

Circuit Court for Baltimore City
Case No. 120017007

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1523

September Term, 2021

JAMES M. PHILLIPS

v.

STATE OF MARYLAND

Arthur,
Friedman,
Tang,

JJ.

Opinion by Arthur, J.

Concurring Opinion by Friedman, J.

Filed: April 20, 2023

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

** At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

On the third day of a four-day criminal trial, a detective testified that he had conducted a previously undisclosed interview of an eyewitness. The State did not actually produce the interview until the final day of trial. The interview contained exculpatory evidence.

In response to the State's failure to produce this evidence, the court expressed its willingness to grant a mistrial if the defendant moved for one. Defense counsel, however, insisted on the dismissal of all charges. The court declined to dismiss the charges, and the jury proceeded to convict the defendant of most of the charges against him.

In this appeal, the defendant argues that the court erred or abused its discretion in not dismissing the charges against him. In the alternative, he argues that he received ineffective assistance of counsel, because his attorney did not accept the court's offer of a mistrial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 11, 2019, Jamari Roscoe and his brother Jabra Roscoe were shot at a convenience store on Belair Road in Baltimore City. Other than the two victims, there were no witnesses.¹

¹ Because Jamari and Jabra Roscoe have the same last names, we refer to them, at times, by the first names only. We mean no disrespect.

Surveillance footage captured the store and its surroundings before and after the shooting, but did not capture the shooting itself. The footage showed Jamari Roscoe, Jabra Roscoe, and a person dressed in peach-colored clothing.

In an interview with a police detective on the evening of the shooting, Jamari Roscoe said that the person who shot him was wearing peach-colored clothing. The State determined that the appellant, James M. Phillips, was the person who was wearing the peach-colored clothing.

The State charged Phillips with attempted first-degree murder of both of the Roscoe brothers, first-degree assault against both of the Roscoe brothers, and a number of related offenses. His trial began on Wednesday, August 11, 2021.

On the third day of trial, the State called Detective Anthony Forbes. Detective Forbes testified about the video footage and explained why it did not capture the shooting. After reviewing the video footage, Detective Forbes testified that he interviewed both Jamari Roscoe and Jabra Roscoe at the hospital on the day of the shooting, November 11, 2019.

While still on direct-examination, Detective Forbes revealed that he had conducted a second interview with Jabra Roscoe at a police station on November 13, 2019. Defense counsel promptly objected on the ground that the State had disclosed nothing in discovery about this second interview. Counsel suggested that the interview might contain “exculpatory” information.

The court asked if the prosecutor had any information about the second interview. She responded that she did not.

At defense counsel’s request, the court directed the prosecutor to ask Detective Forbes whether he had any discoverable information to which defense counsel would be entitled.² The court instructed the prosecutor to obtain copies of any such information for the court and defense counsel to review after the luncheon recess. When counsel returned, the court said, the “first order of business w[ould] be to resolve that problem.”

After the recess, the prosecutor informed the court and the defense that the detective had body-worn camera video of the previously undisclosed interview with Jabra Roscoe. In explaining the State’s previous failure to disclose any of this information, the prosecutor asserted that there had been “a miscommunication between the State and the detective” while they were preparing for trial.

The court asked the prosecutor if the video included information that might be exculpatory. The prosecutor responded that the video was in the police department’s possession, that the detective had been unable to download it or email it to her during the recess, and that she had not seen it. The police department, she said, was working with the State’s Attorney’s Office to produce a copy of the video. She added that the detective had reviewed the video and had informed her that Jabra Roscoe’s statements “were

² The court recognized that, ordinarily, the prosecutor could not speak to the witness while he was on the stand. The court made an exception because defense counsel had asked that the prosecutor be directed to speak to the witness.

consistent with the statements he made in the hospital.” The State had produced the earlier statements in discovery.

At this point, the transcript reflects the following exchange:

[PROSECUTOR]: The detective is accurate in his description that it is consistent with the statements made in the first video. The first video says he says he does not –

THE COURT: I don’t need to know.

[PROSECUTOR]: It would not be exculpated [sic], Your Honor.³

In response to the prosecutor’s suggestion that the video did not or might not contain exculpatory evidence, the court asked whether the State would have produced it in discovery. The prosecutor responded that she would have produced the video if she had it. The court replied, “You know that it’s your fault that you don’t have it.” The court added, correctly, that it was “outrageous” for the State to argue that “it was the policeman’s fault” that the video had not been produced. The prosecutor agreed that it was her fault that the video had not been produced.⁴

³ Phillips argues that the prosecutor “doubled down” by asserting that the evidence was not exculpatory. The State responds that the transcript is probably inaccurate and that the prosecutor probably said, “[i]f the detective is accurate . . . that it is consistent with the statements made in the first video . . . it would not be exculpat[ory].” The State’s response seems persuasive. Why would the prosecutor flatly assert that the interview was not exculpatory when, moments earlier, she said that she hadn’t seen it? In view of our disposition of the matter, however, we need not resolve this controversy.

⁴ As discussed later in this opinion, the prosecutor’s disclosure obligations extend to “material and information” in the “possession or control” of any person “who either reports regularly” to her office or “has reported” to her office “in regard to the particular case.” Md. Rule 4-263(c)(2). That category of persons certainly includes the lead detective on the case.

The court asked defense counsel what relief he sought. He moved for dismissal of the charges. The court indicated that it would not dismiss the charges. Counsel responded that he would reserve his right to make further argument and would view the video over the weekend.

The court directed defense counsel to proceed with the cross-examination of Detective Forbes. The court said that, if defense counsel had additional questions after he had reviewed the video, it would permit him to request a remedy other than dismissal. Counsel suggested that he might request that the detective's testimony be stricken.

Following Detective Forbes's testimony, the State called Jamari Roscoe. The State asked Jamari about his statements to Detective Forbes regarding the shooting. Jamari denied that he talked to a detective on the night of the shooting and later said that he could not remember talking to a detective that night. He also denied telling a detective that he had seen what the person who shot him was wearing. At that point the court permitted the State to play a three-minute clip of Jamari's conversation with Detective Forbes at the hospital on the evening of the shooting. In the video, Jamari stated that the person who shot him was wearing peach-colored clothing.

After the video had been played, Jamari conceded that on the night of the shooting he told the detective that the person who shot him was wearing peach-colored clothing. In addition, he testified that he said the same thing to the detectives three days after the shooting.

The trial resumed on Monday, August 16, 2021. At the outset, defense counsel informed the court that he had received the video of the Jabra Roscoe interview “just one minute ago” and had not had the opportunity to view it.

Defense counsel had a chance to review the 30-minute video on a smart phone during a break. He informed the court that the video contained material, exculpatory information. In the video, he explained, Jabra said that he did not see who shot him; Jabra and the detective reviewed the surveillance video, and Jabra definitively said that the person in the peach jacket did not shoot him; Jabra said that he recognized the person in the peach-colored clothing and knew that he was not the person who shot him; and Jabra argued with Detective Forbes, who insisted that the person in the peach jacket must have shot him. Counsel stated his view that the video was clearly exculpatory.

Defense counsel asserted that, had the State produced the video before trial, he could have used it in cross-examining Detective Forbes. He added that he might have attempted to contact Jabra Roscoe and subpoena him to trial.

Defense counsel moved that the case be dismissed “with prejudice.” The court denied the motion.

Defense counsel then asked that Detective Forbes’s testimony be stricken. Immediately thereafter, however, he had second thoughts, stating that striking the testimony would not do any good “midway through trial,” just before the case was to go to the jury. Short of dismissal, he said, he could not identify another appropriate sanction.

The court agreed that the evidence was exculpatory and that the State had an obligation to turn it over. As a remedy for the violation, the court offered to grant a mistrial, but defense counsel said that he was not asking for one.

After some further discussion, the court stated that it would not dismiss the case, but that it would grant a mistrial if the defense requested one. Defense counsel responded by moving for the dismissal of all charges.

Noting that defense counsel “asked for a dismissal or no relief,” the court reiterated it would not dismiss the case.⁵ In announcing its decision, the court held that the State committed a discovery violation. However, the court found the State did not intentionally withhold the video or act with maliciousness.

On August 18, 2021, after two days of deliberations, the jury found Phillips not guilty of attempted first- and second-degree murder of Jamari and Jabra Roscoe. The jury found him guilty on all other counts, including first-degree assault.

Before sentencing, defense counsel moved for a new trial and argued, again, that the court should have dismissed the charges because of the State’s belated disclosure of the second interview of Jabra Roscoe. The State responded that defense counsel had had the opportunity to accept the court’s offer of a mistrial or to move for another remedy.

⁵ At one point, defense counsel asked that the court dismiss all of the counts or strike the testimony of all of the State’s witnesses. The latter request is tantamount to a request for dismissal (or an acquittal), because the State could not meet its burden of proof without those witnesses.

At oral argument on the motion, defense counsel conceded that “it might have been a good idea” “to ask for a postponement.” “In hindsight,” he said, “maybe” he “should have” asked for one.

The court denied the motion for a new trial. The court recalled that it had offered a mistrial because it was “so offensive” that the State “consistently” failed to comply with its discovery obligations. The court, however, was satisfied that it had offered the proper remedy.

Phillips noted a timely appeal.

QUESTIONS PRESENTED

Phillips presents three questions, which we have rephrased:

1. Did the trial court err or abuse its discretion when, in response to the State’s discovery violation, it denied defense counsel’s motion for dismissal, but offered to declare a mistrial?
2. Did the State’s failure to disclose exculpatory evidence violate its constitutional obligations under *Brady v. Maryland*, and, if so, did the court err or abuse its discretion in addressing that violation?
3. Did defense counsel provide Phillips with ineffective assistance of counsel by not seeking a postponement or moving for a mistrial following the State’s late disclosure of exculpatory evidence?⁶

⁶ Phillips formulated his questions as follows:

1. Did the trial court err in failing to provide a proper sanction to the State’s non-disclosure of exculpatory evidence until the last day of trial?
2. Did the State’s failure to disclose exculpatory evidence violate the State’s constitutional obligations under *Brady v. Maryland*, and deprive Appellant of a fair trial?

DISCUSSION

A. Discovery Violation

Maryland Rule 4-263 governs discovery in criminal cases in the circuit courts. Rule 4-263(d) requires the State’s Attorney, “[w]ithout the necessity of a request,” to provide the defense with “[a]ll material or information in any form, whether or not admissible, that tends to exculpate the defendant or negate or mitigate the defendant’s guilt or punishment as to the offense charged[.]” Rule 4-263(c)(1) also requires the State’s Attorney to “exercise due diligence to identify all of the material and information that must be disclosed under this Rule.” Rule 4-263(c)(2) specifies that the State’s Attorney’s obligations “extend to material and information” in the “possession or control” of any “person who either reports regularly to the attorney’s office or has reported to the attorney’s office in regard to the particular case[.]” a category of persons that obviously includes the police detective investigating the case. One purpose of these rules is to assist the defendant in preparing a defense and to protect the defendant from surprise. *Williams v. State*, 364 Md. 160, 174 (2001).

As the circuit court recognized, this case evidences an abject failure to comply with the most basic discovery obligations imposed by Rule 4-263. The prosecutor herself

3. Did defense counsel provide Appellant with ineffective assistance of counsel by failing to seek a postponement or move for a mistrial following the late disclosure of exculpatory evidence?

did not know of the second interview (or of the recording of it) until her lead witness, the detective, blurted something out about it during his direct examination.

Md. Rule 4-263(n) addresses the sanctions that a circuit court may impose when, as here, it finds that a discovery violation has occurred:

If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances. The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court.

On its face, Md. Rule 4-263(n) does not require a court to impose any particular sanction in the case of a discovery violation. Instead, the rule leaves the choice of a sanction, if any, to the sound discretion of the circuit court. *See Thomas v. State*, 397 Md. 557, 570 (2007).

“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 [sic] of curing any prejudice with a continuance; and (4) any other relevant circumstances.” *Id.* at 570-71 (footnote omitted). “[I]n fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules” (*id.* at 571), which “is to give a defendant the necessary time to prepare a full and adequate defense.” *Raynor v. State*, 201 Md. App. 209, 228 (2011) (quoting *Ross v. State*, 78 Md. App. 275, 286

(1989)), *aff'd*, 440 Md. 71 (2014); accord *State v. Graham*, 233 Md. App. 439, 459 (2017). “[T]he sanction of dismissal should be used sparingly, if at all[.]” *State v. Graham*, 233 Md. App. at 459 (quoting *Thompson v. State*, 395 Md. 240, 261 (2006)).

We conclude that the circuit court did not abuse its discretion in denying defense counsel’s motion to dismiss all charges against Phillips. Instead, the court’s offer to grant a mistrial was sufficient to mitigate any prejudice arising from the State’s late disclosure of Jabra Roscoe’s second interview statements.

As to the first factor, the circuit court immediately inquired into the reason for the State’s late disclosure of the second interview. The court learned that the prosecutor had been unaware of the interview until Detective Forbes disclosed it in his testimony and that there had been a “miscommunication” during case preparation. In these circumstances, the circuit court recognized that, although the failure of discovery was shocking, it resulted only from carelessness or neglect; the State had not intentionally or maliciously withheld information about the second interview.⁷

The court also considered the prejudice that the defense suffered as a result of the late disclosure on the last day of trial, and the feasibility of curing the prejudice. It is obvious that defense counsel might have approached the case quite differently had he known that an eyewitness and victim had repeatedly denied that Phillips was the

⁷ When reviewing a ruling addressing a discovery violation, this Court will not set aside a trial court’s factual findings unless those findings are clearly erroneous. See *Cole v. State*, 378 Md. 42, 56 (2003); *Raynor v. State*, 201 Md. App. at 229. Phillips has not challenged the trial court’s finding that the State’s discovery violation was unintentional. Accordingly, we have no reason to question that finding.

assailant. It is, however, equally obvious that the court recognized and considered the severity of the prejudice that the defense suffered when the court offered to declare a mistrial. A mistrial is an “extraordinary” remedy, which is “only [] granted if necessary to serve the ends of justice.” *Cooley v. State*, 385 Md. 165, 173 (2005).⁸

During the trial, the court did not expressly consider the feasibility of a continuance;⁹ nor, however, did defense counsel request one. Instead, defense counsel took a maximalist approach, demanding dismissal or nothing. The court responded by proposing a remedy that would have given the defense all the time it needed both to investigate the belatedly disclosed information and to incorporate the results of that investigation into its strategy at a new trial.

Where, as here, defense counsel rejects an appropriate sanction for a discovery violation, the trial court is not required to grant an excessive sanction. This State’s highest court has explained:

Although the purpose of discovery is to prevent a defendant from being surprised and to give a defendant sufficient time to prepare a defense, defense counsel frequently forego requesting the limited remedy that would serve those purposes because those purposes are not really what the defense hopes to achieve. The defense, opportunistically, would rather exploit the State’s error and gamble for a greater windfall. As Chief Judge Gilbert

⁸ Phillips himself recognizes that the trial court appreciated the degree of prejudice that he had suffered, because, he says, the court “found sufficient prejudice to warrant a mistrial.”

⁹ At the sentencing hearing, the trial judge remarked that she did not have the power to grant a continuance. We understand this remark to mean that the judge did not have the power to grant a set a new trial date without the approval of the judge in charge of the criminal docket or another senior figure in the circuit court’s hierarchy.

explained . . . in *Moore v. State*, 84 Md. App. 165, 176 (1990), however, the “double or nothing” gamble almost always yields “nothing.”

Thomas v. State, 397 Md. at 575 (quoting *Jones v. State*, 132 Md. App. 657, 678 (2000)).

Phillips complains that the court presented him with a Hobson’s choice between moving for a mistrial and proceeding with the trial, but he fails to appreciate how the range of choices was limited by his own uncompromising demands. The court was not required to respond to this discovery violation by imposing the “extreme sanction” of dismissal. *State v. Graham*, 233 Md. App. at 459 (quoting *United States v. O’Keefe*, 825 F.2d 314, 318 (11th Cir. 1987)).

Phillips argues that the prejudice that he incurred could not have been cured at trial. The trial court agreed: it offered him a mistrial. Phillips has failed to explain why the grant of a mistrial would not have sufficed to address the prejudice that he suffered. Phillips, however, does argue that at this juncture the prejudice that he suffered can be cured only by the grant of a new trial. Ironically, that is exactly the remedy that the circuit court proposed, and that he declined.

Finally, Phillips argues, at some length, that the trial court based its decision on a “flawed understanding of the facts.” In support of his argument, Phillips cites the court’s extemporaneous comments, made in the course of the parties’ arguments about what the previously undisclosed video showed. In those comments, the court, which had not seen the video and had only heard an oral summary of what it showed, said that Jabra Roscoe had been “back and forth” with regard to the identity of the assailant. In fact, in the

second interview, Jabra Roscoe had consistently said that the person in the peach-colored clothing was not the assailant.

We are unconvinced that this misunderstanding, which no one bothered to correct at the time, affords a basis to find that the court abused its discretion in offering a mistrial and in not granting a dismissal. The court did not deny Phillips’s motion to dismiss because it believed that the undisclosed evidence was equivocal or of marginal utility to the defense. To the contrary, the court recognized that the defense had suffered serious prejudice as a result of the State’s failure to disclose the interview until the final day of trial: that is part of the reason why the court offered to grant a mistrial. Additionally, the court found that the discovery violation, unacceptable as it was, was unintentional, and that it could be cured by the grant of a mistrial. In our judgment, the court did not abuse its discretion in reaching that conclusion.

B. *Brady* Violation

In the landmark case of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the United States Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” The category of “evidence favorable to an accused” includes both exculpatory evidence and evidence that “the defense might have used to impeach the [State’s] witnesses[.]” *United States v. Bagley*, 473 U.S. 667, 676 (1985). Phillips contends that he is entitled to a new trial because the State violated his *Brady* rights.

As an initial matter, the State asserts that Phillips has not preserved his *Brady* argument, because defense counsel argued that the State committed a discovery violation, but “never made the related but distinct argument that the State violated *Brady*.” In our judgment, however, defense counsel did more than enough to preserve the issue. The court clearly understood that *Brady* was in play, because it questioned the prosecutor about whether the video contained exculpatory evidence. Moreover, once defense counsel had finally seen the video, he stressed the exculpatory evidence that the video contained. Although no one enunciated the word “*Brady*,” everyone knew that they were dealing with a *Brady* violation.

“To establish a *Brady* violation, the defendant must establish (1) that the prosecutor suppressed or withheld evidence that is (2) favorable to the defense – either because it is exculpatory, provides a basis for mitigation of sentence, or because it provides grounds for impeaching a witness – and (3) that the suppressed evidence is material.” *Ware v. State*, 348 Md. 19, 38 (1997).

It takes little effort to grasp that the second interview of Jabra Roscoe satisfies the second and third conditions, as it was both exculpatory and material. The interview was exculpatory because it undermined the State’s contention that Phillips was the assailant. *See State v. Grafton*, 255 Md. App. 128, 144 (2022) (equating “exculpatory evidence” with evidence that is “favorable to the accused”). The interview was material because there is a “reasonable probability that . . . the result of the proceeding would have been

different” (*id.* (quoting *Ware v. State*, 348 Md. at 46)) had the defense been able to establish that an eyewitness and victim had denied that Phillips was the assailant.

On the other hand, the State did produce the interview, albeit not until the last day of trial. Does the belated disclosure mean that the State did not commit a *Brady* violation?

If the defendant learns of the information “in time to use it,” then the State has not violated *Brady*. *Adams v. State*, 165 Md. App. 352, 422 (2005); *accord State v. Grafton*, 255 Md. App. at 148-49 (“[n]o due process violation occurs as long as *Brady* material is disclosed to a defendant in time for its effective use at trial”) (quoting *United States v. Smith Grading & Paving, Inc.*, 760 F.2d 527, 532 (4th Cir. 1985)). In this case, however, defense counsel did not learn of the information until the last day of trial, minutes before the case was to go the jury, and after he had devised and executed his trial strategy.

To have learned of the information in this case “in time to use it” effectively at trial, the defense counsel would have to have learned of it in advance of trial, so that he could, for example, attempt to locate Jabra Roscoe, confirm that Jabra would say what he said in the interview, and subpoena him as a witness. *See State v. Grafton*, 255 Md. App. at 149 (“exculpatory evidence must be disclosed in time for the defense to be able to use it effectively, not only in the presentation of its case, but also in its trial preparation”) (quoting *Miller v. United States*, 14 A.3d 1094, 1111 (D.C. 2011)). “[T]he longer the prosecution withholds information, or (more particularly) the closer to trial the disclosure is made, the less opportunity there is for use.” *Miller v. United States*, 14 A.3d at 1111

(quoting *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001)); accord *State v. Grafton*, 255 Md. App. at 149. “[N]ew witnesses or developments tend to throw existing strategies and preparation into disarray.” *Miller v. United States*, 14 A.3d at 1111 (quoting *Leka v. Portuondo*, 257 F.3d at 101); accord *State v. Grafton*, 255 Md. App. at 149. “[C]ounsel may not be able, on such short notice, to assimilate the information into their case.” *Miller v. United States*, 14 A.3d at 1111; accord *State v. Grafton*, 255 Md. App. at 149-50.

In short, “[t]he opportunity for use under *Brady* is the opportunity for a responsible lawyer to use the information with some degree of calculation and forethought.” *Leka v. Portuondo*, 257 F.3d at 103. Defense counsel did not have that opportunity in this case. Therefore, the State violated Phillips’s *Brady* rights by failing to produce the second interview of Jabra Roscoe until the last day of trial.

The question becomes, what is the correct remedy for the violation? Phillips argues that the remedy was dismissal. “That is not the case.” *State v. Grafton*, 255 Md. App. at 252. Even when the State has violated *Brady*, “dismissal of an indictment as a sanction is appropriate only where less drastic alternatives are not available.” *Id.* (quoting *Williams v. State*, 416 Md. 670, 693 n.8 (2010)).

Just last year, this Court reversed a circuit court judge for dismissing an indictment as a sanction for a putative *Brady* violation when other, lesser sanctions were available. *State v. Grafton*, 255 Md. App. at 150-51. On the day before the trial was to begin in that case, the State produced some information that implicated another suspect and said that it

was waiting to receive additional information. *Id.* at 133-34. After the defendant objected to the belated disclosure, the circuit court found that the State had committed a *Brady* violation and dismissed the charges. *Id.* at 142. This Court reversed in part because the circuit court “erred in not imposing a less drastic alternative of a brief postponement to allow for the production of evidence by the State.” *Id.* at 151. The postponement in that case would have allowed the court to evaluate whether the defense could have effectively used the information at trial. *Id.* at 150-51.

Unlike the circuit court in *Grafton*, the court in this case correctly considered alternatives less drastic than dismissal. In addition, the court correctly recognized that a mistrial would have given defense counsel a chance to evaluate the new evidence and to determine how or whether to use it. In this case, the court did not err or abuse its discretion in offering to grant a mistrial and not dismissing the case.

C. Ineffective Assistance of Counsel Claim

Phillips argues, in the alternative, that defense counsel’s failure to accept the court’s offer of mistrial or to propose other remedies, such as a postponement, denied him his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution.¹⁰

¹⁰ As the State observes, Phillips’s alternative argument amounts to an argument that his defense counsel was ineffective because counsel insisted on a remedy (dismissal) that, according to the first two sections of Phillips’s brief, the court was required to grant.

An ineffective assistance of counsel claim consists of two elements: deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Phillips bears the burden of proof as to both deficient performance and prejudice. *Id.*

To satisfy the first element, Phillips must show that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* To satisfy the second element, Phillips must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

The trial record ordinarily lacks adequate information from which to assess the performance of defense counsel, “because the character of counsel’s representation is not the focus of the proceedings and there is no discussion of counsel’s strategy supporting the conduct in issue.” *Smith v. State*, 394 Md. 184, 200 (2006). “The evidence introduced at trial . . . will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis.” *Mosley v. State*, 378 Md. 548, 561 (2003) (quoting *Massaro v. United States*, 538 U.S. 500, 505 (2003)).

Ordinarily, therefore, the most appropriate method for litigating the issue of ineffective assistance of counsel is through a separate evidentiary proceeding under the Maryland Uniform Post Conviction Procedure Act. *See, e.g., Mosley v. State*, 378 Md. at 558-59. Unlike direct appeals, post-conviction proceedings “allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel’s

ineffectiveness.” *Id.* at 560. ““By having counsel testify and describe [the] reasons for acting or failing to act in the manner complained of, the post-conviction court is better able to determine intelligently whether the attorney’s actions met the applicable standard of competence.”” *Addison v. State*, 191 Md. App. 159, 175 (2010) (quoting *Johnson v. State*, 292 Md. 405, 435 (1982)).

In a case alleging ineffective assistance of counsel, “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Strickland v. Washington*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). From our perspective, it is entirely possible that counsel’s decision not to request a mistrial was a matter of sound trial strategy.

On the final day of trial, counsel had to decide between accepting a mistrial and gambling on an acquittal. Counsel may have thought that an acquittal was reasonably probable: there was no surveillance footage of the shooting itself, one of the victims contradicted himself about whether Phillips was the assailant, and the other victim did not testify. On the other hand, if counsel accepted the court’s offer of a mistrial, he might or might not be able to develop useful testimony from Jabra Roscoe, but he would also give the State the opportunity to try the case again and perhaps to address some of the weaknesses in its initial presentation.

In these circumstances, we cannot rule out the possibility that it was a matter of sound trial strategy for counsel to decide to forego a second trial in favor of the possibility of an acquittal at the first. In our assessment, therefore, this case does not present one of the “rare instances” in which an appellate court may decide the issue [of ineffective assistance] on direct appeal. *Mosley v. State*, 378 Md. at 566. We express no opinion as to the merits of any ineffective assistance of counsel claim that Phillips may bring in a post-conviction proceeding.

**JUDGMENTS OF THE CIRCUIT COURT
FOR BALTIMORE CITY AFFIRMED;
APPELLANT TO PAY ALL COSTS.**

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** At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

I concur in the majority's judgment.

I write separately to emphasize one short excerpt of the majority's opinion. After the discovery of the State's failure to produce the video of the previously undisclosed second interview with Jabra Roscoe, the prosecutor reported to the court that "the detective had reviewed the video and had informed her that Jabra Roscoe's statements 'were consistent with the statements he made in the hospital.'" Slip Op. at 3-4. And then the prosecutor says, in effect, that if the interviews are consistent, then the evidence is not exculpatory. Slip Op. at 4 & n.3.

In reviewing this brief exchange, I don't know precisely who said what. I don't know what Detective Forbes really said to the prosecutor, if he said anything at all. I don't know exactly what the prosecutor said to the court. Slip Op. at 4 n.3 (discussing potential transcription error). I do know that the two statements put together, constitute a representation made by the State of Maryland to the trial judge, on which the State intended for the judge to rely, that the two interviews were consistent and not exculpatory. We now know that that representation was not true. And that gives me considerable concern.

How the State responds to the belated discovery of exculpatory evidence matters. Even if the initial failure to produce was truly only negligent, if the State intentionally misleads a court to cover up that failure, I believe that courts should review the whole episode under the intentional nondisclosure rubric rather than the negligent nondisclosure rubric. In this case, however, I accept the trial court's implicit finding that the State's representation was only reckless butt-covering (and a transparent, soon-to-be-discovered

butt-covering at that), but not an affirmative misrepresentation. Solely on that basis, I find that the trial court's finding that the State's failure here was "unintentional" not to have been an abuse of discretion.

For that reason, I concur in the majority's judgment.