to the appellant's specific complaint that the trial judge failed to "make an effort to weigh the possible impact of the witness's statement" and otherwise ruled "without making reference to any guiding rules or principles." This contention will not detain us long. First, trial judges are presumed to know the law and to properly apply it. *State v. Chaney*, 375 Md. 168, 181 (2003). The trial judge in this case was a senior judge,

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[4] The defendant in *Rainville* was charged with sexually abusing a seven-year-old girl whose first name was Peggy. The appellant had been separately charged with sexually abusing Peggy's nine-year-old brother, Michael, but the charges were not tried together. When Peggy's mother was on the stand, the following exchange occurred:

> PROSECUTOR: Now, if you would, describe for the gentlemen of the jury Peggy's demeanor when she told you about the incident?
>
> THE MOTHER: She was very upset. I had noticed for several days a difference in her actions. She came to me and she said where Bob [appellant] was in jail for what he had done to Michael that she was not afraid to tell me what had happened.

Defense counsel immediately objected and moved for a mistrial, which was denied. The trial judge, however, issued an immediate curative instruction telling the jurors to disregard the remark by Peggy's mother.

328 Md. at 401-02.

Nevertheless, the *Rainville* Court reversed the conviction because the Court was not persuaded that the judge's curative instruction "could be effective under the circumstances of this case."

Id. at 410-11.

who had extensive experience in trying criminal cases. There is nothing, whatsoever, in this record to rebut the just mentioned presumption. Moreover, the jurors were told to disregard the statement at issue. Jurors are presumed to understand and follow the court's instructions. *State v. Gray*, 344 Md. 417, 425, n.6 (1997); *Dorsey v. State*, 185 Md. App. 82, 110 n.8 (2009). Unlike the situation in *Rainville* (*see* n.4), there is nothing in the record that would support a finding that this presumption was rebutted.

Lastly, we reject appellant's suggestion that based on Mr. Lide's answer, the jury convicted appellant out of "fear." That suggestion is based on pure speculation. As far as we can see, no juror had any reason to fear appellant.

IV.

FAILURE OF THE COURT TO GRANT APPELLANT'S MOTION TO DISQUALIFY AND PRECLUDE THE TESTIMONY OF BARBARA BROWN-HARPS

As mentioned earlier, trial in this case started on June 4, 2019. Five days prior to trial, defense counsel filed a motion to preclude the testimony of Ms. Brown-Harps. The motion was based on the fact that only one week before trial was set to commence, the prosecutor advised defense counsel for the first time that she intended to call Barbara Brown-Harps as a witness. Movant asserted: (1) the prosecutor, on May 24, 2019, interviewed Ms. Brown-Harp; (2) four days later, on May 28, 2019, the prosecutor, by email, notified defense counsel for the first time, that she (the prosecutor) intended to call Ms. Brown-Harps as a witness; and, (3) on May 30, 2019, defense counsel interviewed Ms. Brown-Harps by telephone.

Movant contended that by waiting until one week before trial was set to commence to notify defense counsel that Ms. Brown-Harps would be called as a witness, the State violated Md. Rule 4-263(a)(1), which required the prosecutor to provide the defendant the names of all witnesses intended to be called at trial within 30 days after the earlier of the entry of appearance of counsel or the first appearance of the defendant before the court. *See* Maryland Rule 4-263(h). Appellant was arraigned in the subject case on June 12, 2018, which meant that the prosecutor was over ten months late in notifying defense counsel that she intended to call Ms. Brown-Harps.

The hearing on the motion to disqualify was held on the date that trial commenced. The prosecutor objected to the exclusion of the witness. She explained that she had not initially listed Ms. Brown-Harps as a witness because she had been told by the investigating detectives that Ms. Brown-Harps had not witnessed the shooting. But when the prosecutor personally spoke to Ms. Brown-Harps on May 24, 2019, she discovered that, although the witness had not seen the actual shooting, she was present shortly before the shooting when she saw appellant choking his sister, Diamond Ausby, and also saw him arguing with her. The prosecutor also learned, in the May 24, 2019 interview, that the witness "had seen [appellant] come into the area in his blue colored van and then, after he had fought with his sister," leaving in that van. Shortly before the murder, she saw the same van returning "but . . . she didn't witness the shooting because she had fallen on the steps."

Defense counsel argued that the prosecutor's violation of the discovery rule prejudiced appellant because he first learned from talking to Ms. Brown-Harps on May 30, 2019 that: 1) the victim was involved with gambling; and, 2) someone had tried to shoot

the victim previously because of what Ms. Brown-Harps believed to be a "gambling situation." Defense counsel proffered that had she known those facts previously, it "could provide an ulterior motive in this case." Defense counsel said she did not want a continuance because her client had already been in jail and awaiting trial for more than a year. At the motions hearing, defense counsel did not explain what she meant by "ulterior motive" but in appellant's brief, he states that the discovery violation "prevented defense counsel from exploring the possibility that another suspect could have committed the crime."

At the hearing, the trial judge intensely cross-examined the prosecutor concerning why she had waited until May 24, 2019 to interview Ms. Brown-Harps. Ultimately, the trial judge denied the motion to preclude Ms. Brown-Harps from testifying; she gave her reasons as follows:

> It's troubling. There is no question. It is troubling that the State does such a, sort of a, sort of, casual preparation in a serious case like this. But I don't think there has been any showing of bad faith. She [the prosecutor] has provided an opportunity for defense to interview this witness.
>
> * * *
>
> And so for those reasons, I'm going to deny the defense's motion to disqualify the witness.

In *Raynor v. State*, 201 Md. App. 209, 227-28 (2011), we said:

> The remedy for a violation of the discovery rules is, in the first instance, within the sound discretion of the trial judge. Rule 4-263(n) provides a list of potential sanctions, including: ordering discovery of the undisclosed matter, granting a continuance, excluding evidence as to the undisclosed matter, granting a mistrial, or entering any other appropriate order. <u>The rule does not require the court to take any action; it merely authorizes the court to act</u>. Thus, the circuit court has the discretion to select

> an appropriate sanction, but also has the discretion to decide whether any sanction is at all necessary.
>
> But, 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. Although the prosecutor's intent alone does not determine the appropriate sanction, bad faith on the part of the State can justify exclusion of evidence or serve as a factor in granting a harsher sanction.
>
> * * *
>
> The most accepted view of discovery sanctions is that in fashioning a sanction, <u>the court should impose the least severe sanction that is consistent with the purpose of the discovery rules</u>. We have said that the purpose of the discovery rules is to give a defendant the necessary time to prepare a full and adequate defense. And the Court of Appeals has warned that, if a defendant declines a limited remedy that would serve the purpose of the discovery rules and instead seeks the greater windfall of an excessive sanction, the "double or nothing" gamble almost always yields "nothing."

(Quotation marks and citations omitted.) (emphasis added.)

In the case *sub judice*, appellant does not contend that the trial judge erred in her determination that the prosecutor's failure to provide discovery was not due to bad faith and for good reason. The trial judge believed that the root cause of the failure was lack of diligence on the part of the prosecutor—not bad faith.

The trial judge, impliedly at least, found that appellant had not been prejudiced by the discovery violation because the prosecutor had "provided an opportunity for [the] defense to interview [the] witness."

Appellant in his brief, makes no meaningful attempt to show that the defense was prejudiced by the delay in learning that Ms. Brown-Harps was to be a witness. More

specifically, although appellant provided a good explanation as to why he did not ask for a continuance, he does not explain how a continuance would have been useful to his defense inasmuch as appellant's counsel was given an opportunity to talk to the witness five days prior to trial. In fact, the only argument appellant advances in support of his contention that the trial judge abused her discretion in denying the motion to preclude Ms. Brown-Harps from testifying is as follows:

> Appellant's counsel made a compelling argument for precluding the testimony of Ms. Brown-Harps. There was no other reason apart from abandonment of a duty, or negligence bordering on bad faith, for not conducting a formal interview with the mother of the deceased victim until 11 days before trial, and for delaying disclosing of the substance of her likely testimony for four days after that. A continuance was not a feasible remedy given the previous delays in bringing the [a]ppellant to trial, which were attributable to the prosecution, along with the fact that [a]ppellant had been held without bail awaiting trial. The most appropriate sanction under the circumstances of this case was to preclude the testimony of the witness. The trial court abused discretion by failing to impose this remedy.

We disagree with appellant's contention that trial counsel made a "compelling argument" for precluding the testimony of Ms. Brown-Harps. Proof that the prosecutor was negligent in not previously interviewing a witness, does not come close to proving that the prosecutor was engaged in bad faith. The prosecutor arranged for defense counsel to meet with the witness, and, based on what defense counsel told the trial judge, nothing counsel learned from the witness required additional time to properly cross-examine the witness or to investigate the truth of what she orally told defense counsel.

As mentioned, defense counsel said at the hearing that what Ms. Brown-Harps told her suggested an "ulterior motive," because the victim had been shot at before – probably due to the victim's involvement in gambling. Significantly, however, counsel never

claimed that what Ms. Brown-Harps had to say was new information. And it is very unlikely that it was. After all, appellant was a friend of the victim[5], and appellant's sister was the mother of the victim's child and, at the time of the murder, was pregnant with his second child. In other words, given the close relationship between appellant and the victim, it seems likely that appellant already knew that the victim gambled and had previously been shot at. But even assuming, arguendo, that what Ms. Brown-Harps knew was news to appellant and his counsel, this does not explain why the defense, in the long pretrial period, did not thoroughly investigate the possibility that someone else with an "ulterior motive," may have committed the crime.

As we said in *Raynor*, the trial judge has discretion "to decide whether any sanction is at all necessary." 201 Md. App. at 227-28. To convince an appellate court that the trial judge abused his or her discretion is a very difficult hurdle to surmount. In *North v. North*, 102 Md. App. 1, 13-14 (1994), we said:

> "Abuse of discretion" . . . has been said to occur "where no reasonable person would take the view adopted by the [trial] court," or when the court acts "without reference to any guiding rules or principles." It has also been said to exist when the ruling under consideration "appears to have been made on untenable grounds," when the ruling is "clearly against the logic and effect of facts and inferences before the court," when the ruling is "clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result," when the ruling is "violative of fact and logic," or when it constitutes an "untenable judicial act that defies reason and works an injustice."

(Internal citations omitted.)

[5] At his sentencing, appellant told the judge that the victim had been his closest friend.

In this case, we hold that appellant did not meet the difficult challenge of showing that the trial judge abused her discretion when she denied the motion to preclude the testimony of Ms. Brown-Harps.

V.

FAILURE TO ASK A *VOIR DIRE* QUESTION

As is customary, during the *voir dire* of the prospective jury panel, the trial judge asked numerous questions. The last question that the judge asked was:

> Is there any other reason, whatsoever, that might affect your ability to render a fair and impartial verdict, including, but not limited to, any actual hardship in serving four days, any religious reason, any moral reason, any physical reason, any philosophical reason, or any personal experience you may have had with a criminal justice system?
>
> In other words, is there any reason at all you don't think you can serve on this jury. . . .

Numerous jurors answered that question in the affirmative, and their affirmative responses were discussed, in detail, at the bench.

One of the *voir dire* questions that was requested by both the State and defense counsel was question number 18, *viz*., "Is there any reason whatsoever that you could not render a fair and impartial decision based solely on the evidence and law presented to you during the course of this trial?" The trial judge did not ask question number 18.

At the conclusion of the *voir dire*, defense counsel and the trial court had the following exchange:

> [Defense counsel]: I do have one exception with regards to question number 18, that was proposed by the State and defense jointly. I understand that the [c]ourt said it was ... going to give it in a different format. I think … number 18 encompassed more than what the [c]ourt has elicited. And that

> information - - we are entitled to have inquired of the jury before we make jury selection.
>
> THE COURT: In this [c]ourt's view, the jury will follow the instructions that I give them about the law. And therefore, I'm not - - I decline to ask that.

Appellant contends that it was reversible error for the trial judge not to ask question number 18. In support of that contention, appellant relies solely on the recent opinion by the Court of Appeals in *Kazadi v. State*, 467 Md. 1 (2020), which was decided about six months after the trial in the subject case. In *Kazadi*, in a 4-3 majority opinion, the Court held:

> On request, during *voir dire*, a trial court must ask whether any prospective jurors are unwilling or unable to comply with the jury instructions on the presumption of innocence, the burden of proof, and the defendant's right not to testify.

Id. at 48.

Kazadi overruled *Twining v. State*, 234 Md. 97, 100 (1964), which was the governing law when the subject case was tried. The *Kazadi* decision applies to all cases, such as this one, pending on direct review. *Id*. at 47. Appellant argues:

> In this case, the requested *voir dire* question, although framed in more general terms tha[n] the questions requested in *Kazadi v. State*, nevertheless explored the same area of the prospective jurors' willingness to follow the law as it was presented to them.

The State disagrees, arguing:

> But Ausby does not, on appeal, identify which of these fundamental rights he wished the judge to ask about: presumption of innocence, the burden of proof, and the right not to testify. Rather, he invites this Court to expand *Kazadi*, conceding that the question in this case was "framed in more general terms tha[n] the questions requested in *Kazadi*[.]" On its own terms, *Kazadi* only provides that certain questions are mandatory *when requested*,

> and therefore it would be a repudiation of that new opinion – rather than obeisance to it – to expand it as Ausby requests.
>
> Ausby requested [*voir dire*] questions on none of [those] subjects, and received [*voir dire*] questions on none of those subjects. He is not shielded by *Kazadi*, which, on its own terms, applies only to cases in which the mandatory jury instructions were *requested*. Reversal is not warranted.

(Footnote omitted.)

We agree with the State. The *Kazadi* majority was explicit in holding that the trial judge was not, when asking *voir dire* questions, required to make inquiry about the three areas of the law dealing with fundamental rights, unless asked to do so. The Court said, 467 Md. at 47:

> We point out that a trial court is not required, on its own initiative, to ask *voir dire* questions concerning fundamental rights. Instead, a trial court must ask such *voir dire* questions only if a defendant requests them. This is consistent with prior cases in which this Court has required trial courts to grant requests to ask certain *voir dire* questions, as opposed to requiring trial courts to ask those *voir dire* questions *sua sponte*. *See, e.g., Washington v. State*, 425 Md. 306, 315 (2012); *Pearson* [*v. State*], 437 Md. [350,] 354.[(2014)].

Appellant's trial counsel did not ask for a *voir dire* question concerning any of these fundamental rights discussed in *Kazadi*. We therefore hold that the trial judge did not err when she declined to ask question number 18.[6]

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[6] The State also argued that the objection to the trial judge's failure to ask *voir dire* question number 18 was waived because appellant's trial counsel accepted the jury that was seated. The State is wrong in this regard. *See McFadden and Miles v. State*, 197 Md. App. 238, 252-53 (2011), where we said:

(continued)

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT

(continued)

Next, the State argues that this issue is "nonetheless waived" because "[a]ppellants accepted the jury as empaneled without qualification." Quoting *Gilchrist v. State*, 340 Md. 606 (1995), the State notes that "a defendant's claim of error in the inclusion or exclusion of a prospective juror or jurors is ordinarily abandoned when the defendant or his counsel indicates satisfaction with the jury at the conclusion of the jury selection process." *Id*. at 617-18 (citations omitted). The State's reliance on *Gilchrist*, however, is misplaced, as appellants' claim of error does not lie upon the inclusion or exclusion of a prospective juror. Rather, appellants challenge the court's propriety in posing the CSI question.

In *Fowlkes v. State*, 117 Md. App. 573 (1997), we stated:

> [W]here the objection was not directly aimed at the composition of the jury ultimately selected, we have taken the position that the objecting party's approval of the jury as ultimately selected . . . did not explicitly or implicitly waive his previously asserted . . . [objection, and his] objection was preserved for appellate review.

Id. at 579-80 (citation omitted). In other words, when defense counsel objects to the trial court's "failure to ask a particular question during [*voir dire*], not to the ultimate composition of the jury," he or she does not "waive the objection by approving the panel selected." *Id*. at 580 (citing *Gilchrist*, supra, 340 Md. at 617). This is consistent with our decision in *Marquardt*, where we made clear that "accepting the jury that is ultimately selected after the circuit court has refused to propound requested [*voir dire*] questions does not constitute acquiescence to the previous adverse ruling." *Marquardt* [*v. State*], 164 Md. App. [95,] 143 [(2005)] (citations omitted).

The correction notice(s) for this opinion(s) can be found here:

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