Circuit Court for Baltimore City
Case No. 122118034

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1769

September Term, 2022

TRACY D. RIVERS II

v.

STATE OF MARYLAND

Tang,
Albright,
Eyler, Deborah S.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: November 13, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Tracy D. Rivers II, appellant, was charged with first-degree assault, second-degree assault, and false imprisonment. After trial, a jury acquitted appellant of first-degree assault and convicted him of the remaining two offenses. The Circuit Court for Baltimore City sentenced appellant to 10 years of incarceration with all but 7 years suspended for second-degree assault, and 10 years of incarceration with all but 5 years suspended for false imprisonment to run concurrent with the term imposed on the other count. On appeal, appellant raises two questions that we have rephrased for clarity[1]:

I. Did the court err in denying appellant's motion to exclude a photograph despite an alleged discovery violation?

II. Did the court rely on impermissible considerations when imposing its sentence?

For the reasons that follow, we shall affirm the circuit court's judgments.

FACTS

Appellant and Qunyezjcia Meredith were romantic partners and shared a home in Baltimore City. On January 24, 2022, appellant tried to get Ms. Meredith to see something out of the window, but she was unable to see what appellant was describing. Appellant

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[1] In his brief, appellant raised the following questions for our review:

1. Where the State provided defense counsel on the day of trial with a picture it intended to use at trial of the complainant that counsel had not seen before, did the circuit court err in (a) failing to make a finding as to whether a discovery violation occurred and (b) allowing the State to admit the photograph into evidence?

2. Was the circuit court's sentence – the maximum available for the crime, above what the State and victim requested, and well beyond the guidelines – motivated by impermissible considerations?

accused Ms. Meredith of lying, forced her to stand outside the house, and told her that he was going to "beat" her.

When Ms. Meredith returned inside the house, appellant grabbed her by the neck and pushed her against the kitchen counter. Appellant then restrained Ms. Meredith on the floor. She tried to free herself from appellant's grip, but appellant straddled her, held her hands down, and "continued to choke" her until she momentarily blacked out. Ms. Meredith managed to run upstairs, but appellant chased her while saying that "he's not done" with her. Appellant kicked and punched Ms. Meredith multiple times around the head, side, back, and "all throughout" her body; placed her in a headlock; poured a bottle of mouth wash over her head; and did "like anything, just anything, everything." The attack lasted for "some hours" in different areas of the house as Ms. Meredith tried to "get away." It ended when appellant elbowed Ms. Meredith in the back and heard her rib audibly break, to which he remarked, "Um. I heard that. That might have been broke."

Ms. Meredith did not seek immediate medical attention because she was afraid and embarrassed. She also thought that she "just had some bruises" that would heal, "as [they] had before." She attempted to work the next day but eventually had appellant take her to the hospital where she was diagnosed with three broken ribs. Ms. Meredith was afraid to tell the hospital staff about how she was injured, so she lied and said she had slipped on a piece of laundry and fallen down the stairs. She also denied having any domestic violence concerns. The diagnosis and her explanation were noted in the hospital records that were admitted into evidence.

Days later, Ms. Meredith took a photograph of her face, which depicted a red spot in her right eye. According to Ms. Meredith, the photograph documented certain injuries—"blackness under [her] eyes" and a "busted blood vessel in [her] eye"—that became apparent after her hospital visit. The photograph, the subject of the first issue on appeal, was admitted at trial over a defense objection.

Months later, in April 2022, Ms. Meredith reported the incident to police and applied for charges against appellant. The "reason why it took [her] so long to file the charge is because [she] was afraid."

At trial, Ms. Meredith testified as the State's sole witness. Appellant elected not to testify. As to first-degree assault, the court instructed the jury on strangulation, for which the jury acquitted appellant.[2] The jury convicted appellant of second-degree assault and false imprisonment.

DISCUSSION

I.

Denial of Motion to Exclude Photograph

Before opening statements, appellant sought to exclude the photograph because defense counsel had only seen it for the first time when the prosecutor showed it to him moments earlier. As detailed below, the circuit court did not make a finding of a discovery violation by the State, and it proceeded to deny the motion to exclude. On appeal, appellant

[2] The court instructed the jury that to convict appellant of first-degree assault, the State was required to prove that appellant knowingly applied pressure to Ms. Meredith's throat or neck, intending to impede or obstruct her normal breathing or blood circulation, and that his actions were not legally justified.

argues that the court erred by failing to determine whether a discovery violation occurred, rendering this Court incapable of effectively reviewing the ruling on the motion to exclude. In any event, he contends, the court abused its discretion in allowing the State to use the photograph at trial.

A. Proceeding Below

On April 28, 2022, the State filed an indictment against appellant, and trial was scheduled for November 15, 2022. On August 11, the Office of the Public Defender, through Assistant Public Defender Judit Otvos, entered its appearance in the case. The entry of appearance included various discovery requests to include the opportunity to inspect, copy, and photograph all documents, photographs, or other tangible things that the State intended to use at a hearing or at trial.

On August 26, the State filed its initial disclosures, advising that the defense could inspect such things including "[m]edical records and/or business records" and "DVD-Rom(s), CD-Rom(s), or other electronic or audio files" that the State intended to use at trial. The State's initial disclosures contained an index of the information that it had produced: a copy of redacted medical records, redacted interview notes, the indictment, the charging packet, Ms. Meredith's complaint, and body worn camera videos that were later determined to be unrelated to the case. The photograph was not listed in the State's index, but according to the prosecutor, he sent it to Ms. Otvos before October 4. The State had also sent an offer sheet for plea negotiations that mentioned the photograph and described the hemorrhaging in Ms. Meredith's right eye.

At some point, a different Assistant Public Defender from the same office, Christopher O'Meara, took over the case. Mr. O'Meara received Ms. Otvos's case file containing medical records and the State's initial disclosures, but the file apparently did not include the photograph. Mr. O'Meara acknowledged that "there were issues between what was sent to Ms. Otvos and what was sent to [him] and what made it through the transfer." On October 6, Mr. O'Meara contacted the prosecutor to discuss "enumerated items that [he] thought [he] was missing" and things the prosecutor intended to use at trial. During the discussion, according to Mr. O'Meara, the prosecutor indicated that he intended to use "solely the medical records" at trial. The prosecutor did not recall the details of the discussion "word for word" but acknowledged telling Mr. O'Meara that the State "was going to rely on the medical records[.]"

Trial commenced on November 15. After the jury was selected but before opening statements, the prosecutor showed Mr. O'Meara the photograph the State intended to use at trial. Mr. O'Meara informed the court that the prosecutor had "just shown" him the photograph, and he sought to exclude the State's use of it because he had not seen it before. Mr. O'Meara described the discovery issues recounted above—the transfer of the case file, its contents, and the subsequent discussion with the prosecutor about missing discovery and things the State intended to use at trial. The prosecutor proffered to the court that he "definitely" sent the photograph to Ms. Otvos before October 4. Whether it was forwarded to Mr. O'Meara was unknown.

The court asked whether appellant had suffered prejudice. As detailed later, Mr. O'Meara responded that he would have "prepared differently" the opening statement,

closing argument, and cross-examination. Ultimately, the court denied the motion to exclude the photograph, explaining that the defense had been aware of the photograph but did not seek to obtain it:

> THE COURT: Well, let me say this, and this is my theory of this, because there is no way for me to at this point say "Oh, Mr. O'M[e]ara is telling me the truth, or [the prosecutor] is telling me the truth."
>
> I have to look at it from the point of the Maryland Rules. If you were aware from the offer sheet that there was a photograph, . . . you have in your arsenal the right to file a Motion to Compel, and get that before a judge to force [the State] to turn over a photograph, or to say, on the record, that [the State] doesn't have any photographs, . . . and then if, in fact, [the State] does have it, then we get to sanctions.
>
> But, now, at the 11th hour before trial, I can't sit here and say who's telling me that they did turn it over or they didn't turn it over. [The prosecutor] says he sent [the photograph] to Ms. Otvos. Ms. Otvos hopefully forwarded [it] to [Mr. O'Meara]. I don't know if she did or she didn't. And if she didn't, that's not [the prosecutor's] fault. That's Ms. Otvos's fault.
>
> * * *
>
> I'm not going to make a [d]iscovery call right here. You know, when people switch these cases, I have no idea as to what it is you all are doing, because if you don't use the Maryland Rules to get what you're entitled to, or to get a straight answer as to what does or does not exist by way [of] [d]iscovery, I cannot do anything about it on the day of trial. I cannot.
>
> * * *
>
> I know I read it in the – and it says here, on the offer sheet, photos were taken of petechial hemorrhaging in the right eye. It says it there. You didn't just get it, meaning the sense that there was a photograph, and if you didn't compel [the State] to turn that photograph over, that's on you. I don't know what else to do about it.
>
> It's in the offer sheet. So, you all got to learn to use the Maryland Rules in your favor, because that would have gotten it to you, or at least would have gotten you to me today to say that if the Judge told [the State] to turn it over and [it] didn't, then [the State] won't be using it today.

So, I'm not going to grant your Motion. It's going to be denied.

B. Standard of Review

In *Alarcon-Ozoria v. State*, 477 Md. 75 (2021), the Supreme Court of Maryland summarized the applicable standard of review as follows:

> The circuit court is vested with broad discretion in administering discovery. Therefore, this Court reviews for abuse of discretion a circuit court's decision to impose, or not impose a sanction for a discovery violation.
>
> If the circuit court made no specific finding as a matter of law that the State violated the discovery rule, we exercise independent *de novo* review to determine whether a discovery violation occurred.
>
> We review any discovery violation for harmless error. If the trial judge erred because the State did in fact violate the discovery rule, we consider the prejudice to the defendant in evaluating whether such error was harmless.

Id. at 90–91 (cleaned up).

C. Maryland Rule 4-263

Discovery in criminal cases is governed by Maryland Rule 4-263. "The main objective of the discovery rule is to assist the defendant in preparing his defense, and to protect him from surprise." *Alarcon-Ozoria*, 477 Md. at 101 (citations omitted). To that end, the Rule requires the State to "provide to the defense" "[w]ithout the necessity of a request" the "opportunity to inspect, copy, and photograph all documents, . . . photographs, or other tangible things" that the State "intends to use at a hearing or at trial[.]" Md. Rule 4-263(d)(9). The State must make the disclosure within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant under Rule 4-213(c). Md. Rule 4-263(h)(1).

The Rule further provides that a motion to compel based on a failure to provide discovery timely "shall" be filed within 10 days after the date the discovery was due. Md. Rule 4-263(i)(1). A motion to compel based on "inadequate discovery" "shall" be filed within 10 days after the discovery was received. *Id*. The motion "shall specifically describe the information or material that has not been provided." Md. Rule 4-263(i)(2).

"If at any time during the proceedings the court finds that a party has failed to comply with" Rule 4-263 or an order issued by the court, 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." Md. Rule 4-263(n). "[I]n fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules." *Thomas v. State*, 397 Md. 557, 571 (2007). "Exclusion of evidence for a discovery violation is not a favored sanction and is one of the most drastic measures that can be imposed." *Id*. at 572.

D. Analysis

We need not resolve whether the court erred by failing to determine whether a discovery violation occurred. Even if the court determined that there was no discovery violation, and such determination was in error, the admission of the photograph was harmless beyond a reasonable doubt. The record is sufficiently developed for us to assess such error, notwithstanding the court's decision not to make a "discovery call."

In *Dorsey v. State*, 276 Md. 638 (1976), the Supreme Court of Maryland explained the harmless error standard:

> 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.

Id. at 659. The erroneous admission of evidence "must be prejudicial to warrant reversible error." *Urbanski v. State*, 256 Md. App. 414, 439 (2022). "[A] discovery violation that unfairly surprises a defendant and prejudices the ability of a defendant to mount an adequate defense generally cannot be construed as harmless error." *Alarcon-Ozoria*, 477 Md. at 108 (cleaned up).

In the proceeding below, the court viewed the photograph, observing that it depicted "a red spot in [Ms. Meredith's] eye." As to whether appellant suffered any prejudice in seeing the photograph for the first time before opening statements, the court inquired as follows:

> THE COURT: What's the prejudice to you at this point? [The prosecutor has] given you the photograph. I mean, is there something that you would have liked to have done had you had the photograph a couple of weeks ago, or whatever?
>
> [DEFENSE COUNSEL]: Your Honor, I think it goes to the strength of the case, and that [I] would have prepared differently, the theory of the case—
>
> THE COURT: How would that—how would you have—I mean, I'm serious about, there's a photograph. The photograph is a photograph. So, what would you—what can you tell me how you were prejudice[d], and not just

> generally, that how it could have prejudiced you, but how did it prejudice you in preparing for this case?
>
> [DEFENSE COUNSEL]: Questions for cross-examination would have been different, opening statement would have been different, closing statement, Your Honor. It's a piece of real evidence in a case where the reason [sic] evidence is slight.
>
> THE COURT: So, in your opening statement, were you going to mention that there was a photograph?
>
> [DEFENSE COUNSEL]: I was going to mention the lack of real evidence, yes, Your Honor.

On appeal, appellant argues that he was prejudiced under Rule 4-263 because the use of the photograph resulted in undue surprise, affected his ability to prepare his defense, and substantially influenced the jury. *See Thomas*, 397 Md. at 574. First, we are not persuaded that use of the photograph resulted in undue surprise. Although defense counsel had not personally viewed the photograph before trial, nothing suggested that appellant, through prior counsel, was unaware of it. Indeed, Mr. O'Meara acknowledged that he was aware of the photograph as it was previously mentioned in the State's offer sheet.

Second, appellant contends that the photograph "affected his theory of the case" and preparation for trial. He suggests that having the photograph earlier "could have aided [his] investigation, plea negotiations, and the development of his opening statement, closing argument, and cross examination of [Ms. Meredith]." These general conclusory assertions, however, do not address how appellant "lack[ed] adequate opportunity to prepare a defense." *Thomas*, 397 Md. at 574. Appellant does not explain how his investigation, plea negotiations, opening/closing remarks, and cross-examination were impaired due to the State's purported delay in producing the photograph.

Despite his claim of prejudice, the record demonstrates that appellant effectively used the photograph to his tactical advantage. In his opening statement, appellant through counsel posited that the "real evidence" (*i.e.*, medical records) would not "match" Ms. Meredith's "story," a point that he reiterated in closing argument. The defense argued to the jury that Ms. Meredith's hospital records did not note any head injury, loss of consciousness, change of vision, or eye pain. The photograph, the defense argued, did not show the bruising as Ms. Meredith claimed, nor did the hospital records note any. Defense counsel then used the existence of the photograph to underscore the lack of of photographic documentation of injuries to other parts of her body. He suggested that, because there were no photographs of her neck, Ms. Meredith's testimony about the strangulation was not credible:

> [DEFENSE COUNSEL]: That picture raises another question, [Ms. Meredith] told you she took that picture because she wanted to prove her injuries. She wanted to prove what happened. What don't we see? Pictures of any of the other multiple bruises all over her body that she said she had.
>
> No bruising around the neck, which there would certainly be if someone was choked to the point of unconsciousness. Yet we don't have those pictures. They don't exist.

See, e.g., Gross v. State, 481 Md. 233, 268–70 (2022) (concluding that admission of video was harmless error, considering, in part, the defense's affirmative use of it).

Third, appellant contends that "[b]ecause of the graphic nature of the photograph, [its admission] likely substantially influenced the jury when it deliberated on the assault charges." His characterization of the "graphic nature" of the photograph, however, contradicts the position he took at trial. Defense counsel argued to the jury that the

photograph showed very minor injuries, undermining Ms. Meredith's testimony that she had been severely beaten ("[T]ake a good look at that picture. Tell me if you think that is significant bruising from someone being punched repeatedly in the face.").

The jury convicted appellant of second-degree assault which, as the court instructed, is offensive physical contact with another person. The jury heard testimony about the hours long attack Ms. Meredith endured including multiple strikes "all throughout" her body and the audible breaking of her rib. And the medical records supported her testimony that appellant had broken three of her ribs. The evidence abounded with assaultive acts—the breaking of the ribs being the most compelling and graphic—from which the jury could have found appellant guilty of second-degree assault without the photograph of Ms. Meredith's face. We have no doubt that, had the court excluded the photograph, the verdict would have been the same.

Our review of the record convinces us beyond a reasonable doubt that the admission of the photograph was "unimportant in relation to everything else the jury considered" on whether appellant committed second-degree assault. *Vigna v. State*, 470 Md. 418, 453 (2020) (citation omitted). The court's denial of the motion to exclude the photograph was harmless beyond a reasonable doubt.

II.

Sentencing

Appellant argues that the circuit court's consideration of Ms. Meredith's strangulation, which supported the first degree-assault charge for which he was acquitted, was impermissible. Based on our reading of the entire sentencing transcript, however, the

rationale for the court's sentence was based on appellant's conviction for second-degree assault—the breaking of Ms. Meredith's ribs, and not the strangulation.[3]

A. Proceeding Below

After the jury convicted appellant of second-degree assault and false imprisonment, the court proceeded to sentencing. According to the State, the guidelines for second-degree assault were "probation to one year," and "probation, one year" for false imprisonment. The State asked the court to sentence appellant over the guidelines for a total sentence of ten years of imprisonment with five years suspended, and five years of supervised probation.

In her victim impact statement, Ms. Meredith asked the court to punish appellant to the fullest extent, explaining that she was not fully healed from her broken ribs, the injuries have impacted her daily tasks including work, and she has not yet healed emotionally. Ms. Meredith's mother also provided a statement, echoing most of Ms. Meredith's remarks and adding that it "is inhumane, to strangle someone" and "to beat them for hours[.]" Apparently in response to the mother's comment about strangulation, defense counsel pointed out that "the jury came back and found that there was no strangulation in this incident[.]" He asked that the court "go along with a concurrent sentence within the guidelines for second degree assault[.]"

[3] Appellant cites out-of-state and federal cases for the purported proposition that a sentencing judge cannot consider acquitted acts when fashioning a sentence. We need not address these cases because we conclude that the court did not consider the acquitted act of strangulation that formed the basis of first-degree assault when it formulated its sentence.

The court then sentenced appellant. First, it explained the challenges that victims of domestic violence face to include difficulties in recalling the details of abuse and delayed reporting if reporting occurs at all. Then, it expressly stated that the sentence it was about to impose would not be based on strangulation because the jury acquitted appellant of first-degree assault. Rather, it considered Ms. Meredith's three broken ribs:

> THE COURT: *The jury did not find you guilty of assault in the first degree, and so I – my sentence will have nothing to do with that.*
>
> So, *let's say I can't consider whether you strangled her or you didn't, but you broke three ribs*. Imagine the force that it takes[.] . . . I see that Ms. Meredith is not a large person, but still, *to break a bone, to break three bones*. What does that say about the character of the man, of the person that committed *this assault*. . . . It mattered to me that this particular woman, who you thought enough of at the time to live with, that she suffered at your hands. That's what matters to me. She suffered at your hands.
>
> * * *
>
> [Y]ou've been found guilty of assault in the second degree. The [c]ourt is going to sentence you to 10 years. I'm going to suspend all but seven, *because you broke three ribs*. You will be on probation to this [c]ourt after you have served that period of time, for three years.

(Emphasis added). For false imprisonment, the court sentenced appellant to ten years, suspend all but five years, to run concurrent with the sentence for the other count.

After defense counsel advised appellant of his post-trial rights, the court clarified an earlier point about not considering strangulation. The court noted that placing one's hands around another's neck may not rise to the level of strangulation under first-degree assault, but it could amount to second-degree assault:

> THE COURT: I had said something in error earlier, and I'm going to correct it. When I said I won't be considering the strangulation, I won't consider the first degree assault part of that. It isn't – I don't know if the jury just found

> that the assault – the strangulation did not give rise to a first degree assault, because even if you put your hands around my throat and I don't pass out, or if you put your hands around my throat and I don't get petechiae in my eye doesn't mean that it wasn't an assault. It just didn't give rise to the first degree assault.
>
> So, I do consider that, yes, that you may not have strangled her, as it says in the – as it relates to the law itself for first degree assault, but strangulation can also be second degree assault.
>
> [DEFENSE COUNSEL]: Your Honor, we did give the strangulation instruction.
>
> THE COURT: I understand that. I understand that, but I'm just saying, *I am not considering that – I'm not saying that he committed first degree assault as it relates to strangulation.*
>
> *But I also recognize that even if he put his hands around her throat and didn't add a lick of pressure on her neck, if you put your hands around my throat and I don't want your hands there, that's an offensive contact to me*. That's a harm to me. That's what it is.

(Emphasis added).

B. Analysis

In reviewing the considerations of a sentencing judge, we examine the record to determine whether the sentencing court was motivated by impermissible considerations or whether its comments might lead a reasonable person to infer that it might have been motivated by such considerations. *See Ellis v. State*, 185 Md. App. 522, 551 (2009). In fashioning a sentence, "a sentencing judge is vested with almost boundless discretion." *Anthony v. State*, 117 Md. App. 119, 130 (1997). "[T]he defendant's sentence should be premised upon both the facts and circumstances of the crime itself and the background of the individual convicted of committing the crime." *Id*. (cleaned up). "A trial

court may consider uncharged or untried offenses, or even circumstances surrounding an acquittal." *Id*. at 131.

Appellant argues that the court exceeded the guidelines and the State's recommended sentence, "because, in part, the sentencing judge believed the strangulation allegations." Based on our review of the entire sentencing transcript, we do not agree with appellant's interpretation of the court's rationale when it sentenced appellant. In announcing the sentence for second-degree assault, the court focused on the fact that appellant had broken Ms. Meredith's ribs. It explicitly stated as much when it imposed seven years of active incarceration "because [appellant] broke three ribs."

Moreover, the court clearly stated that the imposition of the sentence had "nothing to do" with first-degree assault, and it did not consider "first degree assault as it relates to strangulation." It merely clarified that strangulation-like conduct—*i.e.*, placing one's hands around another's neck without "a lick of pressure"—could be offensive contact under second-degree assault. We are not persuaded that the court was motivated by impermissible considerations when formulating the sentence.

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