UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0861

September Term, 2014

KAIS AL-AZZAWI

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: September 3, 2015

A jury in the Circuit Court for Montgomery County convicted Kais Al-Azzawi, appellant, of cocaine possession. The court sentenced appellant to two years, all but two days suspended, plus two years of probation.

On appeal, appellant presents the following questions for this Court's review:

1. Did the trial court err in admitting the oral statement of Hope Scully?

2. Did the trial court err in precluding cross-examination of Ms. Scully?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The State's prosecution theory was that appellant, a 63-year-old man, and his younger drug-dealing friend, Arash Biabani, sold cocaine to Ms. Scully in the parking lot of a convenience store. Appellant's defense was that he was merely giving Mr. Biabani a ride, and he did not know that his friend had brought drugs into his vehicle or that Mr. Biabani was conducting a drug transaction with Ms. Scully. The jury acquitted appellant of distribution-related charges but convicted him of cocaine possession.

Montgomery County Police Officer Vincent Sylvester testified that, at approximately 10:30 p.m. on October 29, 2013, while he was conducting covert surveillance of a 7-11 store in the 500 block of Rockville Pike, he observed two vehicles pull into the parking lot. A young woman, later identified as Ms. Scully, got out of a Mazda and met for several minutes with the occupants of a black van, who later were identified as Mr. Biabani, the driver, and appellant, the passenger. During this encounter, the officer observed Ms. Scully conduct what he believed to be a drug transaction at the passenger window of the van. The Mazda

then left the parking lot, followed by the van. After determining that the van registration had been cancelled, Officer Sylvester made a traffic stop.

Appellant, who was in the passenger seat, was carrying $200 cash in his pocket, but he had no drugs on his person. Mr. Biabani, however, admitted that he had heroin in his possession, and a search of the vehicle yielded narcotics in several locations. Eight lorazepam tablets were found in prescription bottles bearing appellant's name. An "Under Armour" bag on the driver's seat contained ten "street-level" paper packages of Suboxone, as well as a digital scale with a powdery substance that tested positive for cocaine. In the center console, another paper package contained a white powder residue, which later was confirmed to be cocaine. Underneath the passenger floor mat, where appellant had been sitting, police recovered a clear baggie of white powder, later determined to be 6.34 grams of cocaine, an amount that a police expert in drug distribution testified could be divided and sold for profit.

Police also stopped the vehicle in which Ms. Scully was a passenger. Ms. Scully was arrested, and a subsequent strip search revealed cocaine on her person. Ms. Scully testified that Mr. Biabani was her "cocaine connect." She recognized appellant as a regular companion of Mr. Biabani's, whom she had seen "plenty. . . . over a time span of many years." According to Ms. Scully, appellant was present during prior drug transactions.

That night, Ms. Scully and her boyfriend arranged to meet Mr. Biabani at the 7-11. Mr. Biabani arrived driving a minivan. Appellant was in the passenger seat. Ms. Scully

went to the passenger window of the van and handed appellant $70. Appellant handed Ms. Scully the cocaine, and she talked to Mr. Biabani for a few minutes before returning to her vehicle.

Mr. Biabani testified that appellant did not know that he brought drugs with him that evening, and appellant did not participate in the sale to Ms. Scully. After he and appellant ate at a Chinese restaurant in Langley Park, Ms. Scully called and arranged to make a purchase at the 7-11. Mr. Biabani told appellant only that he was meeting Ms. Scully to get some money that she owed him. Appellant did not touch either the drugs or the money.

Testifying in his own defense, appellant admitted that he knew Mr. Biabani was a drug dealer, but he maintained that he was not aware that Mr. Biabani brought drugs into his vehicle that night. After dinner, Mr. Biabani drove to the 7-11 to meet Ms. Scully. When appellant saw Mr. Biabani give Ms. Scully a package in exchange for money, he got suspicious and angry. Appellant denied handing Ms. Scully the package containing cocaine or receiving money from her.

DISCUSSION

I.

Discovery Dispute

Pursuant to Md. Rule 4-263(d)(3) & (6)(D), the State is required to disclose to the defense "all written statements [of a witness the State intends to call to prove its case-in-chief] that relate to the offense charged," as well as any "oral statement of the witness, not

otherwise memorialized, *that is materially inconsistent with another statement made by the witness*." (Emphasis added). Appellant contends that the trial court erred in admitting an oral statement made by Ms. Scully to police on the night she was arrested because the State failed to disclose that statement in discovery.

In pre-trial discovery, the State gave defense counsel a copy of the written statement made by Ms. Scully on the night of her arrest, which states, in pertinent part, as follows:

> I got off of work at around 10:15 pm. My boyfriend Emmett picked me up and we decided that we wanted some marijuana. I called my boy [Mr. Biabani] to see if he had any bud but all he had was cocaine and heroin. We arranged to meet at the 7-11 near White Flint Metro so that we could grab a gram of cocaine for $70. We got the stuff, pulled off into the neighborhoods off of Strathmore.

Ms. Scully testified that she was sober when she wrote this statement because she was arrested before she used the cocaine.

On direct-examination, Ms. Scully testified that she talked to Mr. Biabani and arranged to meet him at the 7-11 parking lot. She further testified about the transaction and her conversation with police that night, as follows:

> [PROSECUTOR]: So you and Emm[e]tt went to 7-11?
>
> [MS. SCULLY]: Yeah.
>
> ***
>
> [PROSECUTOR]: Okay. And what did you see come into the parking lot?
> . . .

[MS. SCULLY]: Yeah. I saw [Mr. Biabani] drive into the parking lot. He was driving. They parked across the street near to the 7-11. I got out of the car and went over to the passenger side door and [appellant] handed me the cocaine and I handed him money.

[PROSECUTOR]: And what happened after you got handed the cocaine and you gave him the money?

[MS. SCULLY]: I talked to [Mr. Biabani] for a minute and then went back to the car.

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[PROSECUTOR]: And were you arrested that night?

[MS. SCULLY]: Yes.

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[PROSECUTOR]: Do you remember talking to the police that night?

[MS. SCULLY]: Yeah. Here and there.

***

[MS. SCULLY]: Yes, I do. For the most part.

[PROSECUTOR]: And did you tell the police that night that you got the cocaine from [Mr. Biabani]?

[MS. SCULLY]: Yes.

[PROSECUTOR]: Why did you tell them that?

[MS. SCULLY]: They had already seen all of it. They already knew.

[PROSECUTOR]: And you refer to [Mr. Biabani] as your connect?

[MS. SCULLY]: Yes.

[PROSECUTOR]: So is that who you assumed you had received it from?

[MS. SCULLY]: Oh, that's who I set it all up from, but I guess since [Mr. Biabani] was driving he had given it to [appellant] to give to me or had set it up with him. I don't remember exactly how that got messed around. Normally I did grab it directly from [Mr. Biabani], but this time since he was the one driving, he had me go up to the passenger side where [appellant] was.

On cross-examination, the following occurred:

[DEFENSE COUNSEL]: Now, you say that [appellant] handed you cocaine that night, right?

[MS. SCULLY]: Um-hmm.

[DEFENSE COUNSEL]: And you say you handed him money, right?

[MS. SCULLY]: Yes.

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[DEFENSE COUNSEL]: [A]nd you were standing on the side of the van, right?

[MS. SCULLY]: Right.

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[DEFENSE COUNSEL]: And he took the money, right?

[MS. SCULLY]: Um-hmm.

[DEFENSE COUNSEL]: His hand went up and took the money, right?

[MS. SCULLY]: Yeah.

[DEFENSE COUNSEL]: And then [appellant] handed you the bag of cocaine, right?

[MS. SCULLY]: Yeah.

[DEFENSE COUNSEL]: Right there in the open. Through the open window, right?

[MS. SCULLY]: Well, you know, down. I reached in a little bit through the passenger side window. It wasn't like he just paraded it through –

Ms. Scully confirmed that she made a written statement when she was arrested, that she was sober when she made it, and that she did not mention appellant in that statement, much less that he conducted the actual transaction. She testified, however, that she had seen appellant "all over the place with" Mr. Biabani and that she "saw [appellant] sometimes with drugs."

After Ms. Scully finished testifying, defense counsel moved to strike her testimony regarding the hand-to-hand transaction with appellant, arguing that the State should have disclosed during discovery that Ms. Scully made an oral statement implicating appellant:

[DEFENSE COUNSEL]: . . . I was surprised by the witness's statement implicating my client. The State provided no discovery, one statement, and an additional statement from a police officer, and I would . . . represent to the court that nowhere in either of those statements does it say that [appellant] handed drugs to her or that she handed money. Frankly, that's a shocker. I'm like, okay, what do I do with this. So my point is, I think the State has a discovery obligation to provide such information. I think it would be a violation, and I'd ask that statement be stricken – that exchange be stricken. That's extremely prejudicial, and I didn't see that coming at all.

The trial court denied the motion, ruling that there was no discovery violation because Ms. Scully's oral statement to police was not inconsistent with her written statement:

> THE COURT: You read the [written] statement, which, quite frankly, is not inconsistent with what she said.
>
> [PROSECUTOR]: Agreed.
>
> THE COURT: I thought when she was going to read the statement she was going [to] say, "[Mr. Biabani] gave it to me. [Mr. Biabani] handed me this. And your guy the defendant just kind of leaned back." But that statement doesn't say that. And so your surpris[e] is certainly understandable if that's all you had in the statement, but that statement certainly doesn't delineate the detail – the play by play at the car.

The prosecutor then added that the police officer's notes simply say that "[w]hen [Ms.] Scully met [Mr. Biabani] she bought a gram of cocaine for $70 using money from herself and [her boyfriend]." Defense counsel agreed that neither the notes from the officer nor Ms. Scully's written statement said "[Mr. Biabani] handed it to me," but he argued that "it's a completely fair inference." The prosecutor pointed out that Ms. Scully had "been available this entire time for the defense to interview."

The trial court denied the motion to strike Ms. Scully's testimony, explaining:

> Well, the duty of the State is to get all written statements of witnesses, which [the State] gave. I don't know that the State has a duty to do anything more than what they've done. They've given you what they're required to under open file with respect to all the police reports. I think I would lean your way if, in fact . . . if they had another statement or something.
>
> ***
>
> So I'll deny the request for discovery violation.

Appellant contends that, in so ruling, the trial court erred. He argues that the State violated its discovery obligations by failing to disclose that "[Ms.] Scully had made an oral

statement to the police implicating [appellant] as the person who handed her the drugs, which was materially different from her written statement to the police." In appellant's view, "the trial court erred in finding that the State did not violate the discovery rule, which it clearly did, and the trial court therefore exercised no discretion in fashioning any remedy."

Whether the State has committed a discovery violation is a question of law that this Court reviews *de novo*. *Cole v. State*, 378 Md. 42, 56 (2003). The trial court's factual findings, however, are accepted by this Court unless clearly erroneous. *Id.*

Rule 4-263(d) 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:
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> ***
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> (3) State's Witnesses. As to each State's witness the State's Attorney intends to call to prove the State's case in chief or to rebut alibi testimony: (A) the name of the witness; (B) . . . the address and, if known to the State's Attorney, the telephone number of the witness; and (C) all written statements of the witness that relate to the offense charged;
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> ***
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> (6) Impeachment Information. All material or information in any form, whether or not admissible, that tends to impeach a State's witness, including:
>
> ***
>
> (D) an oral statement of the witness, not otherwise memorialized, that is materially inconsistent with another statement made by the witness or with a statement made by another witness.

We are not persuaded that the State violated its discovery obligation. As indicated, the State provided the defense with Ms. Scully's written statement. And we agree with the trial court that the record does not reflect that Ms. Scully made an oral statement prior to trial that was materially inconsistent with her written statement.

Initially, although appellant asserts that Ms. Scully told the police that appellant handed her the cocaine, the testimony that he cites in support, which we have set forth, does not support that assertion. In any event, even if she did make such a statement prior to her testimony at trial, it was not inconsistent with her written statement.[1] The description of the exchange in Ms. Scully's written statement was simply: "We got the stuff." She did not detail precisely how the exchange of money and drugs was accomplished. At trial, Ms. Scully provided the details of the exchange, specifying to whom she physically handed the money and from whom she received the cocaine. She testified, consistent with her written statement, that her "connect" was Mr. Biabani, that she called him to arrange the sale, and therefore, she told police that she "got" the cocaine from Mr. Biabani. Ms. Scully further testified, however, that although she typically would "grab it directly from" Mr. Biabani, she "guess[ed]" that, because he was driving, he gave it to appellant to handle the exchange of money for drugs.

[1] During trial and in advance of Ms. Scully's testimony, the prosecutor advised the court and defense counsel that Ms. Scully had advised that she purchased the cocaine via the passenger window of the van (where appellant was sitting), and she was not sure who gave her the cocaine, stating that she "could have gotten it from either one of them."

In response to defense counsel's motion to strike Ms. Scully's testimony regarding the details of the exchange, the circuit court made a finding, with which defense counsel agreed, that Ms. Scully's trial testimony was not materially inconsistent with her written statement:

> THE COURT: You read the statement, which, quite frankly, is not inconsistent with what she said.
>
> [PROSECUTOR]: Agreed.
>
> THE COURT: I thought when she was going to read the statement she was going [to] say, "[Mr. Biabani] gave it to me. [Mr. Biabani] handed me this. And your guy the defendant just kind of leaned back." But that statement doesn't say that. And so your surpris[e] is certainly understandable if that's all you had in the statement, but that statement certainly doesn't delineate the detail – the play by play at the car.
>
> [DEFENSE]: When [Ms.] Scully met [Mr. Biabani] she bought a gram of cocaine for $70 using money from herself and [her boyfriend].
>
> THE COURT: Right.
>
> [PROSECUTOR]: Neither one – the notes from the officer or the written statement from here say [Mr. Biabani] handed it to me.
>
> [DEFENSE]: I agree with that. But it's a completely fair inference, when [Ms.] Scully met [Mr. Biabani] she bought a gram of cocaine.

The circuit court's factual finding that there was no inconsistency between Ms. Scully's written statement and her trial testimony was not clearly erroneous. Accordingly, because there was no violation of the discovery rule, the circuit court's ruling denying defense counsel's motion was not erroneous.

II.

Restriction on Cross-Examination

Appellant next contends that the trial court erred in precluding cross-examination of Ms. Scully regarding a seizure that she reportedly suffered shortly before the transaction that led to her arrest. We disagree.

After Ms. Scully testified that it was appellant who made the hand-to-hand exchange, defense counsel attempted to impeach that testimony by asking: "Sometime in the fall of 2013 did you have a seizure?" The court sustained the State's objection. At a bench conference, defense counsel proffered:

> Her credibility is hugely at issue. I want to show that she is a drug addled – her brain is drug addled, and her credibility is – she's not to be believed. I have a statement from the police saying – her talking to the police that she had a seizure that was so bad that [her boyfriend] had to perform CPR on her. She had an allergic reaction to a new drug that she was prescribed.

Defense counsel added that he sought to "explore her drug history" in order to determine "the effect on her memory and . . . perception."

The circuit court stated that it was "quite surprised at how sharp this lady is," and defense counsel would "need some medical testimony or some documentation" that "she was unable to . . . recall what happened that day," which would be "tough because she's already written a statement." The court then stated that it would not permit defense counsel "to get in that she's a bad person because she takes drugs." Defense counsel responded that he was

attempting to impeach her credibility by challenging "her intellect" rather than her "moral values."

The trial court was not persuaded that the alleged seizure had impeachment value, explaining:

> See, you're dealing with a seizure. . . . A lot of people have seizures all the time that are very credible. What I mean is, it's a quantum leap. One that I don't believe you can make . . . by . . . getting her to admit, yeah, I had a seizure a number of years ago.

The court ultimately ruled that the alleged seizure was "not relevant."

Appellant contends that the trial court improperly restricted his constitutional right to cross-examine Ms. Scully, the only witness who could put the drugs and money in appellant's hands. He argues that "[Ms.] Scully's self-reported history to police of seizures and the effect they might have had on her memory and perception required no 'medical testimony,' as this was within her personal experience and well within her ability to explain."

As the excerpted colloquy shows, the court's decision to preclude cross-examination about the alleged seizure was based on its conclusion that appellant failed to establish a sufficient foundation that this line of impeachment was relevant. Both the law and the record support that ruling.

"The Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant the

right to confront the witnesses against him or her." *Pantazes v. State*, 376 Md. 661, 680 (2003). "Central to that right is the opportunity to cross-examine witnesses" in order to challenge their credibility. *Id.* Nevertheless, the right to conduct impeachment cross-examination "is not boundless." *Id.* "Judges have wide latitude to establish reasonable limits on cross-examination based on concerns about . . . confusion of the issues . . . or interrogation that is . . . only marginally relevant." *Id.*

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. "[T]he relevancy determination is not made in isolation. Instead, the test of relevance is whether, in conjunction with all other relevant evidence, the evidence tends to make the proposition asserted more or less probable." *Snyder v. State*, 361 Md. 580, 592 (2000).

As this Court has explained, we review a trial court's decision to admit evidence for abuse of discretion, but we conduct an independent analysis of whether evidence is relevant:

> "It is frequently stated that the issue of whether a particular item of evidence should be admitted or excluded 'is committed to the considerable and sound discretion of the trial court,' and that the 'abuse of discretion' standard of review is applicable to 'the trial court's determination of relevancy.' Maryland Rule 5-402, however, makes it clear that the trial court does not have discretion to admit irrelevant evidence. . . . [T]he 'de novo' standard of review is applicable to the trial judge's conclusion of law that the evidence at issue is or is not 'of consequence to the determination of the action.'"

Donati v. State, 215 Md. App. 686, 736 (quoting *State v. Simms*, 420 Md. 705, 724-25 (2011)), *cert. denied*, 438 Md. 143 (2014).

Here, based on the limited proffer that Ms. Scully suffered a reaction to a prescribed medication, the absence of any indication that this medical event affected her ability to recount the transaction at issue in this case, and the trial court's assessment that Ms. Scully was "sharp," the circuit court determined that the evidence was not relevant for the purpose proffered, i.e., to show that the seizure left Ms. Scully with a "drug-addled brain" that so compromised her "intellect" as to damage her credibility. We agree and perceive no error in the court's decision to sustain the State's objection to appellant's question in this regard.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.