Circuit Court for Calvert County
Case No. C-04-CR-18-000125

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3165

September Term, 2018

GREGORIK B. COLLINGTON

v.

STATE OF MARYLAND

Berger,
Arthur,
Eyler, James R.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Eyler, James R., J.

Filed: March 3, 2020

A jury sitting in the Circuit Court for Calvert County convicted Gregorik Collington, appellant, of possession of cocaine with intent to distribute; simple possession of cocaine; and possession of drug paraphernalia with intent to use. The court sentenced him to 6 years for possession with intent to distribute and merged the other two counts for sentencing purposes. In this appeal, appellant presents six questions for our review, which we have reordered and rephrased:

> 1. Did the trial court err by refusing to propound a "strong feelings" *voir dire* question?
>
> 2. Did the trial court err by admitting hearsay statements concerning the investigation into appellant's alleged drug activities?
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> 3. Did the trial court err by refusing to compel the State to disclose the identity of a confidential informant and the identities of undercover police officers who participated in the search of appellant's residence?
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> 4. Did the trial court err by admitting a report of the tracking of appellant's vehicle generated by an electronic monitoring device?
>
> 5. Did the trial court err in its handling of a *Batson*[1] challenge to the State's exercise of its peremptory strikes?
>
> 6. Did the trial court abuse its discretion by precluding the defense from calling witnesses as a sanction for a discovery violation?

Because the trial court refused to propound the mandatory strong feelings question requested by appellant, we shall reverse and remand for a new trial. For guidance on remand, we address questions two, three and four, which we answer in the negative. We decline to address questions five and six because neither is likely to arise on remand.

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

FACTS AND PROCEEDINGS

In late 2017 and early 2018, the Drug Enforcement Unit ("DEU") of the Calvert County Sheriff's Office investigated appellant for suspected drug dealing. Though appellant's mailing address was a house owned by his mother in Temple Hills, police believed he was residing at 12558 Santa Rosa Road in Lusby. "[S]pot checks" at that residence early in the morning and late at night confirmed that appellant was staying at that location.

In February or March 2018, DEU Detective Luis Kelly obtained a warrant permitting him to affix an "electronic monitoring device" to the Jeep Renegade registered to appellant. Detective Kelly participated in physical surveillance operations on at least three dates: March 2, March 7, and March 30, 2018. On March 2, 2018, Detective Kelly observed appellant and a white female leave the Santa Rosa Road house in the Jeep; pick up a second white female who was a known drug user; and drive to an ATM machine, which appellant then used multiple times over an 18-minute period. Appellant and the other occupants of the Jeep then traveled around Calvert County and St. Mary's County, stopping once on the shoulder of the road for less than a minute before making an abrupt U-turn. Detective Kelly characterized this observed conduct as "counter-surveillance tactics" and testified that this and other behavior he observed was consistent with a "suspected CDS dealer resupplying their supply."

On the evening of March 2, 2018, "mobile and electronic monitoring surveillance" showed that appellant made multiple trips lasting less than 10 minutes from

the Santa Rosa Road residence to residential streets in the area and back to the house again.

In the early evening on March 7, 2018, Detective Kelly observed appellant and a white female leave the Santa Rosa Road house and drive to a community center; a Wawa; and then take a circuitous route around an area of St. Mary's County that was a "known area for CDS." Officers did not follow the Jeep into a residential area, instead relying on the electronic monitoring device to track the Jeep's movements. In the neighborhood, the Jeep made "several stops which appeared to be in front of a couple residences for less than one minute." Later that night, mobile and electronic surveillance revealed multiple short trips similar to those observed on March 2, 2018.

Based upon these observations and, as we will discuss, *infra*, information supplied by confidential informants, on March 29, 2018, Detective Kelly applied for search warrants for appellant's person; the Jeep; and the Santa Rosa Road house.

On March 30, 2018, police surveilled appellant during the day and executed the search warrants that night. The warrants for appellant and the Jeep were executed after a traffic stop. Police recovered from his person two cell phones; two Independence cards, one bearing the name Jameh Freeman and one bearing the name Daniel Delahoussaye; $968 in cash; and a set of keys. One of the keys operated the Jeep and another opened the front door at the Santa Rosa Road house. From the Jeep, police recovered $2,000 in cash separated into two $1,000 folds and a third Independence card, bearing the name

James Delahoussaye. Detective Kelly testified that Daniel and James Delahoussaye are known drug users.

At the Santa Rosa Road residence, which is owned by Jennifer Gregory, DEU undercover Officer James Norton searched the back left upstairs bedroom where appellant was believed to be staying. Officer Norton located two pieces of mail in the bedroom, both addressed to appellant at his Temple Hills address. A digital scale with white powder residue on it was located inside of a pair of virtual reality goggles on a television stand in the bedroom. An electronic air freshener in an outlet in the bedroom concealed a bag containing 5.2 grams of cocaine. A box of clear plastic sandwich bags was found on the floor and $38 in cash was found inside a Play Station box. A long-sleeve t-shirt was found in the bedroom closet that matched one that appellant had been observed wearing during the police investigation.

We shall include additional facts as necessary to our resolution of the issues.

DISCUSSION

I.

Strong Feelings Question

In his proposed *voir dire*, appellant requested that the court ask the following question ("Question 24"):

> 24. There is an allegation that drugs/controlled dangerous substances are involved in this case. Does any member of the jury panel have strong feelings regarding drugs or controlled substances? If so, please rise.

The trial court did not ask Question 24 during the initial *voir dire*. Defense counsel excepted to the court's failure to ask Question 24, and other questions she had requested. The trial judge ruled that Question 24 was unnecessary because the court already had "asked about the strong feelings with the drug question." The court apparently was referring to a question asking if any prospective juror or an immediate family member had been a victim of, a witness to, or charged with a serious crime, or "suffered from an addiction to drugs, whether prescribed or not." After the court made that ruling, defense counsel reiterated her exception to the court's refusal to ask Question 24 (and other questions).

The Court of Appeals has held that a trial court must ask a "strong feelings" question if one is requested. *See Pearson v. State*, 437 Md. 350, 360 (2014) ("we hold that, on request, a trial court must ask during *voir dire*: 'Do any of you have strong feelings about [the crime with which the defendant is charged]?'"); *State v. Shim*, 418 Md. 37, 54 (2011) ("When requested by a defendant, and regardless of the crime, the court should ask the general question, 'Does any member of the jury panel have such strong feelings about [the charges in this case] that it would be difficult for you to fairly and impartially weigh the facts.'") Here appellant requested a strong feelings question and excepted twice to the trial court's refusal to ask the question. The question asked by the court pertaining to prospective jurors' experience with drug addiction plainly did not address the same source of potential bias as the strong feelings question. The trial court abused its discretion by failing to make the mandatory inquiry and, as the State concedes,

this is reversible error. *See Moore v. State*, 412 Md. 635, 666-68 (2010) (court's abuse of discretion in failing to ask a mandatory requested *voir dire* question cannot be harmless error).

II.

Hearsay Evidence

Appellant contends the trial court erred by permitting Detective Kelly to testify to inadmissible hearsay statements concerning the police investigation into appellant prior to the execution of the search warrants. He points to the following exchange from the beginning of Detective Kelly's direct examination:

[PROSECUTOR]: What was the nature of your investigation?

[DETECTIVE KELLY]: We had information that he was selling CDS.

[DEFENSE COUNSEL]: Objection

THE COURT: Overruled.

[DEFENSE COUNSEL]: This is a different basis.

THE COURT: Basis?

[DEFENSE COUNSEL]: Hearsay.

THE COURT: It's the nature of the investigation. Overruled.

We conclude that Detective Kelly's statement that he had "information that [appellant] was selling CDS" was not offered for its truth, but to show why the police

began surveilling appellant. Accordingly, it was not hearsay and the court did not err by admitting it. [2]

III.

Identities of a Confidential Informant and Undercover Officers

Appellant contends the trial court erred by denying his pre-trial motion to compel the State to disclose the identity of a confidential informant and his motion made during trial to compel a State's witness to identify police officers who participated in the search of the Santa Rosa Road residence. We address each contention in turn.

A. Identity of Confidential Informant

Appellant filed a pre-trial motion to suppress the fruits of the searches of his person, vehicle, and the Santa Rosa Road residence, and for the State to disclose the identity of a confidential informant referenced in the warrant affidavits. Detective Kelly was the affiant on all three warrant applications and the statements of probable cause were identical. He averred that the DEU received "multiple tips" that appellant was

[2] Appellant further contends that, following this exchange, Detective Kelly was twice permitted, over objection, to testify to additional hearsay statements concerning the surveillance operations. As the State points out in its brief, defense counsel made specific objections to this testimony and did not specify hearsay as a basis for either objection. *See DeLeon v. State*, 407 Md. 16, 25 (2008) (objection "loses its status as a general [objection]" if the objector "voluntarily offers specific reasons for objecting to certain evidence") (citation omitted). Because appellant specified non-hearsay grounds for objecting to Detective Kelly's subsequent testimony, we decline to consider the argument on appeal that it was inadmissible hearsay. *See* Rule 8-131(a) ("[o]rdinarily, the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court").

selling heroin and cocaine from the Santa Rosa Road house. After multiple confidential informants known to members of the DEU made controlled purchases of heroin and cocaine from appellant, the DEU successfully applied for the electronic monitoring search warrant. Three pages of the affidavit detail the surveillance of appellant on March 2 and March 7, 2018 discussed, *supra*. Detective Kelly averred that appellant's conduct on March 2, 2018 was "consistent with a CDS re-up," specifically the multiple ATM transactions, the presence of a female passenger, the use of "indirect roadways to their destinations," and a stop on the shoulder of the road "to see if any vehicles are following them." The short trips made by appellant that night were consistent with appellant making sales with his replenished supply. Detective Kelly further averred that appellant's activity on March 7, 2018 was consistent with a "CDS re-up" and his multiple short trips to and from the Santa Rosa Road house later that night were consistent with "CDS transactions."

The affidavit then described in detail a controlled buy of cocaine by a "past proven reliable confidential informant"[3] ("the CI") on a date between March 1 and March 15, 2018. The CI met DEU officers at a predetermined location in Lusby; was searched and had his vehicle searched; was provided with cash; and was physically surveilled going to a predetermined meetup spot. Meanwhile, appellant was being physically surveilled and

[3] Though the affidavit refers to multiple confidential informants, appellant only sought to compel the State to identify the CI who engaged in the controlled buy that was described in a detailed fashion.

monitored using the electronic monitoring device. He drove in the Jeep to the meetup spot. At that location, the CI was observed making contact with the driver. After 30-40 second, the Jeep left and returned to the Santa Rosa Road house. The CI then met the DEU officers at another location and turned over to them an unknown quantity of cocaine.

Appellant moved to compel the State to identify the CI. The trial court denied the motion, ruling as follows:

> Mr. Collington is not charged with one offense that is directly related to anything involving the sale of alleged narcotics to the [CI]. He is not a witness here. The [CI] plays a role in that he is part of the probable cause for the search warrant, but the defendant in this case is charged with possession with intent to distribute, possession of not marijuana, possession of paraphernalia. He is not charged with the direct sale of any narcotics or drugs of any sort to the [CI]. The case law is clear on that issue. The State does not need to disclose the [CI], so I will deny that motion as well.

Consistent with the State's representation at the motions hearing, no evidence of any controlled buys was introduced at the trial. The State relied instead upon the same observations made during DEU surveillance of appellant and upon the evidence seized on March 30, 2018 pursuant to the warrants.

Appellant contends that the motions court erred by not compelling disclosure because the CI's "activities were at the heart of the probable cause in the affidavits" and that absent the information about the controlled buy, the affidavits "consist largely of highly circumstantial window-dressing[.]"

The privilege to withhold the identity of a confidential informant is well-established. *Warrick v. State*, 326 Md. 696, 698-99 (1992). As the Supreme Court held in

Roviaro v. United States, 353 U.S. 53, 59 (1957), its purpose is "to further and protect the public interest in effective law enforcement." Nevertheless, the privilege must yield if "'the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause[.]'" *Warrick*, 326 Md. at 699 (quoting *Roviaro*, 353 U.S. at 60-61). Thus, a court must "balance the public interest in protecting the flow of information against the individual's right to prepare a defense." *Id*. at 700.

Ordinarily, when the "informer is a mere 'tipster,' who supplied a lead to law enforcement officers but is not present at the crime," the State may rely upon the privilege and avoid disclosure. *Id*. at 701. In *Edwards v. State*, 350 Md. 433, 444 (1998), however, the Court of Appeals recognized that the "participant/tipster distinction is not necessarily controlling" when an informant "supplied material information in support of the probable cause used to obtain a warrant[.]" Thus, when "the defense . . . rest[s] on a showing that critical evidence was obtained in the absence of probable cause . . . and the determination of that issue depends principally on the reliability of an informant or the veracity of an affiant's assertions of what an informant said or did, the balance may have to be struck in favor of disclosure." *Id*. at 445. In such a case, the court must assess whether the informant supplied the basis for probable cause or whether there was "substantial independent evidence" corroborating the information supplied by the confidential informant. *Id*. at 446 (citation omitted). "In a close case . . . an *in camera*

hearing may be necessary" to permit the court to interview the informant and determine if disclosure is appropriate. *Id*. at 446-47.

We return to the case at bar. In ruling upon appellant's motion, the motions court mistakenly reasoned that disclosure of the CI's identity never would be required if he was not a participant in the crimes charged. Nevertheless, because the record is clear that the warrant application included "substantial independent evidence" supplying probable cause for the issuance of the warrants, the court's ultimate ruling that disclosure of the identity of the CI was not required was not in error.

The surveillance of appellant on March 2 and March 7, 2018 revealed that he traveled around Calvert County and St. Mary's County making repeated use of an ATM machine; making a U-turn in the middle of the road; using indirect and circuitous routes; and making multiple, short trips to residential areas from his home late at night. Detective Kelly averred based upon his training and experience that this behavior was consistent with the distribution of narcotics. Further, the police did not rely upon an uncorroborated tip from the CI, but rather surveilled the entire controlled-buy operation and observed appellant driving to a predetermined location for a very brief meeting with the CI consistent with a drug transaction. There was ample evidence corroborating the information provided by the CI and independently supporting the issuance of the search warrants. Under the circumstances, the motions court did not err by denying the motion to disclose.

B. Identity of Undercover Officers

Multiple officers from the DEU participated in the search of the Santa Rosa Road house. The State called two of those officers at trial: Detective Norton, who, as discussed, searched the back bedroom where appellant was believed to be staying and located all the evidence discussed, *supra*, and Detective Kelly, the lead investigator, who collected all the evidence. At the time of the search, Detectives Norton and Kelly both were working undercover for DEU and the trial judge arranged for them to testify from a position that would permit counsel, appellant, and the jurors to observe them, while blocking them from view from any members of the public who were in the courtroom.

On cross-examination, Detective Kelly confirmed that he had assigned officers to search particular rooms in the house. Defense counsel asked Detective Kelly to provide the names of the officers assigned to search the kitchen, the living room and the bathroom. Detective Kelly could not recall the names of the officers who searched the kitchen and the living room and questioned whether he was permitted to name the officer who searched the bathroom because he was working undercover. Defense counsel reiterated her request for the name of the officer and the State objected.

At a bench conference, the State asserted that, in discovery, it had divulged Detective Norton's name because he located all the evidence being introduced at trial and Detective Kelly's name because he had seized all the evidence and was the lead investigator on the case**.** The State "did not disclose the names of officers who were not going to be called by the State because they searched rooms from which no drugs were

recovered and no evidence against Mr. Collington was recovered[.]" The court inquired as to the relevance of the names of the other officers. Defense counsel responded that items observed in other areas of the house, but not seized, may have been exculpatory and that she had a right to know the identities of those officers so that she could determine whether to call them in her case. Specifically, part of the defense theory was that the cash seized from appellant's car was money he earned as a tattoo artist and defense counsel argued that evidence that police observed tattoo needles and other equipment in the house was relevant and exculpatory.

The court framed the issue as a discovery dispute:

> [T]his case has been going on for several months. You have gotten the State's discovery. You know that this officer was the lead detective, and Detective Norton seized the items in the bedroom, and that there were other items taken. If you felt that they, the State, was not complying with your command for discovery, then you should have filed some motion to compel saying I want the names of each and every officer that was on this scene. That's what you are –
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> ***
>
> asking this officer to do now, and you didn't do it.

Defense counsel explained that she was not aware that there were officers who participated in the search of the Santa Rosa Road house whose names were not provided to her during discovery until Detective Kelly began testifying. She then moved on to another issue and, when the court attempted to revisit the issue, advised the court that she was "done with the . . . issue."

Though we agree with the State that by moving on without requesting a ruling from the court, appellant failed to preserve this issue, we nevertheless briefly address it for guidance on remand. The parties cite no Maryland cases addressing the propriety of concealing the identities of undercover police officers involved in the investigation of a criminal matter and our research has revealed none. Both parties rely upon the confidential informant cases discussed above and we agree that that framework is appropriate. Applying the *Roviaro* balancing test on this record, we would hold that appellant did not make a showing that disclosure of the undercover officers' identities was necessary to ensure his right to a fair trial. On remand, if appellant moves to compel the State to disclose the names of the officers who participated in the search of the Santa Rosa Road house and can satisfy that test, the court may rule appropriately.

IV.

Appellant contends the trial court erred by admitting into evidence a redacted electronic surveillance report showing the movements of the Jeep on March 2 and 7, 2018, because the State failed to properly authenticate it.

As mentioned, Detective Kelly testified about his observations of appellant on March 2 and 7, 2018, and about movements captured by the electronic monitoring device affixed to the Jeep. During cross-examination of Detective Kelly, defense counsel questioned him about the number of stops made and the specific residential addresses where the Jeep stopped on March 7, 2018. Detective Kelly responded that "it's all in the electronic monitoring data."

On redirect examination, the prosecutor asked Detective Kelly if "the electronic monitoring that [he] obtained the authorization for in the course of this investigation . . . provide[d] a report that confirmed [his] observations of the traffic patterns of the defendant's vehicle during the course of the investigation?" He replied that it did. The State sought to admit the electronic monitoring data report into evidence. At a bench conference, the prosecutor explained that the report detailed the "date, time, length of stop, address . . . for each day of the [month-long] investigation." The State agreed to cull the report to just the three dates at issue: March 2, March 7, and March 30, 2018. After a printed version of the report covering just those dates was provided to defense counsel, she objected on authentication grounds, arguing: "I don't know who created it. I don't know where – I don't know whether or not this witness is contemporaneously looking at the report as it is spitting out somewhere. I don't know how it works."

The State responded that she expected Detective Kelly would testify that

> they have a website address that they have a password that they log in to connect to their -- the records of their individual device. The report is in a PDF format that is generated and printed out in accordance with the information that is contained within that GPS device that is used for surveillance. And that PDF report shows the location in paper format of the . . . vehicle location while that electronic monitoring device was attached, providing corroboration for the witness's testimony, unlike the implication from defense counsel that we have, quote, only his word for it.

Over defense counsel's objection, the court admitted the report for those three dates.

On appeal, appellant contends that the report was not properly authenticated because Detective Kelly did not explain "how the device worked, in the sense of the

science or technology explaining how a chunk of metal attached to a car's bumper ultimately produces a printed document which accurately tracks the travels of that vehicle." We disagree.

Authentication is a "condition precedent to admissibility" and may be "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Md. Rule 5-901(a). "The bar for authentication of evidence is not particularly high." *Sublet v. State*, 442 Md. 632, 666 (2015) (cleaned up). Here, Detective Kelly testified that the report was an electronically generated printout of the data being collected by the GPS monitoring device affixed to appellant's Jeep. He further testified that the report accurately reflected movements of the Jeep that he personally observed on the days in question.[4] This was evidence authenticating the report. *See* Md. Rule 5-901(b)(9) ("Evidence describing a process or system used to produce the proffered exhibit or testimony and showing that the process or system produces an accurate result.").

JUDGMENTS OF THE CIRCUIT COURT FOR CALVERT COUNTY REVERSED AND CASE REMANDED FOR A NEW TRIAL. COSTS TO BE PAID BY CALVERT COUNTY.

[4] To be sure, there also was data recorded in the report that Detective Kelly had not personally observed, such as movements of the Jeep late at night on March 2, 2018 and March 7, 2018, but this goes to weight, not admissibility. *See Sublet v. State*, 442 Md. 632, 668-69 (2015) (authentication is an admissibility issue, whereas the issue of the reliability of the evidence is an issue for the jury).