Circuit Court for Cecil County
Case No. C-07-CR-18-001518

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1015

September Term, 2019

ERIC ZACHARIAH GARCIA-NIEVES

v.

STATE OF MARYLAND

Graeff,
Arthur,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 8, 2021

Following a jury trial in the Circuit Court for Cecil County, Eric Zachariah Garcia-Nieves, appellant, was convicted of theft scheme of a value of $100,000 or more and embezzlement or misappropriation of funds by a fiduciary. On appeal, he contends that the court either erred or abused its discretion in refusing to strike the testimony of John Buhler, an expert witness for the State, as a remedy for the State's failure to comply with its discovery obligations under Maryland Rule 4-263(8). For the reasons that follow, we shall affirm the judgments of the circuit court.

Mr. Garcia-Nieves was charged with stealing over $200,000 from his employer, Atlantic Fabricators. At trial, Mr. Buhler, who had been the company's accountant since 2011, was admitted as an expert in the field of accounting. He testified that the company's owner, Richard Peterson, had asked him to help investigate whether Mr. Garcia-Nieves had been stealing from the company. Mr. Buhler then ran various reports using the company's accounting software and reviewed them with Mr. Peterson. Based on those reports, Mr. Buhler and Mr. Peterson were able to identify multiple instances where money had been transferred from the company's bank account to a Capitol One account owned by Mr. Garcia-Nieves. Mr. Peterson testified that most of these transfers were for pay raises that he had not authorized and for travel and other expenses that Mr. Garcia-Nieves had not actually incurred.

In its initial discovery, the State identified Mr. Buhler as a potential expert witness and indicated that he would testify "consistently with his account of the victim's fiduciary matters and supporting documents to same." The State also provided copies of the "Excel reports" that Mr. Buhler had prepared for Mr. Peterson, although it did not specifically

indicate that they had been prepared by Mr. Buhler. In its supplemental discovery, the State also provided Mr. Garcia-Nieves with a copy of Mr. Buhler's curriculum vitae. Several days before trial, Mr. Garcia-Nieves filed a motion in limine claiming that the State had violated Maryland Rule 4-263(8) by failing to provide him with any written reports by Mr. Buhler, the substance of any oral reports by Mr. Buhler, or the substance of Mr. Buhler's opinions and the grounds for his opinions. The only remedy proposed by Mr. Garcia-Nieves was to prohibit Mr. Buhler from testifying as a witness.

At an initial hearing on motion, the prosecutor conceded that Mr. Garcia-Nieves had not been provided with a report summarizing Mr. Buhler's expert opinions. However, he noted that Mr. Buhler had not provided the State with a written report; that Mr. Garcia-Nieves was familiar with Mr. Buhler and his work because Mr. Buhler had been an accountant for the company since 2011; that the accounting reports that Mr. Buhler would be testifying about had been provided by counsel; and that defense counsel had not raised the issue at a motions hearing one month earlier when they had discussed discovery issues. When pressed by the court, the prosecutor indicated that the substance of Mr. Buhler's opinion, based on limited conversations would be that "a review of the business records indicate that the defendant was funneling money from the company to his own personal credit card, and was also reimbursing himself . . . for expenses such as mileage and things like that as an employee he was not entitled to." The prosecutor further noted that, although nothing had been provided to Mr. Garcia-Nieves that specifically said those would be his findings, that was "clearly the understanding of both the indictment and the subsequent discovery."

After hearing arguments from counsel, the court found that it was undisputed that a "technical discovery violation" had occurred because a summary of Mr. Buhler's expert testimony had not been provided to Mr. Garcia-Nieves. The court noted, however, that prohibiting Mr. Buhler from testifying entirely would be a "severe penalty" and that no other remedy had been requested. The court then indicated that it would allow Mr. Buhler to testify as a fact witness but that it was going to reserve ruling on whether it would allow Mr. Buhler to testify as an expert until the following day.

The next day the court stated that it had given the matter some thought and was denying the motion. In doing so it relied on the facts that: (1) Mr. Buhler had been timely disclosed as an expert; (2) Mr. Buhler was not a hired gun but rather someone Mr. Garcia-Nieves was familiar with; (3) the prosecutor was a new hire, having only been at the State's Attorney's Office for one month, which indicated that the failure to provide the discovery was likely inadvertent; (4) the summary report that had not been provided would have "actually track[ed] the allegation in the indictment"; (5) it appeared that Mr. Garcia-Nieves was just as familiar with the company's accounting as Mr. Buhler based on his former position with the company; (6) Mr. Garcia-Nieves had not filed a motion to compel; (7) Mr. Buhler was not using a novel accounting approach; and (8) Mr. Garcia-Nieves had not requested another remedy such as a continuance.

On appeal, Mr. Garcia-Nieves contends that the court either erred or abused its discretion in failing to strike Mr. Buhler's testimony as a remedy for the State's discovery violation. A trial court's ruling on sanctions for discovery violations is reviewed for abuse of discretion. *Bellard v. State*, 229 Md. App. 312, 340 (2016), *aff'd*, 452 Md. 467 (2017).

"To constitute an abuse of discretion, the decision 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." *Cousins v. State*, 231 Md. App. 417, 438 (2017) (internal quotation marks and citation omitted). Generally, in ruling on sanctions, the trial court "'should impose the least severe sanction that is consistent with the purpose of discovery rules.'" *Raynor v. State*, 201 Md. App. 209, 228 (2011) (quoting *Thomas v. State*, 397 Md. 557, 571 (2007)). This view is consistent with the tenet that "discovery sanctions are designed to prevent a defendant from being surprised, not to yield a defendant the windfall of exclusion every time the State fails to comply with discovery rules." *Morton v. State*, 200 Md. App. 529, 543 (2011) (citations and internal quotation marks omitted). Indeed, "[e]xclusion of evidence for a discovery violation is not a favored sanction and is one of the most drastic measures that can be imposed." *Thomas*, 397 Md. at 572. In considering whether, and to what extent, sanctions are appropriate, "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." *Id*. at 570-71).

To avoid review of his claim under the abuse of discretion standard, Mr. Garcia-Nieves first asserts that the court failed to exercise its discretion because it did not "apply any sanction whatsoever." He contends this was "tantamount to failing to find any discovery violation in the first instance." This claim is belied by the record. The court specifically found that the State had committed a discovery violation. However, it noted that the only remedy that Mr. Garcia-Nieves had requested was the "severe penalty" of

exclusion of the witness's testimony. It then considered all the relevant factors and declined to impose that penalty. Although the circuit court "has the discretion to select an appropriate sanction" it "also has the discretion to decide whether any sanction is at all necessary." *Raynor*, 201 Md. App. 227-28 (further noting that the Rule regarding discovery sanctions does "not require the court to take any action; it merely authorizes the court to act"). Consequently, we are persuaded that the court exercised its discretion when it declined to exclude Mr. Buhler's expert testimony.

Mr. Garcia-Nieves alternatively contends that, if the court exercised its discretion, it abused that discretion when it allowed Mr. Buhler to testify. Again, we disagree. Having reviewed the factors considered by the court, including the reasons for the delay and the prejudice to Mr. Garcia-Nieves, we cannot say its decision not to exclude Mr. Buhler's testimony was so far removed from any center mark that we can imagine that it constituted an abuse of discretion. In so holding, we note that defense counsel was aware that Mr. Buhler could be called as an expert witness and had been provided with the reports that Mr. Buhler relied on during his testimony. However, he did not raise the discovery issue until several days before trial. Moreover, despite defense counsel's non-specific protestations of prejudice, he did not request an alternative remedy such as a continuance to allow him more time to prepare. The exclusion of evidence is not a favored sanction. And the Court of Appeals has cautioned "that, if a defendant declines a limited remedy that would serve the purpose of the discovery rules and instead seeks the greater windfall of an excessive sanction, 'the double or nothing gamble almost always yields nothing.'" *Raynor*,

201 Md. App. at 228 (citation omitted). The fact Mr. Garcia-Nieves's gamble similarly failed does not require reversal.

JUDGMENTS OF THE CIRCUIT COURT FOR CECIL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.