UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0830

September Term, 2014

TYRELL FORD

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: June 24, 2015

A jury in the Circuit Court for Baltimore City convicted Tyrell Ford, the appellant, of attempted robbery, second-degree assault, attempted theft, conspiracy to commit robbery, and conspiracy to commit theft. He was sentenced to a total of 14 years' imprisonment: seven years for conspiracy to commit robbery, a consecutive seven years for attempted robbery, and a concurrent seven years for second-degree assault. The convictions for attempted theft and conspiracy to commit theft were merged for sentencing purposes.

The appellant presents two questions, which we quote:

> 1. Did the trial court err in admitting fingerprint evidence?
>
> 2. Are separate sentences for both attempted robbery and second degree assault illegal?

For the following reasons, we shall affirm the convictions but vacate the sentence for second-degree assault.

FACTS AND PROCEEDINGS

Shortly before 5:00 p.m., on January 2, 2013, Tearra Hamilton[1] went to a check-cashing business where she obtained two money orders: one for $125, to pay for her three-year-old daughter's day care, and another for $600, to pay her rent. She then walked two blocks to the day care center, and met her daughter out front. Hamilton's grandmother already was waiting in a car outside the day care center. Hamilton put her daughter in the car and returned to the day care center and delivered the $125 money order. She then walked back to the car.

[1]Although Hamilton's first name is spelled "Tiara" in the trial transcripts, we have used the spelling she used when she signed a photographic array.

As Hamilton was opening the car door, a tall, slim man put his right hand on the car window and shut the door. The man, who was wearing a face mask that left only his eyes uncovered, said he knew Hamilton had money orders. He directed her to surrender them, along with anything else she had. Hamilton still had the $600 money order. On her back she was wearing a small drawstring bag that contained her wallet and drawing books. In her pockets, she was carrying a handheld game system, keys, and a cell phone.

Hamilton refused to cooperate. At that point, a second, shorter man grabbed her by the drawstring bag and began "slinging [her] around like [she] was somebody's toy," dragging her from the sidewalk into the street. While Hamilton was on the ground struggling with the accomplice, the masked robber walked over and "started digging in [her] pockets." Hamilton saw that he was holding a black semiautomatic gun.

Hamilton's grandmother flagged down a passing car, whose driver came to Hamilton's aid. The two robbers fled on foot in separate directions.

Detective Kevin Carvell of the Baltimore City Police Department ("BPD") responded to the scene. Hamilton told him that the masked robber had shut the car door with his right hand, leaving visible fingerprints on the car's window. Detective Carvell "lifted" the fingerprints on three cards and submitted them for forensic analysis.

Sean Dorr, a Latent Print Examiner with the BPD determined that two of the three fingerprints on the lift cards submitted by Detective Carvell matched previously obtained samples of the appellant's fingerprints. Lift card number one was a print of the appellant's

right index finger; lift card number two was a print of his right middle finger. The third lift card did not contain "enough friction ridge detail . . . to make any type of comparison."

With this information, on January 15, 2013, Detective Carvell proceeded to show Hamilton an array of six photographs. Hamilton identified the appellant as "the person that shut the car door as I opened it," stating that the photograph "brought a memory of what one of my attackers may look like," and noting that her "main focus was the suspect's face, even though he had a face mask on." A statement of charges was issued against the appellant that same day.

At trial, Hamilton identified the appellant as "the tall person with the gun." On cross-examination, she acknowledged that she had seen the appellant and his accomplice "[e]very day just on the corner hanging out" "[a]round the corner from [her] daughter's daycare," near the business where she obtained the money orders.

We shall include additional facts as necessary to our discussion of the issues.

DISCUSSION

I.

Discovery Violation and Remedy

Maryland's circuit court discovery rules in criminal cases require a prosecutor to disclose to the defense, "[w]ithout the necessity of a request," the identity of any expert consulted by the State, "the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion." Md. Rule 4-

263(d)(8)(A). With respect to documents, the State must afford the defendant "the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison." Md. Rule 4-263(d)(8)(B).

The appellant contends the trial court erroneously concluded that the State did not violate these discovery rules when it failed to disclose the fingerprint evidence that Sean Dorr, its fingerprint expert, used to link the crime scene fingerprints to the appellant. That fingerprint evidence was identified at trial as State's Exhibits 5B and 5C. According to the appellant, the trial court "did not find that a discovery violation occurred and, therefore, did not exercise its discretion in fashioning a remedy for the discovery violation." We disagree.

The Record

On the scheduled trial date, before the jury was selected, defense counsel moved *in limine* to exclude evidence that was not disclosed in discovery. Defense counsel proffered:

> [DEFENSE COUNSEL]: [T]here were some . . . fingerprint lifts taken from an automobile . . . .
>
> There were some lifts taken by the detective, not by the Crime Lab . . . . And these supposed lifts were then . . . somehow received by the Fingerprint Section who issued a report a couple days later indicating that matched [sic] What was sent to them was three fingerprint[s], supposedly, three lifts. They sent back that two of the lifts are connected to Tyrell Ford. . . .
>
> I have received absolutely nothing from how the detective lifted them, where he lifted them from, what day he lifted them, and what he did with them until they were received by the fingerprint people which I don't – I'm not sure exactly when that was. . . .

> Ultimately, I don't have any of the work done by the fingerprint examiner as to how many points were . . . made, how many ridges, whatever. I don't have any of that work-up.

The prosecutor responded that police investigatory notes had been given to defense counsel, and the notes disclosed that Detective Carvell had retrieved the fingerprints from "the right side passenger door where subject number one pushed the door closed." She explained that, with respect to the "ridge detail and the work-up by Sean Dorr, the State never provides that. We provide[d] the report" prepared by Dorr "saying that a fingerprint connected to the Defendant's . . . right index and middle finger."

After confirming that defense counsel had received that "expert report," the trial court asked defense counsel, "what is it you're saying you didn't get?" The following colloquy ensued:

> [DEFENSE COUNSEL]: I'm just saying it's not enough. I understand that, that they write[] a report, that they lifted them. . . .
> Well, how did they lift them. What – there was three –
>
> THE COURT: Well, that's cross-examination. That's not when it comes in.
>
> [DEFENSE COUNSEL]: Well, it might, it may as well, may well be, Your Honor, but how do we know – I mean, I – the chain of custody, if it's – when were they submitted to the Crime Lab?
>
> THE COURT: Oh, I don't know but . . . [t]hat's clearly something that you get to cross in front of the trier of fact.
>
> [DEFENSE COUNSEL]: But shouldn't I have in discovery what the examiner examines? There was three lifts. . . .

I've only got hit on two. I don't know what happened to the third lift. I don't wanna go into this not knowing what's going on.

THE COURT: I don't think I understand what you're saying. . . . I don't know, but what you're telling me is that there were three fingerprint . . . cards lifted . . . supposedly. One, or two come back to your client allegedly?

[DEFENSE COUNSEL]: Yes.

THE COURT: Okay. So you have the two that come back to your client. The third didn't come back to your client, I'm assuming, again, just for the –

[DEFENSE COUNSEL]: No, I guess it didn't.

THE COURT: Okay. And so State, did you not turn over the fact that it didn't come back to his client?

[PROSECUTOR]: I gave the report that was given to me by the Latent Print Unit that said, and I will indicate to the Court that Detective Carvell filled out a print request identification submission to the Latent Print Unit which was given to [defense counsel] saying that there were three prints taken from the right front window exterior . . . and according to Sean Dorr, that 1A and 2A are that of the Defendant. . . .

[DEFENSE COUNSEL]: I agree. . . .

THE COURT: Okay. So . . . I guess I'm missing what the issue is.

[DEFENSE COUNSEL]: Well, my point is, this officer, supposedly on January 2nd, makes some lifts. . . .

Okay. I don't know what his expertise, experience, what his – and it wasn't on the scene. It was after the car was traveled to, I guess Southwest District. I'm not sure even where the lift was taken. What did he do with the lifts that weren't submitted for a week? . . .

THE COURT: Okay. And those are fair questions to ask him, but as far as a motion in limine, I guess you're asking me to exclude the fingerprints –

[DEFENSE COUNSEL]: Correct.

THE COURT: – because of what, just so I can make a –

[DEFENSE COUNSEL]: Discovery violations. . . .

THE COURT: Okay. Your motion is denied. I do not find that there are discovery violations for failing to let you cross-examine before trial, because that's effectively what you're asking. So the motion is denied. . . .

[DEFENSE COUNSEL]: That's not really what I'm asking, but I understand.

THE COURT: Seems like what you are asking.

[DEFENSE COUNSEL]: I know. I know.

During the State's case-in-chief, Detective Carvell testified that he personally lifted three fingerprints from the window of the vehicle. When the prosecutor asked to approach the witness with documents marked for identification, defense counsel objected and renewed his discovery complaints, prompting the following bench conference:

[DEFENSE COUNSEL]: Your Honor, I would object to the admissibility of any of th[ese] items. I never received one piece of it in discovery, none. . . .

[PROSECUTOR]: The latent print evidence, Your Honor, that was lifted from the car was identified by Detective Carvell. He indicated what he did with it . . . .

Because these items were analyzed by Sean Dorr. . . .

THE COURT: Did you give notification of the, of the cards (inaudible)?

[PROSECUTOR]: Yes. The, the fingerprint work was done. It's on all the paperwork. Okay? And, and –

THE COURT: Okay. So what is it you're objecting to?

[DEFENSE COUNSEL]: I'm objecting to the paperwork going – I never got it.

THE COURT: Well, what, what is it specifically?

[DEFENSE COUNSEL]: Specifically she's got these items and those items and I never received any of them in discovery . . . .

THE COURT: (Inaudible.)

[DEFENSE COUNSEL]: No, just that they did that, that he lifted them.

THE COURT: (Inaudible.) Okay. So you got information, information that they lifted (inaudible).

[DEFENSE COUNSEL]: Well, I have a police report that says he did it.

THE COURT: So that, you had that. . . .

So now I'm trying to figure out what it is (inaudible) now that you were not aware of. (Inaudible) never got copies of these; is that correct?

[DEFENSE COUNSEL]: Yes.

THE COURT: Okay. Now, what's this (inaudible) that you're trying to put in?

[PROSECUTOR]: This is the identification that Sean Dorr did, Your Honor. So it was –

THE COURT: (Inaudible).

[PROSECUTOR]: They take the fingerprint, they scan it in to a computer and based on the Defendant's latents –

THE COURT: Okay.

[PROSECUTOR]: – they make a comparison. . . .

THE COURT: Did you turn that over? . . .

[PROSECUTOR]: Not these items. Okay? These items are the actual print –

THE COURT: Did you list that in discovery?

[PROSECUTOR]: The discovery was that they had made an identification of the Defendant's prints that were lifted from the car with his prints. So, and that they were positive analysis. This is similar to the, the chemist, the date that they would use for the –

THE COURT: (Inaudible) never disclosed it in discovery –

[PROSECUTOR]: It wasn't – these particular items were not disclosed. However –.

THE COURT: (Inaudible) Ms. [Prosecutor], Ms. [Prosecutor] –

[PROSECUTOR]: – the expert's report –

THE COURT: – Ms. [Prosecutor], (inaudible)?

[PROSECUTOR]: These fingerprint cards were.

THE COURT: Okay. And I'm not disputing that. . . .

If the cards, again (inaudible) discovery, whatever this document (inaudible) – . . .

Have them marked for identification purposes. . .

[PROSECUTOR]: Okay. Because they all came out of the same envelope, I'm gonna do this 5-B, 5-C and the lift cards would be 5-A. . . . [2]

[2]Throughout this colloquy, the court and counsel used Exhibit "4-A," 4-B," etc. Later, all Exhibits 4 were changed to Exhibits 5, because the photo array already had been (continued...)

THE COURT: You're saying that based on discovery you identified the lift cards.

[PROSECUTOR]: Correct.

THE COURT: Okay. 5-B is what? What is 5-B?

[PROSECUTOR]: These are the standard prints for Mr. Ford.

THE COURT: What do you mean standard prints?

[PROSECUTOR]: These are his fingerprints that are on file . . . with the police department.

THE COURT: – did you identify those in discovery? For example –

[PROSECUTOR]: Not his actual prints, but the fact that his prints were compared, his prints were compared to an unknown, which were these, okay, based on Sean Dorr, the latent print examiner. . . .

And he made a report and the report was turned over to [defense counsel]. . . .

[PROSECUTOR]: 5-D . . . shows that these are the lifts that [were] taken from the window. . . .

Now, these are the fingerprint cards that Detective Carvell submitted.

THE COURT: Okay. And so this was turned over . . . . in discovery, you're saying?

[PROSECUTOR]: Yes. . . .

[DEFENSE COUNSEL]: I got that. . . .

[2](...continued)
introduced into evidence as Exhibit 4. We have changed all the references to "4" in the colloquy to "5," to avoid confusion.

[PROSECUTOR]: [Exhibit] 5-E, this is the report that was completed by Sean Dorr.

[DEFENSE COUNSEL]: Yes, I got that. . . .

THE COURT: Well, the print report does come in and the latents come in . . . but again, **Ms. [Prosecutor], what you're presenting to me, which is, you have to turn this over to counsel. You can't just presume that things are going to come in. This is apparently, this being . . . the prints of the Defendant allegedly, I assume. You acknowledge you have not turned that over to defense. If he wanted to get an expert, how would he get an expert to compare?**

[PROSECUTOR]: He has ever[y] right to ask the State to . . . compare the, the fingerprints, to . . . have access to them, Your Honor.

THE COURT: But, Ms. [Prosecutor], how do you not notify him that this exists? There's nothing on this documentation saying that it exists.

[PROSECUTOR]: It indicates in the report that a comparison was done with the –

THE COURT: To what?

[PROSECUTOR]: – Defendant – it has been identified as impressions of Mr. Ford, which is similar based on –

THE COURT: Ma'am, that's the conclusion. You're correct. These have been identified . . . as Mr. Ford's. . . .

He's not disputing that. What he's saying is that you never turned 5-C and 5-B over and if you don't have to actually turn it over, you have to make notification of it. You did not.

[PROSECUTOR]: He was notified of –

THE COURT: Where? And I'm not being funny. Show me where there is notification that . . . you have a copy of the latent prints of Mr. Ford to make a comparison. Where is that? On what documentation? Is it on another document? I mean, where is it? This is a conclusion.

[PROSECUTOR]: Your Honor, based on the analysis of the fingerprints, my understanding that . . . Sean Dorr, the latent print examiner, compared these to the Defendant's fingerprints.

THE COURT: You're making conclusions, Ms. [Prosecutor]: I'm not disputing that latent . . . fingerprints were pulled from . . . the window. . . . That's 5-A. You've turned that over in discovery. . . .

5-C is what? I don't know.

[PROSECUTOR]: That shows his print comparison.

THE COURT: Let's see. . . . 5-C seems to be a comparison of candidate finger number 12 and I'm assuming latent 1-A. All right. And did you ever advise counsel of that? Do you have any documentation that shows you provided counsel 5-C?

[PROSECUTOR]: No, Your Honor. The State never had one. . . .

THE COURT: . . . 5-D is the latent. What's 5-F? What's this?

[PROSECUTOR]: It indicates that it was a . . . fingerprint case that, when the hit date was. This was turned over. . . .

THE COURT: 5-G. All right. So 5-G is the fingerprint case indicating there was a hit date and there were suitable prints. And there's a fingerprint match identification. . . .

Ms. [Prosecutor], I'm still not clear how you believe 5-B comes in without any . . . presentation to defense, I don't mean the actual paperwork aspect, but just notification of what was used. I don't know how that would come in in any circumstance.

[PROSECUTOR]: Well, Your Honor, we could have him print it in the courtroom and have a comparison done then.

THE COURT: You could, but you wouldn't be doing that in the middle of my trial. That would never happen. . . . So, based on what you've presented so far, he's right. 5-A can come in for whatever value it comes in. 5-D can

> come in because . . . he received notification . . . . And then, 5-E which is the conclusion. . . .
>
> **All right. 5-C and 5-B can't come into evidence at this point in time . . . .**
>
> **If tomorrow, Ms. [Prosecutor], you can show the Court where the Court is wrong from a legal standpoint that this is not a discovery violation, I'll certainly take that into consideration. I could be. I doubt it, but I could be. But for the present time, 5-B doesn't come in.**
>
> Now, [defense counsel], I'm not really sure how much that helps you. I mean, it gives you some argument and so forth. But the [fingerprint] cards come in for whatever value there may be. And I know what your argument is going to be, but I'm just telling you what my ruling is and you have tomorrow to think about it, too. **The [fingerprint] cards come in. The paperwork comes in. The only thing that doesn't come in would be the 5-B and 5-C which . . . 5-B is the print from your client . . . what they used to compare.** It's still a conclusion and I assume the expert is going to come in . . .

(Emphasis added.)

The following day, Sean Dorr testified as an expert witness for the State. He identified State's Exhibit 7, which is identical to Exhibit 5-E, as the "form which is the Latent Print Unit report," in which the crime scene fingerprints were compared to the appellant's fingerprints from the CJIS database. Over defense objection, the exhibit was admitted into evidence and Dorr was permitted to testify that "[t]he lift card number one was found to be the number two finger or the right index finger of Tyrell Ford and the print on lift number two was found to be the number three or the right middle finger of Tyrell Ford."

In a bench conference, defense counsel challenged the admissibility of Dorr's report.

[DEFENSE COUNSEL]: I'm a little bit confused, if the Court is no[t] allowing the information of Tyrell Ford's fingerprint cards but now you're letting in the same thing without the card.

THE COURT: Right. The State, just so the record is clear, the State attempted to [g]et in . . . what was alleged to be the fingerprints of Tyrell Ford . . . through Officer Carvell or whatever his name was, **you made an objection, I sustained the objection. We're at a different witness at a different time. Your complaint was that you did not receive it in discovery and I said that that may or may not be a discovery violation but as far as what this witness used, you can cross-examine him and ask him questions** but what he used to get to his conclusion is separate and apart from what you received, so that's my ruling.

[DEFENSE COUNSEL]: But it's the same thing.

THE COURT: It is not.

[DEFENSE COUNSEL]: He used the fingerprint card of Mr. Ford.

THE COURT: Right, that she was trying to get into evidence through Officer Carvell that you said did not receive but just because you didn't receive it, I'm not going to let Officer Carvell let it in but he could look at all kind of different things and you can ask him questions about what he reviewed to get to that particular conclusions, so –

[DEFENSE COUNSEL]: But I still didn't get any of his reports, I mean, I've got the bottom line, nothing in between.

THE COURT: Okay. I note your objection.

(Emphasis added.)

Discovery Violation

State's Exhibit 5-B is a two-sided form document. On the front side, it bears the appellant's name and displays his fingerprints for all ten fingers. It is dated "12/05/12." The reverse side of the document states that on that date the appellant was arrested and charged

with drug offenses. State's Exhibit 5-C is a two-page document entitled "Unsolved Latent-Tenprint Search confirmation." It appears to be a computer print-out that shows a fingerprint of the appellant compared to a fingerprint in a prior criminal case, with the appellant's unique SID number, as contained in the CJIS database. There are computer markings on the fingerprints showing areas of similarity. Neither of these documents was attached to Sean Dorr's report.

The appellant argues that "[t]he State's failure to disclose State's Exhibits 5B and 5C constitutes a discovery violation," that "[t]he trial court did not find that a discovery violation occurred," so that the court "did not exercise its discretion in fashioning a remedy for the discovery violation."

Contrary to the appellant's argument on appeal, the trial court in fact found that the State had committed a discovery violation with respect to Exhibits 5-B and 5-C.[3]

Remedy

Although the appellant does not expressly argue that the trial court abused its discretion in failing to impose a greater sanction, he maintains that, even though State's Exhibits 5-B and 5-C were excluded from evidence, reversal is warranted. To the extent he is challenging the adequacy of the remedy, we find no merit in that challenge. When the court has found a discovery violation, the remedy to be imposed is "'within the sound discretion of the trial judge.'" *Cole v. State*, 378 Md. 42, 56 (2003) (quoting *Williams v.*

[3] We express no opinion about the propriety of that finding.

State, 364 Md. 160, 178 (2001)).

> 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.

Thomas v. State, 397 Md. 557, 570-71 (2007) (footnote omitted). When "fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules," which is "to give a defendant the necessary time to prepare a full and adequate defense" and to file pretrial motions. *Id.* at 567-75 (citations and internal quotation marks omitted); *see Francis v. State*, 208 Md. App. 1, 25 (2012).

"The exercise of discretion contemplates that the trial court will ordinarily analyze the facts and not act, particularly to exclude, simply on the basis of a violation disclosed by the file." *Taliaferro v. State*, 295 Md. 376, 390 (1983). Because exclusion of evidence is "one of the most drastic measures that can be imposed," it is "not a favored sanction." *Thomas*, 397 Md. at 572. Instead, when a criminal defendant's trial preparation is hindered by the State's failure to disclose, a continuance is generally the preferred remedy. *Id.* at 573.

Because "[t]he discovery law is not an obstacle course that will yield a defendant the windfall of exclusion every time the State fails to negotiate one of the hurdles," courts are skeptical of defendants who seek "a sanction which is excessive." *Ross v. State*, 78 Md. App. 275, 286 (1989). As the Court of Appeals has observed:

> 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 frequently forego requesting the limited remedy that would serve those purposes because those purposes are not really what the defense hopes to achieve. The defense, opportunistically, would rather exploit the State's error and gamble for a greater windfall.

Thomas, 397 Md. at 575 (citations and internal quotation marks omitted).

The appellant did not claim surprise that his prints were available to the State. Nor was defense counsel surprised that the State had matched the appellant's prints to prints found on the car window. As the State points out, the disclosure of Sean Dorr's report was enough to put the defense on notice that the State also possessed Exhibits 5-B and 5-C. Aware of the inculpatory information in Dorr's report, defense counsel, instead of retaining his own expert or seeking a continuance, sought to exclude all fingerprint evidence. On this record, the trial court fairly could infer that counsel was seeking the windfall of exclusion rather than an opportunity to adequately prepare for trial.

In these circumstances, the trial court imposed the disfavored remedy of exclusion but limited it to the two documents that were not disclosed. The court did not abuse its discretion in declining to exclude other fingerprint evidence, because such a "drastic measure[]" was not warranted. *See id.* at 572.

II.

Merger of Second-Degree Assault Sentence

The trial court sentenced the appellant to seven years' imprisonment for conspiracy to commit robbery, plus a consecutive seven years for attempted robbery. It merged the conspiracy to commit theft and attempted theft convictions for sentencing purposes. When

considering the second-degree assault conviction, the court observed, "there's an argument it may merge, but just in case I am wrong, that will be seven years concurrent," for a total term of fourteen years.

The appellant contends the trial court "erred in failing to merge the second degree assault conviction and the attempted robbery conviction and in imposing separate, albeit concurrent, sentences." In support, he argues:

> Second degree assault is a lesser included offense of attempted robbery under the required evidence test, and the second degree assault conviction must be merged into the attempted robbery conviction for two reasons. First, the evidence cannot support a finding that there was an assault separate and distinct from the attempted robbery. Second, even assuming that the evidence could support such a finding, because the jury was never instructed to consider whether the second degree assault and the attempted robbery were based on separate and distinct acts and, therefore, it is impossible to tell whether the jury found that Ford committed an assault that was separate and distinct from the force or threat of force used to commit the attempted robbery, the doubt just be resolved in favor of merger.

The State concedes that merger is required in these circumstances. We agree. Accordingly, we shall vacate the appellant's sentence for second-degree assault.

SENTENCE FOR SECOND-DEGREE ASSAULT VACATED. JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY OTHERWISE AFFIRMED. COSTS TO BE PAID ONE-HALF BY THE APPELLANT AND ONE-HALF BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.