UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 157

September Term, 2014

LARRY DAVIS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: May 21, 2015

In February of 2010, in the Circuit Court for Baltimore City, Larry Davis, the appellant, was convicted of attempted first-degree murder, assault in the second degree, knowing possession of incendiary material with intent to create a destructive device, and other crimes. After sentencing, he appealed, and this Court affirmed his convictions. *Davis v. State,* No. 407, Sept. Term 2010 (filed May 9, 2012). On September 7, 2012, the appellant filed a *pro se* motion for new trial based upon newly discovered evidence. He supplemented the motion on November 25, 2013, December 20, 2013, and March 7, 2014. Defense counsel then filed a motion for new trial on behalf of the appellant on March 11, 2014. The court denied the motion.

On appeal, the appellant presents two questions, which we have rephrased as follows:

I. Did the circuit court abuse its discretion in denying the motion for new trial?

II. Was the evidence legally sufficient to support the appellant's convictions?

For the reasons discussed below, we shall affirm the order of the circuit court.

FACTS AND PROCEEDINGS

On May 23, 2007, the appellant was convicted of attempted murder and other crimes for trying to kill his former girlfriend, Sarah Burke, by attaching an incendiary device to the underside of her car. On appeal, this Court reversed the convictions for a *voir dire* violation and remanded the case for a new trial. *Davis v. State*, No. 991, Sept. Term, 2007 (filed April 23, 2009).

The appellant was retried in February of 2010. The evidence showed that Burke and the appellant had been romantically involved and had a contentious break-up in February of 2006. On the afternoon of April 11, 2006, Burke left work temporarily to put some items in the trunk of her car. As she approached her car, she saw the appellant lying on the ground behind it, looking as if he were "doing some work" under the vehicle. Burke screamed and ran. The appellant gave chase, yelling, "I'm gonna kill you, bitch." He appeared to be carrying duct tape and other items. The appellant caught up to Burke and grabbed her. After a struggle, she was able to break free, but fell to the ground while the appellant ran into a nearby wooded area. Shortly thereafter, the police were called and the appellant was arrested. He had duct tape in his possession. In the wooded area the police found various items connected to the appellant, including wire cutters, sulfuric acid in a bag, fuel cells with attached wires, a large rubber band, and a receipt bearing his signature.

One of the Baltimore City Police Department ("BPD") officers who responded inspected Burke's car and discovered that a yellow propane cylinder had been attached to its tail pipe with duct tape and copper wire. Officer Bryan Bacon, of the BPD's bomb squad, removed the device. He testified that, had Burke driven the car with the propane cylinder attached, the heat from the car would have caused a "large incendiary explosion" of the propane gas and possibly an ignition of the car's gas tank that would have injured her and others in the immediate area.

On February 18, 2010, the jury found the appellant guilty of all charges, and on February 25, 2010, the court sentenced him for the offenses of attempted first-degree murder,

second-degree assault, and knowing possession of incendiary material with intent to create a destructive device. The appellant filed a motion for new trial under Rule 4-331(a), which was denied. He appealed to this Court. We affirmed the convictions, but vacated one of his sentences.

On September 7, 2012, the appellant filed a *pro se* motion for new trial, under Rule 4-331(c). He argued that there was newly discovered evidence consisting of a chain of custody report for the propane cylinder. The report, prepared by the Evidence Control Unit ("ECU") of the BPD, identifies the propane cylinder as Inventory 06020727, Complaint #065D005654, and sets forth its chain of custody as follows:

> Item #1 - PROPANE CYLINDER (1 piece) was turned over to BARBARA DAIS (Badge: M496, Cmd: ECU) at the Baltimore Police Department on Wednesday April 12th, 2006 by LISA HARDY (Badge: H655 Cmd: ND). the current location of the item is 'BECHRAD' and its current status is 'Frozen'. The following is a chronological list of all transactions performed on this item:
>
> Item was logged into evidence on 04/12/2006 at 12:06:48 AM.
>
> On Wednesday, April 12th, 2006, at 12:11:17 AM, BARBARA DAIS (Badge: M496, Cmd: ECU) moved item from location 'A-SIDE HOLD AREA' to 'BECHRAD'.
>
> On Tuesday, March 2nd, 2010 at 09:05:56 AM, LAWRENCE HOVERMILL (Badge: E951, Cmd: ECU) placed an administrative freeze on the item.

In a November 25, 2013 supplement to his motion for new trial, the appellant argued that the BPD's chain of custody report "confirm[ed] with certainty" that the propane cylinder introduced into evidence at trial was not the same propane cylinder being held at the ECU under AC06020727. The appellant asserted that he had "diligently tried to obtain chain of

custody report AC06020727" before trial, and, although the BPD released other chain of custody reports for photographs and police reports, the "[c]hain of custody report AC06020727 and other reports requested weren't released." Exhibits to this supplement include several pieces of correspondence documenting his requests for documents and custody reports. In a letter dated August 30, 2009, to an Assistant State's Attorney, the appellant states:

> On August 22nd 2009, the Office of Legal Affairs for the Baltimore City Police Department, sent a letter that was forwarded to me. The letter states since my case is back at trial level they can no longer provide any documents from investigative files as per Custodian of Records.
>
> On or about July 12th 2008, I received chain of custody report number's AC#06020730 and 06020731 dated 7/8/08. But the (sic) would not release AC#06020727 which contains information on the propane cylinder. Therefore I am requesting that you contact the Police Department and obtain a copy of The Chain of Custody Report #06020727, written under CC 065d5654, in case no 106116048 before trial please.

(Emphasis in original).

In the motion for new trial filed on March 11, 2014, counsel for the appellant argued that he had received ineffective assistance of trial counsel because counsel had failed to obtain the chain of custody report for the propane cylinder before trial. According to the appellant, because the chain of custody report does not show that the cylinder was removed from the ECU for trial, the cylinder from the crime scene could not have been the same cylinder moved into evidence and testified about at trial. Therefore, trial counsel performed deficiently by failing to argue that the State had committed a discovery violation with regard to this evidence.

The court held a hearing on the appellant's motion for new trial on March 12, 2014. Several issues were raised and argued. After hearing defense counsel's argument, the hearing judge suggested that his "most critical issue" was the issue regarding the chain of custody report for the propane cylinder. In response, the prosecutor, who had participated in both of the appellant's trials, explained the relative insignificance of the chain of custody report. She pointed out that the "chain of custody report is a half-page. It's computer generated from April 12th, 2012."[1] She further noted that there was no one present from the BPD to

> say what should be there and what shouldn't be there. Mr. Davis is arguing the assumption that because it does not say out to court, therefore, that cylinder did not move for six years. . . . There should be a witness here to talk about what the proper procedure is for making these reports . . . .

The prosecutor continued:

> That being said – and this gets interesting because I'm now, kind of, a witness to the court as well as counsel because I was the original trial attorney on this case in both matters. The crime scene photos from the night of this incident, show the photographs of the propane cylinder. The propane cylinder was brought to court for both trials, the first trial and the second trial.
>
> It would have been a totally generic propane cylinder, of the type that you could buy at Lowe's if you wanted this narrow type of propane cylinder. But for the fact that because of how it was attached to the car and how it was removed, it had been attached with duct tape. And then the duct tape had been cut when it was removed, which specifically rips the label in a certain way that I think would be almost impossible to recreate. I saw the physical cylinder. I had the photographs in my hand. It was clearly the same cylinder.

[1]The report in the record bears a date of April 12, 2012, because that is when it was printed out from the computer to be sent to the appellant by the BPD. It was sent to him with a cover letter dated April 13, 2012.

> So that being said, if this report is actually done in the record keeping of the Baltimore City Police Department, I would argue that it is the report that is faulty and not the cylinder in question. That the cylinder in question is clearly the one in the photographs that any lay person, looking at the color photographs and the cylinder, could make that determination that it was the same cylinder.
>
> Even if the Court did not want to accept that argument. The cylinder itself, it was not that we tested the contents and we offered those tests as the evidence. The cylinder was brought in so that the jury could see exactly what was recovered in-person, its size, et cetera. If, let's say, the Baltimore City Police Department had lost the cylinder. They couldn't find the cylinder, I would have had the crime scene photographs and I could have gone to Lowe's and bought the same cylinder and brought it in as demonstrative evidence. This is that kind of cylinder. This is how big it is. This is what color it is. And most importantly, these are all the warning labels that are written right on it so that anybody can read that it shouldn't be stored next to sources of heat. That it's flammable. That it's explosive, et cetera, et cetera.
>
> Therefore, even if the Defendant were successful in this argument, that this were newly discovered evidence. And I am not conceding that it is. It would not be of the nature that upon a new trial, that this would likely to be producing an acquittal.

The appellant responded that the chain of custody report for the propane cylinder clearly differs from those for other pieces of evidence, even though they all were stored in the same area.

The court denied the new trial motion, stating:

> So then I think the only issue that has any legs, if you will, is the issue of the chain of custody with the propane cylinder. . . . And in a way, my problem with it is that Defendant's Exhibit No. 1 [the computer print-out of the chain of custody report], which Mr. Davis says he received in 2012, which clearly would have been two years after the trial, is the one document.
>
> And newly discovered, at least my understanding of the law, is that it could not have been discovered at the time of the trial. And I think the Defense No. 2 [the appellant's August 30, 2009 letter to the Assistant State's

> Attorney] flies in the face of that proposition that it could not have been discovered. Because Defense No. 2 is actually Mr. Davis saying, well, let me see a chain of custody.
>
> So it's not that I could not have discovered it. It could have been discovered. And the response of the Police Department is, this is a case that's in active litigation. So the way in which to address it is to raise pretrial the motion; I'd like to see the chain of custody. We need to have a discussion about that or to cross examine the officer with respect to is there a chain of custody?
>
> So I don't believe this falls within the purview of newly discovered evidence. And, therefore, the Motion for a New Trial is respectfully denied.

The court issued a written order the next day. It states that, "[u]pon consideration of the Defendant's Motion for New Trial, the Supplements to the Motion, and the arguments of counsel made on the record at the hearing on March 12, 2014," the motion for new trial is denied, "as the Defendant has failed to establish that there is evidence which has been newly discovered and which would likely lead to an acquittal."

The appellant noted a timely appeal.

DISCUSSION

I.

The appellant contends the circuit court's adverse ruling on his motion for new trial "was an abuse of discretion and based on a clearly erroneous view of the facts presented." He argues that the chain of custody report was newly discovered evidence that "would have made a substantial difference" in the outcome of his trial. He maintains that the court erroneously concluded that he "could have obtained the newly discovered evidence in time

for trial when it was undisputed that the evidence was withheld by the police department until after [he] fought for many years to obtain it."

The State responds that the chain of custody report was not newly discovered evidence, and the appellant failed to exercise due diligence to obtain it; therefore, the court properly exercised its discretion to deny the motion for new trial.

A circuit court's decision to deny a Rule 4-331(c) motion for new trial is reviewed on appeal for abuse of discretion. *Campbell v. State,* 373 Md. 637, 665 (2003). The court's discretion is broad, but not boundless; the "abuse of discretion standard requires a trial judge to use his or her discretion soundly." *Id.* at 665-66. The decision to deny a motion for new trial based on newly discovered evidence is an abuse of discretion if it is "'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Jackson v. State,* 216 Md. App. 347, 363-64 (quoting *Moreland v. State,* 207 Md. App. 563, 569 (2012)), *cert. denied,* 438 Md. 740 (2014).

In criminal cases, motions for new trial are governed by Rule 4-331, which states in relevant part:

> (a) **Within ten days of verdict.** On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial.
>
> * * *
>
> (c) **Newly discovered evidence.** The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule . . . .

To prevail on a motion under Rule 4-331(c), the defendant must establish that the evidence at issue was, in fact, newly discovered evidence

> that could not have been discovered by due diligence in time to have presented it in connection with [his] first motion for new trial, and that the newly discovered evidence "may well have produced a different result, that is, there was a substantial or significant possibility that the verdict of the trier of fact would have been affected."

Jackson v. State, 358 Md. 612, 626 (2000) (quoting *Yorke v. State,* 315 Md. 578, 588 (1989)).

The threshold question in ruling on a motion for new trial based on newly discovered evidence is whether the evidence in question was, in fact, "newly discovered." To be "newly discovered," evidence must not have been previously discoverable through the exercise of due diligence. *Love v. State,* 95 Md. App. 420, 432 (1993). "Unless and until there is found to be 'newly discovered evidence which could not have been discovered by due diligence,'" a circuit court need not weigh its significance, and a new trial may not be granted, "no matter how compelling the cry of outraged justice may be." *Id.* at 432 (quoting Rule 4-331(c)). *Accord, Jackson,* 216 Md. App. at 364. "The role played by 'due diligence' in adjudicating claims of newly discovered evidence cannot be overstated." *State v. Steward,* 220 Md. App. 1, 21-22 n.15 (2014), *cert. granted*, 441 Md. 666 (2015).

In *Douglas v. State,* 423 Md. 156, 187 (2011), the Court of Appeals affirmed a circuit court's order denying a motion for new trial based on newly discovered evidence when the evidence in question was "known but unavailable." The Court opined that, "'[e]xculpatory evidence known . . . prior to the expiration of the time for filing a motion for a new trial,

though *unavailable,* in fact, is not newly discovered evidence.'" *Id.* (quoting *Argyrou v. State*, 349 Md. 587, 600 n.9 (1998)) (emphasis in *Douglas*). If a party is aware of the existence of particular evidence prior to the relevant expiration period, but does not exercise due diligence to seek that evidence, even if it is unavailable, then the party may not claim that the evidence is "newly discovered." *Love,* 95 Md. App. at 436.

"'[A]s used in Maryland Rule 4-331(c), 'due diligence' contemplates that the defendant act reasonably and in good faith to obtain the evidence, in light of the totality of the circumstances and the facts known to him or her.'" *Steward,* 220 Md. App. at 21 (quoting *Argyrou,* 349 Md. at 605). If a party is on notice of the existence of a piece of evidence, but neglects to make a proper inquiry, "'he will be held guilty of bad faith and must suffer from his neglect.'" *Id.* (quoting *Argyrou,* 349 Md. at 603). "The diligence criterion is a demanding one, and it may not be casually brushed aside." *Yonga v. State,* 221 Md. App. 45, 99 (2015), *cert. granted*, ___ Md. ___, Case No. 30, Sept. Term 2015 (Apr. 17, 2015).

If the evidence in question indeed is newly discovered, it also must be found to be material, and "more than 'merely cumulative or impeaching.'" *Love,* 95 Md. App. at 432 (quoting *Stevenson v. State,* 299 Md. 297, 301-02 (1984)). Only if evidence meets those criteria will the court inquire into the possible impact the evidence would have had on the outcome of the trial. *Stevenson,* 299 Md. at 302. Finally, if the evidence in question is newly discovered and material, the new trial motion only is to be granted if the court "find[s] that there is 'a substantial or significant possibility'" that the jury would have returned a different

verdict with the newly discovered evidence. *Love,* 95 Md. App. at 433 (quoting *Yorke,* 315 Md. at 588); *accord Argyou,* 349 Md. at 601.

In this case, the court denied the new trial motion upon determining that the appellant "failed to establish that there is evidence which has been newly discovered and which would likely lead to an acquittal." Based upon the record before us, we conclude that the court did not abuse its discretion in so ruling.

The appellant's own correspondence about the chain of custody report for the propane cylinder established that he knew of its existence before the February 2010 trial. In his letter of August 30, 2009, to an Assistant State's Attorney handling his case, the appellant states that on or about July 12, 2008, he received chain of custody reports for two pieces of evidence, but the BPD "would not release AC#06020727 which contains information on the propane cylinder. Therefore I am requesting that you contact the Police Department and obtain a copy of The Chain of Custody Report #06020727, written under CC 065d5654, in case no 106116048 before trial please." (Emphasis in original).

The appellant argues that these inquiries show that he was exercising "due diligence" in attempting to obtain the report. The record shows otherwise. In August of 2009, the BPD's Legal Affairs Office notified the appellant that because his criminal case was currently open any requested BPD documents could not be provided to him via the Maryland Public Information Act. He was advised to make use of the discovery rules in seeking such documents. Notwithstanding this advice, neither the appellant nor his counsel filed a motion to compel discovery to obtain the chain of custody report, *see* Rule 4-263(i), nor did they

request the issuance of a subpoena for tangible evidence, pursuant to Rule 4-264, or a *subpoena duces tecum*, in accordance with Rule 4-265. The appellant simply took no steps within the court proceeding to obtain the chain of custody report before trial. Nor did he raise the issue in his Rule 4-331(a) motion for new trial, which was argued prior to sentencing on February 25, 2010.

The chain of custody report for the propane cylinder was not newly discovered evidence and the appellant did not exercise due diligence to obtain it before trial. The court's denial of the appellant's Rule 4-331(c) motion for new trial was not an abuse of discretion.

II.

The appellant contends the evidence at trial was legally insufficient to support his convictions. Recognizing that this Court rejected his sufficiency argument on direct appeal, he nevertheless asks that we reconsider the issue because our decision "did not take into account . . . the newly discovered evidence." The State responds that we "should decline to consider [the appellant's] sufficiency argument as it is not a proper subject of a motion for new trial under Rule 4-331(c) and was rejected by this Court on direct appeal." We agree with the State.

On direct appeal from the appellant's February 2010 convictions, we held that he failed to preserve the issue of the legal sufficiency of the evidence, but if the issue had been preserved, he would not have prevailed because it lacked merit.

The present appeal is a review of the circuit court's denial of the appellant's motion for new trial based upon newly discovered evidence. That ruling did not concern the

sufficiency of the evidence to support the appellant's convictions. To be sure, if we had reversed the circuit court and concluded that the appellant was entitled to a new trial, the appellant could have been retried only if the evidence against him was legally sufficient to support his convictions. However, it already was established on direct appeal that the evidence was sufficient. We should not and shall not delve into that issue again.

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