Circuit Court for Montgomery County
Case No. 133342C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0147

September Term, 2019

ALEXANDER LANGLEY

v.

STATE OF MARYLAND

Fader, C.J.,
Meredith,
Wright
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: June 2, 2020

On February 22, 2018, Alexander Langley, appellant, was charged via indictment in the Circuit Court for Montgomery County with five counts: (1) first-degree rape of Ms. W. in violation of Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL") § 3-303; (2) conspiracy to commit first-degree rape in violation of CL § 3-303; (3) second-degree rape of Ms. W. in violation of CL § 3-303; (4) conspiracy to commit second-degree rape in violation of CL § 3-303; and (5) attempted second-degree rape of Ms. P. in violation of CL § 3-303.

A jury trial was held November 13-20, 2018, in the Circuit Court for Montgomery County. The court denied Motions for Judgments of Acquittal after the close of the State's case and at the close of evidence. Prior to the beginning of the defense's case in chief, the State *nolle prossed* both conspiracy counts. The jury acquitted appellant of Count 1, convicted him on Count 3, and could not reach a verdict on Count 5. As a result of the hung jury, the State *nolle prossed* Count 5. On February 28, 2018, the court sentenced appellant to a term of 20 years in prison, with all but 12 years suspended, followed by a five-year period of probation. On March 27, 2019, appellant filed this timely appeal.

QUESTIONS PRESENTED

(1) Did the trial court abuse its discretion by preventing defense counsel from introducing evidence of prior recent sexual conduct of [Ms. W.] to explain the cause of her physical trauma?

(2) Did the trial court abuse its discretion by admitting new photographs of the alleged crime scene that were not disclosed to defense counsel until the second day of trial, and that differed significantly from photographs disclosed during discovery?

Answering both questions in the negative, we affirm the judgment of the circuit court.

STATEMENT OF FACTS

On July 13, 2017, at approximately 3:00 a.m., the Montgomery County Police Department received a call to respond to a McDonald's restaurant located in Silver Spring, Maryland. Mr. P., later identified as the father of one of the complaining witnesses, had reported an assault that allegedly occurred earlier that night on July 12, 2017. Upon arrival, Officers Jason Burkett and Shannon Mattingly interviewed the complaining witnesses, Ms. W. and Ms. P.

Both women alleged they had been sexually assaulted by appellant and another man, with whom they had spent the evening. The women claimed they were very intoxicated at the time of the assaults, and that they could not recall parts of the evening.

All four individuals involved in the incident testified at trial, giving accounts that mirrored each other preceding the alleged attacks. Around 3:00 p.m. on July 12, 2017, appellant and Jonathan Guevera met up with Ms. W. and Ms. P. at a local park. Siquiera,[1] a friend of Mr. Guevera's, had driven them to the park. Ms. W. testified that she expected to go to IHOP with appellant and was surprised when he came with two friends that she did not know. Ms. W. testified that she knew appellant from school but never really had a

[1] Siquiera was the only name given during the trial. We assume it was a first name or nickname.

close relationship with him. Ms. P. and Ms. W. were best friends, and Ms. P. knew appellant from school as well.

The group stayed at the park for just a few minutes before a security guard asked them to leave. Siquiera drove the four of them to Mr. Guevara's home, where they spent time in the back shed. Appellant testified that Mr. Guevara brought a bottle of Bacardi rum. The two women testified that they voluntarily drank the alcohol in the shed. Ms. W. testified that she consumed two shots of the rum and began to feel woozy after the second drink. During this time, appellant and Mr. Guevara smoked marijuana. Both women testified that they were having a nice time in the shed. Ms. W. testified that this was the only time they had alcohol that evening.

Both women testified they felt "really woozy" and "dizzy" when they left the shed. Despite this, the four of them went to a McDonald's to use the bathroom and a local Safeway and Giant to purchase balloons for Ms. W.'s brother's birthday. Ms. W. testified that she only vaguely remembered going to Safeway, while Ms. P. testified that she did not remember going at all. Afterwards, they proceeded to go to a Little Caesar's restaurant where they ordered and ate pizza, although the women did not recall ordering. Mr. Guevara testified that he was flirting with, cuddling, and kissing Ms. W. while they went from store to store.

After leaving the restaurant, the four walked to the same park where they had met earlier that night and split up—Mr. Guevara going with Ms. W. to the slide, and appellant climbing the jungle gym with Ms. P. Ms. W. claimed that, at this point, she "blacked

out[,]" only to wake up with Mr. Guevara "on top of [her] raping [her]." She said the only reason she woke up was because Mr. Guevara was biting her on her lip and neck.

According to Ms. W., when Mr. Guevara got off of her for a moment, appellant approached and asked, "Yo, why are you hitting that?" Ms. W. testified that appellant threw her back on the slide, ripped her pants off, and placed his penis inside of her. She was crying and telling him to stop. She testified that appellant asked her sexual questions, and when she did not answer, choked her until she could not breathe and pulled her hair. Ms. W. testified that after appellant ejaculated, he helped put her pants on as if nothing happened.

Ms. W. then walked over to the side of the park towards Ms. P. Ms. W. claimed that Ms. P. was balled up on the steps of the playground with her eyes shut. Ms. W. shook Ms. P. to wake her up and noticed that Ms. P. had thrown up on the ground.

Ms. P. testified that appellant attempted to sexually assault her while on top of the jungle gym, but she did not believe that he was successful in so doing. She testified that appellant attempted to penetrate her with his fingers and with his genitalia, but she could not remember whether he was successful in doing that either. Ms. P. testified that during this time her memory was hazy, even causing her to black out at points. She testified that she threw up multiple times and passed out, waking up when Ms. W. shook her. Erin Farr,

a forensic biologist, testified that appellant's nuclear DNA[2] was not found on Ms. P.'s body.

In exchange for the State asking for a ten-year suspended sentence instead of jail time, Mr. Guevara pled guilty to third-degree sexual assault. At trial, he testified that he never forced himself upon Ms. W. and had consensual sex with her. He testified that, while he was having sexual intercourse with Ms. W., appellant approached and asked him if he was "hitting that," referring to Ms. W., who at the time was lying on the slide. Mr. Guevara testified that he never ejaculated during the sexual encounter because appellant made him feel uncomfortable. He testified that he witnessed appellant have intercourse with Ms. W. and that Ms. W. was crying. He told appellant to stop, but appellant continued having sex. Mr. Guevara did not attempt to stop him. After the incident, Mr. Guevara left to attend a local party.

Appellant testified that he never sexually assaulted anyone that night. He denied having any sexual contact with Ms. P. at all. He testified that he and Ms. P. were "just talking" in the park. At that time, he was unable to see Ms. W. and Mr. Guevara engaging in sexual intercourse and only saw them making out at one point. According to appellant,

[2] Nuclear DNA is found in the structure of a double helix, or a "twisted ladder of chemicals." *United States v. Coleman*, 202 F. Supp. 2d 962 (E.D. Mo. 2002). The "rungs" of the ladder are composed of four chemical bases known as nucleotides: adenine, cytosine, thymine, and guanine. The chemical bases are generally referred to as A,D,T, and G, respectively. An A is always paired with a T, and C is always paired with a G on opposite "rails" of the ladder. *Id.* at 965. The order of the chemical bases is what provides the informational content of the DNA. *Id.* Everyone's nuclear DNA can be considered unique, with the exception of identical twins. *Id.*

while he was talking to Ms. P., Ms. W. called him over and invited him to have sexual intercourse with her. Appellant testified that the sex was consensual and that he wore a condom the entire time. He disputed ever asking Mr. Guevara if he was "hitting that," referring to Ms. W. After having consensual sexual intercourse with Ms. W., appellant left the park and said he attended a party.

Although neither victim called 911 while at the park, Ms. W. testified that, after the men left the park, she called her boyfriend and told him about the alleged assault. She testified that during this phone call, her boyfriend called a Lyft to take the women to Silver Spring. While in the Lyft, Ms. P. became nauseous and the driver asked them to leave the car before they reached their destination. After the women left the vehicle, they proceeded to walk through an unfamiliar neighborhood and along a highway to a local McDonald's restaurant.

When the two women arrived at the McDonald's, they called Ms. P.'s father. Mr. P. testified that he received this call late at night from his daughter who seemed distraught. She told him she thought she had been drugged and felt as though she had been assaulted but she was unsure. Mr. P. called the police and went to the McDonald's. Moments before Mr. P. arrived, Officer Burkett arrived at the McDonald's with several Montgomery County Police Department officers.

Officer Burkett testified that he met the two women inside and spoke with them regarding the incident earlier that night. At first, the officer questioned the two women together, but separated them after medical personnel arrived. According to Officer Burkett,

the women seemed flustered, distraught, and had "some level of intoxication." Officer Burkett interviewed Ms. P. At trial, the officer's body camera video was played, corroborating his testimony. During his interview, Ms. P. reiterated the fact that she was unsure if appellant raped her, and at one point was unsure whether appellant or Mr. Guevara was the one attempting to penetrate her. Ms. P. also told the officer that she thought she had been drugged. The rest of the interview was similar to what Ms. P. testified to at trial.

Officer Mattingly questioned Ms. W. She testified that there was no body camera footage of this interview because Ms. W. was too hysterical at the time to give proper consent. Officer Mattingly's interview with Ms. W. was consistent with Ms. W.'s testimony at trial. After paramedics arrived, Ms. W. rode to the hospital with her mother, Ms. C.

Ms. C. testified that she received a call around 3:30 a.m. to come to the local McDonald's. On this call, Ms. W. told her that "they raped me," and later broke down crying. After speaking with her daughter about the incident, she spoke with the officers and informed them of the location of the park where she believed the incident occurred. This location was not correct. Ms. C. testified that on the first day of trial she notified prosecutors of the incorrect location. She later provided them with photographs she took that night of the correct park. Some of these photographs were admitted into evidence the next day, over the objection of defense counsel.

After speaking with the officers at the McDonald's, both women were taken to the Shady Grove Medical Center for further examination. Corporal Mike Putnam, a former

sexual assault detective, came to the hospital to question the women further. After his interviews with the two women, Corporal Putnam went to the park originally identified by Ms. C. and took photographs that were given to defense counsel during discovery. Corporal Putnam admitted that he never went to the correct scene, even after he was aware that he had investigated the wrong park.

While at the hospital, the women were examined by two nurses who specialized in sexual assault examinations: Ms. Najia Barton and Ms. Ann Winklebauer. Ms. Barton testified that she examined Ms. W. and detailed her findings in a report that was later introduced at trial as Exhibit 41 but never admitted into evidence. The trial court allowed Ms. Barton to read off the "pathologically germane" material from this report into the record. This report stated that Ms. W. had bruises and abrasions on her neck and legs.[3] Photographs of these injuries were admitted as exhibits during trial. Ms. Barton did not test Ms. W.'s blood for alcohol or for drugs.

Ms. Winklebauer examined Ms. P. While Ms. P. was calm and cooperative throughout, she was unable to recall if appellant ever penetrated, kissed, or licked her during the incident. Ms. Winklebauer did not conduct a urine or blood analysis of Ms. P.

Detective Abigail Ratnofsky spoke with both women at the hospital. Ms. P. informed her that appellant attempted to rape her. Detective Ratnofsky also spoke with Ms. W., who told her that she was raped by appellant and Mr. Guevara but was unable to

[3] Ms. W. testified that the appellant was choking her to the extent that her breath was affected and that the photograph entered into evidence fully and accurately reflected bruising around her face and neck area.

recall Mr. Guevara's name at that time. Detective Ratnofsky testified that she eventually learned that police had investigated the wrong park, and she reported this mistake to the State's Attorney's Office at a case conference in March 2018.

The hospital sent over the samples collected from the two women to the Montgomery County Police Department's forensic biology unit where the forensic biologist, Ms. Farr, tested them. After testing multiple samples, Ms. Farr testified that she found appellant's DNA near Ms. W.'s genitalia. Ms. Farr did not find appellant's DNA on Ms. W.'s neck but did find Mr. Guevara's.

Appellant and Mr. Guevara were arrested on January 20, 2018, some six months later. Because of this delay, officers never searched the shed during their investigation. Soon after arresting Mr. Guevara, officers arrested appellant. Officer Jason Bahm testified that he took buccal samples (cheek swabs) that were provided to the forensic lab from both men.

At the conclusion of appellant's trial, the jury acquitted him of first-degree rape of Ms. W. but convicted him of second-degree rape. The jury hung on the attempted rape charge involving Ms. P.

DISCUSSION

I. RAPE SHIELD LAW

Appellant argues that the court abused its discretion in deciding that the Rape Shield law exception did not apply to Ms. W.'s recent sexual conduct as presented by appellant. During opening statements, appellant referred to a note from hospital records that Ms. W.

had sexual relations the night before the incident with appellant. The prosecutor objected based on Rape Shield law. During a brief bench conference, appellant argued that the evidence would call into question the source of the trauma. In response, the prosecution argued that Maryland's Rape Shield law required a pre-trial conference to determine admissibility of the evidence. The court ordered the jury to disregard the statement and instructed the parties that arguments regarding the issue would be heard the following morning.

The next morning, appellant proffered that only the nurse that examined the victim would be questioned, and that the evidence was relevant because it created reasonable doubt of the source of the trauma. The report stated that Ms. W. had bruises and abrasions on her neck and legs. The court ruled that unless the defense was going to present evidence linking the consensual sex to the trauma, such as a medical expert, the evidence was not admissible because it would force the jury to speculate. Because appellant did not have a witness linking the two issues, the judge found that the evidence of sexual conduct was not admissible.

This Court has explained the standard of review of a trial court's decision regarding the admission of evidence as follows:

> Determinations regarding the admissibility of evidence are generally left to the sound discretion of the trial court. This court reviews a trial court's evidentiary rulings for abuse of discretion. A trial court abuses its discretion only when no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding principles.

Baker v. State, 223 Md. App. 750, 759 (2015) (internal citations, quotations, and alterations omitted) (quoting *Donati v. State*, 215 Md. App. 686, 708-09 (2014)).

The abuse of discretion standard applies "with respect to the admissibility of evidence concerning a victim's past conduct[.]" *Bell v. State*, 118 Md. App. 64, 89 (1997), *rev'd on other grounds*, 351 Md. 709 (1998); *see* CL § 3-319(a) ("Evidence relating to a victim's reputation for chastity or abstinence and opinion evidence relating to a victim's chastity or abstinence may not be admitted" in rape and sexual offense cases); *see also Johnson v. State*, 332 Md. 456, 464 (1993) (a "trial court's ruling on the admissibility of specific instances of a victim's past sexual conduct is subject to review for an abuse of discretion standard") (citing *White v. State*, 324 Md. 626, 637 (1991)). Further, the Rape Shield law provides an exception under the following circumstances:

> (b) Evidence of a specific instance of a victim's prior sexual conduct may be admitted in a prosecution described in subsection (a) of this section only if the judge finds that:
>
> (1) the evidence is relevant;
>
> (2) the evidence is material to a fact in issue in the case;
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> (3) the inflammatory or prejudicial nature of the evidence does not outweigh its probative value; and
>
> (4) the evidence:
>
> (i) is of the victim's past sexual conduct with the defendant;
>
> (ii) is of a specific instance of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma;
>
> (iii) supports a claim that the victim has an ulterior motive to accuse the defendant of the crime; or

> (iv) is offered for impeachment after the prosecutor has put the victim's prior sexual conduct in issue.

CL § 3-319(b).

Appellant argued that the victim having sex the day before could create reasonable doubt that the injuries came from appellant. This court, however, has held that prior sexual conduct is inflammatory unless there is expert testimony specifically linking the prior conduct to the trauma that occurred. *Smith v. State*, 71 Md. App. 165, 183 (1987).

In *Smith*, the court addressed evidence of prior sexual conduct to explain the source of semen. *Smith*, 71 Md. App. at 181. The court reviewed various state cases with similar Rape Shield laws regarding evidence of semen which hold that there must be expert medical testimony to explain how prior conduct relates to the trauma. *Id.* at 183. Specifically, the court held "it is incumbent upon [appellant] to produce scientific rather than purely speculative, evidence as to how the presence of semen and/or injury to the victim occurred." *Id.* at 189. Here, appellant did not proffer specific facts regarding the sexual conduct that occurred the day before that would relate the trauma to the sexual assault, nor did he produce a medical expert to produce scientific evidence that the trauma could have occurred from that particular prior consensual sexual act. Because the only evidence is of consensual sexual conduct the night before without any evidence it resulted in trauma, the evidence in this case is speculative and cannot demonstrate how an injury occurred.

The trial court relied on a Connecticut case which presented similar facts to the present case. In *State v. Thomas*, 173 A.3d 430 (Conn. App. Ct. 2017), the Appellate Court of Connecticut addressed the introduction of prior recent sexual conduct to show alternative cause of injury. In *Thomas*, the defendant wanted to introduce evidence of prior consensual sex and an expert witness to show that "rough" consensual sex could have potentially caused the injuries. *Id.* at 452. The court ruled that evidence of consensual sex with a person not a party to the case was not of probative value without further evidence showing that the injuries came from the consensual sex. *Id.* at 453.

Similarly, the evidence presented in this case only amounted to the testimony of the nurse stating that she wrote down that Ms. W. had consensual sexual relations the night before the incident. Without additional specific facts or expert testimony to tie the occurrence to the trauma, there is no probative value to the evidence because it would merely be speculative. The circuit court properly excluded the evidence of prior sexual conduct based upon Maryland's Rape Shield law.

II. DISCOVERY VIOLATION

Appellant argues that the trial court abused its discretion by failing to remedy the prosecutor's late disclosure of accurate crime scene photographs. Appellant further avers that the erroneous admission of new crime scene photographs on the second day of trial seriously prejudiced the defense, which had relied on photographs of the wrong park that were disclosed during discovery.

It is undisputed that, shortly after arresting Mr. Langley, police mistakenly took photographs of a park different than the one where the alleged sexual assaults occurred. The prosecution disclosed these photographs to defense counsel during pre-trial discovery. During opening statements, defense counsel relied on these photographs as being accurate depictions of the crime scene. After the prosecution contended that the jury would hear evidence of Ms. W. screaming during the assault, defense counsel attempted to rebut this assertion by showing a photograph depicting a playground with townhomes in the immediate background. Defense counsel argued that had Ms. W. screamed, someone in the homes would have heard the incident.

The prosecutor indicated that she learned later that same day that the photographs disclosed during discovery were of the wrong location, but she had pictures taken of the actual park that night. The next morning defense counsel was made aware of the mistake. After Ms. W.'s initial direct examination, the prosecutor asked to reopen the examination to admit the new photos, explaining that she had forgotten them. When the defense objected, the court heard arguments from both parties, stating: "I think [defense counsel] is prejudiced if he made comments in the opening about the wrong pictures that he's been provided." Defense counsel argued that the prejudice stemmed from the fact that there were no townhouses in the new photographs. Thus, they contradicted his opening statement and undermined his credibility. Further, counsel did not have opportunity to investigate the location shown in the new photographs.

The prosecutor responded that all parties had the accurate location of the park during discovery, and that the defense could have investigated the scene prior to trial. The defense countered that it had no reason to investigate the park, as it had relied upon the State's photographs, believing them to be accurate. Further, the prosecutor stated that an overhead photograph of the scene was already admitted into evidence, which showed the location of the correct park and apartments in the vicinity.

The prosecutor represented that she had only learned about the incorrect photographs the previous day. She stated that she realized the photographs were of the wrong park when she showed them to Ms. W. on the first day of trial. At that point, according to the prosecutor, "we went last night to get pictures of the right park." She acknowledged she "wanted these pictures specifically because based on what [defense counsel] said I wanted to know how close the apartments were."

Ms. C., Ms. W.'s mother, testified later that day and further addressed the photographs at issue. Ms. C. explained that she had initially directed investigators to the wrong park by mistake. She realized this shortly after the alleged incident, when her younger daughter found a piece of clothing belonging to Ms. W. in a different park. Ms. C. notified investigators that the initial location she had given was incorrect, but she did not receive a response. According to Ms. C. she texted the prosecutors on the first day of trial to inform them that they had the wrong location for the park. Later that night, on her initiative, she went and took photographs of the correct park, which she sent to the prosecutors.

The court, after considering all of the facts and circumstances, admitted the photographs. The court stated that the photographs only showed playground equipment, which caused little prejudice: "I don't see them as distinct in any way from any park in America . . . ." The court offered to instruct the jury that defense counsel was initially provided the wrong images, but defense counsel argued that this instruction was insufficient to cure the prejudice of the last-minute surprise. He went on to argue that, in addition to the harm suffered during opening statements, he was unable to investigate the correct scene after learning of the prosecutor's mistake or speak to Mr. Langley in detail about the new photographs. The court delayed its final ruling until after a break to review both sides' opening statements. After listening to the opening statements, the court again found that there was minimal prejudice from the new photographs and admitted them into evidence.

Under Md. Rule 4-263, a defendant is prejudiced only when he is unduly surprised and lacks adequate opportunity to prepare a defense, or when the discovery violation substantially influences the jury. The prejudice that is contemplated is the harm resulting from the nondisclosure.[4] If the trial judge erred because the State did, in fact, violate the discovery rule, we consider the prejudice to the defendant in evaluating whether such error was harmless. *See Johnson v. State*, 360 Md. 250, 269 (2000). "If at any time during the

[4] Where the trial judge made no specific finding as a matter of law that the State violated the discovery rule, we exercise independent *de novo* review to determine whether a discovery violation occurred. *See Ferris v. State*, 355 Md. 356, 368-69 (1999) (maintaining that questions of law are reviewed *de novo*); *see also, Hutchins v. State*, 339 Md. 466, 475 (1995).

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." *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 of curing any prejudice with a continuance; and (4) any other relevant circumstances. *See Taliaferro v. State*, 295 Md. 376, 390 (1983). "While the prosecutor's intent alone does not determine the appropriate sanction, bad faith on the part of the State can justify exclusion of evidence or serve as a factor in granting a harsher sanction." Thomas,397 Md. at 570 n.8. And, if the discovery violation irreparably prejudices the defendant, a mistrial may be required even for an unintentional violation. *Id. See also Raynor v. State*, 201 Md. App. 209, 228 (2011), *aff'd*, 440 Md. 71 (2014). "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 471.

In this case, the trial court identified the discovery violation and acted within its discretion to permit the photographs of the correct park. In consideration of possible discovery sanctions, the trial court considered the pertinent *Taliaferro* factors. As for the

first factor – "the reasons why the disclosure was not made" – while the State failed to disclose the issue that the photographs were of the wrong park during discovery, the State prosecutor did not know it was the incorrect park until the trial had begun. The new photographs of the alleged crime scene were taken after the first day of trial and disclosed the next day. The State provided the defense with this information and photographs of the actual park, and the State notified defense counsel immediately upon learning from a witness that the photographs in question were incorrect. There is no suggestion or allegation of bad faith on the part of the prosecutor. Additionally, the trial court noted that the defense had old photographs during discovery, that he was provided the new photographs at essentially the same time as the State, and that prosecutors had just learned about the mistake themselves.

The second factor, "the existence and amount of any prejudice to the opposing party," and the third factor, "the feasibility of curing any prejudice with a continuance," are interrelated, and we shall analyze them together. As to the former, the Court of Appeals has said that, when a criminal discovery rule is violated, "a defendant is prejudiced only when he is unduly surprised and lacks adequate opportunity to prepare a defense, or when the violation substantially influences the jury," and that "the prejudice that is contemplated is the harm resulting from the nondisclosure." *Thomas*, 397 Md. at 574. In assessing prejudice, the trial court reviewed the photographs and found that they were indistinguishable from any other photographs of local community parks. The old photographs and the new photographs were not significantly different from one another,

therefore limiting the amount of possible prejudice. The defense counsel at no point asked the trial court for anything other than excluding the photographs. If defense counsel felt truly prejudiced by the new evidence, then a continuance or mistrial should have been requested. There was no such request of the trial court. In this case, this issue of prejudice and preparation could have been remedied by a continuance.

Exclusion of evidence for a discovery violation is not a favored sanction and is one of the most drastic measures that can be imposed. *Thomas*, 397 Md. at 571. It is undisputed that defense counsel had the correct address of the sexual assault all along and had not been prejudiced because defense counsel had every opportunity before the trial to examine the scene of the crime. In addition, appellant presumably knew of the exact position of the park as he admitted being there and having consensual sex with Ms. W. The trial court judge, presented with one option from defense counsel to exclude the evidence, acted within his discretion to admit the photographs and give the jury a limiting instruction on how the one set of photographs admitted were of the wrong park. Defense counsel had argued that, "the prejudice stemmed from the fact that there were no townhouses in the new photographs. Thus, the picture contradicted his opening statement and undermined his credibility." After reviewing the opening statements, the trial court found that there would be no unduly prejudicial effect on the defense counsel.[5] The appellant had the

[5] Defense counsel may have oversold the closeness of the apartments to the playground. Our review of the incorrect photographs reflects that the apartments are separated from the playground by a parking lot with double rows of cars which would be considerably more than ten feet. In fact, it would be incongruent for a playground to be placed within ten feet of the residential area because of the possible noise from children's

opportunity to cross-examine the investigators on their steps in conducting a thorough investigation. This is particularly the case where the alleged prejudice stemmed from a remark made in the Defense's opening statement. It is well-established principle that opening statements are not evidence. *See Ford v. State*, 462 Md. 3, 33 (2018) (citing *Keller v. Serio*, 437 Md. 277, 288 (2014)).

Further, this is not the type of prejudice contemplated by the prejudice requirement for a Md. Rule 4-263 sanction. Appellant has failed to demonstrate any prejudice he has suffered as a result of the delay in disclosure. *See Bellard v. State*, 229 Md. App. 312, 341-42 (2016). As we stated above, under Md. Rule 4-263, a defendant is prejudiced only when he is unduly surprised and lacks adequate opportunity to prepare a defense, or when the violation substantially influences the jury. The prejudice that is contemplated is the harm resulting from the nondisclosure. 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 here seemed to forego requesting the limited remedy that would serve those purposes and instead acted opportunistically in order to exploit the State's error and gamble for a greater windfall upon appeal. *See, Jones v. State*, 132 Md. App. 657, 678 (2000).

Here, the trial judge did not abuse his discretion in admitting the first set of photographs at trial. The trial court admitted the correct photographs of the alleged crime

play. The court indicated as much by ruling that the pictures were not distinct in any way from any park in America.

scene, as well as the incorrect photographs into evidence. The trial court permitted cross-examination of the investigators and offered to give a limiting instruction, and the appellant objected to giving that instruction. Appellant was not unduly prejudiced in any way and there was no bad faith on the part of the State.

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

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0147s19cn.pdf