Circuit Court for Baltimore City
Case No. 120167041

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1790

September Term, 2021

ULISES LOPEZ

v.

STATE OF MARYLAND

Leahy,
Reed,
Tang,
JJ.

Opinion by Tang, J.
Concurring Opinion by Leahy, J.
Concurring Opinion by Reed, J.

Filed: December 29, 2022

* 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.

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

On March 16, 2020, Sergio Jones was shot and killed in a residential area in Baltimore City. After a jury trial, Ulises Lopez, appellant, was convicted of second-degree murder, use of a firearm in the commission of a crime of violence, loaded firearm on a person, transportation of a firearm in a vehicle, and possession of a regulated firearm after a disqualifying conviction.

On appeal, appellant raises three questions which we have rephrased slightly:[1]

1. Where the prosecutor belatedly provided a recorded proffer session with a co-defendant, did the trial court err in admitting the testimony of that witness?

2. Did the trial court err in requiring appellant to wear jail-issued shoes at trial?

3. Did the trial court err in admitting marijuana-related testimony?

For the reasons explained below, we shall answer each question in the negative and affirm the judgment of the circuit court.

BACKGROUND

On March 16, 2020, Baltimore City police officers responded to a shooting on the 400 block of South Lehigh Street. They located Sergio Jones, the victim, with multiple

[1] The questions presented in appellant's brief are as follows:

1. Did the trial court err in failing to exclude the co-defendant's testimony when, in violation of discovery rules, [a]ppellant's trial counsel was not notified that the co-defendant would be testifying against [a]ppellant until the morning of trial?

2. Did the trial court abuse its discretion in denying [a]ppellant's request to wear his dress shoes, compelling him to wear the Division of Correction issued white slippers instead?

3. Did the trial court err in allowing drug related testimony when the testimony was irrelevant and prejudicial to [a]ppellant?

gunshot wounds to his body. Mr. Jones died from his injuries. Certain residents of the area variously testified to hearing gunshots, observing Mr. Jones falling or laying on the ground thereafter, and/or seeing the shooter. One resident described the shooter as "tall, 165 height, dark hair, light skin" with a black t-shirt. This witness also testified to seeing a small, "silver looking" gun being used. The witness further observed that, after the shooting, the shooter entered a car with tinted windows, then later "noticed that the car . . . was no longer there. It had gone." Another resident did not see the shooter but saw someone running "back towards the alley after the shooting." Yet another resident, who did not witness the shooting, provided to the police security camera footage of the "incident they were canvassing for." The gunshots were audible on the footage, but the shooting itself was not visible.

The car observed by the witness was found a few minutes after the initial 911 call. A search of the vehicle, a 2010 Toyota Yaris, revealed a pill bottle in the glove compartment with appellant's fingerprints. While eight gun cartridge cases were recovered at the scene, no latent prints were recovered from them for comparison.

Appellant's co-defendant, Jerry Cruz, the driver of the vehicle, took a plea deal and then testified against appellant at trial. Mr. Cruz testified that, on the day of the shooting, he and appellant had "chilled" at appellant's house and "smoked a little bit of weed." Mr. Cruz then drove his father's Toyota, with appellant as a passenger, to a store on Eastern Avenue. After leaving the store, they drove back to appellant's house. On the way, Mr. Cruz stopped at a stop sign on Lehigh Street, and appellant said, "There's Sergio."

Appellant asked Mr. Cruz to "swing back around[.]" Mr. Cruz parked the car and appellant exited the vehicle. Mr. Cruz testified, "Next thing, I know, all I hear is gunshots, about seven gunshots." Appellant then ran back to the car with a silver gun in hand. As Mr. Cruz drove away, appellant said, "oh, he was a rat." Mr. Cruz then dropped appellant off at appellant's house and abandoned the car behind a school.

The following day, Mr. Cruz called the police and reported that his car had been taken in a carjacking at gunpoint. During an interview with detectives, Mr. Cruz admitted to lying about the carjacking, and identified appellant as the individual who killed Mr. Jones. Mr. Cruz was charged with first-degree murder, which carries a potential penalty of life imprisonment, but he pleaded guilty to accessory after the fact of first-degree murder, with a maximum ten-year sentence, in exchange for testifying at trial.

Additional facts will be supplied in the discussion as necessary.

DISCUSSION

I.

Appellant argues that the court erred in allowing Mr. Cruz's testimony at trial because the State violated the discovery rules by failing to timely disclose a proffer session recording with Mr. Cruz and that he would be testifying against appellant at trial.

Appellant and Mr. Cruz were scheduled to be tried jointly beginning on October 7, 2021. Prior to jury selection, with appellant's counsel present, the prosecutor informed the court that Mr. Cruz had taken the State's plea offer to plead guilty to one count of accessory after the fact, in exchange for his testimony at appellant's trial.

Appellant's counsel objected to Mr. Cruz testifying, stating:

> . . . I would object to Mr. Cruz testifying in [appellant]'s trial because we are here today for specially set trial. We found – we, meaning, myself and [co-counsel], found out about this deal literally five minutes ago. We were handed this five minutes ago, which apparently is recorded proffer session between the State of Maryland and Mr. Cruz, so we haven't seen it obviously.
>
> * * *
>
> So this needed to [] have been disclosed two months ago when it happened. Also, any discussions between the State of Maryland and Mr. Cruz with his counsel needed to be disclosed prior to five minutes ago, we're here ready to trial.

The State explained that it had not previously disclosed the recording because "at least at the time, it was just the proffer session[,]" "there hadn't been any agreement made yet[,]" and it "took a very long time" to secure in-office approval of the agreement.

Defense counsel claimed that the belated disclosure amounted to "trial by surprise" and Mr. Cruz's anticipated testimony for the State "change[d] the posture of the [d]efense case." Defense counsel requested that the court strike Mr. Cruz's testimony because of the State's "late notice." The court denied that request, explaining, "if you're looking for a postponement, I think that would be the remedy. I don't see where you can . . . object to his testimony." Defense counsel stated that he was "not going to ask for a postponement," which he confirmed with appellant on the record:

> [DEFENSE COUNSEL]: The judge has said that [Mr. Cruz is] going to be allowed to testify but [the judge] will entertain a postponement request if you think that more time is needed to sort of analyze this new piece of the case before we have a trial. *Myself and [co-counsel], I think, we're ready to roll* but ultimately, it's your call, it's your case. If you want to – *if you think that we need more time to analyze this new piece of evidence before your trial, then I'll ask the[c]ourt for a postponement. And if not, then, then not,* so what –

[APPELLANT]: *I'm ready.*

[DEFENSE COUNSEL]: *You're ready to roll?*

[APPELLANT]: *Yeah.*

[DEFENSE COUNSEL]: You don't want a postponement?

[APPELLANT]: (No audible response.)

[DEFENSE COUNSEL]: Okay. Then that's it.

THE COURT: Okay. All right. Obviously, we are ready to go. Let's call for a panel, please.

(Emphasis added).

Days later, just before Mr. Cruz testified, defense counsel renewed the objection and again moved to exclude Mr. Cruz's testimony:

[DEFENSE COUNSEL]: We've had an opportunity, obviously, since we've received the disk from the State to review it. Mr. Cruz did a what was described as a proffer session on August the 17th. Present was Mr. Cruz, Mr. Cruz's counsel . . . [the prosecutor] as well as [the detective] were there. Even though it was described as a proffer session, Mr. Cruz signed acknowledging that yes, in fact, he was participating as a witness for the State in this. He was going to answer their questions, et cetera. And that happened on August 17th.

So my objection is that should have been disclosed to me on August 18th or certainly well before trial[.] I think I recall [the prosecutor] saying in my initial objection that . . . the delay was because of some form of approval needed or something like that. But I don't agree – if approval was needed to effectuate the plea deal, which Mr. Cruz actually did before Your Honor, that's separate. The disclosure of this witness testimony, or this witness statement is . . . mandatory under the rules. I don't even have to ask for it. And we certainly didn't get it. And I don't think I would argue that getting it the morning of trial is not getting it before trial, certainly when the evidence or the statement was had two months prior to trial. And it was recorded and everything.

The State responded that it had previously disclosed another statement by Mr. Cruz that contained essentially the same statement he made at the proffer session:

> [THE STATE]: [O]n March the 17th, 2020, Mr. Cruz was down at homicide and gave a recorded statement. In his recorded statement, he indicated that it was [appellant] who he had picked up in his car, driven to the 400 block of South Lehigh and that he committed the murder of Sergio Jones. And that statement was turned over to [defense counsel] long ago. And that is the essence of what is in the statement that he made during the proffer session of finding out – just solidifying what happened.
>
> And so, [defense counsel] has had the information that Mr. Cruz has identified [appellant] as the shooter of Sergio Jones for more than a year. And so it – there is no surprise to what Mr. Cruz is going to testify to.

The court stated that the proffer "does qualify, though, as a witness statement" and had "to be disclosed without the necessity of a request." When asked why the State did not disclose it earlier, the prosecutor cited Mr. Cruz's safety. The court again overruled appellant's objection, explaining that "the proper remedy . . . was a postponement. [The court] offered [appellant] that opportunity [and he] declined it." The court permitted Mr. Cruz to testify.

a.

In the circuit court, Maryland Rule 4-263(d) governs the State's obligations to disclose discovery without the necessity of a request. "[W]ithin 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court" pursuant to Rule 4-263(h)(1), the State is required to disclose, *inter alia*:

> (1) all written and oral statements 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[.]" Md. Rule 4-263(d)(1);

(2) the name of each witness the State intends to call to prove its case in chief. Md. Rule 4-263(d)(3)(A); and

(3) the pretrial identification of the defendant by a State's witness. Md. Rule 4-263(d)(7)(B).

The duty to disclose is continuing, and discovery must be supplemented promptly. Md. Rule 4-263(j). The purpose of the discovery rules is to "assist the defendant in preparing his defense, and to protect him from surprise." *Rosenberg v. State*, 129 Md. App. 221, 259 (1999) (quoting *Mayson v. State*, 238 Md. 283, 287 (1965)). The State agrees that the late disclosure of the proffer session recording violated the discovery rules. The dispute on appeal, therefore, is the appropriate sanction for this discovery violation.

Maryland Rule 4-263(n) sets forth the sanctions for discovery violations as follows:

> If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances. The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court.

On appeal from a trial court's ruling on a discovery violation, our review is limited to whether the trial court abused its discretion. *Rosenberg*, 129 Md. at 259 (citing *Aiken v. State*, 101 Md. App. 557, 577 (1994)). A trial court has abused its discretion when its decision is "well removed from any center mark imagined by the

reviewing court and beyond the fringe of what that court deems minimally acceptable." *King v. State*, 407 Md. 682, 697 (2009) (quoting *North v. North*, 102 Md. App. 1, 14 (1994)).

In determining the appropriate discovery sanction, trial courts 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 v. State*, 397 Md. 557, 570-71 (2007) (citing *Taliaferro v. State*, 295 Md. 376, 390 (1983)) (footnote omitted). "The most accepted view of discovery sanctions is that in fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules." *Thomas*, 397 Md. at 571. Although the exclusion of evidence for a discovery violation is authorized under the Rule, it is not a favored sanction because it may result in a windfall to the defense. *Id*. at 572-73. Exclusion of evidence "should be ordered only in extreme cases." *Id*. at 573.

To determine whether exclusion of Mr. Cruz's testimony should have been granted in this case, we focus on whether appellant was prejudiced by the discovery violation. *See id*. at 572. "Under Rule 4-263, a defendant is prejudiced only when he is unduly surprised and lacks adequate opportunity to prepare a defense, or when the violation substantially influences the jury." *Id.* at 574.

In *Jones v. State*, we considered sanctions for discovery violations under similar circumstances. 132 Md. App. 657, 677 (2000). After a discovery violation, the defendant

in *Jones* did not request a continuance for more time to prepare, nor did he request a lesser sanction. *Id*. Instead, he moved for dismissal of the case, which was the most extreme sanction possible. *Id.* We explained:

> Although the purpose of discovery is to prevent a defendant from being surprised and to give a defendant sufficient time to prepare a defense, defense counsel frequently forego requesting the limited remedy that would serve those purposes because those purposes are not really what the defense hopes to achieve. The defense, opportunistically, would rather exploit the State's error and gamble for a greater windfall. . . . [H]owever, the "double or nothing" gamble almost always yields "nothing.''

Id. at 678 (internal citation omitted).

In the instant case, the element of surprise pertained to the existence of the recorded proffer session, and not the information contained therein. Appellant did not dispute that the State had previously identified Mr. Cruz as a State witness and had disclosed another, similar statement made by Mr. Cruz a year earlier which identified appellant as the shooter.[2] When presented with postponement as a remedy, appellant declined, noting he was ready to proceed. There was no assertion by appellant that the belated disclosure impaired his ability to mount a defense or compromised his ability to effectively cross-examine Mr. Cruz at trial. There was no indication that appellant needed additional time to interview or subpoena witnesses or otherwise conduct further investigation before trial. Appellant "simply sought the windfall of exclusion." *Thomas*, 397 Md. at 575. We discern no abuse of discretion in the court's refusal to exclude Mr. Cruz's testimony.

[2] Appellant claims the State violated the discovery rules in bad faith. We do not condone the belated disclosure of the proffer session recording; it should have been disclosed earlier pursuant to the Rules. The record, however, does not evidence bad faith by the State considering its earlier disclosures.

II.

Appellant argues that the court abused its discretion when it denied his request to wear dress shoes brought for him by defense counsel, compelling him to wear white shoes issued by the Department of Corrections. Before the prospective jurors arrived for *voir dire*, defense counsel asked the court to permit appellant to wear "regular shoes instead of the standard issue [jail shoes]." The court conferred with the in-court officer, who needed to obtain approval from a supervising officer:

> THE OFFICER: Your Honor, I need to call my sergeant to let her know that you want [appellant] to put [his dress] shoes in the courtroom.
>
> THE COURT: Okay. Okay. If you don't mind calling, that would be great. *I just think that's almost as much of a giveaway as the chains are.*
>
> * * *
>
> THE COURT: Oh. What are the shoes that [appellant]'s wearing look like? Are they the like [sic] white?
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> [DEFENSE COUNSEL]: The shoes that [appellant] is wearing?
>
> THE COURT: Yeah.
>
> [DEFENSE COUNSEL]: These are the standard issue jail shoes.
>
> THE COURT: Are they white?
>
> [DEFENSE COUNSEL]: Yes, they're white.

(Emphasis added). When the supervising officer entered the courtroom, the following discussion ensued:

> THE COURT: I was just –the [defense] attorneys had brought shoes for him, so it wasn't quite so obvious that [appellant]'s wearing jail-issued shoes.

> [SUPERVISING OFFICER]: Yeah.
>
> THE COURT: We're not allowed to do that?
>
> [SUPERVISING OFFICER]: No. Shoes is in a part of – no change regular clothes. That would be part of the property package that they will receive from the Institution. Clothing only.
>
> THE COURT: All right. But – all right. All right. Understood.

Defense counsel noted an objection to "the shoe issue," explaining:

> [DEFENSE COUNSEL]: And I'll also make it very clear in the record that Your Honor's perfectly fine with [appellant] wearing the shoes. [Appellant] stands before you today wearing a black suit, white button down shirt ready to be seen by the jury in this – the trial today and he's wearing what I would describe the standard issue jail shoes, white canvas, dirty ill-fitting shoes that even if the general public would not look at those and say, hey, there's a jail shoes, they're going to look at them and say, hey. That doesn't match the suit. That's weird. [Defense counsel] brought a standard issue, the regular old nylon socks and black shoes, black dress shoes to complete the suit. And I understand that [appellant] is not able to wear those and I'll just – for what it's worth make an objection on that issue.

The trial court overruled the objection:

> THE COURT: Your objection is noted. I wish I could accommodate you because I agree that the fashion obviously is not optimal. But, you know, one of the reasons that the jury should not see [appellant] in chains is because it suggests certain things. The shoe issue, while I recognize [is] not good fashion, certainly, *doesn't suggest to a casual [sic] or anything about his custody status.* So I will note your objection for the record, but let you know that because of security issues, I can't accommodate you.

(Emphasis added). According to appellant, the court compelled appellant to stand trial in prison garb in violation of his right to a fair trial, and he "was unfairly prejudiced by this indicator of incarcerated status."

a.

"The general rule, well settled in Maryland, is that the conduct of a criminal trial is committed to the sound discretion of the trial judge." *Campbell v. State*, 243 Md. App. 507, 518 (2019) (cleaned up). "That control, however, must safeguard the defendant's constitutional rights[,]" including his right to a fair trial. *Id*. The trial court violates the right to a fair trial by "compel[ling] an accused to stand trial before a jury while dressed in identifiable prison clothes" because doing so serves as a "constant reminder of the accused's condition implicit in such distinctive, identifiable attire" and impairs the presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 504-12 (1976) (involving a defendant who appeared at trial in clothes that were distinctly marked as prison issue). "The presumption of innocence, however, is not impermissibly impaired every time a defendant stands trial before a jury in prison attire." *Knott v. State*, 349 Md. 277, 287 (1998).

To establish that his attire impaired the presumption of innocence and violated his right to a fair trial, a defendant must first establish that the court "compel[led him], against his will, to be tried in jail attire." *Estelle*, 425 U.S. at 507; *Knott*, 349 Md. at 287 (describing this component as the "element of compulsion"). To establish the "element of compulsion," a defendant must object to being tried in prison attire at the first available opportunity, *i.e*., before the jury has been impaneled. *Knott*, 349 Md. at 287-88, 290. "[T]he reason for the compulsion requirement is to prevent defendants from choosing to

appear at trial in prison attire for tactical reasons, and then later claiming that such an appearance constituted reversible error[.]" *Id*. at 287 (citing *Estelle*, 425 U.S. at 507-08).

Second, a defendant must establish that he was wearing "identifiable prison attire." *Knott*, 349 Md. at 286-87. This second component is the focus of our discussion. There is a dearth of Maryland cases addressing "identifiable prison attire." None specifically address jail-issued footwear, but two cases are instructive: *Knott v. State*, 349 Md. 277 (1998), involving an orange jumpsuit; and *Williams v. State*, 137 Md. App. 444 (2001), involving a jail-issued identification bracelet.

In *Knott*, the Supreme Court of Maryland (at the time named the Court of Appeals of Maryland)[3] held that an orange, prison-issued jumpsuit was identifiable as prison attire. 349 Md. at 291. At trial, Knott raised concerns that wearing an orange jumpsuit would influence the jury. He requested a continuance, which the court denied. *Id*. at 284. Although the trial court recognized that the orange jumpsuit would "hint" to the jury at his incarceration status, it explained that the jury would expect Knott to be in jail based on the seriousness of the charged offenses. *Id*. at 283-84. After he was convicted, Knott appealed. On appeal, the State argued that the record did not demonstrate that the orange jumpsuit was identifiable prison attire. The Court disagreed, explaining,

[3] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See, also*, Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland….").

> When Knott's counsel presented her first reason for a continuance, the trial court immediately recognized where the argument was headed and described the attire as giving the jury a "hint" that Knott was being held in jail. Moreover, the trial judge's ground for denying the opportunity to change into mufti was that the jurors would expect Knott to be in jail because of the severity of the charges and, hence, appearing in prison garb would not be prejudicial. Implicit in that analysis is that jurors could recognize Knott's garb as that of a prisoner.

Id. at 291 (footnote omitted). Accordingly, the Court reversed Knott's convictions. *Id*. at 295.

Conversely, in *Williams*, our Court affirmed the trial court's factual finding that an identification bracelet worn by the defendant during a jury trial was not readily identifiable as prison attire. 137 Md. App. at 449. We held:

> This case is unlike *Knott* or *Estelle,* in that we see no hint in the record that the bracelet worn by appellant branded him as a prisoner. To the contrary, the trial judge stated that the jurors might think the bracelet was a "hospital band." In effect, then, the court made a factual finding that the bracelet was not readily identifiable as a type of prison attire. Significantly, appellant neither contradicted that assertion nor offered a different description of the bracelet. Moreover, there is no evidence in the record as to the size of the courtroom or the distance between the jurors and appellant, which might have shed light on the question of the visibility of the bracelet. Therefore, we cannot tell from the record whether the jurors could necessarily see the bracelet.

Id. at 452.

Although no Maryland case has yet addressed whether standard-issue jail shoes are identifiable prison attire, courts from other jurisdictions have considered it, along with other clothing items. In *State v. Crump,* the Missouri Court of Appeals affirmed the trial court's refusal to grant a mistrial or continuance after a defendant appeared before the jury in a blue jumpsuit and white sneakers issued by the jail. 589 S.W.2d 328, 329 (Mo. Ct.

App. 1979). The trial court observed that the defendant wore a jumpsuit described as a blue, "one-piece coverall type garment" and "white sneakers with the usual three black stripes on each side above the instep." *Id.* at 330. The sneakers had "CJ" printed on the outside of each shoe above the heel, which became partially or completely concealed when the shoes were worn. *Id*. The appellate court concluded that "[t]here was no way a juror could have identified clothing worn by [the defendant] as being jail attire." *Id*.; *see also Harper v. State*, 349 S.E.2d 841, 841 (Ga. Ct. App. 1986) (affirming the court's decision to overrule defendant's objection to being tried in prison clothing where the record established that shirt, trousers, and "slip-on tennis shoes" did not bear any writing to indicate they were prison clothing); *Barksdale v. State*, 499 S.W.2d 851, 852 (Ark. 1973) (affirming the denial of a motion for mistrial on grounds that the defendant wore prison garb where the record showed that trousers, shirt, jacket and "house shoes" did not bear any name or number indicating they were prison garb).

In the instant case, appellant argues that the record demonstrates, by the court's own comments, that the white jail shoes worn by appellant were "almost as much of a giveaway as the chains are." The court's preliminary comments, however, are not conclusive. The court's subsequent inquiries about what the shoes "looked like" and whether they were "white" indicate that it could not see appellant's shoes from its vantage point. Once defense counsel described the shoes as white, canvas, ill-fitting shoes, the court determined that the shoes did not suggest anything about appellant's custody status, even though the shoes may not have matched the rest of his outfit. As in *Williams*, the record provided no information

as to the size of the courtroom or distance between the jurors and appellant, which might suggest whether the shoes were visible. 137 Md. App. at 452. Even if the shoes were visible to the jury, we cannot disregard the court's finding that the shoes "[didn't] suggest . . . anything about [appellant's] custody status." We afford deference to the trial court's factual findings. *See United States v. Martin*, 964 F.2d 714, 720 (7th Cir. 1992) (applying a clearly erroneous standard to the trial court's finding that a defendant's clothes were not obvious prison garb); *United States v. Henry*, 47 F.3d 17, 22 (2d Cir. 1995) (deferring to the trial court's finding that a jury would not readily identify a defendant's clothing as prison garb).

Even if the shoes revealed appellant's custody status, the court had a compelling interest in maintaining its security protocol by limiting an inmate's access to certain types of non-jail-issued attire. Relying on *Estelle*, appellant maintains that wearing the jail-issued shoes did not further any state policy. Specifically, he argues that the supervising officer "never articulated a specific security concern[.]" Appellant's arguments are unpersuasive.

In *Williams*, the defense counsel asked the trial court to have defendant's jail-issued "BCDC bracelet removed, so that the jury would not see it." 137 Md. App. at 447-48. The in-court officer indicated that the "sergeant [didn't] want it taken off." *Id*. at 448. The trial court denied counsel's request, commenting that the bracelet "is the identification band of the defendant" "that BCDC has." *Id*. In affirming the trial court's decision, we acknowledged the compelling interest: "even if the bracelet revealed appellant's status as a

detainee, the [detention center] has a compelling interest in maintaining the identification of those within its custody, and that interest outweighed the minimal indicia of custody caused by the bracelet." *Id*. at 452.

In this regard, the record in *Williams* was no more developed than the record in the instant case. Here, although the supervising officer's explanation was fragmented, it was enough to signal to the court a distinction between the permissible wearing of non-jail-issued *clothes* and the impermissible wearing of non-jail-issued *shoes* brought in by appellant's defense counsel. The court understood the distinction as raising "security issues" associated with having appellant wear non-jail-issued shoes.

Based on the record before us, we conclude that the court did not err in denying appellant's request to wear non-jail-issued dress shoes.

III.

Appellant claims that the court erred in admitting the detective's testimony regarding the contents of the pill bottle found in Mr. Cruz's car. At trial, the detective testified about the search of the interior of Mr. Cruz's car, stating that "latent prints were recovered" from "a pill bottle" in the glove compartment. The State had established that those prints belonged to appellant.

The detective testified that the pill bottle contained a suspected controlled dangerous substance. When the State offered the detective as an expert in the field of the packaging and identification of controlled dangerous substances, appellant objected:

> [DEFENSE COUNSEL]: I'm going to object to relevance as to this whole line of questioning. This isn't a drug case.

> [THE STATE]: Well, it's that he suspected that it was marijuana. And Mr. Cruz testified that he and [appellant] were going to get together and smoke marijuana. The latent prints were taken from this pill bottle. So it –
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> THE COURT: You think it corroborates his statement.
>
> [THE STATE]: Yes.
>
> THE COURT: All right. Anything else?
>
> [DEFENSE COUNSEL]: I still think that it's – any probative value is outweighed by its prejudicial nature.
>
> THE COURT: Respectfully, in a case like this, I think it's probably a whole lot less prejudicial than any of the other accusations against [appellant]. So respectfully, I'm going to consider it and overrule your objection.

The court accepted the detective as an expert, and the detective testified that he suspected that the pill bottle contained marijuana. Appellant challenges the testimony as irrelevant because it did not make it more or less likely that he committed the shooting. He also contends that the testimony was more unfairly prejudicial than probative.

a.

Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. This Court reviews questions of relevance *de novo*. *Montague v. State*, 471 Md. 657, 673 (2020). Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Md. Rule 5-403. We review a ruling under Maryland Rule 5-403 for abuse of discretion. *Montague*, 471 Md. at 673-74.

As previously mentioned, Mr. Cruz testified that, before the shooting, he and appellant had "chilled" at appellant's house and "smoked a little bit of weed." The marijuana in the pill bottle, discovered by the detective, tended to corroborate the timeline of events that placed appellant with Mr. Cruz prior to the shooting and in the car at the time of the shooting. The evidence had the tendency to make appellant's presence at the murder scene more probable than it would be without it. Therefore, the detective's testimony was relevant.

With respect to unfair prejudice, we observe that evidence of appellant's earlier "smoking a bit of weed" was admitted without objection. We fail to see unfair prejudice in the admission of testimony intimating that appellant possessed marijuana in the pill bottle when prior, unobjected to testimony established that he smoked marijuana and, by implication, was in possession of it. *See, e.g.*, *Grandison v. State*, 305 Md. 685, 739 (1986) (the challenged testimony was not prejudicial where the facts were independently established through prior unobjected to testimony). We find no reversible error in the admission of the marijuana-related testimony.

JUDGMENT BY THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

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Concurring Opinion by Leahy, J.

Filed: December 29, 2022

Mr. Lopez was required to wear, over his objection and as described on the record by his attorney, "standard issue jail shoes, white canvas, dirty[,] ill-fitting" with his black suit during his trial on murder charges. Nothing in this record provides a security or policy reason for denying Mr. Lopez's request to wear the black shoes that his attorneys brought for him to wear. In my view, compelling Mr. Lopez to wear ill-suited white canvas "standard issue jail shoes" during his trial before a jury without a good reason offends the revered principle of the presumption of innocence.

The majority, in a well-written opinion, appropriately points out that the record also does not provide any information as to whether Mr. Lopez's shoes were actually visible to the jury. Relying on our decision in *Williams v. State*, 137 Md. App. 444 (2001), the Majority defers to the trial court's factual finding that the shoes "[didn't] suggest . . . anything about [appellant's] custody status." *Lopez*, No. 1790, Sept. Term 2021, slip op. at 15 (majority opinion). Ultimately, given the lack of a fully-developed record as to "the scene presented to the jurors" in this case, I cannot say that what the jury saw "was so inherently prejudicial as to pose an unacceptable threat to [the] defendant's right to a fair trial[.]" *Wagner v. State*, 213 Md. App. 419, 478 (2013); *see also Smith v. State*, 481 Md. 368, 400 (providing that it is the defendant's burden to demonstrate "based on the record of the proceeding in the trial court, that the challenged practice was observable by the jury."). For that reason, I concur in the judgment.

It is long recognized that "*enforcement*" of the presumption of innocence "lies at the foundation of the administration of our criminal law." *Estelle v. Williams*, 425 U.S. 501,

503 (1976) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)) (emphasis added).

The United States Supreme Court observed in *Estelle* that:

> [u]nlike physical restraints . . . *compelling an accused to wear jail clothing furthers no essential state policy*. That it may be more convenient for jail administrators, a factor quite unlike the substantial need to impose physical restraints upon contumacious defendants, provides no justification for the practice.
>
> Similarly troubling is the fact that *compelling the accused to stand trial in jail garb operates usually against only those who cannot post bail prior to trial*. Persons who can secure release are not subjected to this condition. To impose the condition on one category of defendants, over objection, would be repugnant to the concept of equal justice embodied in the Fourteenth Amendment. [4]

Id. at 505-06 (emphasis added) (internal footnotes and citations omitted).

Of course, the foregoing principles apply only to *identifiable* jail garb, *see id.* at 506, and the majority opinion, acknowledging that Mr. Lopez was compelled to wear the white jail shoes in this case, appropriately focuses on the "dearth of Maryland cases addressing

[4] In 2017, the Supreme Court of Maryland adopted Maryland Rule 4-216.1 "to promote the release of defendants on their own recognizance or, when necessary, unsecured bond." The Rule mandates that, in granting pretrial release, additional conditions "should be imposed on release only . . . to ensure appearance at court proceedings, to protect the community, victims, witnesses, or any other person and to maintain the integrity of the judicial process[.]" Md. Rule 4-216.1(b)(1)(A). If the judge determines that additional conditions are necessary, the judge "shall impose on the defendant the least onerous condition or combination of conditions of release" and "[p]reference should be given to additional conditions without financial terms." Md. Rule 4-216.1(b)(3), (b)(1)(A). Pretrial release is not permissible, however, "upon a finding by the judicial officer that, if the defendant is released, there is a reasonable likelihood that the defendant (i) will not appear when required, or (ii) will be a danger to an alleged victim, another person, or the community." Md. Rule 4-216.1(b)(1)(B). Accordingly, the implication of a defendant being denied bail may be even more prejudicial in Maryland today than when *Estelle* was decided in 1976. Rather than an indication that the defendant was too poor to post bond, the implication may now be that the defendant was either too dangerous or too much of a flight risk to be released.

'identifiable prison attire.'" *Lopez v. State*, No. 1790, Sept. Term 2021, slip op. at 13 (majority opinion). Our case of the white canvas jail shoes surely falls somewhere between the orange jumpsuit worn by the defendant in *Knotts v. State*, 349 Md. 277 (1998), and the Baltimore County Detention Center (BCDC) identification bracelet worn by the defendant in *Williams v. State*, 137 Md. App. 444 (2001). We observed in *Williams* that:

> This case is unlike *Knotts* or *Estelle*, in that we see no hint in the record that the bracelet worn by appellant branded him as a prisoner. To the contrary, the trial judge stated that the jurors might think the bracelet was a 'hospital band.' In effect, then, the court made a factual finding that the bracelet was not readily identifiable as a type of prison attire. Significantly, appellant neither contradicted that assertion nor offered a different description of the bracelet.

137 Md. App. at 452.

In *Williams*, the State also pointed out that appellant was wearing a short-sleeved shirt and did not attempt to obtain a long-sleeved shirt. *Id.* The State argued that a defendant "cannot choose clothing which reveals the wristband and then claim that the State compelled him to reveal the wristband to the jury." *Id.* We considered "the risk that the jury might view the wristband as prison attire" and determined that the BCDC's security needs and "compelling interest in maintaining the identification of those within its custody" outweighed the "insignificant risk" created by the bracelet. *Id.* On the foregoing points, the circumstances in *Williams* are distinguishable from those presented here.

In this case, the trial judge began by observing, in regard to jail shoes generally, "I just think that's almost as much of a giveaway as the chains are." After the judge ascertained that Mr. Lopez's jail shoes where white, the court wanted to hear from Officer

Watts because "the attorneys had brought shoes for [the defendant], so it wasn't quite so obvious he's wearing jail issued shoes." When asked whether Mr. Lopez was allowed to wear the shoes his attorneys brought for him, Officer Watts responded: "No. Shoes is in a part of - - no change regular clothes. That would be a part of the property package that they will receive from the Institution. Clothing only." That was all that Officer Watts said on the subject. Nevertheless, from there, the court the determined that "because of security issues, I can't accommodate" Mr. Lopez's request, while observing that "the shoe issue, while I recognize . . . not good fashion, certainly, doesn't suggest to a casual or anything about [Mr. Lopez's] custody status."

The State concedes that the officer did not provide a security reason for requiring Mr. Lopez to wear the white canvas jail shoes. Indeed, the officer did not offer *any* policy reason why the court should refuse Mr. Lopez's request. That is deeply troubling considering that, while the "method and extent of courtroom security is left to the sound discretion of the trial judge[,]" that decision may "not be delegated to courtroom security personnel." *Wagner*, 213 Md. App. at 476. And clearly, the State should be prepared to provide the court with the security or other compelling policy reason behind its recommendation to deny a defendant's request to wear civilian attire because the court should not have to risk going against the State's recommendation only to learn later that that decision put someone in danger.

The State urges that the trial court did not need to have a compelling security or policy reason for denying Mr. Lopez's request because the judge found that the white

canvas shoes were not identifiable as prison clothing. The facts bear out, however, that the court searched for a good reason why Mr. Lopez could not wear the shoes that his attorneys brought for him "so it wasn't quite so obvious he's wearing jail issued shoes." Accordingly, the court should have probed further into whether there was *any* reason for denying the request before concluding, rather summarily, that the shoes would not reveal Mr. Lopez's custody status to a jury.

The United States Supreme Court has directed that in "enforcing" the principle of the presumption of innocence, courts "must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience." *Estelle*, 425 U.S. at 504. It is well known that juries carefully scrutinize defendants' attire.[5] *Accord Estelle*, 425 U.S. at 504-05 (citing the American Bar Association's 1968 Project on Standards for Criminal Justice and noting that, "The defendant's clothing is so likely to be a continuing influence throughout the trial that, not unlike placing a jury in the custody of deputy sheriffs who were also witnesses for the prosecution, an unacceptable risk is presented of impermissible factors coming into play."). As defense counsel pointed out below, the jury would have to notice that the "white canvas, dirty ill-fitting" jail shoes against Mr. Lopez's "black suit, white button-down shirt."

[5] "Common human experience" certainly dictates that shoes are "attire." For example, one commentator explains that "courtroom attire" includes "conservative dress shoes." Merrie Jo Pitera, *Courtroom Attire: Ensuring Witness Attire Makes the Right Statement*, THE JURY EXPERT (Jul. 4, 2012), https://www.thejuryexpert.com/wp-content/uploads/TJE-July-Aug-pages40-42.pdf.

With so much at stake, we should know *why* Mr. Lopez was not able to wear his civilian shoes. As I see it, where the State offers no security or public policy reason why a defendant's request to stand trial in civilian attire should be denied, and the defendant has provided the attire, the court should grant the request regardless of whether the prison-issued attire bears any jail-issued marks unless the court finds that the request would somehow disrupt or delay the trial proceedings. *See, e.g.*, *Knotts,* 349 Md. at 286 (noting that, a fully developed inquiry by the court may reveal that a defendant has "waived his right to appear in non-prison garb" by "appearing in court in prison garb as a tactic in an attempt to force a postponement of the case to another day."). Absent *any* such reason to deny the request, why take the risk that the presumption of innocence could be impaired because the jury was able to identify as prison attire certain prison garb that bear no markings—like the white canvas prison shoes in this case? *See, e.g.*, *Smith*, 481 Md. at 393 (providing that a defendant "establishes inherent prejudice if the defendant shows that the challenged practice presented 'an unacceptable risk ... of impermissible factors coming into play.'" (quotation omitted)). Judge Rodowsky articulated the risk succinctly in *Knotts*: "Compelling a defendant to stand trial in identifiable prison attire impairs [the] presumption [of innocence] because it serves as a 'constant reminder' that the accused is in custody, and presents an unacceptable risk that the jury will consider that fact in rendering its verdict." *Knotts*, 349 Md. at 286-87 (quoting *Estelle*, 425 U.S. at 504-05).

Circuit Court for Baltimore City
Case No. 120167041

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 1790

September Term, 2021

ULISES LOPEZ

v.

STATE OF MARYLAND

Leahy,
Reed,
Tang,
JJ.

Concurring Opinion by Reed J.

Filed: December 29, 2022

I join Sections I and III of Judge Tang's majority opinion. I also join Judge Leahy's concurrence. I agree with her conclusion that "with so much at stake we should know why Mr. Lopez was not able to wear civilian shoes". I separately and briefly write from the perspective of a former trial judge and an attorney who practiced criminal law in the courthouses that comprise the Circuit Court for Baltimore City.

The common law referenced in Section II of the majority opinion has given me pause because of the events that unfolded pre-trial in this case. The other judges on this panel have outlined that this is a situation of grave constitutional import which other courts have grappled with in circumstances that are distinguishable from this case. As a former judge of the circuit, I am acutely aware of the constitutional and legal demands to keep cases progressing to ensure that they are tried in a timely manner. I understand the trial judge's ruling and have affirmed it because of the failure to meet the abuse of discretion standard, but I have concerns about the procedure we are upholding by denying Mr. Lopez's appeal to wear dress shoes instead of jail garb. I disagree with the trial judge's holding that Mr. Lopez's dress "doesn't suggest to a casual or anything about [Mr. Lopez's] custody status". During the voir dire process, jurors are required to examine the defendant to identify whether they know the person from prior experience. Trial judges and practicing attorneys know that jurors are interested in everything that goes on in a courtroom in particular the behavior not only at the trial tables but also in the gallery. I am writing to strongly urge other judges who might be confronted by this challenge to explore further

into the basis for a limitation on a defendant's request to be tried in civilian garb which has the potential to deny a defendant a fair trial.

This is a problem that should and can be remedied by the courts.