UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0407

September Term, 2014

JUAN CARIBE

v.

STATE OF MARYLAND

Krauser, C.J.,
Zarnoch,
Reed

JJ.

Opinion by Krauser, C.J.

Filed: June 23, 2015

*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.

Convicted by a jury, in the Circuit Court for Baltimore City, of second-degree rape, second-degree sexual offense, third-degree sexual offense, child sexual abuse, and second-degree assault, Juan Caribe, appellant, contends that the circuit court erred in denying his motion for a new trial, a motion based on what he claimed was "newly discovered evidence" that had been wrongfully withheld by the State. For the reasons that follow, we affirm.

I.

Appellant was the stepfather of the victim, Doryan G.,[1] who was nine years old at the time appellant was charged with assaulting and raping her. These crimes first occurred on December 12, 2007, at the home appellant shared with Doryan and her mother and sister, while Doryan's mother was giving birth at a hospital to Doryan's half-sister, Ciarilys. During the evening of that day, while Doryan was watching television in the bedroom that appellant and her mother shared, appellant entered the room and began undressing. When Doryan attempted to leave the room, appellant told her to stay, grabbed her, and sexually assaulted her.

The next day appellant took Doryan to the hospital to visit with her mother. Upon returning home that night, appellant asked Doryan to cook for him. When Doryan brought food to his room, he grabbed her and sexually assaulted her a second time.

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[1] We will use only the victim's name and initial to protect her anonymity. Her first name is spelled alternatively "Dorian."

About a week after her mother returned home from the hospital, Doryan told her about the attacks. Her mother then instructed her not to tell anyone about the assaults, because appellant had threatened to turn her in to immigration. That warning kept Doryan from reporting the attacks for several years.

Five years later, in 2012, Doryan moved in with a friend, Nury Carranza,[2] for about two months. At that time, Nury was 21 years old and Doryan was 14. Doryan's mother disapproved of her friendship with Nury and that disapproval sparked arguments between mother and daughter. On September 16, 2012, Doryan's mother, together with Donna Caribe (appellant's aunt), showed up at Nury's home with a police officer, Officer Andre Parker of the Baltimore City Police Department. When Doryan told the officer that appellant had raped her five years earlier, Donna Caribe suggested that Doryan was making it up in order to stay with Nury. After Doryan's family subsequently obtained a protective order preventing Nury from having any contact with Doryan, they sent Doryan to live with an aunt in Las Vegas, Nevada. A law enforcement officer named "Ms. Fisher" interviewed Doryan in Las Vegas about her relationship with Nury. During that interview, Doryan recounted how appellant had sexually assaulted her.

[2]Ms. Carranza's name is spelled several different ways in the transcript. We utilize this spelling taken from official court documents.

II.

At sentencing, the State provided appellant with what it had referred to as a "victim impact statement," which was a letter written by the victim a year before appellant's trial began and which she had sent to the victim's advocate of the Office of the State's Attorney. In that letter, she described appellant's acts of abuse to which she had been subjected, a description which appellant maintains was at odds with the victim's testimony.

At that time, appellant promptly moved for a new trial, asserting that the letter constituted "newly discovered evidence" under Maryland Rule 4-331 and that the State's failure to provide this letter violated appellant's due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). Defense counsel pointed out what he alleged to be the following inconsistencies between Doryan's trial testimony and the statements made in the victim impact letter:

> [S]he testified in trial that she was in the bedroom watching television [prior to the first incident] when [appellant] came in. [In the letter] she speaks that she was not in the room, that she was coaxed into the room. She also talks about the next day [appellant] woke her up and told her to come into the room, but her testimony she talked about she was cooking breakfast in the kitchen and then it was after that that the incident brought her – in – he was brought into the bedroom and the incident occurred. She also testified under oath that she had told her mother when the mother had returned from the hospital. In the statement she talks about there was an alleged third incident and it was after the third incident that she told her mother.

Defense counsel further asserted that the letter described an incident where Doryan called the police to her house to report the incidents though no such evidence was presented by the State at trial.

The court denied the motion for a new trial, stating:

> Well, there is mention in a presentence report that the victim was not going to be interviewed by presentence because she had already prepared a victim impact statement, a written victim impact statement which I assume is reference to this. But this is not suppression of evidence. What you're really speaking about is a possible discovery violation and if in fact there was a discovery violation whether it is material and could have affected the outcome of the case.
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> The two material – or the two aspects which are argued to be material are the circumstance under which the victim ended up in the room where she alleged the rape took place, whether she was coaxed into the room as she indicates in her letter or whether she was already in the room with her sister and then her sister was told to leave. I don't see a substantial difference to this, particularly since the victim was cross examined extensively about that under the circumstances. I don't find that to be a material difference.
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> The second difference that is pointed out is that she told her mother about this event immediately upon her return or whether she said in the letter which may be considered contrary to her trial testimony that it was two weeks later. In fact she says in the letter after referencing the third time she blacked out: "So I told my mother two weeks after she came out of the hospital what Juan Caribe had done. So she asked me then when this happened and I told her that it was when she was in the hospital. My mother, Maria, told me not to say anything to nobody because if I said something they were going to take him to jail and we don't live – we won't have somewhere to live. So I kept my mouth shut for close to five years."
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> I don't find that to be a major difference to what she testified in court, particularly when we realize that her mother, for the person who is alleged to have received the complaint, testified and was fully cross examined about that. **I don't find these to be material differences** as to a possible discovery violation. As an account of events I think it should have been shared but **I don't find that any prejudice to the defense has resulted from the failure to share it** and I do believe that this is essentially a victim impact statement[.]

(Emphasis added.)

III.

Appellant contends that the circuit court abused its discretion in denying his motion for a new trial, a motion he made at his sentencing hearing upon learning, the morning of that hearing, of a "victim impact statement" letter that was written by Doryan and sent to the State's Attorney's Office a year before appellant's trial began. Appellant asserts that, because the account Doryan gave in that letter differed from her trial testimony, the letter constituted "newly discovered evidence," under Rule 4-331(c),[3] and he was therefore entitled to a new trial. He further contends that the State's belated disclosure of Doryan's letter, following the verdict but prior to sentencing, constituted a "*Brady* violation" because the letter included information that could have been used to impeach Doryan's trial testimony.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Although evidence disclosed during trial is not

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[3]That Rule provides:

> **(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:
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> (1) on motion filed within one year after the later of (A) the date the court imposed sentence or (B) the date the court received a mandate issued by the final appellate court to consider a direct appeal from the judgment or a belated appeal permitted as post conviction relief . . . .

considered suppressed for *Brady* purposes, such evidence must be disclosed in time for the defendant to use it to his or her advantage. *In re: Matthew S.*, 199 Md. App. 436, 459-60 (2011) (citing *Bielanski v. County of Kane*, 550 F.3d 632, 645 (7th Cir. 2008)). Here, the letter was not disclosed to appellant until *after* the jury returned its verdict, effectively preventing appellant from using the letter to his advantage at trial. Consequently, we are persuaded that *Brady* is implicated here.

To establish that a *Brady* violation has occurred, the accused must show that the evidence was suppressed by the State, either willfully or inadvertently, that the evidence was favorable to the defendant as either exculpatory or impeachment evidence, and the withholding of the evidence prejudiced the defense. *Yearby v. State*, 414 Md. 708, 717 (2010) (quoting *Strickler v. Greene* 527 U.S. 263, 281-82 (1999)). To satisfy the prejudice prong, there must be a showing of a reasonable probability that the disclosure of the suppressed evidence would have yielded a different result at trial. *Id.* at 717-18 (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).[4]

The State concedes that the first two *Brady* criteria are met. It does not concede, however, that the third criterion, that is, that the letter was "material" and its suppression prejudiced appellant, was satisfied. Because we agree that the letter at issue was suppressed

[4] This standard is essentially the same test as the Supreme Court set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) in determining whether a defendant was prejudiced by a constitutional violation depriving him of a right to a fair trial. *Yearby v. State*, 414 Md. 708, 718-19 (2010) (citing *United States v. Bagley*, 473 U.S. 667 (1985)).

by the State and contained information that, to some degree, contradicted Doryan's testimony at trial, we now turn to the question of whether the circuit court correctly determined that those differences were not material and did not prejudice appellant.

In deciding whether evidence was "material" under *Brady*, "it is not enough that evidence may have been suppressed by the State that would have been helpful to the defense. It is also required that the evidence, had it been known and used by the defense, would truly have made a difference to the outcome of the case." *Adams v. State*, 165 Md. App. 352, 425 (2005). And, because appellant presented his claim of a *Brady* violation in the form of a motion for a new trial based on newly discovered evidence, we review the circuit court's decision to deny his motion for a new trial for abuse of discretion. *Miller v. State*, 380 Md. 1, 92 (2004); *Argyrou v. State*, 349 Md. 587, 600 (1998). The Court of Appeals has defined abuse of discretion as follows:

> "Abuse of discretion" is one of those very general, amorphous terms that appellate courts use and apply with great frequency but which they have defined in many different ways. It has been said to occur "where no reasonable person would take the view adopted by the [trial] court," or when the court acts "without reference to any guiding rules or principles."
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> . . .
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> The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.

Sumpter v. Sumpter, 436 Md. 74, 85 (2013) (quoting *North v. North*, 102 Md. App. 1, 13-14 (1994)) (alterations in original)).

Appellant first asserts that the letter provided a different account of events leading up to the first assault. At trial, Doryan testified that she was watching television in appellant's bedroom when he entered the room and began undressing. But, in the letter, she claimed she was ordered into the bedroom by appellant. The court found that this hardly amounted to a material difference, as Doryan was extensively cross-examined at trial about the events that occurred prior to the first assault. We find no abuse of discretion in the court's ruling, and agree that, had this inconsistency been brought out at trial, there is not a reasonable probability that the verdict would have been different.

Appellant next asserts that, at trial, Doryan testified that the second assault occurred in the evening after the first assault. In her letter, Doryan asserted that appellant woke her up the next morning, told her to come into his room, and raped her. This argument, however, is not the same argument appellant presented to the circuit court. Before that court, appellant simply asserted that the letter did not contain any mention of Doryan cooking for appellant before the second assault. As appellant is confined to the issues raised in or decided by the circuit court, we may only consider the omission of the act of cooking from the letter which is, at best, inconsequential. Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"). Furthermore, at trial, Doryan was specifically cross-examined about cooking before the second assault. She had not mentioned cooking to Ms. Fisher during her interview, and appellant highlighted that fact before the jury.

The third alleged inconsistency is that the letter mentions a third assault on Doryan that appellant committed, but that was not raised below. The State did not ask any questions about this alleged third assault, nor did appellant raise the subject, which is quite understandable, given that the suggestion of a *third* assault would hardly have helped while he was on trial for two other assaults. This purported inconsistency was thus not preserved for appellate review. *See* Md. Rule 8-131(a).

Finally, appellant points out that, in her letter, Doryan claimed that she summoned police to her mother's house in September of 2012, and then accused appellant of the crimes with which he was ultimately charged. This fact, however, is consistent with Doryan's trial testimony and therefore did not constitute impeachment evidence.

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