

Circuit Court for Baltimore City  
Case No. 119168009 & 119168010

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

Nos. 125 & 126

September Term, 2021

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THOMAS ALSTON

v.

STATE OF MARYLAND

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Beachley,  
Ripken,  
Kenney, James A., III  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Ripken, J.

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Filed: April 25, 2022

\*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.

Thomas Alston (“Alston”), appellant, was charged with numerous assault and firearm offenses related to a shooting that occurred May 21, 2019. A jury trial was held in the Circuit Court for Baltimore City. The jury found Alston guilty of one count of first-degree assault and one count of second-degree assault, two counts of reckless endangerment, and related firearm offenses. He was sentenced to forty-five years’ incarceration. Alston now appeals his convictions to this Court. For the reasons that follow, we shall affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

In May of 2019, Laerica Smith (“L. Smith”) and her husband, Samuel Smith (“S. Smith”) lived in an apartment building on Cold Spring Road in Baltimore City, Maryland. On the evening of May 21, 2019, L. Smith walked from her apartment to pick up an order she placed for carry-out food at a Chinese restaurant approximately one mile from her home. When L. Smith arrived, she called S. Smith. L. Smith noticed two other people in the restaurant. After retrieving her food, L. Smith began walking back to her apartment while on the phone with S. Smith.

On her walk back, L. Smith heard someone say from a distance behind her “I’m trying to talk to you real quick.” She told S. Smith over the phone that someone was following her and shouting at her. L. Smith recognized the person following her as a man from the Chinese restaurant. L. Smith told S. Smith that she was scared and there was no one else around.

S. Smith grabbed a knife from the kitchen and waited outside the apartment for L. Smith. He observed L. Smith running towards the apartment and a man following her. L.

Smith reached the apartment building, where S. Smith confronted the man who responded that he was “trying to talk to her real quick.” S. Smith told L. Smith to go inside the apartment, and the man stated: “let me talk to her real quick, or” followed by a gesture towards his pants. S. Smith attempted to push L. Smith inside the apartment building. The man drew a gun and fired a shot. S. Smith threw the knife at the man. The man fired a second shot, which hit the apartment door and shattered the glass.

L. Smith went inside the apartment and called the police. Detective Moorhead responded to the scene. He spoke to the Smiths about the events of that night. L. Smith described the man as African American with “a light complexion,” “slim,” “not much taller than [her],” with facial hair, and wearing a blue and gray jacket. S. Smith told Detective Moorhead that the man was wearing a hoodie, had a mustache, was not very tall, African American, and smelled of alcohol.

After speaking with the Smiths, Detective Moorhead went to the Chinese restaurant to obtain surveillance footage. He noticed a man inside the restaurant that was “passed out” in the corner. Detective Moorhead went to the back of the restaurant and reviewed the footage from earlier that night. He noticed that the same individual also appeared in the video at the time L. Smith arrived. Detective Moorhead went back to the waiting area, however the individual was no longer there. Based on Detective Moorhead’s description of the suspect, Northwest Patrol identified the suspect as Alston.

The next morning, May 22, 2019, Detective Moorhead reviewed the surveillance footage from the Smiths’ apartment complex. He identified Alston as the individual in that video. Detective Moorhead spoke again with the Smiths at the police station, and S. Smith

identified Alston in a photo lineup. L. Smith did not identify Alston.

Detective Moorhead thereafter drove by the Chinese restaurant and noticed Alston sitting outside wearing the same clothes as appeared in both surveillance videos and that Detective Moorhead had seen him wearing in the restaurant the night before. Additional officers arrived on scene and arrested Alston. Alston was searched upon his arrest and the officers recovered a handgun, a magazine, and ammunition from his person.

Detective Moorhead interviewed Alston at the police station. During that interview, Alston confirmed that he was at the Chinese restaurant the evening of May 21, 2019. Detective Moorhead presented Alston with a photo taken from the surveillance footage at the Chinese restaurant, and Alston confirmed that it was him. Alston also stated that around 9 p.m., he was walking around Park Heights. Detective Moorhead showed Alston photos taken from the apartment surveillance footage, and Alston responded: “looks like me.” Alston stated that another picture from the apartment surveillance footage appeared as if he had “a shotgun” in his hand.

Alston was indicted in the Circuit Court for Baltimore City on two counts of first-degree assault, two counts of second-degree assault, use of a firearm in the commission of a crime of violence, two counts of reckless endangerment, possession of a firearm in violation of a disqualifying conviction, wearing, carrying, and transporting a handgun, and discharging a gun in city limits. A jury trial was scheduled to commence January 14, 2020.

On January 9, 2020, the State sent an email informing the defense that the State possessed Internal Affairs Division (“IAD”) reports on the State’s witnesses that the

defense could review. There were six reports on Detective Moorhead, including four reports of excessive force complaints that were found not sustained, unfounded, or exonerated. There was also a report of an allegation that Detective Moorhead filed a probable cause statement that conflicted with his body camera footage, which was found to be not sustained. Finally, there was a report of an improper search that was found “sustained” but was pending review by a trial board. There was also an IAD report concerning a physical altercation between the State’s firearms examiner in Alston’s case, Christopher Faber (“Faber”), and another firearms examiner. After viewing the reports, the defense requested copies from the State. The defense subsequently filed a Motion to Dismiss or Exclude arguing that because of the late disclosures of the potential impeachment evidence of Detective Moorhead, the charges should be dropped, Detective Moorhead should be prohibited from testifying, or the trial should be postponed.

The court held a hearing on Alston’s Motion to Dismiss or Exclude on January 14, 2020.<sup>1</sup> Defense counsel explained that the State provided a disk purportedly containing the IAD reports at issue, but defense had not had an opportunity to review the contents. Defense counsel orally requested that the motion incorporate the IAD report for Faber. While the court found that the information was not timely turned over and that there was no excuse for the delay, it ultimately denied the motion to dismiss or exclude as to the IAD reports that found the allegations not sustained or that exonerated Moorhead. The court

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<sup>1</sup> Alston also filed motions to suppress the evidence of S. Smith’s identification of Alston in the photographic array as well as the gun and ammunition recovered. The court also addressed these motions at the hearing and denied both.

noted that reports “would not be usable in court.” It reserved a ruling on the report with the sustained finding of an improper search. The court also reserved ruling on defense’s Motion to Dismiss or Exclude as it pertained to Faber to give defense an opportunity to review the IAD report.

The following morning, the court heard further argument. Defense counsel identified additional documentation of Faber’s misconduct in the form of a corrective action report, which the State had not yet produced or disclosed. The court found that the failure to produce the IAD report on Faber constituted a discovery violation, but stated that it was “not equally convinced that there has been a discovery violation with respect to the failure to produce corrective action documentation.” The court nonetheless found the proper remedy was to instruct the State to ask Faber limited questions concerning those reports in direct examination and permit the defense to cross-examine Faber about the reasons he was subject to a corrective action plan, stating: “That is the scope of the Court’s remedy so that [Faber] may be cross-examined as to issues of competency and the remedy for failing to turn over the information.”

At trial, the State called both L. Smith and S. Smith to testify to the events of May 21, 2019. Detective Moorhead also testified for the State. The defense objected to his identification of Alston in the surveillance footage from the apartment complex, arguing that it would constitute improper lay witness testimony. The court overruled that objection.

Faber testified as an expert in firearms operability analysis. He stated that he received a cartridge case recovered from the apartment as well as the firearm taken from

Alston. Based on the tests he conducted, he opined that the cartridge case recovered was fired from that firearm.

After each side rested, the jury returned verdicts finding Alston guilty of all of the charged counts except for first-degree assault as to L. Smith.<sup>2</sup> Alston now appeals to this Court. Additional facts will be included as they become relevant to the issues.

### **ISSUES PRESENTED FOR REVIEW**

Alston presents three issues for our review, which we rephrase as follows:<sup>3</sup>

- I. Did the circuit court abuse its discretion in declining to issue discovery sanctions for the untimely disclosure of Detective Moorhead's IAD reports?
- II. Did the circuit court abuse its discretion in declining to issue discovery sanctions for the failure to disclose Firearms Examiner Faber's corrective action reports?
- III. Did the circuit court abuse its discretion in permitting Detective Moorhead to identify Alston in the surveillance footage?

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<sup>2</sup> The court sentenced Alston to twenty years' incarceration for first-degree assault, ten years' incarceration for the second-degree assault, and fifteen years' incarceration for the use of a handgun in a crime of violence, all to be served consecutively, and one year of incarceration for the discharging a firearm in city limits, to be served concurrently. As to the prohibited possession charge, the court sentenced Alston to five years without parole, to be served concurrently with the sentences for the firearm offenses. The court further sentenced Alston to five years supervised probation, but the court struck the probationary period upon Alston's motion to correct an illegal sentence.

<sup>3</sup> Rephrased from:

1. Did the trial court err by improperly analyzing the State's last-minute notice that the lead detective had internal affairs reports and by ruling that the reports could not be used to impeach him?
2. Did the trial court err as a matter of law when it ruled that the State's failure to disclose the firearms examiner's "corrective action report" was not a discovery violation, where the document was intertwined with an internal affairs report that the court concluded was discoverable?
3. Did the trial court err in permitting the lead detective to identify [Alston] in surveillance footage, where the testimony constituted inadmissible lay opinion invading the province of the jury?

For the reasons to follow, we affirm the convictions.

### DISCUSSION

“Discovery questions generally ‘involve a very broad discretion that is to be exercised by the trial courts. Their determinations will be disturbed on appellate review only if there is an abuse of discretion.’” *Cole v. State*, 378 Md. 42, 55 (2003) (quoting *North River Ins. v. Mayor & City Council of Balt.*, 343 Md. 34, 47 (1996)). However, conclusions as to whether discovery violations occurred are reviewed without deference. *Id.* at 56. “Where a discovery rule has been violated, the remedy is, in the first instance, within the sound discretion of the trial judge. The exercise of that discretion includes evaluating whether a discovery violation has caused prejudice.” *Id.* (internal quotation marks omitted).

Similarly, the admissibility of “a lay opinion is vested in the sound discretion of the trial court.” *Rosenberg v. State*, 129 Md. App. 221, 255 (1999). Therefore, a trial court’s decision to admit relevant evidence will not be disturbed unless “the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion.” *Decker v. State*, 408 Md. 631, 649 (2009). A court abuses its discretion when its decision is “well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.” *Gray v. State*, 388 Md. 366, 383 (2005).



**I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO ISSUE DISCOVERY SANCTIONS BASED ON THE UNTIMELY DISCLOSURE OF DETECTIVE MOORHEAD’S IAD REPORTS.**

Alston first contends that the trial court erred in its handling of Detective Moorhead’s IAD reports. According to Alston, the court improperly based its analysis of the potential discovery violation on whether the reports could have been used to impeach Detective Moorhead. Alston also argues that the court acted prematurely in concluding that the reports did not contain impeachment material and that it erred in failing to impose a sanction. The State responds that the court in fact found the untimely disclosures were a discovery violation, that the court discussed the impeachment potential of the reports in the context of whether Alston suffered prejudice from the untimely disclosures, and that the court did not err in declining to impose a sanction. We first provide additional background facts and second analyze the parties’ legal arguments.

**A. Background**

Alston filed a discovery request on August 12, 2019 for all impeachment information regarding State witnesses. On January 9, 2020, four days before trial, the State notified Alston that there were certain IAD reports related to Detective Moorhead that were in the State’s possession and that Alston could view those documents. Those included: reports concerning four allegations of unnecessary force that were determined to be either not sustained, unfounded, or exonerated; a referral from the State’s Attorney’s Office concerning a discrepancy between Detective Moorhead’s body camera footage and his probable cause statement, which was found “not sustained”; and a complaint alleging improper search of a house without a warrant or consent, which was sustained by the

investigator but was pending before the trial board. After Alston viewed the files, he filed a motion to dismiss the charges, exclude the testimony of Detective Moorhead, or postpone the trial based on the State's discovery violations.

The court held a hearing on that motion on January 14, 2020. During the hearing, Alston argued that the State's untimely disclosure and failure to turn over the documents constituted a discovery violation. With respect to the IAD reports in which the allegations were unfounded, not sustained, or exonerated, the court inquired as to how Alston would be prejudiced from untimely disclosure—the court noted that, if an allegation were unfounded, the court would “not likely allow it to be used.” Alston responded that the late disclosure hampered his ability to obtain the body camera footage and subpoena witnesses to prepare his cross-examination. The court stated that Alston would not be permitted to “have a mini-trial in the middle of this trial for impeachment purposes.” Alston finally requested that even if the court were not inclined to exclude Moorhead's testimony or dismiss the case, that postponement would be an appropriate remedy.

At the hearing, the State argued that the information contained in the reports was irrelevant for impeachment purposes and that Alston did not suffer prejudice by the late disclosure because nothing contained in the reports would be usable at trial. The State further argued that all but one of the allegations in the IAD reports were exonerated, unfounded, or not sustained. As to the report with the sustained finding, the State argued that the improper search had no bearing on credibility because there was no dishonesty or deceit involved. Rather, it was “simply a situation where they did go into a house without a warrant,” and Detective Moorhead was assisting as back-up. Finally, the State argued

that the detective was challenging the sustained findings before a trial board and thus the case was not yet closed and was not admissible evidence.

The court denied Alston’s motion. In doing so, the court stated that “there is no question that this information wasn’t turned over timely [a]nd there’s no question about whether the court has received an adequate response[.]” The court found that the excessive force complaints as well as the allegation concerning the discrepancy in the probable cause statement would not be usable at trial. The court reserved ruling as to whether it would allow Alston to question Detective Moorhead concerning the sustained allegation, and stated that it “may conduct an in-camera hearing with respect to that limited issue[.]”

Following jury selection, the court readdressed Alston’s motion as it pertained to the sustained allegation of the improper search. At that time, Detective Moorhead testified that the case was pending trial board review and was still ongoing. The court concluded that because the case was still pending, Alston could not question Detective Moorhead about the incident.

**B. The Circuit Court Did Not Abuse Its Discretion in Declining to Issue Sanctions.**

“The main objective of the discovery rule is to assist the defendant in preparing his defense[] and to protect him from surprise.” *Alarcon-Ozoria v. State*, 477 Md. 75, \_\_\_ (2021). Maryland Rule 4-263 governs discovery in criminal cases. The rule mandates that, without the necessity of a request, the State shall provide to the defense “[a]ll material or information in any form, whether or not admissible, that tends to impeach a State’s

witness.” Md. Rule 4-263(d)(6). That information includes “evidence of prior conduct to show the character of the witness for untruthfulness.” Md. Rule 4-263(d)(6)(A).

If the court finds that the State failed to comply with the discovery requirements, it may order [the State] to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances.

Md. Rule 4-263(n). The court has the discretion to select an appropriate sanction for a discovery violation, and it also has the discretion to decide whether any sanction is at all necessary. *Francis v. State*, 208 Md. App. 1, 24 (2012). In exercising that discretion, the trial court should consider: “(1) the reasons why disclosure was not made; (2) the existence and amount of prejudice to the opposing party (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances.” *Id.* at 24–25. *See Thomas v. State*, 397 Md. 557, 574 (2007) (stating that a defendant is prejudiced by a discovery violation where “he is unduly surprised and lacks adequate opportunity to prepare a defense, or when the violation substantially influences the jury.”)

At trial, witnesses may be cross-examined on matters relating to their credibility, memory, relationship to the parties, or bias. *State v. Cox*, 298 Md. 173, 178 (1983). The trial court has discretion to exclude cross-examination into matters that are irrelevant to the issue being tried. *Id.* at 183. “[M]ere accusations of crime or misconduct may not be used to impeach [a witness],” *id.* at 179, but cross-examination of a witness regarding “prior bad acts which are relevant to an assessment of [a] witness’ credibility” may be permitted, *id.* Where the prior bad acts did not result in a conviction, Maryland Rule 5-608(b) provides:

The court may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction but that the court finds probative of a character trait of untruthfulness. Upon objection, however, the court may permit the inquiry only if the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred. The conduct may not be proved by extrinsic evidence.

In other words, where a party has objected to such examination, as is the case here, the court may not permit the inquiry unless: (1) the conduct was probative of untruthfulness and (2) is established by a reasonable factual basis. *Pantazes v. State*, 376 Md. 661, 686–87 (2003). In this context, extrinsic evidence may not be introduced into evidence. *Id.* at 686–87.

Initially, we do not agree with Alston that the court conflated “admissibility” with “discoverability.” The court here concluded that there was “no question” the State’s disclosure of the IAD reports on Detective Moorhead four days before trial was untimely and constituted a discovery violation. The court also stated that the reasons the State offered to explain the delay were inadequate. Nonetheless, the court declined to impose sanctions. The court concluded that Alston failed to demonstrate prejudice resulting from the untimely disclosure because the reports did not contain material that could be used to impeach Detective Moorhead at trial. The court’s analysis about the utility at trial of the untimely disclosed information was an appropriate consideration in weighing the potential prejudice to Alston.

We review the IAD reports individually and conclude the circuit court did not abuse its discretion in finding that Alston did not demonstrate prejudice. As to the four allegations of excessive force, they had negligible impeachment potential, if any. First, allegations of

excessive force were not relevant to Moorhead’s credibility, as they are not probative of a character trait for untruthfulness. Second, the allegations did not offer a reasonable factual basis to inquire about a prior bad act because none of the allegations were sustained. *See Cox*, 298 Md. at 181 (“[W]hen impeachment is the aim, the relevant inquiry is not whether the witness has been accused of misconduct by some other person, but whether the witness actually committed the prior bad act. A hearsay accusation of guilt has little logical relevance to the witness’ credibility.”).

For similar reasons, the circuit court could determine the report concerning a discrepancy in Detective Moorhead’s body camera footage and his probable cause statement was not a proper subject for impeachment inquiry at trial. The State explained in the pretrial hearing that the investigation revealed that the discrepancy happened due to Detective Moorhead’s misunderstanding of an informal term for a suspect’s waistband area. Another officer recounted details of a search to Detective Moorhead using the informal term, which Detective Moorhead misunderstood when preparing the probable cause statement. The investigation did not result in any finding bearing negatively on Detective Moorhead’s credibility. The investigation resulted in a not sustained finding.<sup>4</sup>

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<sup>4</sup> Alston argues that, regarding the probable cause discrepancy, “it was unclear whether the internal affairs investigator determined that the accusation was ‘not sustained’ or ‘unfounded.’” The State argues that whether a complaint is deemed “not sustained” or “unfounded” is immaterial to our analysis because neither are admissible evidence in court. *See Md. Code, Public Safety Article (“PS”) § 3-110(b)* (“Evidence of a formal complaint against a law enforcement officer is not admissible in an administrative or judicial proceeding if the complaint resulted in an outcome listed in subsection (a)(1) of this section.”); *PS § 3-110(a)(1)* (listing the outcomes as exoneration, unsustainable, or unfounded). We note that the Public Safety Article refers to “admissibility” and does not necessarily prohibit cross-examination based upon information contained in a report

Last, we turn to the allegation that Detective Moorhead searched a home without a warrant, which an investigator found sustained. That alleged conduct did not suggest any deception or untruthfulness bearing on Detective Moorhead’s veracity. Although an investigator found that the allegations were sustained, the circuit court accepted that Detective Moorhead’s pending review board hearing meant that the matter had not been “fully and finally litigated.” Thus, the court could reasonably conclude that the allegation about the alleged search was an inappropriate topic for cross-examination.

Alston argues that the trial court failed to consider whether the untimely disclosure hindered his opportunity to independently investigate the information in the reports. The circuit court questioned Alston multiple times as to how the late disclosure caused prejudice, and Alston responded that he needed time to subpoena witnesses to testify as to the allegations and obtain body camera footage. Alston reiterates on appeal that independent investigation into any of the allegations may have yielded information bearing on Detective Moorhead’s credibility. But Alston had reviewed the reports and was familiar with their substance. Alston did not explain how further independent investigation of the allegations would have yielded impeachment material. The court could appropriately conclude that the proffered lack of opportunity to independently investigate the IAD reports did not meaningfully hinder the preparation of his defense.

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resulting an outcome under (a)(1). Nonetheless, an investigation that did not confirm an allegation generally would not provide a “reasonable factual basis” for cross-examination about a prior bad act. *See Cox*, 298 Md. at 179–80.

Alston also argues, as he did in the trial court, that *Fields v. State*, 432 Md. 650 (2013), is analogous. There, two defendants, Fields and Colkley, were convicted in connection with multiple shootings. *Id.* at 659. The defendants learned during discovery that the Internal Investigation Division had sustained allegations of deceit against two officers involved in the case. *Id.* at 661. Fields and Colkley sought discovery of those reports, and the court denied that request. *Id.* at 661, 664. They also sought to cross-examine the officers at trial about those reports, but the court denied their request reasoning that they could not prove a factual basis for asserting the conduct occurred. *Id.* at 665. The Court of Appeals vacated their convictions. *Id.* at 657.

The Court of Appeals reasoned that while the reports constituted personnel records that are generally exempt from disclosure, the confidentiality interest in those reports must nonetheless be balanced against the rights of the defendant. *Id.* at 666. The Court articulated the applicable test to determine whether a defendant is entitled to discovery of protected documents: First, the defendant must “demonstrate a ‘need to inspect,’ that is, ‘a reasonable possibility that review of the records would result in discovery of usable evidence.’” *Id.* at 667 (quoting *Zaal v. State*, 326 Md. 54, 81 (1992)). Second, if the court finds that the defendant has established the need to inspect, the court “may elect to review the records alone, to conduct the review in the presence of counsel, or to permit review by counsel alone . . . subject to such restrictions as the court requires to protect the records’ confidentiality.” *Id.*

Applying this test, the Court of Appeals reasoned that, though the circuit court properly requested the defendants to demonstrate a “need to inspect,” it nonetheless “ran



afoul” of the second prong of the test by declining to review the content of the files. *Id.* at 669–70. It stated that the court had “the obligation to review the [] files . . . to decide whether the files contained anything even arguably relevant and usable by the defense to impeach the detectives and, only if the answer to that question were no, then deny the defendant total access to the records.” *Id.* at 670–71 (emphasis and internal quotation marks omitted). The Court further found that the trial court erred in declining to permit cross-examination on the reports pursuant to Maryland Rule 5-608(b) because it was undisputed that the report’s finding was sustained, and that finding “was not challenged, much less overturned, by a Trial Board.” *Id.* at 674. The Court concluded, there was “no doubt” that the defendants could have established a reasonable factual basis that the conduct occurred, and “no doubt” that such conduct would be probative of untruthfulness as required by Rule 5-608(b). *Id.*

Turning back to the instant case, *Fields* does not require reversal. Unlike *Fields*, here, the State in fact disclosed Detective Moorhead’s IAD reports and permitted Alston to review them prior to trial. Moreover, only one report resulted in sustained findings, and an appeal of that finding was pending before the trial board. The allegations of excessive force and an improper search did not relate to Detective Moorhead’s credibility. Finally, Alston’s proffer as to the alleged misconduct and its relation to the veracity of Detective Moorhead was sparse, as he argued only that he might have turned up some other usable impeachment material. *See Fields*, 432 Md. at 671 (“[Defendants] offer[ed] a detailed proffer of the alleged misconduct underlying the IID complaint, which was deemed ‘sustained,’ and by explaining how that misconduct related to the veracity of the detectives

and the potential value of that impeachment evidence to the defense’s theory of the case.”). Therefore, we hold the circuit court did not abuse its discretion in declining to impose discovery sanctions for the untimely disclosure of Detective Moorhead’s IAD reports.

**II. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN FASHIONING A SANCTION THAT PERMITTED ALSTON TO QUESTION FIREARMS EXAMINER FABER ABOUT CORRECTIVE ACTION REPORTS.**

Alston relatedly contends that the circuit court erred in declining to issue sanctions based on a failure to disclose firearms examiner Faber’s corrective action report. Alston maintains that because the court had already found the State’s late disclosure of Faber’s IAD report to be a discovery violation, and the corrective action reports were related to the same incident in the IAD report, the court should have imposed sanctions for the failure to disclose the corrective action reports. The State responds that the court in fact found the non-disclosure to constitute a violation and used its discretion to order a limited remedy for that violation. Again, we first provide additional background information and then analyze the parties’ legal contentions.

**A. Background**

On January 14, 2020, the morning of the hearing on Alston’s motion to dismiss the case or exclude testimony of Detective Moorhead, the State provided Alston with a disk that had information related to Faber’s IAD report. Alston orally requested that his motion incorporate that information as it related to Faber. Alston further argued that the State’s late disclosure of the IAD report related to Faber was prejudicial because it did not give Alston adequate time to prepare his defense. The State argued that the information contained in the Faber report was not impeachment material and proffered that the report

was based on an altercation with a coworker who called into question Faber’s competency. Alston responded that if the report concerned a complaint against Faber related to his competency as a firearms examiner, it would be impeachment information.

The court reserved ruling on the motion as it pertained to Faber to give defense counsel an opportunity to review the information. The court clarified that the State was required to give the full report on Faber, and if it did not do so, Faber would be precluded from testifying. The court further stated that competency was a viable issue for impeachment.

The next morning, the State moved for reconsideration of the court’s prior ruling regarding Faber’s testimony arguing that the file was turned over and the report contained no impeachable information. A prosecutor with the Police Integrity Unit argued on behalf of the State that because there was no duty to disclose the report, there could be no discovery violation.

The Office of the Public Defender’s Director of Special Litigation argued on behalf of Alston that although Faber’s IAD file had been turned over, the State had not provided corrective action reports related to the misconduct in the IAD report. The Special Litigation counsel stated that she had the corrective action reports because she obtained them for a prior case, subject to a “case related use” confidentiality agreement. The State responded that it did not have the corrective action reports because they were not part of the IAD file. The State further argued that there could be no prejudice from the late disclosure because Alston, through the Office of the Public Defender, knew about the contents from another case.

The court reviewed a portion of the corrective report. The IAD report detailed an incident where Faber was involved in a physical altercation with another employee, as a result of which he had to be removed from the main laboratory area. Because of this change in environment, he was under undue stress and made a mistake in a comparison, which required corrective action reports to be completed.

The court concluded that the late disclosure of the IAD report constituted a discovery violation. The court noted that there was little in the IAD report related to credibility, but that “while he was under stress, there [w]as an issue with respect to his performance directly related to his job.” The court stated that it was “not equally convinced that there has been a discovery violation with respect to the failure to produce corrective action documentation.” Therefore, the court found that the proper remedy for the violation was to direct the State to ask limited questions going to the issue of Faber’s competency. Those questions were whether, as a result of an incident with another employee, Faber was required to work at a separate location and whether, as a result of having to work at another location, Faber was under undue stress that caused him to make a misidentification subjecting him to a corrective action plan that he was required to complete before working in his full capacity. The court stated: “That is the scope of the Court’s remedy so that [Faber] may be cross-examined as to issues of competency and the remedy for failing to turn over the information.” The court concluded that it would not allow the corrective action plan or the IAD file into evidence, as it would not permit a mini-trial as to whether people believe Faber is competent. The court permitted Special Litigation counsel to provide to Alston copies of the corrective action documents related to the stress-induced

incident. The court also ordered the counsel from the Police Integrity Unit to provide the court and Alston with copies of the corrective action report.

Special Litigation counsel stated that she had the one corrective action report from the prior case, but that the State possessed corrective action reports for subsequent years. The court responded that it was limiting the reports to only the ones from the incident in which Faber allegedly made a misidentification.

The next day, Alston informed the court that the copy of the corrective action report the State provided did not appear to have the previously-discussed corrective information about Faber. The State averred that it provided “the corrective action plan” and did not know what else Alston sought. Alston clarified that he sought the documents possessed by Special Litigation counsel. After a recess, Alston confirmed that he received from Special Litigation counsel “the full documents of what [Special Litigation counsel] had, but not from yesterday.”<sup>5</sup> The court declined to permit Alston to argue for further disclosures.

Faber testified on direct that as a result of an altercation with another employee, he was not allowed to work in the main section of the laboratory and was required to work in a subsection. During this time, he made a mistake in one of his comparisons and was subjected to corrective action reports and proficiency tests. Faber stated that he completed all of the required tests and was deemed competent. On cross-examination, Faber testified

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<sup>5</sup> It is not clear which document “from yesterday” Alston was apparently missing. The circuit court directed the Special Litigation Counsel to “provide the corrective action documents . . . in this limited case.” The circuit court referred to a chart that it reviewed, but the court did not know whether the chart “was something [Special Litigation counsel] completed or whether it was something someone else completed.” Defense counsel apparently was also uncertain about the chart’s origin.

that as a result of his mistaken comparison, he was temporarily removed from his duties of examining firearms.

**B. The Circuit Court Did Not Abuse Its Discretion.**

We initially note that we disagree with Alston’s characterization of the court’s ruling as a finding of no discovery violation related to the corrective action report. Although the court noted that it was “not equally convinced that there ha[d] been a discovery violation with respect to the failure to produce corrective action documents,” the remedy encompassed the corrective action report. Specifically, the court stated that it would permit questions concerning the altercation that required Faber to work in a separate location, the misidentification that resulted from stress of working in another location, and whether as a result of that misidentification, he was subject to corrective action plans and was temporarily suspended. It concluded: “That is the scope of the Court’s remedy so that he may be cross-examined as to issues of competency and the remedy for failing to turn over the information.” Permitting questions specifically addressing the information in the corrective action report as a “remedy” indicated that the court in fact found the failure to turn over the corrective report to be a discovery violation.

Alston next acknowledges that the court permitted questions about the corrective action report but asserts that those questions were an insufficient remedy for the violation. He maintains that first, the court did not “ensure that defense counsel had received the official, complete corrective action report in the State’s possession,” and second, the court should not have limited the disclosures, but should have instead permitted disclosure of all corrective action and proficiency reports.

As to the “completeness” of the report, Alston alleges that the court “failed to ensure that defense counsel had received the official, complete corrective action report in the State’s possession.” Alston states that he received only one corrective action report, “and possibly only a part of that report[.]” The court permitted Special Litigation counsel to provide Alston with the corrective action documents relating to “what was allegedly done while [Faber] was under stress,” *i.e.*, relating to the misidentification.<sup>6</sup> Based on our review of the record, we see no basis to conclude that Alston lacked the identified documents bearing on Faber’s competency. The record does not offer insight into the contents of the corrective action reports. Alston did not proffer how the other reports related to Faber’s competency.

Finally, we conclude that the circuit court did not abuse its discretion in its choice of remedy for the violation. “The most accepted view of discovery sanctions is that in fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules.” *Thomas*, 397 Md. at 571. In determining an appropriate sanction, the court should consider: (1) the reasons why disclosure was not made; (2) the existence and amount of prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances. *Francis*, 208 Md. App. at 24–25.

Here, the circuit court considered the reason for the non-disclosure, that the

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<sup>6</sup> Special Litigation counsel suggested there may have been additional reports detailing discipline resulting from Faber speaking to another firearms analyst while a microscope comparison was occurring, contrary to policy. We understand the circuit court’s ruling to mean that reports relating to that alleged incident were not required to be provided.

corrective action report was not contained in Faber’s IAD file. Moreover, any prejudice to Alston was minimal as the court permitted the Special Litigation counsel, to share the report with Alston’s counsel, Alston’s counsel had time to review the contents prior to Faber’s testimony, and Alston’s counsel cross-examined Faber about the misidentification. *See Thomas*, 397 Md. at 574 (“[A] defendant is prejudiced only when he is unduly surprised and lacks adequate opportunity to prepare a defense[.]”). The court acted within its discretion in permitting Alston to cross-examine Faber with regard to his competency to cure any prejudice from the untimely disclosure.

**III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING DETECTIVE MOORHEAD TO IDENTIFY ALSTON IN THE SURVEILLANCE FOOTAGE.**

Finally, Alston contends that the court erred in permitting Detective Moorhead to identify Alston in the apartment surveillance footage. He argues that such testimony constituted an improper lay opinion which invaded the province of the jury. He similarly contends that Detective Moorhead was not “substantially familiar” with Alston prior to his arrest to permit identification.

Pursuant to Maryland Rule 5-701, a lay witness may testify in the form of opinion or inferences that are “(1) rationally based on the perception of the witness; and (2) helpful to a clear understanding of the witness’s testimony or determination of a fact in issue.” “A trial court should, within the sound exercise of its discretion, admit lay opinion testimony if such testimony is derived from first-hand knowledge; is rationally connected to the underlying facts; is helpful to the trier of fact; and is not barred by any other rule of evidence.” *Robinson v. State*, 348 Md. 104, 118 (1997).



Personal knowledge must be “sufficient to form a basis for the formation of rational opinion.” *Id.* at 123 (internal quotation marks omitted) (quoting *Ingalls v. Trs. of Mt. Oak Methodist Church*, 244 Md. 243, 258 (1966)). There must be a nexus between the perception and the opinion, which must not be based on speculation or conjecture. *Id.* at 124–25. “Thus, the proper question for determining if a sufficiently rational nexus exists between actual perception and the subsequent lay opinion testimony based on that perception is the validity of the proposition the witness used to link perception to opinion.” *Id.* at 125. Finally, the lay opinion must be helpful, meaning there was sufficient factual support for the witness’s conclusion. *Id.* at 127.

We addressed the admissibility of lay witness testimony identifying an individual in a photograph or video as the defendant in *Moreland v. State*, 207 Md. App. 563, 573 (2012). We followed the rule of the majority of jurisdictions that permit such testimony “if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than the jury.” *Id.* at 572 (quoting *Robinson v. Colorado*, 927 P.2d 381, 382 (Colo. 1996)). We recognized: “All of the courts among the majority agree that a lay witness who has substantial familiarity with the defendant . . . may properly testify as to the identity of the defendant in a surveillance photograph.” *Id.* (quoting *Robinson*, 927 P.2d at 383). “[A]lthough the witness must be in a better position than the jurors to determine whether the image captured by the camera is indeed that of the defendant, this requires neither the witness to be ‘intimately familiar’ with the defendant nor the defendant to have changed his appearance.” *Id.* at 572–73 (quoting *Robinson*, 927 P.2d at 384). Rather, “the intimacy level of the witness’ familiarity with the defendant goes

to the weight to be given the witness' testimony, not the admissibility of such testimony. *Id.* (quoting *Robinson*, 927 P.2d at 384).

Here, Detective Moorhead had previously encountered Alston on three occasions. First, on the night of the shooting, Detective Moorhead went to the Chinese restaurant to review surveillance footage and noticed Alston in the corner of the restaurant. Additionally, though Detective Moorhead testified that he initially did not suspect Alston's involvement upon this first encounter, he further testified that after viewing the surveillance footage from the Chinese restaurant, he immediately recognized the person on the video as the same person that he just encountered. Second, in driving by the Chinese restaurant the day after the shooting, Detective Moorhead testified that he recognized Alston outside the restaurant. At that point, Detective Moorhead had learned Alston's identify from the patrol unit, had reviewed the surveillance footage from the Chinese restaurant and the apartment complex and recognized Alston in both videos, and had put together a photo array from which S. Smith identified Alston. Third, after Alston's arrest, Detective Moorhead conducted a face-to-face interview of Alston at the police station. Detective Moorhead's familiarity with Alston provided "some basis" for the trial court to conclude that he was more likely to be able to identify Alston from the apartment surveillance video than was the jury.

Moreover, Detective Moorhead's identification was derived from his first-hand interactions with Alston. There was a rational connection between Detective Moorhead's perception that Alston was the person in the surveillance video and his testimony identifying Alston. Detective Moorhead testified that in reviewing the surveillance video,

he observed Alston’s face on the video “when he was walking up from the side video angle,” and identified the individual as Alston based on his side profile. Alston confirmed Detective Moorhead’s perception during his interview with Detective Moorhead. The detective showed Alston still photographs taken from the apartment surveillance, and Alston stated: “looks like me.” Finally, given Detective Moorhead’s prior encounters with Alston, there was sufficient factual support for his conclusion that Alston was the person depicted on the footage, and his opinion was therefore helpful to the trier of fact. We conclude the circuit court did not abuse its discretion in permitting Detective Moorhead’s testimony as to the identification.<sup>7</sup>

Alston argues that in *Moreland*, the witness was substantially more familiar with the defendant than is the case here, and therefore Detective Moorhead did not meet *Moreland*’s threshold requirement of “substantial familiarity.” While we agree with Alston that the witness in *Moreland* was more familiar with the defendant than is the case here, we disagree with Alston’s interpretation of the holding. Although, in adopting its rule, the *Moreland* Court noted that a majority of jurisdictions agree that “substantial familiarity” with a defendant would be *sufficient* to permit testimony, the Court did not hold that such familiarity was *required*. In fact, the Court explained that a witness is not required to be “intimately familiar,” but rather permits such testimony provided there is “some basis” to conclude the witness was more likely to correctly identify the defendant than the jury. *Id.*

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<sup>7</sup> Alston argued that officer’s prior familiarity should be judged only from the time prior to arrest. He raises no cases in support of this contention, nor do we read *Moreland* as implying such a timing requirement.

at 572–73. Where there is some factual basis, the witness is permitted to identify the defendant, and the jury determines the weight to be given to that testimony depending on the level of familiarity. *Id.* The trial court did not abuse its discretion in permitting such testimony.

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