UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 950

SEPTEMBER TERM, 2014

CARLTON DURBIN

v.

STATE OF MARYLAND

No. 1963

SEPTEMBER TERM, 2014

JAMAL CEASAR

v.

STATE OF MARYLAND

Eyler, Deborah, S.,
Nazarian,
Friedman,

JJ.

Opinion by Eyler, Deborah, S., J.

Filed: October 13, 2015

Appellants Jamal Ceasar and Carlton Durbin were tried together by a jury in the Circuit Court for Prince George's County. Ceasar was convicted of two counts of robbery, conspiracy to commit robbery, theft under $1,000, and theft over $1,000. He was sentenced to an aggregate term of 35 years' incarceration, all but 20 years suspended, and five years' supervised probation upon release. Durbin was convicted of two counts of armed robbery, two counts of robbery, three counts of use of a handgun in a crime of violence, first degree assault, second degree assault, conspiracy to commit armed robbery, theft under $1,000, theft over $1,000, and wearing, carrying, or transporting a handgun. He was sentenced to an aggregate term of 55 years' incarceration, all but 35 years suspended, and an additional 5 year period of supervised probation upon release.

Ceasar raises one issue for review, which we have rephrased:

> Did the circuit court err by not giving missing evidence and missing witness instructions?

Durbin raises one issue for review, which we also have rephrased:

> Did the trial court abuse its discretion by allowing the testimony of Corporal Peters?

For the reasons to follow, we shall affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

On April 11, 2013, at around 3:00 a.m., Charles Wilder ("Charles"), and Brittany Robinson drove to Charles's apartment in Suitland, Maryland. They parked and started walking to the apartment building. Three African American males, dressed in black and wearing gloves and facemasks, approached them from behind. A struggle ensued and the

three men, armed with handguns, forced Charles and Robinson into Charles's apartment. A neighbor saw the scuffle from his window and immediately called 911.

Once inside, the three men handcuffed Charles and Robinson to each other and searched the apartment. Charles's sister, Yvette Wilder ("Yvette"), was sleeping in a guest bedroom. Two of the three men entered the room, ordered her out of bed, hit her with a handgun, and demanded cash. They forced her into Charles's bedroom, asked her where Charles hid his money, hit her multiple times with what Yvette believed was a steel gun, and finally directed her to the main room of the apartment. The three men continued searching and left with an Apple iPad mini, Charles's cellular phone, his wallet with approximately $300 inside, Robinson's purse containing approximately $700, and her Apple iPhone. The robbery lasted about fifteen minutes.

As the three assailants were leaving the apartment building, Private First Class ("PFC") Stephen Italiano arrived. The men scattered. Two ran along the front of the building and the other ran to the back. PFC Italiano pursued the man who ran to the back of the building but lost sight of him after a few minutes. He went inside to assist the victims. He preserved the scene for the crime scene investigator. DNA samples and fingerprints later were obtained and submitted to the Regional Automated Fingerprint Identification System ("RAFIS").

After receiving a call from dispatch, Lieutenant David Levin drove his patrol car around the immediate area, looking for the suspects. In his rear view mirror, he saw two African American males, both wearing dark clothing and one wearing a mask. When the

men saw him they ran. Lieutenant Levin pursued the men in his vehicle, anticipating that they would run through a nearby parking area. He then saw one suspect in a grassy area, out of breath and walking slowly. He exited his patrol car, drew his weapon, ordered the man to the ground, and arrested him. The man was identified as Rodney Gordon.[1]

Soon after, Officer Marquette Turner joined in the search. In an alley, he saw a man matching the descriptions of the suspects. He chased the man across a parking lot, apprehended him, and placed him under arrest. The entire pursuit lasted approximately two minutes. The man later was identified as appellant Ceasar.

At this point a number of other officers arrived and searched the area for the third suspect. Corporal Brandon Peters, accompanied by a K-9 and several patrolmen, searched a nearby commercial parking lot. Ultimately, Corporal Peters found the third man and arrested him. That man later was identified as appellant Durbin.

Police retrieved various items that had been strewn about the immediate vicinity of the chases. They collected four handguns, a black magazine missing a plastic butt, one black plastic magazine butt, a folding knife, and several pairs of rubber gloves. A black mask and shirt as well as three cellular phones also were recovered. None of the victims' stolen items were located.

[1] Gordon was charged with numerous crimes and plead guilty to robbery with a dangerous weapon, use of a handgun during a crime of violence, and possession of a firearm with a felony conviction. He did not testify at the appellants' trial.

In the parking lot outside Charles's apartment, the officers noticed a gold 2005 Honda Accord with its engine running. The vehicle had been reported stolen six days earlier by David Johnson, who lived with the vehicle's owner. The police towed the car, suspecting it to be associated with the robbery. PFC Holmes,[2] an evidence technician ("Technician Holmes"), processed the car for evidence, obtaining several DNA and fingerprint samples. She found a wallet containing Virginia identification cards for one Brandon Sparks inside the car. Technician Holmes wrote a report about her processing of the car for evidence, which was admitted.

At trial, the State called the three victims to testify about the robbery. Each victim remembered that the robbers brandished guns and wore dark clothing and masks. Charles testified that two of the three assailants were dark skinned. He and Yvette both testified that the third assailant had light skin and dread locks. Testimony varied as to how tall the men were and whether they were wearing gloves.

The State called Jessica Charak, who was accepted, without objection, as an expert in the field of forensic serology and analysis. At the time of the robbery she was a Senior DNA Analyst with the Prince George's County Police Department. She testified that the testing she performed matched Ceasar's DNA to DNA found on two of the rubber gloves, Durbin's DNA to DNA found on another rubber glove, and Gordon's DNA to DNA on one of the magazines and yet another rubber glove.

[2] The record does not identify PFC Holmes by her full name.

PFC Italiano, Lieutenant Levin, Officer Marquette, Corporal Peters, Crime Scene Investigator Kelcey Miller, and Detective Timothy Bayes, also testified for the State. Technician Holmes was not called as a witness.

Ceasar and Durbin rested without putting on any evidence. They were convicted and sentenced, and noted timely appeals. The appeals were consolidated by order of this Court.

We shall include additional facts in our discussion of the issues.

DISCUSSION

I.

On cross examination, counsel for Ceasar questioned Detective Timothy Bayes, the lead investigator in the case, about the evidence retrieved from the Honda Accord.

> [MR. MOONEY]: Did you speak with Brandon Sparks?
>
> [DETECTIVE BAYES]: Did not.
>
> [MR. MOONEY]: Okay. Did you ever -- well, did you ever open that wallet?
>
> [DETECTIVE BAYES]: I did not.
>
> [MR. MOONEY]: You knew that the wallet existed based on the processing by [Technician Holmes] right?
>
> [DETECTIVE BAYES]: I knew [Technician Holmes] recovered a wallet, yes.
>
> [MR. MOONEY]: Did you do anything to determine whether or not Brandon Sparks' [sic] DNA was on or about that vehicle or in that vehicle?
>
> [DETECTIVE BAYES]: Did not, no.

[MR. MOONEY]: Did you speak with the owners of the vehicle to determine if they knew a Brandon Sparks?

[DETECTIVE BAYES]: In reference to Brandon Sparks, no.

[MR. MOONEY]: Was any additional investigation done related to Brandon Sparks to determine why his wallet would become of evidentiary value within a Honda Accord parked on a crime scene?

[DETECTIVE BAYES]: No.

* * *

[MR. MOONEY]: How about latent prints, were fingerprints taken from that Honda Accord as well?

[DETECTIVE BAYES]: They were.

* * *

[MR. MOONEY]: Twelve latent fingerprints taken from that Honda?

[DETECTIVE BAYES]: Correct.

[MR. MOONEY]: From various places; the door, right, exterior, passenger's window, passenger's door? All those places, right?

[DETECTIVE BAYES]: Correct.

[MR. MOONEY]: Okay. Of those 12 prints, were they tested? Were they submitted to RAFIS for analysis?

[DETECTIVE BAYES]: They were.

[MR. MOONEY]: They were. Were the results received by you?

[DETECTIVE BAYES]: They were not.

[MR. MOONEY]: They were not. Who were they received by?

[DETECTIVE BAYES]: There were no results. I know the evidence tech submitted them. They went to RAFIS.

[MR. MOONEY]: Okay. Well, you had access to the three defendants right?

[DETECTIVE BAYES]: Correct.

[MR. MOONEY]: Did you submit their prints for comparison against the prints that were lifted from the vehicle?

[DETECTIVE BAYES]: I did not, no. Did I submit their prints to RAFIS?

[MR. MOONEY]: Well, did you ask for a comparison of the 12 latent lifts that were recovered from that vehicle to the three persons who were the subject of your investigation?

[DETECTIVE BAYES]: I did not.

[MR. MOONEY]: Why were they submitted to RAFIS, these prints?

[DETECTIVE BAYES]: Standard procedure. That's where they get sent.

[MR. MOONEY]: I see. And then what, you have to request them to be analyzed?

[DETECTIVE BAYES]: Correct.

[MR. MOONEY]: And you would have to name the persons against whom you're requesting comparisons?

[DETECTIVE BAYES]: Correct.

[MR. MOONEY]: And in this case, you did not do that or you did do that?

[DETECTIVE BAYES]: I don't recall if I did or not.

[MR. MOONEY]: Is it possible that you did?

[DETECTIVE BAYES]: It's possible.

* * *

[MR. MOONEY]: Is it possible that RAFIS has conducted the fingerprint analysis, rendered a result and you just don't know what it is?

[DETECTIVE BAYES]: No. I would know what it is.

[MR. MOONEY]: Why, because they'd call you?

[DETECTIVE BAYES]: Correct.

[MR. MOONEY]: They call you if what?

[DETECTIVE BAYES]: If they got a hit off those prints.

[MR. MOONEY]: Okay. But if they didn't get a hit for either of the three individuals charged, would you get notification?

[DETECTIVE BAYES]: No.

[MR. MOONEY]: I see.

* * *

[MR. MOONEY]: Okay. Based on the discovery of somebody's wallet and all of their identifying information, license and the like, the fact that those items were left in the car and presumably never came back to be retrieved, was any additional investigation done on Brandon Sparks to determine if he was involved in this crime?

[DETECTIVE BAYES]: No.

On re-direct examination, Detective Bayes was shown the latent fingerprint examination form he submitted to RAFIS for the fingerprints obtained from the Accord, and identified it as such. The form was introduced into evidence. Detective Bayes

reiterated that, after submitting the form, he only would receive a call back from RAFIS if a hit matched one of the defendants.

As noted, Technician Holmes was not called as a witness.

Ceasar contends the circuit court erred by declining to give two jury instructions he requested: 1) a missing evidence instruction about the latent fingerprints obtained from inside the Accord and RAFIS's analysis of those prints; and 2) a missing witness instruction regarding Technician Holmes.

"We review 'a trial court's refusal or giving of a jury instruction under the abuse of discretion standard.'" *Jarrett v. State*, 220 Md. App. 571, 584 (2014) (quoting *Stabb v. State*, 423 Md. 454, 465 (2011)). Under Md. Rule 4-325(c) "The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. . . . The court need not grant a requested instruction if the matter is fairly covered by instructions actually given." "A trial court only will abuse its discretion in denying a [requested jury instruction] if 'the jury instructions, taken as a whole, [do not] sufficiently protect the defendant's rights' and 'cover adequately the issues raised by the evidence.'" *Gimble v. State*, 198 Md. App. 610, 630 (2011) (citations omitted).

In his brief, Durbin states in a footnote that he is "incorporating" Ceasar's arguments on appeal. Ceasar requested missing evidence and missing witness instructions, which the court declined to give, and objected after the court instructed the jury. After the instructions, Durbin's counsel was asked if he was satisfied with the

instructions as given; he replied, "No objection." Accordingly, the instruction issues only are preserved for review as to Ceasar.

A.

MISSING EVIDENCE INSTRUCTION

Ceasar argues that there was a "missing report" about RAFIS's analysis of the latent fingerprints lifted from the Honda Accord; that this evidence was under the State's control; and that, because the evidence against him was scant, the missing report was highly relevant. Specifically, Ceasar maintains that the fingerprint analysis would have supported his defense of lack of criminal agency.

The State counters that there was nothing to indicate that the latent fingerprints sent to RAFIS were destroyed or negligently mishandled, and there is no "missing report," just testimony by Detective Bayes that he did not hear back from RAFIS, which meant, to him, that the fingerprint analysis had not produced a "hit" on any of the defendants. The State maintains that the absence of fingerprint evidence does not negate the other evidence against Ceasar.

A missing evidence instruction is designed to "draw a jury's attention to a simple, straightforward premise: that 'one does not ordinarily withhold evidence that is beneficial to one's case.'" *Cost v. State*, 417 Md. 360, 370 (2010) (quoting *Anderson v. Litzenberg*, 115 Md. App. 549, 562 (1997)). In the criminal context, the instruction ordinarily is given when a defendant concealed or destroyed inculpatory evidence to prevent its use at trial. Although the instruction does not "require that a jury make an adverse inference in

situations involving [destruction] of evidence . . . it merely permits such an inference." *Cost*, 417 Md. at 370.

In two cases, the Court of Appeals has addressed the missing evidence instruction in the context of evidence controlled by the State. In *Patterson v. State*, 356 Md. 677 (1999), the defendant was pulled over for a routine traffic stop and detained for driving on a suspended license. Officers searched his vehicle and found a jacket containing a Ziploc baggie with thirty individually packaged bags of crack cocaine inside. The police photographed the jacket, but did not keep it.

At trial, the State introduced the photographs of the jacket into evidence. The defendant maintained that the jacket was not his. He requested a missing evidence instruction, arguing that the police were required to preserve the jacket as evidence, and had they done so he could have shown that it did not fit him and therefore it and the drugs inside it were not his. The trial court denied the instruction.

This Court affirmed Patterson's conviction. The Court of Appeals granted certiorari and examined Patterson's challenge on constitutional due process grounds. Relying upon *Arizona v. Youngblood*, 488 U.S. 51 (1988), the Court held that, for a defendant to succeed in challenging the denial of a missing evidence instruction on constitutional grounds, he must show bad faith by the State. There was no showing of bad faith, however.

The Court observed that a criminal defendant "generally is not entitled to a missing evidence instruction," 356 Md. at 681, and the decision to give such an

instruction generally is within the sound discretion of the trial court. *Id.* at 691. The Court explained that jury instructions about inferences that may be drawn from facts differ from those stating the relevant law:

> An evidentiary inference, such as a missing evidence or missing witness inference . . . is not based on a legal standard but on the individual facts from which inferences can be drawn and, in many instances, several inferences may be made from the same set of facts. A determination as to the presence of such inferences does not normally support a jury instruction. While supported instructions in respect to matters of law are required upon request, instructions as to evidentiary inferences normally are not.

356 Md. at 685. The Court clarified that even when the trial court has declined to give a missing evidence instruction, the defendant nevertheless may argue the factual inference to the jury:

> [The defendant] was able to: (a) present testimony that he was not seen wearing the jacket and that it was not his style; (b) question the police officer as to what happened to the jacket; and (c) argue to the jury to draw the adverse inference on their own based on the evidence in the case. [The defendant's] ability to draw an inference against the State was thus satisfied.

Id. at 690.

Eleven years later, in *Cost v. State,* the Court of Appeals reexamined missing evidence instructions. There, the defendant was convicted of reckless endangerment regarding the stabbing of a fellow prisoner in the Maryland Correctional Adjustment Center "Supermax" prison in Baltimore City. Photographs from the scene showed the victim's cell with blood stains on the floor and on towels he had used to stop the bleeding. The prison cell was sealed off, but the prison's internal investigation unit did

not process it or collect any physical evidence from inside. Additionally, the victim's clothes were not accepted by the crime lab because of the amount of time that had passed since they were collected and the lack of chain of custody. There was no physical evidence that linked the defendant to the attack. The only evidence against him was the victim's testimony.

The Court observed that its decision in *Patterson* "did not definitively establish the limits of substantive Maryland evidence law, the other theory [in addition to constitutional grounds] which may support a missing evidence instruction." *Cost*, 417 Md. at 378 (emphasis omitted). The Court reiterated its prior holding that "trial courts 'need not instruct . . . [on] *most* evidentiary inferences,' and that 'a party *generally* is not entitled to a missing evidence instruction[.]'" *Id.* at 378 (quoting *Patterson*, 356 Md. at 694) (emphasis in original). Thus, a bad faith prerequisite for a missing evidence instruction "is not an absolute rule." *Cost*, 417 Md. at 378.

The Court concluded that in exceptional circumstances, where missing evidence of major import was not retained or analyzed under an unusual factual scenario, a missing evidence instruction may be required, notwithstanding the absence of bad faith. The Court held that *Cost* was such a case. *Id.* at 380. The victim's prison cell, at all times under the State's control, contained evidence that went to the heart of the charges against the defendant. In that exceptional circumstance, the trial court abused its discretion in failing to give a missing evidence instruction.

The Court of Appeals cautioned, however, that:

> Our holding does not require a trial court to grant a missing evidence instruction, as a matter of course, whenever the defendant alleges non-production of evidence that the State might have introduced. Instead, we recommit the decision to the trial court's discretion, but emphasize that it abuses its discretion when it denies a missing evidence instruction and the "jury instructions, taken as a whole, [do not] sufficiently protect the defendant's rights" and "cover adequately the issues raised by the evidence." *Fleming*, 373 Md. at 433, 818 A.2d at 1121. In another case, where the destroyed evidence was not so highly relevant, not the type of evidence usually collected by the state, or not already in the state's custody, as in *Patterson*, a trial court may well be within its discretion to refuse a similar missing evidence instruction.

Id. at 382.

In the instant case, there is no evidence of bad faith (and a constitutional argument has not been made) and there are no exceptional circumstances such as those in *Cost*. There is no evidence and no claim by Ceasar that the latent fingerprints lifted from the Accord were destroyed or negligently mishandled by the State. Detective Bayes testified that he submitted the fingerprints to RAFIS for testing, and the form showing that he did so was moved into evidence. He further testified that RAFIS only would contact him if the fingerprints submitted to it matched those of one or more of the defendants; and RAFIS did not contact him. On cross-examination, Detective Bayes acknowledged that the fact that he was not contacted by RAFIS after submitting the latent fingerprints meant either that there was no "hit" for any defendant or that RAFIS did not perform the required testing.

There is absolutely nothing in this evidence to show that there was any "report" by RAFIS, let alone a report that was "missing." Nor was there any evidence to show that, if RAFIS prepared a report, it was provided by RAFIS to the police. And, if RAFIS

performed testing that showed a match to Brandon Sparks's fingerprints, there was no evidence of that, or that the police knew about that. In short, this case is devoid of the kind of destruction of material evidence facts that existed in *Cost*. Under Maryland common law, on this evidence, Ceasar was not entitled to a missing evidence instruction and the trial court did not abuse its discretion in denying that instruction.

Even if there were a "missing report" from RAFIS—and again, there is no such indication in the record—and even if RAFIS's testing showed a "hit" on someone other than Ceasar, Durbin, or Gordon, that evidence would not be central to Ceasar's defense, as was the missing evidence in *Cost*.

In *Gimble v. State,* 198 Md. App. 610 (2011), the defendant attempted to flee a traffic stop, failed to negotiate a turn, and lost control of his vehicle. Multiple items, including a backpack, were ejected from the car. The police found marijuana, cocaine, and a digital scale inside the backpack. They did not test the backpack and its contents for fingerprints. The defendant maintained that, if fingerprint testing had been done, the results could have shown that the items belonged to someone else. He requested a missing evidence instruction, which was denied. He was convicted of possession with intent to distribute.

On appeal, we affirmed, holding that a missing evidence instruction was not warranted and that, even if fingerprint testing had been done and the results were favorable to a defendant—*i.e.* "his fingerprints were not found, and fingerprints of another (or others) were found—that evidence would not have negated the evidence

against the [defendant]." *Gimble*, 198 Md. App. at 631. The same can be said in the case *sub judice*. There was ample evidence of Ceaser's guilt, and fingerprint testing would not have negated that.

B.

MISSING WITNESS INSTRUCTION

Ceasar requested a missing witness instruction regarding Technician Holmes. The requested instruction was Maryland Pattern Jury Instruction—Criminal ("MPJI-Cr") 3:29, which states:

> You have heard testimony about _____, who was not called as a witness in this case. If a witness could have given important testimony on an issue in this case and if the witness was peculiarly within the power of the [State] [defendant] to produce, but was not called as a witness by the [State] [defendant] and the absence of that witness was not sufficiently accounted for or explained, then you may decide that the testimony of that witness would have been unfavorable to the [State] [defendant].

The State objected and the following colloquy transpired:

> [PROSECUTOR]: Well, I object to the missing witness, Your Honor. The State objects to even including that; the reason being is that Tech Holmes is not peculiarly -- I can't even say the word -- within the power of just the State.
>
> Mr. Mooney's been doing this a lot longer than I have, Your Honor. He has subpoena power just as the State does.
>
> He knows how to subpoena a police officer. If he thought her testimony would be important or relevant, he certainly could have subpoenaed her as well. So I do not believe that he gets that missing witness jury instruction based on the fact that he certainly could've called Tech Holmes himself.
>
> [MR. MOONEY]: Well, peculiarly within the control of a specific party isn't necessarily limited to subpoena power. It's a witness who in this instance, at the direction of the State, conducted testing in order to ultimately arrive at a conclusion.

> There were two sets of information. There was DNA recovered by [Technician Holmes], which apparently, according to Detective Bayes' [sic] testimony, was not submitted for comparison, but there was also fingerprints which were submitted. And the detective, I guess, by way of deductive reasoning, suggests that because he didn't get a call saying that there was a hit, then there must not have been a hit as to the three defendants.
>
> This is a police-officer witness, one who acts at the direction of the State's attorney and its agents and whom is listed on the State's witness list, conducted tests at the request of the State and, quite frankly, their finding, their work, their involvement is squarely part of this.
>
> * * *
>
> [PROSECUTOR]: I wasn't keeping Tech Holmes from the defense. The simple fact that I did not call her does not make her unavailable to the defense.
>
> They've had the discovery. They've had Tech Holmes' [sic] report. They've had the opportunity to speak with her whenever they wanted to and, therefore, she was not unavailable to the defense. He could have subpoenaed her just as much as I could have subpoenaed her.
>
> * * *
>
> THE COURT: I agree with the State. I'm going to eliminate [the missing witness instruction].

Ceasar contends he was entitled to a missing witness instruction regarding Technician Holmes because, other than Detective Bayes, she was the only witness who could account for the "missing" fingerprint analysis evidence. He maintains that his inability to explore this evidence prejudiced his defense of lack of criminal agency.

The State counters that Technician Holmes's report was produced in discovery; that she was available to Ceasar to discuss her investigation; and that Ceasar could have subpoenaed her to testify at trial if he so desired. Accordingly, Technician Holmes was

not "peculiarly available" to the State, and the trial court acted within its discretion in denying the instruction.

In *Graves v. United States*, 150 U.S. 118, 121 (1893), the Supreme Court explained that, "if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." Under Maryland law, "the missing witness rule applies where (1) there is a witness, (2) who is peculiarly available to one side and not the other, (3) whose testimony is important and non-cumulative and will elucidate the transaction, and (4) who is not called to testify." *Woodland v. State*, 62 Md. App. 503, 510 (1985). There is no dispute that Technician Holmes was a witness who was not called to testify. Our analysis turns on whether she was "peculiarly available" to the State and, if so, whether her testimony would have been "important and non-cumulative."

To determine whether a witness is "peculiarly available" to one side, we look at the witness's relationship with that party. In *Bereano v. State Ethics Comm'n*, the Court of Appeals identified two relationship categories germane to missing witnesses:

> In the first, an adverse inference may be drawn against a party for failure to produce a witness reasonably assumed to be favorably disposed to the party. In the second, the inference may be drawn against a party who has exclusive control over a material witness but fails to produce him or her, without regard to any possible favorable disposition of the witness toward the party.

403 Md. 716, 741 (2008) (citing 2 Kenneth S. Broun et al., *McCormick on Evidence* § 264 (6th ed. 2006)). Ordinarily, the type of relationship that would make a witness

favorably disposed to the party is a "family relationship, an employer-employee relationship, and, sometimes, a professional relationship." *Christensen v State*, 274 Md. 133, 135 (1975). This Court has held on numerous occasions that law enforcement employees do not possess the type of relationship with the State that warrants a missing witness instruction.

In *Briscoe v. State*, 40 Md. App. 120 (1978), the defendant was convicted of two counts of rape and false imprisonment and one count of petit larceny. During the police investigation, several items, including blankets, towels, sheets, soil and blood samples, saliva, and hair were sent to an FBI laboratory for analysis. At trial, an FBI agent designated as an expert in hairs and fibers testified regarding the evidence relating only to his area of expertise. The defendant argued that because other experts did not testify regarding the other types of samples collected the results would have been favorable to the defendant and he was entitled to a missing witness instruction. In rejecting the appellant's argument, we held that "the missing witness and test results were as available to the [defendant] as they were to the State," and therefore the trial court did not err in refusing to give the missing witness instruction. *Briscoe*, 40 Md. App. at 134.

In *Smith v. State*, 66 Md. App. 603 (1986), we addressed whether a non-testifying police officer was equally available to a defendant as to the State. The defendant was charged with robbery, kidnapping, and related crimes. He requested a missing witness instruction after a police officer did not appear at trial. (The opinion only states that "the police officer who had issued the appellant the traffic ticket in Baltimore County did not

appear at the trial" but does not give any context about the ticket or what the officer would say.) We held that the subpoena power was equally available to the defendant and therefore the officer was not peculiarly within the control of the State. *Smith*, 66 Md. App. at 620.

The holdings in *Briscoe* and *Smith* make clear that Ceasar was not entitled to a missing witness instruction. Technician Holmes was not in a favorable relationship with the State, nor was she within the State's exclusive control. She did no more than collect the evidence from the Accord as her report reflected. There is nothing to indicate that any of the evidence she collected later went missing; that she had a personal stake in the outcome of the trial; or that, had she been called, her testimony would have been adverse to the State. *See also Dansbury v. State*, 193 Md. App. 718, 747 (2010) (citations omitted) ("The mere possibility that a witness personally may favor one side over the other does not make that witness peculiarly unavailable to the other side."). As the State points out, Ceasar was in possession of Technician Holmes's report and could have subpoenaed her had he thought her testimony important to his defense. There was no showing by Ceasar that Technician Holmes was "peculiarly" within the control of the opposing party—here, the State—and, as such, the evidence, including any proffered evidence, did not generate a missing witness instruction.

Moreover, Ceasar did not make a showing that any testimony by Technician Holmes would not have been cumulative. Defense counsel questioned Detective Bayes at length about Technician Holmes's report and the evidence that was collected. Ceasar

did not proffer that Technician Holmes's testimony would cover any territory beyond what Detective Bayes had testified to. A party who fails to proffer how a missing witness's testimony will be non-cumulative is not entitled to a missing witness instruction. *Smith*, 66 Md. App. at 621.

II.

Durbin moved *in limine* to exclude the testimony of Corporal Peters. He argued that Corporal Peters had used a specially trained K-9 to locate him in the parking lot and that, but for the dog's special training, the police would not have apprehended him. He further argued that Corporal Peters only could testify about this special training as an expert witness, but he had not been identified as an expert before trial.

The State did not dispute that Corporal Peters was not identified as an expert witness. It maintained that he could testify about his independent observations as a lay witness, however. The prosecutor proffered:

> Your Honor, [the officers] go straight to that parking lot, and [Corporal Peters is] going to indicate on the map that that's where he was; and that there was a radio call -- it maybe didn't say a suspect, but, Your Honor, from the facts of the case, it's 3:00 in the morning and three people are seen running from the scene of this incident. Somebody is seen jumping over a fence.
>
> They're going to investigate it with or without a dog. They would have searched that area because he was seen jumping over a fence going in the direction of that shopping mall, which is where he was found.

Relying on *Simpson v. State*, 214 Md. App. 336 (2013), *rev'd on other grounds*, 442 Md. 446 (2015), the court ruled that "if [Corporal Peters] ha[d] an independent reason" to search the parking lot where Durbin was found that testimony would be

allowed, but he could not make any mention of the K-9. The court admonished the prosecutor:

> We'll take a moment for you to go talk to your witness. And you understand the risk you're running by calling that witness and we'll see where the testimony goes.
>
> * * *
>
> Remember I said he could testify as to what he observed, so if he has an independent source of [sic] but for the dog.

The State called Corporal Peters, and he testified about the night of the robbery as follows:

> [CORPORAL PETERS]: I exit my vehicle. I was briefed in reference to a last-known direction of travel, at which point I advised [the other officers] to let's start canvassing the area, check to see if we can locate the outstanding person by checking through the vehicles, using our flashlights, checking underneath the vehicles.
>
> [PROSECUTOR]: When you say vehicles, this is a business vehicle [sic]?
>
> [CORPORAL PETERS]: To the rear of the location. I believe it was like an auto body shop or some shop where they worked on automobiles, so there were several vehicles parked to the rear of that location.
>
> * * *
>
> [PROSECUTOR]: Okay. And as you were searching, what, if anything did you see or find?
>
> [CORPORAL PETERS]: While canvassing that area, I noticed a pair of shoes sticking from underneath a vehicle. That's when I crouched down in a squat position and flashed my flashlight and I observed [Durbin] . . . underneath of the vehicle, at which point he was ordered from underneath the vehicle, which he complied with, and was taken into custody.

At no point did Corporal Peters mention the K-9.

Durbin argues that Corporal Peters would not have located him in the nearby parking lot but for being lead there by the K-9; and that the court abused its discretion by allowing Corporal Peters to testify that he located him on independent grounds. In particular, the court's ruling permitted Corporal Peters to testify about matters he had no firsthand knowledge of and effectively let the State "conduct an end run around" the expert witness ruling. The State counters that, given the facts independently known to Corporal Peters, the trial court was within its discretion in allowing him to testify.

"We review a circuit court's ruling on the admissibility of lay testimony for an abuse of discretion." *Randall v. State*, 223 Md. App. 519, 577 (2015). "There is an abuse of discretion 'where no reasonable person would take the view adopted by the [trial] court.'" *Peterson v. State*, 196 Md. App. 563, 584 (2010) (quoting *Metheny v. State*, 359 Md. 576, 604 (2000)). In allowing any witness to testify, the court is bound by Rule 5-602, which states in part:

> [A] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony.

In *Simpson v. State*, this Court held that a police officer who is to testify about a K-9's special training and skill must be identified as an expert witness before trial and must be accepted as an expert witness by the court in order to testify about the K-9. Here, Corporal Peters did not rely upon his K-9's special training to locate Durbin in the

nearby commercial parking lot. As he explained in his testimony, he knew first-hand when he arrived at the scene that there were three suspects, two of whom were in custody, and that he and several other officers canvassed the immediate area around the apartment for the third suspect. The search continued to a nearby parking lot where he personally observed two feet sticking out from underneath a parked car. Corporal Peters looked under the car and found Durbin. Thus, the presence of the K-9 was not integral to Durbin's arrest. Corporal Peters had an independent basis for discovering Durbin in the parking lot. The trial court did not abuse its discretion in allowing Corporal Peters to testify about finding and arresting Durbin.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AGAINST CARLTON DURBIN AND JAMAL CEASAR AFFIRMED. COSTS TO BE PAID ONE-HALF BY DURBIN AND ONE-HALF BY CEASAR.