Circuit Court for Baltimore City
Case No. 119184014

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 191

September Term, 2020

CLAUDIA MCLAIN

v.

STATE OF MARYLAND

Graeff,
Zic,
Salmon, James P.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: August 5, 2021

* 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.

A jury, sitting in the Circuit Court for Baltimore City, convicted the appellant, Claudia McLain, of possession of a firearm with a nexus to a drug trafficking crime, possession of a firearm by a prohibited person, possession of heroin with intent to distribute, and related offenses. The court sentenced McLain to a total term of fifteen years' incarceration, all but ten suspended, and three years' post-release probation. On appeal, she presents four questions for our review, which we have rephrased as follows:

I. Did the court abuse its discretion when posing a "strong feelings" voir dire question?

II. Did the court abuse its discretion by admitting evidence of a prior narcotics transaction?

III. Did the court abuse its discretion by denying McLain's motion to compel disclosure of a confidential informant's identity?

IV. Did the court commit reversible error by ruling that the State had not committed a discovery violation?[1]

For the reasons discussed herein, we shall affirm appellant's convictions.

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[1] In her brief, McLain framed the questions presented as follows:

1. Did the court err in propounding voir dire with respect to the "strong feelings" question?

2. Did the court err in admitting evidence of a prior drug purchase?

3. Did the court err in denying Appellant's motion to disclose the identity of a confidential informant?

4. Did the court err in ruling that there was no discovery violation?

FACTUAL BACKGROUND

In the last week of May 2019, a confidential informant employed by the Maryland State Police purchased heroin and other controlled dangerous substances ("CDS") from a person residing at a house located at 1233 Darley Avenue in Baltimore City. Based on information gained as a result of that purchase, together with other information the Maryland State Police had gained concerning appellant's activities, a search and seizure warrant was issued that gave the police the right to search the Darley Avenue residence.

At 4:00 a.m. on June 10, 2019, Maryland State Police officers, acting in concert with the Baltimore City Police, executed a "no knock" search and seizure warrant and searched the Darley Avenue house where McLain and her wife, Tammy Johnson, resided along with four additional housemates. When executing the warrant, members of the Maryland State Police Entry Team ("the Entry Team") breached the front door by detonating an explosive affixed to the door, thereby removing the door from its frame. The blast awoke Johnson and McLain, who occupied the residence's rearmost bedroom. Upon exiting the bedroom, McLain was confronted by members of the Entry Team as they were ascending the stairs. A member of the Entry Team then escorted McLain outside.

Once the scene had been secured, Johnson and McLain were brought back inside the house where they were met by Maryland State Trooper First Class James Ward. Trooper Ward advised McLain of her *Miranda* rights and handed her a *Miranda* form,

which she signed.[2] Trooper Ward testified that after signing the *Miranda* form, McLain claimed exclusive ownership of the property within her home, declaring: "[E]verything at the residence is mine, drug dealer[.]"[3] Corroborating Trooper Ward's testimony, his supervisor, Maryland State Police Sergeant Richard Roberts, testified that McLain had "stated that all the drugs inside the residence were hers[.]" According to Sergeant Roberts, McLain also attempted to absolve her wife of any criminal culpability, proclaiming that Johnson "had no idea what was going on." McLain then invoked her right to counsel. Thereafter, Trooper Ward transported McLain to Central Booking, where she made multiple recorded telephone calls. During one such call, placed to an individual whom McLain later identified as her sister, she said: "I'm a soldier, I'm going to grind it out."

During the search of McLain's bedroom, the police discovered digital scales, plastic bags, and on a window sill, a bag containing approximately 204 grams of a tan powder, which was later identified as a combination of heroin, cocaine, and 4ANP.[4] An expert who testified for the State opined that the CDS was worth $24,000.

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[2] According to McLain's trial testimony, she asked the police to retrieve her reading glasses from her bedroom before she signed the form, but the officers did not comply with her request. At trial, Trooper Ward was unable to recall whether McLain's glasses had been given to her.

[3] At trial, McLain denied having told Trooper Ward that she was a drug dealer. She further denied having known that controlled dangerous substances and firearms were in the residence.

[4] Dr. Mohammed Majid, who the trial court accepted as an expert witness in the analysis of CDS, testified that 4ANP is "used in the manufacture of other drugs like fentanyl."

According to McLain's trial testimony, the door to her bedroom was secured by a padlock, which Johnson and she routinely locked upon entering and exiting the room. A search of the living room uncovered a Mossberg .22 caliber semiautomatic rifle, which had been hidden behind a couch. That rifle was subsequently examined by Zoe Krohn, a forensic scientist with the Baltimore City Police Department, who testified that she had test fired the rifle and had found it to be operable. In addition to the rifle, the police recovered multiple handguns and ammunition.[5]

We will include additional facts as necessary in our discussion of the questions presented.

DISCUSSION

I.

McLain contends that the trial court abused its discretion during voir dire. She argues that the court's "strong feelings" question was ineffective in that it was unlikely to reveal the prospective jurors' biases inasmuch as it did not refer to each of the crimes with which McLain was charged. She asserts that by identifying the charges as "possession of a firearm and possession of [a] controlled dangerous substance," the court's "strong feelings" question did not adequately probe potential biases pertaining to the more serious crimes of possession with intent to distribute and possession of a firearm with a nexus to a

[5] The handguns were found in the front bedroom of the house. Given that McLain did not occupy the room in which the handguns were found, the firearm charges lodged against her pertained solely to the Mossberg .22 caliber rifle.

drug trafficking crime. The State responds that the "strong feelings" question "was proper and reasonably tailored to the facts of th[e] case."

A. Pertinent Procedural History

After instructing the venire that McLain had been charged with "possession of a firearm and possession of a controlled dangerous substance, drugs," the court asked the prospective jurors: "[I]s there any member of this jury panel who has strong feelings regarding the nature of the charges?" The court then asked that any prospective juror harboring such feelings to "please stand." A single venire member stood and said: "Yeah, I know you mentioned something about drugs[.]" The court advised that prospective juror: "I'm going to call you up a little bit later, not just you, I'll call everybody who stood up a little later and have the individual voir dire[.]" During an ensuing bench conference, the State expressed its reservation regarding the "strong feelings" question that the court had posed, saying: "My concern is just the nature of the charges I think sometimes they have very strong feelings about drugs and/or crimes." The following exchange ensued:

> THE COURT: I don't need to know which one.
>
> [THE STATE]: Okay.
>
> THE COURT: As long as they have strong feelings, I'm bringing them up here, you can ask that question. Yes?
>
> [DEFENSE COUNSEL]: Well, you know, I kind of concur with the State, we asked the question without –
>
> THE COURT: You can ask [them] when [they] come[] up here, I asked the strong feelings question, when they come up here on their individual voir dire, you can ask them whether because you have strong

> feelings about guns or whether that's because you have strong feelings about drugs, not a problem.
>
> [THE STATE]: Thank you, Your Honor. That was my concern.
>
> THE COURT: Is there something that I missed?
>
> [DEFENSE COUNSEL]: You know, I think that you ought to ask that before counsel goes asking that at the bench, I think you indirectly asked it without being specific.
>
> * * *
>
> [DEFENSE COUNSEL]: I'd like to know without asking the question.
>
> THE COURT: I asked the question, you can get more specific when they come up here, I'm not going to re-ask that question again.

During individual voir dire of the juror who had stood in response to the "strong feelings" question, defense counsel did not pose any follow-up questions.

B. Standard of Review

We review a circuit court's decision whether to pose a requested voir dire question for abuse of discretion. *See Collins v. State*, 463 Md. 372, 391 (2019) ("An appellate court reviews for abuse of discretion a trial court's 'rulings on the record of the *voir dire* process as a whole[.]'") (quoting *Pearson v. State*, 437 Md. 350, 356 (2014)). Ultimately, "'[t]he standard for evaluating a court's exercise of discretion during the *voir dire* is whether the questions posed and the procedures employed . . . created a reasonable assurance that prejudice would be discovered if present.'" *Collins v. State*, 452 Md. 614, 623-24 (2017) (quoting *White v. State*, 374 Md. 232, 242 (2003)). In other words, a court abuses its

discretion "only when the voir dire method employed . . . fails to probe juror biases effectively," *Wright v. State*, 411 Md. 503, 508 (2009), as where voir dire was "cursory, rushed, and unduly limited[.]" *White*, 374 Md. at 241.

C. Voir Dire

The Sixth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, guarantees defendants in criminal trials the right to be tried by an impartial jury. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]"). Article 21 of the Maryland Declaration of Rights likewise assures "[t]hat in all criminal prosecutions, every man [or woman] hath a right . . . to a . . . trial by an impartial jury, without whose unanimous consent he [or she] ought not to be found guilty."

In Maryland, "the sole purpose of *voir dire* 'is to ensure a fair and impartial jury by determining the existence of [a specific] cause for disqualification[.]'" *Pearson*, 437 Md. at 356 (quoting *Washington v. State*, 425 Md. 306, 312 (2012)). "Without adequate *voir dire*, the trial judge is unable to fulfill his or her responsibility to eliminate those prospective jurors who will be unable to perform their duty impartially." *White*, 374 Md. at 240. As the Maryland Court of Appeals has repeatedly held, on request by a party, it is incumbent upon a court to ask the venire whether anyone has "strong feelings" regarding the crime(s) with which a defendant has been charged. *See Collins*, 463 Md. at 377; *Pearson*, 437 Md. at 354. The failure of a court to grant such a request constitutes an abuse

of discretion, which warrants reversal unless that error was harmless beyond a reasonable doubt. *See Collins*, 463 Md. at 403 n.5 ("[T]his Court has applied the doctrine of harmless error to a trial court's decision to ask a particular question during *voir dire*[.]") (citing *State v. Stringfellow*, 425 Md. 461, 465 (2012)).

D. Waiver

Maryland Rule 8-131 defines the scope of appellate review and provides, in pertinent part: "Ordinarily, the appellate court will not decide an[] . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). Maryland Rule 4-323(c), in turn, "governs the 'manner of objections during jury selection,' including objections made during *voir dire*," *Smith v. State*, 218 Md. App. 689, 700 (2014) (citation omitted), and provides:

> For purposes of review by the trial court or *on appeal of any other ruling or order, it is sufficient that a party*, at the time the ruling or order is made or sought, *makes known to the court the action that the party desires the court to take* or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

(Emphasis added.)

Although Rule 4-323(c) "does not require the objection to be stated with particularity or specific language," *Newman v. State*, 156 Md. App. 20, 51 (2003), *rev'd on other grounds*, 384 Md. 285 (2004), when the excepting party specifies the basis for the objection, that party waives appellate review of any grounds not so specified. *See Banks v. State*, 84 Md. App. 582, 588 (1990) ("[W]hen the grounds for an objection are stated by

the objecting party, either on a volunteered basis or at the request of the court, only those specifically stated are preserved for appellate review; those not stated are deemed waived.") (citations omitted).

McLain has waived appellate review of her contention that the court should have referred to each of the crimes with which she was charged. As is clear from the above-quoted colloquy, the State's objection—which the defense adopted—was to the court having posed a compound question, which asked whether the prospective jurors harbored strong feelings regarding either drugs or guns. Neither the State nor defense counsel requested that the court pose voir dire questions asking whether members of the venire had strong feelings about possession of heroin with the intent to distribute or possession of a firearm in furtherance of drug trafficking. Given that McLain, through counsel, did not request that the court pose the voir dire questions she now claims should have been asked, she has waived appellate review of this issue.[6]

[6] In her reply brief, appellant argues for the first time:

> Neither the court nor the State has provided a rational explanation for why the court did not simply ask the "strong feelings" question again, but this time specifying something along the lines that the charges involved guns and drugs. What conceivable interest weighed against asking the question again? It would have taken ten to twenty seconds to ask the question again. That, surely, cannot justify the court's position. Of course, some more time might have been consumed fielding affirmative responses, but spending time to field affirmative responses to required voir dire questions is not a disvalue [*sic*].

The short and complete answer to the above argument is that at trial, appellant's counsel made no request that the court repeat the question or ask the question she now suggests should have been asked.

II.

McLain asserts that the court erroneously admitted Trooper Ward's answer to one question that concerned the purchase of controlled dangerous substances (prior to the search of appellant's home) by a confidential informant ("C.I.") from someone living at 1233 Darley Avenue. She argues that said testimony was (i) impermissible hearsay, (ii) inadmissible "other crimes" evidence, and (iii) irrelevant. McLain further claims the probative value of Trooper Ward's response to the question was substantially outweighed by the danger of unfair prejudice. We need not reach the merits of these arguments because appellant has failed to preserve them for our review.

During direct examination of Trooper Ward, the State inquired as to what he told McLain before questioning her. More specifically, the State asked: "[W]hat if any information did you inform Ms. McLain with regards to CDS that [had] been found in the residenc[e]?" Trooper Ward answered, "Just [that] we found CDS." The State then inquired: "Was there anything else that would give you an indication that she knew about the CDS in the house?" Defense counsel objected, and the court overruled the objection. Trooper Ward answered, "She read the search warrant that stated we purchased CDS from the residence." Defense counsel neither renewed her objection nor moved to strike that answer.

Maryland Rule 4-323(a) provides: "An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent." Generally, "an objection must be made when the question is asked or,

if the answer is objectionable, then at that time by motion to strike." *Ware v. State*, 170 Md. App. 1, 19 (citations omitted), *cert. denied*, 396 Md. 13 (2006). *See also Ross v. State*, 276 Md. 664, 672 (1976) ("Unquestionably, a motion to strike out an answer is the correct action to take where an objection to a *proper* question is overruled but the answer is unresponsive or otherwise inadmissible[.]") (emphasis added; citation omitted); *Holmes v. State*, 119 Md. App. 518, 523 ("An objection must be made when the question is asked or, if objectionable material comes in unexpectedly in the answer, then at that time by motion to strike."), *cert. denied*, 350 Md. 278 (1998); Joseph F. Murphy, Jr., *Maryland Evidence Handbook*, § 103 at 18 (4th ed. 2010) ("When the question is proper but the answer introduces inadmissible evidence, you must 'move to strike' the inadmissible evidence."); *McCormick On Evidence*, § 32, p. 254 (6th Ed. 2006) (same).

In both her brief and reply brief, McLain focuses exclusively on what she perceives to be objectionable elements of Trooper Ward's answer. But she says not one word in her briefs concerning the issue of whether there was anything objectionable about the question.

We hold that there was nothing objectionable about the question: "Was there anything else that would give you an indication that [McLain] knew about the CDS in the house?" Moreover, nothing suggests, as appellant contends, that the record indicates that the State posed the question at issue with either the knowledge or the intent that it would elicit an answer that was objectionable.[7] In other words, prior to the ruling on McLain's

[7] In appellant's brief, she does not directly argue that there was anything improper

(continued . . .)

objection, the court had been presented with no reason to sustain the objection. Because no objection was made to Trooper Ward's answer, nor was there a motion to strike, McLain's claim is not preserved for our review.[8]

(. . . continued)

about the question at issue. But in a footnote in her opening brief, she suggests that the trial judge should have known that if he overruled the objection, inadmissible evidence would be admitted because of what took place during "litigation the previous day." That was a reference to a hearing the previous day that concerned whether appellant was entitled to be advised of the name of the confidential informant who made a drug purchase from appellant in May of 2019. Appellant's footnote reads:

> From the nature of the question, in light of the controlled-buy that had been the subject of litigation the previous day, it was obvious where the question was leading and that it was an improper question for the reasons stated herein, and it was sufficient for preservation purposes to object to the question. *Ross v. State*, 276 Md. 664, 673 (1976) ("Where, as here, a timely objection made to an improper question is erroneously overruled, a motion to strike or for a mistrial is not essential to preserve the objection for appellant review.").

The above argument is unpersuasive. It is not at all obvious that the question at issue ("[w]as there anything else that would give you an indication that she knew about the CDS in the house?") would result in the answer that was given.

[8] Nothing in this opinion should be read to suggest that we agree with appellant that the answer given by Trooper Ward contained inadmissible evidence. The answer did not violate the hearsay rule because it was introduced to prove what appellant knew - not for the truth of the matter asserted (that a drug purchase had previously been made at appellant's house). Moreover, the answer did not violate the rule prohibiting other crimes evidence. Although the search warrant revealed that the confidential informant, in the last week of May 2019, had purchased cocaine and heroin from appellant, that fact was never revealed to the jury. Furthermore, it is far from clear that the answer introduced was irrelevant as appellant contends. According to the State's evidence, appellant admitted that all the drugs in the house were hers and that she was a drug dealer. That admission was made after appellant was shown the search warrant that revealed a CDS sale had been made from her house.

III.

Prior to the start of trial, appellant's motion to require the State to tell her attorney the name of the confidential informant who had made a controlled purchase of controlled dangerous substances from appellant, at her house, in the last week of May 2019, was denied. That controlled purchase, along with surveillance of McLain's house by the Maryland State Police, formed a part of the basis for the issuance of the warrant to search appellant's house.

Maryland Rule 4-263(g)(2) provides that "[t]he State's Attorney is not required to disclose the identity of a confidential informant unless the State's Attorney intends to call the informant as a State's witness or unless the failure to disclose the informant's identity would infringe a constitutional right of the defendant."

McLain contends that the court abused its discretion by denying her motion to compel disclosure of the identity of the C.I. whose tip provided probable cause for the issuance of the search and seizure warrant. Quoting *Edwards v. State*, 350 Md. 433, 442 (1998), she argues that the C.I. was "no mere 'tipster,' but someone who allegedly participated in the type of criminal activity with which [McLain] was charged and 'who may, as a result, have direct knowledge of what occurred and of [her] criminal agency, and who therefore may be a critical witness with respect to [her] guilt or innocence[.]'" Specifically, she asserts that the C.I. may "have helped to exonerate [her] by testifying that he/she purchased drugs from someone other than [her]."

The State counters that McLain did not "satisfy her burden of showing a 'substantial reason' . . . why the identity of the informant was material to her case." Accordingly, the State concludes, the denial of McLain's motion constituted a proper exercise of the court's discretion. We agree.

A. Standard of Review

When reviewing the denial of a motion to disclose, we limit our review to the record of the motions hearing. *Brooks v. State*, 320 Md. 516, 528 (1990). "In reviewing a trial court's determination not to compel disclosure, 'we look to see whether the court applied correct legal principles and, if so, whether its ruling constituted a fair exercise of its discretion.'" *Elliott v. State*, 417 Md. 413, 444 (2010) (quoting *Edwards*, 350 Md. at 442). "In determining whether a court properly exercised its discretion, the question 'is whether the court reached the right balance among the competing interests.'" *Id*. at 428 (quoting *Edwards*, 350 Md. at 441). Accordingly, the court must weigh "'the public interest in protecting the flow of information against the individual's right to prepare his [or her] defense.'" *Elliott*, 417 Md. at 445 (quoting *Roviaro v. United States*, 353 U.S. 53, 62 (1957)).

B. The Informer's Privilege

The informer's privilege is a "common law privilege possessed by the Government 'to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law.'" *Edwards*, 350 Md. at 440 (quoting *Roviaro*, 353 U.S. at 59). The purpose of the privilege is to "'further[] and

protect[] . . . the public interest in effective law enforcement'" by safeguarding the anonymity of citizens who cooperate with the authorities. *Id.* (quoting *Roviaro*, 353 U.S. at 59). The informer's privilege is not absolute, however, and, in certain circumstances, must yield to the countervailing right of a criminal defendant to prepare and present an adequate defense. *See Edwards*, 350 Md. at 440-41 ("'Where the disclosure of an informer's identity, or of the content[] of his [or her] communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.'") (quoting *Roviaro*, 353 U.S. at 60-61). In other words, the privilege should be suspended when a C.I.'s testimony is material to the determination of a defendant's guilt or innocence. *See Elliott*, 417 Md. at 445 ("'[T]he key element is the materiality of the informer's testimony to the determination of the accused's guilt or innocence.'") (quoting *Warrick v. State*, 326 Md. 696, 701 (1992)). Given that the materiality of informants' tips vary on a case-by-case basis, "[w]hether the balance requires disclosure . . . 'must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.'" *Edwards*, 350 Md. at 441 (quoting *Roviaro*, 353 U.S. at 62). The Court of Appeals has "identified three defenses which often require disclosure: entrapment, lack of knowledge, and mistaken identity." *Elliott*, 417 Md. at 445 (citing *Brooks*, 320 Md. at 523).

When evaluating the materiality of a C.I.'s prospective testimony, we distinguish between a participant in the crime(s) with which a defendant is charged and a mere

"tipster." "Hav[ing] direct knowledge of what occurred and of the defendant's criminal agency," the former "may be a critical witness with respect to the defendant's guilt or innocence." *Edwards*, 350 Md. at 442. A "tipster," by contrast, is "a person who did nothing more than supply information to a law enforcement officer, who did not participate in the criminal activity and may not even have been present when it occurred, and who has little or no direct knowledge of the defendant's guilt or innocence[.]" *Id.* Accordingly, "the privilege ordinarily applies where the informer is a mere 'tipster,' . . . while disclosure is usually required when the informer is a participant in the actual crime." *Brooks*, 320 Md. at 525.

C. The Motions Hearing

At the hearing on McLain's motion to disclose, the State introduced into evidence the search and seizure warrant for 1233 Darley Avenue, Trooper Ward's application for that warrant, and his affidavit in support thereof. These documents showed that in May of 2019, a "proven, and reliable" C.I. informed Trooper Ward that McLain had been distributing heroin throughout Maryland. A background check revealed that McLain had an extensive criminal history, which included narcotics distribution. Based on the foregoing, Trooper Ward surveilled 1233 Darley Avenue. While doing so, he observed several individuals park their vehicles in front of 1233 Darley Avenue, meet McLain at the front door of the house, enter the residence, and exit less than two minutes later.

According to Trooper Ward's application for a warrant, during the fourth week of May 2019, he asked the C.I. to make a "controlled purchase" of heroin and cocaine from

McLain; the C.I. contacted appellant by phone and when she called back, appellant said that "she was good" and to "come over." After meeting the C.I. at a neutral location, Trooper Ward "provided him/her with an amount of pre-recorded money (with serial numbers pre-recorded) and a listening device." Trooper Ward followed the C.I. to McLain's residence. Police officers surveilling 1233 Darley Avenue observed McLain make contact with the C.I. and permit him or her to enter the house. Following a drug transaction, the C.I. and Trooper Ward returned to the neutral location. There, the C.I. provided Trooper Ward with "a small plastic baggie containing a white powdery substance, as well as a second plastic baggie containing CDS caps of heroin."

At the motions hearing, Trooper Ward confirmed that he had surveilled McLain's residence and observed vehicular traffic consistent with drug activity. He further testified that he had supplied the C.I. with "buy money" with which to make a controlled purchase of narcotics from McLain and that after the transaction, the C.I. had returned with a "baggie" containing a combination of cocaine and heroin. During the later search of 1233 Darley Avenue, the police discovered cash in the front and rear bedrooms of the house.[9] The court denied McLain's motion, ruling: "[T]he C.I.'s identity is not necessary because the C.I.'s only participation in this event – the series of events – was the controlled buy that occurred in May[.]"

[9] At trial, McLain testified that the $1,870 found in her bedroom was "rent money."

Warrick v. State

McLain analogizes the facts in this case to *Warrick v. State*, 326 Md. 696 (1992). The defendant in *Warrick* was charged with distributing crack cocaine. At trial, the defense pursued a theory of mistaken identity. On cross-examination of the undercover officer to whom the cocaine was allegedly sold, defense counsel asked who had introduced him to the defendant on the date of the transaction. The State objected. Defense counsel argued that the "information was relevant because 'the identification of the defendant [wa]s the keystone in this case.'" *Id.* at 702. The State acknowledged that the individual who had introduced the officer to the defendant had been a C.I. and admitted that it had not apprised the defendant of that fact prior to trial. The court sustained the State's objection, reasoning that the C.I.'s identity "was not 'particularly germane or relevant.'" *Id.* at 703. Defense counsel then "undertook to establish that several other men of [the defendant's] approximate size and build frequented" the crime scene. *Id.* Testifying on his own behalf, the defendant claimed that two of his friends, both of whom had frequented the scene of the drug sale, "bore a resemblance to him." *Id.*

The Court of Appeals granted *certiorari* and remanded the case to the circuit court without affirmance or reversal pursuant to Maryland Rule 8-604(d), holding that "the trial judge . . . [had] not balance[d] the respective interests of the State and the defense[.]" *Id.* at 705. The Court reasoned:

> [W]hen an informer introduces an undercover officer to a suspected drug dealer for the purpose of facilitating a drug sale, the informer's identification of, or failure to identify, the accused may constitute highly relevant testimony

> when . . . a colorable dispute as to the accused's identity is presented in the case.
>
> * * *
>
> [T]he trial judge in the present case did not balance the respective interests of the State and the defense. Indeed, it appears that he simply concluded that because the evidence showed that the informer, the trooper, and Warrick were together in the parking lot, the informer's identity was "totally irrelevant." The trial judge seemingly ignored the possibility that Warrick sought the disclosure of the informer's identity because he truly was misidentified by the officer as the seller, and was therefore not at the scene of the crime to know the informer's identity. In these circumstances, it is hardly beyond reason that the informer, who knew the seller, might exonerate him.

Id. at 705-06.

As the State argues, *Warrick* is readily distinguishable from the instant case. While the C.I. in *Warrick* facilitated the illegal sale *with which the defendant was charged*, McLain was not charged with any activity connected with the "controlled buy" in which the C.I. participated. Rather, the charges in this case arose exclusively from what police found when they executed the search and seizure warrant. Appellant produced no evidence at the hearing that would show that the C.I. was either present or in any way involved in the execution of the warrant. Instead, the record shows that the C.I.'s role in this case was that of a mere "tipster" to whom the informant privilege is generally applicable. *See United States v. Harrington*, 951 F.2d 876, 878 (8th Cir. 1991) (finding that the C.I. was a mere "tipster" where that C.I. "made controlled buys from the apartment and observed the cocaine one day prior to the warrant's execution," but "neither witnessed nor participated in the search of the apartment"); *United States v. Wilburn*, 581 F.3d 618, 623 (7th Cir.

2009) ("[A]lthough the C.I. allegedly purchased crack from 'someone' in the upper apartment at the Charles Street residence, his only function in [the defendant's] prosecution was to provide information for obtaining the warrant. Therefore, he is a 'tipster' rather than a transactional witness to the crimes charged[.]"); *Commonwealth v. Fernandes*, 568 N.E.2d 604, 607 (Mass. App. Ct. 1991) (finding that the C.I. was a mere "tipster" where he or she "participated in a controlled buy on the premises within seven days of the application for the warrant," but "was neither an active participant in the crimes charged, which were based on the possession of narcotics with intent to distribute, nor the only nongovernment witness").

Appellant argues: "[I]t is hardly beyond reason that the informer, who allegedly knew [a]ppellant, might have helped to exonerate [a]ppellant by testifying that he/she purchased drugs from someone other than [a]ppellant, consistent with [a]ppellant's defense at trial." The trouble with that argument is that it is not supported by any evidence; to the contrary, that argument is contradicted by the evidence admitted at the hearing, i.e., the sworn application for the search warrant as well as Trooper Ward's testimony. Both showed that the C.I. bought the drugs from appellant.[10]

In summary, McLain failed to meet her burden of proffering a "substantial reason indicating that the identity of the informer is material to [her] defense or the fair

[10] McLain does not contend that the Frederick County District Court erred by issuing the search and seizure warrant that allowed the police to search her house.

determination of the case." *Brooks*, 320 Md. at 528 n.3. Accordingly, we hold that the circuit court did not abuse its discretion when it denied McLain's motion.

IV.

Lastly, McLain claims that the court committed reversible error by ruling that the State had not committed a discovery violation by withholding photographs of the currency that had been used in the controlled buy. Appellant claims that "[t]he serial numbers of the controlled-buy money *could have* been compared to the serial numbers of the currency recovered from [her] room" and that "[s]uch comparison *could have* corroborated [her] testimony that the currency was not proceeds from drug sales." (emphasis added).[11] The State maintains that the photographs were irrelevant, arguing that "regardless of whether the serial numbers matched, it would not have proved or disproved whether McLain was in possession of the guns or drugs found in her residence on the day the warrant was executed." We agree with the State and shall hold that because in discovery the serial numbers were never requested and because the State was not required to produce, without request, information concerning the serial numbers, appellant failed to prove a discovery violation.

[11] The unstated premise of this argument is that if the "buy money" was not found in appellant's possession ten days (or more) after the sale, then a fact-finder could infer, legitimately, that appellant was not the seller. The inference would be permissible only if it was shown that it was more likely than not that a drug dealer, who sold drugs for cash, would not spend the proceeds in ten days but instead would keep the sale proceeds in his/her house for that period, or longer.

The issue concerning the State's failure to produce photographs of the "buy money" arose for the first time during the hearing concerning whether the State was required to divulge the identity of the C.I. At the hearing, Trooper Ward testified that he supplied the C.I. with the money that was to be used to buy drugs from appellant, and that prior to the drug purchase, his supervisor photographed the buy money and memorialized the serial number of the currency. Trooper Ward testified that he did not know whether the serial numbers on the "buy money" were ever compared with the serial numbers of the money found when the search warrant was executed, but he denied ever making such a comparison. In his words: "I don't compare thousands of dollars to a single serial number." At the hearing, defense counsel told the court that he wanted the State to produce a copy of the photographs of the "buy money" or any documents memorializing those numbers. Appellant's counsel admitted that the defense had previously not asked the State to produce such material. The motions judge denied the request.

On appeal, appellant implies, but does not say so directly, that the photographs of the buy money or any document memorializing the serial numbers were required to be produced by the State without request. Appellant relies on Md. Rule 4-263(d) which provides, in pertinent part:

> **(d) Disclosure by the State's Attorney.** Without the necessity of a request, the State's Attorney shall provide to the defense:
>
> * * *
>
> (5) *Exculpatory Information.* All material or information in any form, whether or not admissible, that tends to exculpate the defendant or negate or mitigate the defendant's guilt or punishment as to the offense charged;

*   *   *

> (7) *Searches, Seizures, Surveillance, and Pretrial Identification.* All relevant material or information regarding:
>
> (A) specific searches and seizures, eavesdropping, and electronic surveillance including wiretaps.

We will consider these subsections of Rule 4-263(d) in reverse order.

Rule 4-263(d)(7)(A) is inapplicable because the photographs (or memorandum) relating to the serial numbers did not constitute "relevant" material or information regarding the search and seizure of property at appellant's residence. The relevant information regarding the search and seizure of appellant's house was contained in the search warrant and the application for that warrant that the State supplied.

We turn next to Rule 4-263(d)(5), upon which appellant mainly relies. Pictures of the drug money (or a report setting forth the serial number(s)), if produced, would not "tend[] to exculpate the defendant or negate or mitigate" appellant's guilt. Once again, it is important to emphasize that appellant was not charged with selling drugs to the C.I. She was charged with having nearly one-half pound of illegal drugs in her possession, with the intent to distribute those drugs, and with possession of a firearm by a prohibited person (along with related charges). At trial, the fact that appellant sold drugs to the C.I. was never mentioned.

Appellant argues that the State withheld exculpatory evidence. She contends that <u>if</u> the serial numbers on the drug buy money had been compared with the approximately $1,800 that was found in her room ten days (or more) after the purchase by the C.I., and <u>if</u>

there was no match, this would help her defend against the crimes charged. This argument might have at least some semblance of plausibility if she had been charged with sale of the CDS to the C.I. But as to the charge for which she stood trial, her defense was not that she was innocent of a crime that the jury didn't even know that she had committed. Her defense was that the drugs found in her room did not belong to her, therefore, she could not possibly have had an intent to distribute them; as to the firearms charge, her defense was that she had no knowledge that a rifle was secreted behind her living room couch.

For the above reasons, we hold that the trial judge did not err when he ruled that the State did not violate the discovery rules.

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