UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0556

September Term, 2016

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FLOYD D. POWELL

v.

STATE OF MARYLAND

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Wright,
Berger,
Shaw Geter,

JJ.

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Opinion by Shaw Geter, J.

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Filed: January 3, 2017

A jury in the Circuit Court for Montgomery County convicted Floyd Powell, appellant, of one count of obstructing and hindering a police officer, three counts of assault in the second degree, and one count each of speeding, reckless driving, negligent driving, and unsafe lane changing. Powell was sentenced to a total of ten years imprisonment. In this appeal, he presents the following questions for our review:

1. Did the court err in excluding the testimony of a defense witness after finding that there had been a discovery violation?

2. Did the court commit plain error in responding to a question from the jury by referring the jury to the jury instructions already given?

3. Was the evidence sufficient to support Powell's conviction for obstructing and hindering a police officer?

For reasons to follow, we answer the first two questions in the negative, and the third question in the affirmative. Accordingly, we affirm the judgment of the circuit court.

## BACKGROUND

On June 25, 2014, Montgomery County Police Officer Abraham Groveman was tasked with executing an arrest warrant on an individual, later identified as Powell. After receiving information that Powell's vehicle, a maroon Yukon, was parked outside of Powell's home, Officer Groveman, along with several other officers, traveled to the home to "identify if [he] was in fact at that address." Upon responding to the area, the officers, approximately eight in total, positioned their unmarked vehicles in strategic locations near Powell's home.

Shortly thereafter, Officer Groveman received notification that an individual matching Powell's description was seen exiting the house and getting into a maroon

Yukon. Officer Groveman then observed the Yukon driving in his direction, at which time he identified Powell as the driver. Officer Groveman radioed to another officer, Paul Bandholz, and informed him that Powell was heading in the officer's direction.

Officer Bandholz, who was at the scene in a different unmarked vehicle, received the transmission, located the Yukon, and identified Powell as the driver. The officer followed the Yukon, which began to drive "very fast, very aggressively." By that time, Officer Groveman's vehicle had caught up with the Yukon. Officer Groveman followed the Yukon down a residential cul-de-sac, at which time the Yukon pulled into a driveway, pulled back out, and "came very fast" toward the officer's vehicle. Both Officer Groveman and another officer, Neil Mohardt, who was in a separate unmarked car, turned abruptly to avoid a collision, and the Yukon passed by them.

At this time, "all the vehicles" had their lights and sirens activated, and the officers continued their pursuit of the Yukon, which was now traveling at speeds ranging from 70 to 90 miles per hour. The Yukon then turned into another residential driveway, drove across the residence's front lawn, and headed back toward the pursuing officers at a high rate of speed. Officer Groveman and another officer, Jonathan Green, each pulled their vehicles over to avoid a collision, and the Yukon continued driving. Officer Groveman resumed the pursuit, but eventually lost sight of the Yukon. The Yukon was later found "wrecked" in the rear of a residential property. Powell was not located until the next day, at which time he was arrested and charged.

At the beginning of trial, defense counsel informed the court that he may call a witness, Sara Schum. The State objected, arguing that defense counsel did not disclose Ms. Schum as a witness until the day of trial. At this time, the following colloquy ensued:

THE COURT: All right. [Defense counsel], this witness was disclosed today.

[DEFENSE]: Well, it was – yes. I intended – I told him I might call her today, apologized for not listing her. She's in the discovery the State has. They've had contact with her.

THE COURT: What is the proffer of what her testimony would be?

[DEFENSE]: Her testimony would be about a conversation with one of the police officers, about asking them for her – they asked her to tell them if he was in that car, should be it.

THE COURT: And that's it?

[DEFENSE]: Other than, you know, where she was going at the time when it all happened, but that's basically it.

THE COURT: There's no testimony that she was in the car?

[DEFENSE]: No. She was pulled over in a different car, and they were, they wanted her to testify – they wanted her to tell them that he was the driver of that car.

* * *

THE COURT: Okay. All right. [Mr. Prosecutor], I'm not quite sure what the significance of that is going to be or how that is –

[STATE]: May I just elaborate briefly on the State's…position? While that proffer sounded extremely benign, what that – the proffer is that she is going to provide a statement which would seem to elicit some sort of, like, character testimony about the officers and then necessitate the State to put on rebuttal witnesses regarding the statement to an officer that occurred on a different date;

basically that – and disclosing that the morning of…I think, is completely unfair to the State, because it's not just a benign statement that could just leave. It's something that then requires several officers to impeach the statement, other officers on a different traffic stop, on a different date in time.

THE COURT: Well, is the, is the import of it that somehow the police officers didn't know who was in the car and that's why they were asking her who was in the car, or –

[STATE]: Well, I think that's, that's what she apparently is going to say today. That's obviously not what the State's rebuttal case would then show.

THE COURT: What does the evidence show regarding [Powell's] apprehension? Was he apprehended from the car or –

[STATE]: No.

THE COURT: He was not?

[STATE]: Correct.

THE COURT: So he exited from the vehicle?

[STATE]: Correct.

THE COURT: And they caught him how much later?

[STATE]: Two days…a day later.

[DEFENSE]: Judge, just let me add…it's important in the sense that they're looking to verify information that is the issue in this case through her, asking her to tell them in essence that he was in that car.

THE COURT: So what is the import of that to the Defense? I mean, they're doing an investigation.

[DEFENSE]: Well, it's like you said: There is the inference that they didn't know or they're trying to have her testify to that effect. She alludes and tells me that they were telling

her, I wouldn't use the word threat, but there was some pressure put on her to say that. So –

THE COURT: So is the, is the – then the import is, is that you are viewing it as the police are pressuring her to come up with an answer that may not be correct?

[DEFENSE]: They're – yes.

THE COURT: Well, then I understand the State's problem, especially dropping this on the State today, the day of trial, literally minutes before trial, that, that this witness is now going to testify and the State would have been more prepared if they had known in advance. All right. The Court's going to grant the State's request, and that witness will be precluded from testifying, failure to comply with the discovery rules.

After the close of the State's case-in-chief, defense counsel asked the court if it would reconsider its prior ruling regarding Ms. Schum as a witness. The court asked defense counsel to re-proffer the substance of Ms. Schum's testimony, and defense counsel stated that Ms. Schum would testify that "shortly after" the police chase involving Powell, the police pulled Ms. Schum over and attempted to "persuad[e] her that she should tell them that Powell was indeed the driver of that car." The court reaffirmed its prior ruling "on the failure to provide discovery." The court also noted that Ms. Schum's testimony would be of little consequence because "several police officers…already testified as to identity." The defense rested without calling any witnesses.

Later, the court instructed the jury on the relevant law, including what did and did not constitute evidence. The court defined evidence as "testimony from the witness stand," "physical exhibits," and "evidence admitted into evidence." The court also discussed and

gave examples of the differences between direct and circumstantial evidence. At no time did the court state that a defendant's behavior could be considered as evidence.

During jury deliberations, the jury sent a note to the court asking whether Powell's "behavior in the courtroom is admissible as evidence." After sharing the note with both parties, the court informed the parties that it intended to tell the jury "that they should review the instruction as to what constitutes evidence in this case because in fact [the court] did instruct them as to what is evidence in this case[.]" Neither the State nor defense counsel objected, and the court responded to the note by informing the jury that it should review the court's prior instruction on what constituted evidence.

## DISCUSSION

### I.

Powell first argues that the trial court erred in excluding Ms. Schum's testimony. Powell maintains that the court failed to properly exercise its discretion because it did not "explicitly consider" the appropriate factors prior to rendering a decision. This failure to exercise discretion was, according to Powell, an abuse of discretion and warrants reversal. Powell also argues, in the alternative, that even if the trial court exercised the appropriate discretion, its exclusion of Ms. Schum's testimony was, under the circumstances, an abuse of discretion.

Maryland Rule 4-263(e)(1) states that a defendant must provide the State with the name and address of each non-impeachment witness whom the defendant intends to call at trial. *Id.* "Unless the court orders otherwise…the defense shall make disclosure pursuant to section (e) of this Rule no later than 30 days before the first scheduled trial date." Md.

Rule 4-263(h). "If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may…prohibit the party from introducing in evidence the matter not disclosed[.]" Md. Rule 4-263(n).

"The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying." *Id.* Instead, "disqualification is within the discretion of the court." *Id.* "In exercising its discretion regarding sanctions for discovery violations, a trial court should consider: (1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances." *Thomas v. State*, 397 Md. 557, 570-71 (2007) (citing *Taliaferro v. State*, 295 Md. 376, 390 (1983)).

In the present case, we hold that the trial court properly exercised its discretion prior to excluding Ms. Schum's testimony. The court engaged in a thorough discussion with both parties regarding defense counsel's reasons for the untimely disclosure, the nature of Ms. Schum's testimony, the potential prejudice to the State in allowing the evidence, and the relative lack of prejudice to the defense in excluding the testimony. The trial court then excluded Ms. Schum's testimony, not based on a predetermined position, but rather in light of the circumstances as presented by the parties. *See Taliaferro*, 295 Md. at 390 ("The exercise of discretion contemplates that the trial court will ordinarily analyze the facts and not act, particularly to exclude, simply on the basis of a violation disclosed by the file."). Powell's claim that the court "simply said the witness could not testify" is belied by the record.

Moreover, Powell erroneously claims that the court was required to "explicitly consider the *Taliaferro* factors or lesser sanctions." In putting forth this argument, Powell relies on *Joyner v. State*, 208 Md. App. 500 (2012); however, such reliance is misplaced, as we did not, as Powell suggests, hold that a trial court commits error by failing to explicitly discuss all of the *Taliaferro* factors. *Id.* at 526. Rather, we held that, under the circumstances of that case, if any error was committed by that trial court, such error was harmless beyond a reasonable doubt. *Id.* at 523 ("We conclude that, assuming the trial court abused its discretion, or even failed to exercise it, any misstep by the trial court was harmless beyond a reasonable doubt."). In short, the language relied on by Powell is purely dicta. Nowhere in *Taliaferro* does it state that a trial court is required to discuss each factor prior to rendering a decision. In fact, the Court of Appeals has expressly stated the opposite. *See e.g. Beka Industries, Inc. v. Worcester County Bd. of Educ.*, 419 Md. 194, 232 (2011) ("We have not required that statements addressing each of these factors be part of the record."); *Silver v. State,* 420 Md. 415, 435 (2011) ("Our precedents do not require a trial court to engage in a prolonged and formal analysis of prejudice whenever a discovery error is alleged. Instead, a court is required to hear the arguments of the parties and determine the correct remedy[.]").

Finally, there is no evidence that the trial court, in exercising its discretion, acted in "an arbitrary or capricious manner" or went "beyond the letter or reason of the law." *Johnson v. State,* 228 Md. App. 391, 433 (2016) (discussing the abuse of discretion standard) (internal citations and quotations omitted). To the contrary, the court considered the relevant factors, noting that the prejudice to the State was strong, given that the

proffered testimony was that the police, in essence, were pressuring Ms. Schum to provide seemingly fabricated testimony, which would have required a calculated response from the State. The court also noted that the probative value of Ms. Schum's testimony was weak because the officers had already identified Powell as the person they saw driving the Yukon. Finally, defense counsel provided no explanation, reasonable or otherwise, for the untimely disclosure, choosing instead to simply "apologize[] for not listing her." Accordingly, the trial court did not abuse its discretion in precluding Ms. Schum's testimony.

**II.**

Powell next argues that the trial court erred in its response to the jury's question regarding whether Powell's courtroom behavior was admissible as evidence. Conceding that the issue was unpreserved, Powell asks that we review the court's decision for plain error, arguing that the trial court had an affirmative duty to respond to the jury's question "in a way that clarifies the confusion."

Plain error review is reserved for those issues that are "compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *State v. Hutchinson*, 287 Md. 198, 203 (1980). Even in the face of such an issue, we shall intervene "only when the error complained of was so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial." *Trimble v. State*, 300 Md. 387, 397 (1984). Moreover, "it is a discretion that appellate courts should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the

first instance to the trial court[.]" *Chaney v. State*, 397 Md. 460, 468 (2007). In fact, "the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation." *Morris v. State*, 153 Md. App. 480, 507 (2003).

In light of this stringent standard, we decline Powell's invitation to review the issue for plain error. The court's initial instructions to the jury included a sufficient explanation of what constituted evidence, and nowhere in this definition did the court indicate that the jury could consider Powell's behavior as evidence. In sum, the trial court's response was not error, much less the sort of error "so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial." *Trimble*, 300 Md. at 397 (discussing plain error review).

**III.**

Powell's final argument is that the evidence was insufficient to sustain his conviction for obstructing and hindering a police officer. Specifically, Powell maintains that the evidence was insufficient to prove that he "knew that the drivers of the cars chasing him were police officers and that he intended to obstruct and hinder the police officers with his actions."

"The test of appellate review of evidentiary sufficiency is whether, 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Donati v. State*, 215 Md. App. 686, 718 (2014), *cert. denied* 438 Md. 143 (2014) (internal citations omitted). "The test is 'not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded

*any* rational fact finder.'" *Painter v. State*, 157 Md. App. 1, 11 (2004) (internal citations omitted). Moreover, "[w]e 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [we] would have chosen a different reasonable inference.'" *Donati*, 215 Md. App. at 718 (internal citations omitted). "Further, we do not 'distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Id.*

As to circumstantial evidence, "[i]t is not necessary that the circumstantial evidence exclude every possibility of the defendant's innocence, or produce an absolute certainty in the minds of the jurors." *Hebron v. State*, 331 Md. 219, 227 (1993) (internal citations omitted). "Many an inculpatory inference is permitted notwithstanding the fact that an exculpatory inference was just as likely and would also have been permitted." *Cerrato-Molina v. State*, 223 Md. App. 329, 350 (2015), *cert denied* 445 Md. 5 (2015). In short, although circumstantial evidence "must afford the basis for an inference of guilt beyond a reasonable doubt, it is not necessary that each circumstance, standing alone, be sufficient to establish guilt, but the circumstances are to be considered collectively." *Hebron*, 331 Md. at 227 (internal citations omitted).

The common-law crime of obstructing and hindering a police officer requires the existence of four distinct elements: "1) a police officer engaged in the performance of a duty; 2) an act, or perhaps an omission, by the accused which obstructs or hinders the officer in the performance of that duty; 3) knowledge by the accused of facts comprising [the first element]; and 4) intent to obstruct or hinder the officer by the act or omission

constituting [the second element]." *Titus v. State*, 423 Md. 548, 559 (2011) (quoting *Cover v. State*, 297 Md. 398, 413 (1983)).

Regarding the third and fourth elements, which Powell claims were insufficiently proven by the State, the Court of Appeals explained the State's burden as follows:

> In proving [the third] element, "[m]ere knowledge that the person allegedly hindered was a police officer does not suffice; there also must be knowledge that the officer was engaged in performing police duties." The trier of fact is permitted to make reasonable inferences from the surrounding facts and circumstances presented by the State at trial to come to the conclusion that the defendant was aware that his or her actions were directed toward an officer engaged in the performance of official duties.
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> The fourth element of the offense is an intent on the part of the accused to obstruct or hinder the officer in the performance of his or her duty. In [*Attorney Grievance Comm'n v. Sheinbein*], this Court relied on the established legal principal that "[u]nless there is evidence presented to the contrary, the law presumes that a person intends the natur[al] and probable consequences of his acts." We further held that in analyzing the intent element in the offense of obstructing and hindering, such an intent "may be inferred from the defendant's voluntary and knowing commission of an act which is forbidden by law." Thus, the trier of fact can infer from a defendant's actions and the surrounding circumstances whether the defendant had the requisite intent to obstruct or hinder an officer in the performance of his or her duties.

*Titus*, 423 Md. at 563-64 (internal citations omitted).

In light of the above legal principles, we hold that the evidence was sufficient to sustain Powell's conviction beyond a reasonable doubt. Officer Groveman testified that, although the officers were in unmarked vehicles during the chase, at some point "all the vehicles…turned lights and sirens on." Despite this, Powell continued driving through a residential area at speeds in excess of 60 miles per hour, all while being pursued by multiple

police vehicles. Then, after being pursued down a dead-end street, Powell turned his car around and drove directly at the oncoming officers, causing at least two of them to swerve in order to avoid a collision. Finally, after leaving the Yukon "wrecked" in the rear of someone's home, Powell fled the scene. Given these circumstances, a jury could reasonably infer that Powell knew the officers were engaged in the performance of their duties (by attempting to effectuate a stop of his vehicle) and that he intended to obstruct or hinder these efforts by his actions (by driving his vehicle directly at the officers and fleeing the scene).[1]

**JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**

[1] In putting forth his argument, Powell relies on *Williams v. State*, 200 Md. App. 73 (2011); however, such reliance is misplaced. There, the issue was one of statutory interpretation, specifically, whether an unmarked vehicle equipped with lights and sirens could be considered "a vehicle appropriately marked as an official police vehicle" pursuant to Section 21-904(c) of the Maryland Transportation Article. *Williams*, 200 Md. App. at 114. Here, the issue is not whether the officers' vehicles were "appropriately marked;" rather, the issue is whether a reasonable inference could be drawn that Powell knew that the officers were engaged in the performance of their official duties. Thus, *Williams* is inapposite to the case at hand.