Circuit Court for Harford County
Case No. 12-K-17-1320

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1496

September Term, 2019

MATTHEW C. OAKES

v.

STATE OF MARYLAND

Graeff,
Wells,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, J.

Filed: February 22, 2021

A jury in the Circuit Court for Harford County convicted Matthew C. Oakes, appellant, of one count of unlawful possession of a firearm by a prohibited person; one count of wearing, carrying, or transporting a handgun upon his person; and one count of unlawful possession of ammunition.[1] After noting this timely appeal, Oakes presents the following questions for our review:

1. Did the trial court err in denying [his] motion for a mistrial?
2. Did the trial court err in failing to hold a *Roviaro v. United States in camera* hearing on [his] motion to disclose the identity of the confidential informant used in this case?

For reasons that follow, we conclude there was no error and affirm the convictions.

BACKGROUND

Around 7:45 p.m. on August 18, 2017, Havre de Grace Police Detective Francis Davidson was conducting covert surveillance from an unmarked car in an area with "high narcotics activity[,]" between Hoppers Lane and Otsego Street in Havre de Grace. A white pickup truck caught his attention because it had unusually high "after-market" panels. When the detective ran a "routine registration check of the license plate," he learned that the vehicle registration was expired.

Following the truck, Davidson radioed Corporal Joseph Cooper, who was on patrol in a marked police cruiser, asking him to make a traffic stop based on the expired registration. As Cooper conducted the traffic stop, Detective Davidson continued to

[1] For the prohibited firearm conviction, Oakes was sentenced to fifteen years, with all but seven years and six months suspended. For the carrying conviction, he was sentenced to a consecutive term of three years, all suspended. For the prohibited ammunition count, he was sentenced to a concurrent term of one year, all suspended.

observe from his vehicle, which was parked "six car lengths" away. When Cooper approached the driver's side of the truck, he obtained the driver's license and registration, then returned to his cruiser. Cooper recognized Oakes in the passenger seat.

Before Cooper returned to the truck, Davidson saw an individual that he later identified as Oakes exit from the passenger side of the vehicle, walk around to the driver's side, and hold a "brief interaction" with the driver. Oakes then walked across Congress Avenue toward an entrance to Havre de Grace High School.

At that point, another marked cruiser driven by Officer Forsmark arrived as backup for Cooper. Oakes "made an immediate reactive left turn" toward the parking lot of the high school auditorium.

Detective Davidson moved his vehicle to the 700 block of Bourbon Street, where he saw Oakes walking along a wall of the school, moving toward him, and increasing his speed while looking back "over his right shoulder to observe the activity by Officer Forsmark and [Corporal] Cooper." When Oakes neared the corner of the building, he began "making adjustments to the front waistband or the street term of dip area of his body." After making "one last look over to the officers[,]" Oakes "removed an item from the center of his waistband and reached up above the fence and dropped it on the opposite side of the fence." Detective Davidson recognized the object as a handgun.

As Oakes continued walking toward the 700 block of Bourbon Street, Detective Davidson radioed Cooper and Forsmark to stop him. Forsmark returned to the location described by Davidson and "immediately identified a semiautomatic pistol laying just on

the other side of the fence." The detective took a photograph of the pistol where it was found.

The operable handgun was loaded with a magazine and a cartridge in the chamber. Oakes' fingerprint matched a latent print found on the magazine. As a result of a prior conviction, Oakes was prohibited from possessing a regulated firearm.

We shall add material from the record in our discussion of the issues raised by Oakes.

DISCUSSION

I. Motion for Mistrial Based on Missing Defense Witness

In his first assignment of error, Oakes contends that "the trial court erred in denying [his] motion for mistrial based on the failure of Ms. Kristi Fletcher Long to appear at [his] trial in response to the defense's subpoena and the issuance of a body attachment issued by the court for her appearance at trial." Reviewing the record in light of legal standards governing mistrials based on a missing defense witness, we conclude that the trial court did not err or abuse its discretion in denying Oakes' motion.

A. Standards Governing Review of Mistrial Motion Based on Missing Defense Witness

Summarizing the standards governing the denial of a motion for mistrial, this Court recently explained that appellate review

> is conducted "under the abuse of discretion standard." *Nash v. State*, 439 Md. 53, 66–67 (2014). Because "'a ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling[,]'" courts reviewing the denial of a mistrial afford trial judges "a wide berth." *Id.* at 67, 68 (citation omitted). Moreover,

> we are mindful that "declaring a mistrial is an extreme remedy not to be ordered lightly." *Id*. at 69.
>
> Our benchmark for appellate relief "is whether 'the prejudice to the defendant was so substantial that he [or she] was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (citation omitted).

Vaise v. State, 246 Md. App. 188, 239, *cert. denied*, 471 Md. 86 (2020).

Here, Oakes asserted the ground for mistrial was that Ms. Long was essential to his defense of entrapment. Ms. Long, who was subject to a bench warrant and body attachment, had not been located or apprehended by police. *See generally Kamara v. State*, 184 Md. App. 59, 74-75 (2009) ("The defense of entrapment is generally available 'where there is an inducement on the part of the government officials for the accused to commit the offense and, if so, where the accused has not shown any predisposition to commit the offense.'") (quoting *Skrivanek v. State*, 356 Md. 270, 286 (1999)). Under the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights, a criminal defendant has a right to "compulsory process for obtaining witnesses in his favor" so as to be able to "examine the witnesses for and against him on oath." *See Washington v. Texas*, 388 U.S. 14, 14-15 (1967); *Kelly v. State*, 392 Md. 511, 532-33 (2006); *Wilson v. State*, 345 Md. 437, 445 (1997). Because "the adversarial system of justice . . . requires that the defendant be given every opportunity, within procedural and evidentiary boundaries, to present a defense[,]" *Kelly*, 392 Md. at 533, "'it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.'" *Id.* (quoting *United States v. Nixon*, 418 U.S. 683, 709 (1974)). This "right to offer the testimony of witnesses, and to compel

their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington*, 388 U.S. at 19.

In turn, because this is a "basic ingredient of due process of law[,]" *id.*, "criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987); *see also Wilson*, 345 Md. at 447. To be sure, a court is not required "to engage in a manhunt for [a] missing [defense] witness. It is up to the defendant to locate his or her witnesses, or at least to give the court a reasonable indication of where the witnesses may be found so that a subpoena or other process may be served." *Wilson*, 345 Md. at 449 (citing *United States v. Glover*, 946 F.2d 1354 (8th Cir. 1991)). Yet "the right to compulsory process embodies more than just the right to have a subpoena issued, even if it does not constitute an actual guarantee of attendance." *Id.* at 450. Because "[a] defendant needs his or her witnesses in court, not simply subject to later punishment for failure to obey a subpoena[,]" "[t]he issuance of body attachments or bench warrants to bring recalcitrant witnesses before the court is a traditional and usual method of enforcing subpoenas, and it is a necessary element in the concept of compulsory process." *Id.*

Under Md. Rule 4-266(d), therefore,

> a witness personally served with a subpoena is liable to a body attachment for failure to obey the subpoena and . . . a writ of attachment may be executed by the sheriff or other peace officer. Normally, when the problem of a missing witness surfaces, the defendant asks for a dual form of relief-a body attachment or bench

> warrant and a continuance in order to have the witness apprehended and brought to court. Generally . . . the debate centers around the continuance, rather than the issuance of additional process. The decision to issue an attachment or warrant affects only the convenience of the witness and the officer needed to serve the process; the decision to grant a continuance also affects the convenience of the court, the jury, the prosecution, other witnesses, and possibly other cases scheduled for trial. Accordingly, the trial court is vested with a significant amount of discretion whether to grant the necessary continuance to allow the missing witness to be located, subpoenaed, or apprehended, and reversal of a judgment of conviction is appropriate only upon a finding that that discretion has been abused.

Id. at 449-51. In exercising such discretion over a defense request for a continuance in order to locate a missing defense witness whose attendance has been compelled by subpoena or body attachment, courts "have required the defendant to show, among other things, an ability to locate the witness within a reasonable time." *See id.* at 449.

B. The Motion Record

Oakes' defense was that he was entrapped. In an attempt to establish an entrapment defense, on January 22, 2019, Oakes' defense counsel served a subpoena on Ms. Long, compelling her to appear at trial on April 20, 2019. Ms. Long failed to appear. As a result, the trial court granted a defense request for a body attachment for Ms. Long compelling her appearance at the rescheduled trial date of September 10, 2019.

When Ms. Long again failed to appear on September 10, defense counsel requested another trial postponement. Court and counsel reviewed the unsuccessful attempts made by the Sheriff's Office to find Ms. Long, pointing out that efforts to locate her did not begin until a couple days before the new trial date. Although warrant officers located Ms. Long's

boyfriend at a local hotel two days before trial, Ms. Long was not there at the time. By the time officers returned later that day, the couple had checked out.

The trial court indicated that it would not grant another postponement. But the court required the sheriff's deputies to continue searching for Ms. Long while the trial was underway. The court also requested a proffer of Ms. Long's testimony. In response, defense counsel explained that Oakes' defense theory "should we be able to produce her, is that [Ms. Long] entrapped at the behest of the Havre de Grace Police my client into possessing the firearm." When pressed by the court and prosecutor, defense counsel conceded that he had "never heard [Ms. Long] testify," had not interviewed her, was not aware of any statement she made, and did not "know if she [was] going to invoke her Fifth Amendment privilege."

The trial proceeded. Just before the court recessed for the day, defense counsel advised that sheriff's deputies were "headed up to Havre de Grace" to look for Ms. Long, who had been seen there recently. Oakes' decision whether to testify hinged on whether Ms. Long appeared for trial the next day.

The next morning, defense counsel informed the court that the deputies had not been able to locate Ms. Long. Counsel moved for a mistrial, arguing that Ms. Long was critical to his entrapment defense and that the administrative judge had already "deemed it appropriate that we actually start the trial" but that "if Ms. Fletcher Long was not produced that a mistrial be granted, given that it completely hamstrings . . . the entire trial."

The trial court denied the motion for a mistrial, explaining:

> The first issue is does the Court believe that the warrant division of the Harford County Sheriff's Office has done something improper in terms of bringing this witness to court.
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> The information that the defense had apparently it shared with the warrant division, and it sounds as though the information that the defense had was as good, if not better, than the information that is proffered to have been held by the Havre de Grace police in this matter, if she's in Elkton, she's in Aberdeen or Havre de Grace at a hotel. And I don't see that the warrant division of the Sheriff's Office has done anything improper. And it's not for this Court to alter the policy that they have of waiting just before trial, and it was just before trial probably almost a week ago. And if the person can't be brought in, so be it.
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> The other issue in this matter is even if this person were brought in, would they invoke a privilege that they have to not testify. We don't know if that's going to happen. And the other side of this is . . . does this witness have impeachables? In other words, are they even permitted to provide testimony to this Court because they may have impeachables themselves. So, it doesn't sound as though the warrant division of the Sheriff's Office nor defense counsel have done anything improper or not correct in bringing this claimed material witness to court. If the witness doesn't want to appear to court or doesn't have a good address, that's not the fault of defense counsel or the Sheriff's Office. They certainly looked and she's not here. And I think the Court gave every opportunity to position the case in such a way that time would be given, additional time would be given to have this witness appear. So, I have to deny the request at this point, counsel, to have a mistrial declared.
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> So, at this stage, then, the State has closed its case. The request for a declaration of a mistrial's been denied.

C. Oakes' Challenge

Oakes contends that "the trial court abused its discretion in denying [his] motion for mistrial for the failure of Ms. Fletcher Long to appear at [his] trial[,] infringing on his constitutional right to put on a defense." Oakes maintains that after "the defense presented the substance of what she was expected to testify[,]" "demonstrated the relevance and importance of" that testimony to his entrapment defense, and "did everything it could to

procure [her] appearance[,]" "including serving her with a subpoena and arranging for a body attachment[,]" "the Sheriff's Office failed to" locate and serve her. Oakes argues that "[i]n these circumstances, no reasonable person would have denied" him a mistrial, in order to afford him "the opportunity to call this witness" to support what was his only effective defense to these weapons charges.

The State counters that "the trial court soundly exercised its discretion" in denying a mistrial. In support, the State points out that Oakes did not establish any factual predicate for his belief that Long was a material witness who would support his entrapment defense, given that defense counsel did not interview her, obtain her statement, or otherwise have any indication that she would waive any Fifth Amendment right she may have not to testify. Moreover, "[b]y the time the mistrial motion was made, the case had been delayed by nearly 6 months after the issuance of the body attachment[,]" while the witness was still "on the lam" from police. Despite "good faith efforts to locate Long" during "the days leading up to trial[,]" sheriff's deputies still could not find her.

We conclude that Oakes was not denied a fair trial as a result of Ms. Long's failure to testify. When she did not appear under subpoena for the initial trial date, the court continued the case and issued a bench warrant and body attachment to secure her testimony for the rescheduled trial date. Although deputies searched for Ms. Long in the days before the trial, she could not be located.

Based on this record, we conclude that the defense failed to establish that Ms. Long could be compelled to testify within a reasonable period of time. The trial already had been delayed six months following her failure to appear for the first trial date. Any effort to

apprehend her earlier than a few days before the rescheduled trial date likely would have necessitated her release before trial, thereby increasing the risk that she again would avoid testifying by evading apprehension. As detailed by the court and by counsel, in the days just before and during the rescheduled trial date, sheriff's deputies made good faith but unsuccessful efforts to locate Ms. Long in order to take her into custody. Indeed, based on the accounts proffered by counsel regarding efforts to locate her, both before and during the rescheduled trial, she continued to avoid compulsory process.

Moreover, defense counsel admitted that even if Ms. Long could be found and was compelled to take the witness stand, Oakes could not say whether she would provide testimony supporting his entrapment defense. As defense counsel conceded, he had not interviewed her and did not know of any other statement. And more importantly, Ms. Long might invoke her Fifth Amendment right to silence with respect to the gun and/or her interactions with Oakes.

These significant uncertainties—both as to when Ms. Long might be located and what she might testify to—distinguish this case from *Wilson*. There, the trial court abused its discretion in denying a body attachment and related continuance to secure testimony from Ms. Coleman, a defense witness who allegedly could support a defense theory of misidentification. With respect to materiality, the Court of Appeals explained in *Wilson* that "[i]t was evident . . . despite some unsupported skepticism on the part of the court, that her testimony could have been helpful to the defense" given the existence of "a clear conflict" in the evidence "as to when Wilson entered the house, what he did there, and who

else was in the house at the time" and "as to who was in control of the drugs." *Wilson*, 345 Md. at 451-52.

With respect to the witness' reasonable availability to testify, the Court pointed to multiple distinguishing factors indicating that, unlike Ms. Long, Ms. Coleman could be easily located:

> The question remains . . . whether Ms. Coleman could have been located and brought to court within a reasonable time. Two facts, in particular, are relevant with respect to that question. First, Ms. Coleman's current address was known and given to the court. She had been served with a subpoena at that address the previous afternoon. Second, the court did not reject Wilson's request for assistance because of any finding that Ms. Coleman could not be located. It was willing to dispatch a deputy sheriff if one was immediately available. The court, ultimately, declined to enforce the subpoena solely because some unknown supervisor in the sheriff's office told the deputy sent to inquire that there was no one immediately available, and, based upon that fact, the court decided that it was not going to prolong the trial for another day.
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> That decision, made for that reason, under the circumstances of this case, constituted an abuse of discretion.
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> It is not an abuse of discretion for the court to consider the convenience of the jury; nor is it an abuse to consider the extent of the delay that would be engendered by interrupting an ongoing trial to search for and apprehend a missing witness. The right of compulsory process is, however, an important, fundamental right that may not lightly be disregarded simply because some unidentified person in the sheriff's office decides that other obligations are more important. At the very least, before rejecting Wilson's request for assistance, the court should have inquired on its own whether, and when, a deputy or other authorized officer would be available. This record does not reveal just how the question was put to the supervisor by the courtroom deputy. Moreover, the inconvenience to the jury of having had to appear on two separate days was caused by the court's decision to end proceedings before 3:30 on June 15 and not to begin until 2:00 p.m. on June 16.

Id. at 452. Based on these circumstances, the Court concluded that "Wilson was denied his State and Federal Constitutional right of compulsory process, and reversal is therefore mandated." *Id.* at 453.

Here, in contrast to *Wilson*, the trial court afforded Oakes his right to compulsory process by issuing first a subpoena and then a bench warrant authorizing body attachment. The record supports the court's determination that Oakes failed to establish the materiality and reasonable availability factors warranting another continuance for the purpose of affording Oakes a third opportunity to secure Ms. Long's testimony. In turn, because the trial court did not abuse its discretion in proceeding with trial, we hold that the trial court did not err or abuse its discretion in denying a mistrial based on the unavailability of Ms. Long.

II. **Motion to Disclose Identity of Confidential Informant**

Oakes alternatively contends that the trial court erred in failing to hold a *Roviaro v. United States in camera* hearing on [his] motion to disclose the identity of the confidential informant used in this case." In Oakes' view, defense counsel's request for identification of an informant that he suspected was Ms. Long required the court conduct an *in camera* hearing under the analytical framework established by *Roviaro v. United States*, 353 U.S. 53 (1957). The State responds that this claim was waived and, in any event, "fails" because Oakes did not "show his case involved a confidential informant's tip."

When a prosecution relies on information supplied by a confidential informant, the State may assert a privilege to protect the informant by not disclosing his or her identity. *See Brooks v. State*, 320 Md. 516, 522 (1990). "The purpose of the privilege is to further

and protect the public interest in effective law enforcement." *Id.* (citing *Roviaro*, 353 U.S. at 59). To overcome this qualified privilege, the accused may seek to compel disclosure of the informant's identity by asserting "a substantial reason indicating that the identity of the informer is material to [their] defense or the fair determination of the case." *Id.* at 528 n.3 (citation omitted).

In *Roviaro*, the Supreme Court indicated that entrapment is one of the defenses for which an informer's identity could be vital. 353 U.S. at 64; *see* also *Warrick v. State*, 326 Md. 696, 700 (1992). "[W]henever the informer was an integral part of the illegal transaction" or otherwise "a participant, accessory or witness to the crime[,]" the balance tips toward disclosure. *See id.* at 699-700.

In *Elliott v. State*, 417 Md. 413, 446 (2010) and *Edwards v. State*, 350 Md. 433, 440, 440-41 (1998), the Court of Appeals explained that a court should determine the materiality of a confidential informant's identity and whether the State's privilege of nondisclosure applies, by undertaking the balancing test established in *Roviaro*. Under that test, a court weighs "the public interest in protecting the flow of information against the individual's right to prepare [their] defense." *Roviaro*, 353 U.S. at 62; *see Elliott*, 417 Md. at 445. In assessing materiality, the court considers whether probable cause for the search and/or seizure "is a significant issue in the case," and, if so, whether the evidence was sufficient to independently establish probable cause "apart from [the informant's] confidential communication[.]" *Elliott*, 417 Md. at 446; *see also Roviaro*, 353 U.S. at 61.

In *Elliott*, for example, the Court of Appeals held that a court erred in failing to conduct such a balancing test before denying a defense motion to disclose the identity of a

registered confidential informant who advised police that a man named Winston would be making a large delivery of marijuana to a movie theater between 1:00 p.m. and 3:00 p.m. that day. *See id.* at 423. Describing Winston "as a slim, black male, approximately five feet, eight inches tall, with a heavy Jamaican accent[,]" the informant provided the color, make, and license plate number of the car he would be driving. *See id.* When police investigated, they observed a vehicle closely matching that description drive into the parking lot. *See id.* Four officers surrounded the car in the parking lot, then arrested Winston Elliott and his passenger. *See id.* at 423-24. After an officer smelled the odor of marijuana coming from the trunk, police recovered a suitcase containing twenty pounds of marijuana. *See id.* at 424.

Elliott moved to suppress the evidence and to compel identification of the informant, arguing that the informant set him up because he was not aware that there was marijuana in the suitcase. *See id.* The Court of Appeals explained that when reviewing whether the identity of a confidential informant should have been disclosed, appellate courts ask whether the motion court committed clear error in its factual findings, legal error in applying principles of law, or an abuse of discretion in balancing competing interests. *See id.* at 428.

The Court reversed the denial of Elliott's motion to compel the informant's identity, concluding that "[t]he facts compelled a limit on the State's privilege based on fundamental fairness" because disclosure was both relevant to Elliott's lack of knowledge and entrapment defenses and "also integral in establishing the alleged probable cause to stop and search Elliott's vehicle." *Id.* at 447. In turn, the Court held, "[u]nder *Roviaro*, the

State was required to disclose the identity because there was '[in]sufficient evidence apart from his confidential communication' to establish probable cause." *Id.* at 448.

In this case, Oakes argues that the motion court erred in denying his pretrial motion to compel disclosure of the identity of a confidential informant who allegedly supplied information about his possession of a handgun, without holding a *Roviaro* hearing to balance his need for that information against the State's privilege to protect a law enforcement source. Nevertheless, Oakes, citing *Malarkey v. State*, 188 Md. App. 126, 156 (2009) ("[a] party cannot complain about the court's failure to rule on a pending motion unless it has "brought [it] to the attention of the trial court."), tacitly acknowledges that he did not request such a *Roviaro* hearing. We agree with the State that Oakes failed to preserve his complaint that the court erred in failing to conduct such a hearing, by failing to ask for such a hearing or to seek plain error review in this Court. *See* Rule 8-131(a). *Cf. Mack v. State*, 244 Md. App. 549, 585 (2020) (emphasizing that appellate consideration of plain error is "'a rare, rare phenomenon'" when a court is asked, but "infinitely rarer still . . . when not asked to do so").

Even if defense counsel had not waived this claim of error, we conclude it would not have been successful. Although the State proffered that weeks before the August 18 encounter in this case, "a confidential informant had advised Det. Davidson" that Oakes "was known to carry a handgun[,]" the prosecutor advised that the informant was not Ms. Long. Nothing in either the statement of probable cause or the trial record indicates there was confidential informant who provided information material to Oakes' arrest. As Corporal Cooper explained in his probable cause affidavit, he "was familiar with Oakes

from prior dealings and had knowledge that he was known to carry a firearm." Moreover, the surveillance, arrest, and prosecution of Oakes was not premised on the weeks-old generic tip to Detective Davidson, but on what the detective observed when Oakes exited the vehicle, walked away from the traffic stop, and disposed of the gun.

Because the State had independent grounds for the investigation and arrest of Oakes, the motion court correctly concluded that the confidential source did not provide information material to Oakes' prosecution or defense. Under these circumstances, the court did not err or abuse its discretion in concluding that an *in camera Roviaro* hearing and balancing analysis were not required.

JUDGMENTS OF CONVICTION IN THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.