UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1803

September Term, 2014

DEVIN JAY GALLAGHER

v.

STATE OF MARYLAND

Meredith,
Hotten,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: November 18, 2015

Devin Jay Gallagher, appellant, was convicted by a jury sitting in the Circuit Court for Talbot County of distributing heroin, possessing heroin with the intent to distribute, possessing heroin, and three counts of conspiracy, one for each of the three preceding convictions.[1] Appellant asks two questions on appeal:

> I. Did the trial court err when it restricted appellant's cross-examination of a State's witness?
>
> III. Did the trial court err in excluding the testimony of a defense witness not disclosed during discovery?

For the reasons that follow, we shall affirm the judgments.

FACTS

The State's theory of prosecution was that appellant engaged in a drug transaction with a confidential informant on the evening of July 15, 2013. The confidential informant and the three police officers with the Easton Police Department who observed various parts of the drug buy testified for the State. The theory of defense focused on the "integrity" of the controlled buy, asserting that the buy was "orchestrated [by the informant as a] ruse to snare" appellant. The defense presented no witnesses. Viewing the evidence in the light most favorable to the State, the prevailing party, the following was established.

[1] The court sentenced appellant on the distributing conviction to 20 years of imprisonment, all but ten years suspended, to be served without the possibility of parole and five years of supervised probation upon his release from prison, and a concurrent 20 year sentence, all but ten years suspended, for the corresponding conspiracy conviction. The court merged appellant's remaining convictions.

Detective Sergeant George Paugh, III, with the Easton Police Department, testified that following the arrest of Daniel Giles in November 2012 for possession with intent to distribute, Giles signed an agreement to work as a confidential informant. As part of the agreement, Giles was to plead guilty to one felony drug charge and the State would request no more than two years of incarceration and nol pros another felony drug charge. Based on a conversation between the detective and Giles, the sergeant decided to target appellant.

On July 15, 2013, Giles called the sergeant and said he had arranged to purchase 30 capsules of heroin from appellant that evening at Giles's home. Giles and the sergeant met before the drug buy in a building in downtown Easton; Giles's home was around the corner and less than a couple of hundred yards away at 211 South Lane. Giles was searched – he had no drugs on him and his money was removed from his person. Giles was then given $380 in police department funds to purchase the heroin. Giles maintained an open phone line with the sergeant through a Bluetooth device. Giles then walked from the building to the back deck of his home while observed by the sergeant and two other officers: Detective Shayne McKinney, who was stationed with the sergeant, and Detective Robert Schuerholz, who was stationed on a rooftop patio, adjacent to the back deck of Giles's home.

While Giles stood waiting on his back deck, a bail bondsman drove up. According to the sergeant, Giles and the bail bondsman talked for a few minutes and then the bail bondsman left. The sergeant testified that at no time did Giles and the bail bondsman make physical contact. Detective Schuerholz testified that Giles and the bail bondsman came

within 10 feet of each other during their interaction but no closer. Giles likewise testified that he and the bail bondsman spoke for about five minutes, but that they did not exchange anything. A short time later, Giles's girlfriend came onto the deck, spoke to Giles, and then went inside the home. Again, no physical contact occurred between Giles and his girlfriend. About ten minutes later, Giles's daughter came outside to play, and she and Giles bounced a ball between them for about twenty minutes before she too went back inside the home.

Shortly thereafter, around 7:55 p.m., the officers observed a Kia pull up driven by appellant's girlfriend, Jordan Schminit. Schminit exited the car with a semi-transparent grocery bag in her hands, walked over to Giles, and handed the bag to him. Appellant exited the passenger side of the car, walked over to Giles, and asked him if he had his money. Giles handed appellant the department funds. Giles testified that the $380 was to pay for the 30, $10 capsules of heroin, and he owed appellant $80 from a previous drug sale. Appellant then grabbed a laundry basket sitting on the back deck, which had been there since Giles's arrival. The sergeant explained that Giles's girlfriend did appellant's laundry. Appellant and Schminit then left in their car with the laundry.

Giles was observed walking back to the building where he handed the grocery bag to the sergeant. The bag contained 30 capsules of what was later determined to be heroin. Giles was again searched; he had no drugs or money on him. The sergeant testified that if any of the people who had contact with Giles before the drug buy had passed something to Giles, the sergeant would have "shut down" the controlled buy. The sergeant testified that

because Giles performed more drug sales than his contract had required, the State decided to nol pros the felony drug charge against Giles.

DISCUSSION

I.

Appellant argues on appeal that the trial court erred in limiting his cross-examination of Giles in two ways: (1) by refusing to allow him to confront Giles with a receipt suggesting that Giles had exchanged money with a bail bondsman the day of the controlled buy, and (2) by refusing to allow him to cross-examine Giles about his interaction with the bail bondsman. The State responds that the court properly excluded the receipt because it was not produced during discovery, and without the receipt, appellant lacked a "good-faith basis" to cross-examine Giles about any exchange with the bondsman.

The right of a criminal defendant to cross-examine the witnesses against him or her is guaranteed by both the Sixth Amendment and by Article 21 of the Maryland Declaration of Rights. *Pantazes v. State*, 376 Md. 661, 680 (2003). "Nevertheless, a defendant's constitutional right to cross-examine witnesses is not boundless." *Id.* Trial court's "have wide latitude to establish reasonable limits on cross-examination based on concerns about . . . harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id*. (citations omitted).

"The scope of cross-examination lies within the sound discretion of the trial court." *Id*. at 681 (citations omitted). On appellate review, we determine whether the trial court

imposed limitations "that inhibited the ability of the defendant to receive a fair trial." *Id*. at 681-82 (citations omitted). "[W]e do not disturb a trial court's evidentiary ruling absent error or a clear abuse of discretion." *Fontaine v. State*, 134 Md. App. 275, 287-88 (citations omitted), *cert. denied*, 362 Md. 188 (2000). We have said that an abuse of discretion occurs where "no reasonable person would take the view adopted by the [trial] court." *Id*. at 288 (quotation marks and citations omitted)(brackets in original). "Thus, where a trial court's ruling is reasonable, even if we believe it might have gone the other way, we will not disturb it on appeal." *Id*.

Md. Rule 4-263 sets forth the rules of discovery in circuit court for both the State and the defense. The Rule provides that, without the necessity of request and no later than 30 days before trial, the defense "shall" provide to the State's Attorney:

> (1) Defense witness. The name and . . . the address of each defense witness other than the defendant, together with all written statements of each such witness that relate to the subject matter of the testimony of that witness. Disclosure of the identity and statements of a person who will be called for the sole purpose of impeaching a State's witness is not required until after the State's witness has testified at trial.

Md. Rule 4-263(e)(1), (h)(2). Giles testified on direct examination that while under police surveillance but before appellant and his girlfriend arrived his bail bondsman drove up. Giles testified that he and his bail bondsman spoke for about five minutes and nothing was exchanged between them. On cross-examination, defense counsel sought to cross-examine

Giles about his interaction with the bondsman. The court sustained the State's objection to that line of questioning and a bench conference followed.

At the bench conference, defense counsel asked permission to question Giles about a receipt he had acquired between a bail bondsman at East Coast Bail Bonds and Giles for $20 dated the day of the controlled buy. When the State responded that she knew nothing about a receipt and that defense counsel should have disclosed the receipt during discovery, defense counsel argued that he was not required to disclose the receipt because he did not intend to use it until Giles testified that there had been no transaction between him and the bondsman. The court agreed with the State and sustained its objection to use of the receipt.

A. The receipt

Appellant argues that the trial court erred in refusing to allow him to use the receipt to cross-examine Giles because he did not produce the receipt in discovery. He argues, as he did below, that he was not required to disclose the receipt during discovery. He posits that pursuant to Md. Rule 4-263(e), he only had to disclose documents that he "intend[ed] to use at trial," and that he did not intend to use the document at trial until after Giles denied that he exchanged anything with the bail bondsman. We find no error by the trial court.

The answer to appellant's argument lies in the reading together of *Thomas v. State*, 213 Md. App. 388 (2013), *cert. denied*, 437 Md. 640 (2014) and *White v. State*, 300 Md. 719 (1984), *cert. denied*, 470 U.S. 1062 (1985). In *Thomas*, defense investigators obtained recorded statements from two State's witnesses prior to trial. When asked to disclose the

statements in discovery, defense counsel refused, arguing, among other things, that he did not intend to use the recordings at trial. *Thomas*, 213 Md. App. at 400. "After further inquiry, however, defense counsel confirmed that, if these witnesses testified 'to something different, then at that point in time the material would be used as impeachment material.'" *Id*. (footnote omitted). The State filed a motion to compel, and the trial court ordered the defense to provide the recordings to the court for an *in camera* review. After its review, the court ordered disclosure of the recordings.

On appeal, the defendant challenged the trial court's order to disclose. The Court began its analysis by affirming the underlying goals of discovery, namely, to provide "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." *Id*. at 402 (quotation marks and citation omitted). To effectuate those goals, the Court adopted the view espoused by other jurisdictions that "if defense counsel, even though not certain, can 'reasonably predict' that she will use certain exhibits to impeach a State's witness, she must give timely discovery to the prosecutor." *Id*. (quotation marks and citation omitted). Applying this "reasonably predict" rule, the Court held that the trial court had properly determined that the defense had violated the discovery rules by not providing the recordings during discovery because defense "intended to use" the statements if the witness testified to something different from what was stated in the recordings. *Id*. at 402-03.

We agree with the State that the same conclusion follows here. The defense possessed before trial a receipt purporting to document an exchange of money between Giles and a bail bondsman on the date of the controlled buy. Defense counsel knew from the officers' incident reports that a bail bondsman had visited Giles in the midst of the police surveillance shortly before appellant arrived. Those reports, however, did not mention any exchange between Giles and the bail bondsman, let alone a hand-to-hand transaction involving $20 and a receipt. Under the circumstances we agree with the State that defense counsel could have reasonably predicted that he would use the receipt to impeach Giles about the controlled buy.

Appellant argues that *Thomas* is distinguishable because in *Thomas* defense counsel sought out a statement of a witness "to lock him into a particular story" where here defense counsel "found a document through its investigation." We agree with the State that the "reasonably predict" rule adopted by the *Thomas* Court does not depend on how the evidence came into being nor whether defense counsel played an active or passive role in creating or finding it. The touchstone of the rule is whether defense counsel could have reasonably predicted the evidence's use for impeachment.

Appellant argues that *White v. State*, *supra*, controls our case and that it compels a contrary conclusion. In that case, the defendant's accomplice testified for the State. On cross-examination defense counsel emphasized the accomplice's plea agreement with the State. *White*, 300 Md. at 731. On re-direct examination, the State introduced the written plea agreement that contained a promise by the accomplice to testify truthfully. *Id*. at 731-32.

Seizing that provision as an excuse for recross-examination, defense counsel then introduced into evidence a letter from the accomplice to the defendant in which the accomplice wrote that he would not let the defendant "get burned" – suggesting that the accomplice had committed the murder, not the defendant. *Id*. at 732. The letter refers to an earlier letter written by the defendant to the accomplice. *Id*. On re-direct, the State introduced, over objection, the earlier letter in which the defendant urged the accomplice to not cooperate with the police, which placed the "burned" comment in a significantly different light.

On appeal, the defendant argued that the court erred when it permitted the State to admit into evidence his letter to his accomplice because the State failed to disclose the letter during pretrial discovery. The Court held that the there was no discovery violation because the letter was not a statement that the State "intended to use at trial." *White*, 300 Md. at 733. Instead, the "relevance of the letter arose fortuitously after the State had concluded its direct and redirect examination" of the accomplice. *Id*.

White involved a document whose relevance could not have been reasonably predicted until recross-examination, for its relevance, as the Court held, arose "fortuitously" and not predictably. In contrast, the document in *Thomas*, and the receipt in our case, arose directly from direct examination and defense counsel could have reasonably predicted its use at trial. Under the circumstances presented, we are persuaded the trial court acted within its discretion when it refused to allow appellant to use the receipt during cross-examination because it was not provided during discovery. *See Fontaine*, *supra* (stating that an abuse of

discretion occurs where "no reasonable person would take the view adopted by the [trial] court.")(quotation marks and citations omitted)(brackets in original).

B. Cross-examination of Giles about his interaction with the bondsman.

Appellant also argues that the trial court erred in refusing to allow him to cross-examine Giles about his interaction with the bondsman. Appellant argues that the court's restriction "severely prejudiced" him because he was unable to challenge Giles's testimony that "he gave all $380 to" appellant. The State argues that because the trial court properly excluded the receipt as a discovery sanction, the court properly limited appellant's inquiry into Giles's interaction with the bondsman. The State argues that without the receipt, appellant lacked a "good-faith" basis to contest Giles's testimony about his interaction with the bondsman. We agree with the State that the trial court did not err. Even if it did, however, we find the error harmless.

The harmless error doctrine provides:

> We conclude that when an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of — whether erroneously admitted or excluded — may have contributed to the rendition of the guilty verdict.

Dorsey v. State, 276 Md. 638, 659 (1976)(footnote omitted). *See also Bellamy v. State*, 403 Md. 308, 332 (2008)("To say that an error did not contribute to the verdict is, rather, to find

that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record.")(quotation marks and citations omitted).

Regardless of whether or not Giles gave the bondsman $20 for the receipt, appellant has never argued or suggested that the bondsman gave Giles heroin or was involved in the heroin buy in any way. Rather, appellant's argument focuses on the possibility that not "all" the money went to appellant. However, it is not necessary to prove that Giles paid the correct amount of money or gave appellant all the money he had. *Cf. Hignut v. State*, 17 Md. App. 399, 403-06 (1973)(culpability for distribution arises even if drugs are given away for free). There was no contradiction between the testimony of the four witnesses (Giles and the three police officers) that appellant's girlfriend handed Giles a grocery bag containing heroin and Giles gave appellant money. Giles's interaction with the bondsman shed no light on the drug transaction. Accordingly, even if the trial court had erred, which we do not believe that it did, any error was harmless beyond a reasonable doubt.

II.

Lastly, appellant argues that the trial court erred when it refused to allow him to call the bondsman as a witness because appellant had not disclosed the witness in discovery. Appellant argues that he was not obligated to disclose the bondsman prior to trial, and even if he was obligated, the trial court's ruling was in error because the trial court failed to exercise its discretion in excluding the bondsman's testimony, failed to state its reasons for

its ruling, and the exclusion was "an inappropriately harsh sanction." The State responds that the trial court properly exercised its discretion.

"[W] exercise independent *de novo* review to determine whether a discovery violation occurred." *Cole v. State*, 378 Md. 42, 56 (2003)(quotation marks and citations omitted). Where there has been a violation, the remedy lies "within the sound discretion of the trial judge." *Id*. "Generally, unless we find that the lower court abused its discretion, we will not reverse." *Id*. (quotation marks and citation omitted). As related above, Md. Rule 4-263(e)(1) provides that the defense must disclose to the State the identity of its witnesses but "the identity and statements of a person who will be called for the sole purpose of impeaching a State's witness is not required until after the State's witness has testified at trial."

The Rule also sets forth a course of action should the discovery rules be violated:

> 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.

Md. Rule 4-263(n). *See also Evans v. State*, 304 Md. 487, 500 (1985)(the question of what sanction, if any, is to be imposed for a discovery violation, is committed to the discretion of

the trial court, and the exercise of that discretion includes evaluating whether the violation prejudiced the defendant), *cert. denied*, 478 U.S. 1010 (1986).

We agree with the State that appellant's argument that he intended to call the bondsman for the "sole purpose" of impeachment belies belief. At trial, defense counsel advised the court and the State that, in his view, evidence of the alleged hand-to-hand exchange of $20 for the receipt "blows the State's case right out of the water." When advised that he had a duty to disclose the information, defense counsel responded that the evidence was for rebuttal purposes only and that he had no duty to tell the State "what my case is[.]" We agree with the State that given defense counsel's view of the evidence, defense counsel was not likely to be satisfied with introducing the evidence for mere impeachment nor was defense counsel likely to forgo the opportunity to rehash and expand upon the assertedly compromised nature of the controlled transaction buy. Accordingly, under the circumstances we are persuaded that defense counsel had committed a discovery violation.[2]

Appellant alternatively argues that even if he had committed a discovery violation, the trial court failed to exercise its discretion in fashioning the sanction of exclusion, failed to state its reasons for the ruling, and the exclusion was an inappropriately harsh sanction. We disagree.

[2] Even if the trial court erred in finding a discovery violation, and thus erred in precluding the bail bondsman from testifying for the defense, we would find the error harmless for the reasons set out above.

There is no evidence that the trial court applied a "hard and fast rule" or made its ruling based on some predetermined position. While exclusion of a witness or evidence is disfavored, the trial court had earlier heard from the parties about defense counsel's failure to disclose the receipt and the court had remarked to defense counsel that "we don't do trial by ambush anymore[.]" It was in that context that court deemed exclusion of the bail bondsman as a witness was the best remedy. Moreover, trial courts are presumed to know the law, and there is no requirement that the court place its findings on the record in the circumstances presented. *See Samie v. State*, 181 Md. App. 59, 66 (2008).

As stated above, the imposition of a sanction rests with the "very broad" discretion of the trial court. *Cole v. State*, 378 Md. 42, 55 (2003) (quotation marks and citation omitted). In reviewing the court's exercise of its discretion, we are guided by *Taliaferro v. State*, 295 Md. 376, *cert. denied*, 461 U.S. 948 (1983). In that case, the Court of Appeals affirmed the exclusion of an alibi witness who had been disclosed, in contravention of the rules of discovery, for the first time on the last day of the trial. In explaining why the exclusion of that key witness was not an abuse of discretion under the facts of that case, the Court summarized a number of key factors to be considered by the trial judge in fashioning a sanction:

> whether the disclosure violation was technical or substantial, the timing of the ultimate disclosure, the reason, if any, for the violation, the degree of prejudice to the parties respectively offering and opposing the evidence, whether any resulting prejudice might be cured by a postponement and, if so, the overall

> desirability of a continuance. Frequently these factors overlap. They do not lend themselves to a compartmental analysis.

Taliaferro, 295 Md. at 390-91.

Looking to the *Taliaferro* factors, we fail to see any abuse of discretion. The discovery violation was not technical but substantial, defense counsel waited until mid-trial to make the disclosure, there was no legitimate reason for the violation, the State was unfairly prejudiced, and a continuance would not cure the prejudice because other witnesses had already testified. Under the circumstances we are persuaded that the trial court's decision was not an abuse of discretion.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.