

Circuit Court for Baltimore County
Case No. 03-K-16-000108

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1715

September Term, 2017

HAYES SAMPLE

v.

STATE OF MARYLAND

*Wright,
Arthur,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: August 31, 2020

*Wright, Alexander, J., now retired, participated in the hearing of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Part I, Section 3A, he also participated in the decision and the preparation of this opinion.

*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.

We consider the case of appellant Hayes Sample on remand from the Court of Appeals reversing this Court’s decision on May 11, 2020. *State v. Sample*, 468 Md. 560 (2020). The Court of Appeals held that “the circuit court did not abuse its discretion in admitting the Facebook-related evidence, as there was sufficient circumstantial evidence under Maryland Rule 5-901(b)(4) for a reasonable juror to find that the SoLo Haze Facebook profile belonged to Sample, that the claude.mayo.5 Facebook profile belonged to Mayo, and that Sample used the SoLo Haze profile to unfriend the claude.mayo.5 profile.” *Id.* at 567. The Court of Appeals remanded the case to this Court to consider the remaining issues, set forth as follows:

- “1. Did the trial court err in not granting appellant’s motion for mistrial based on the prosecution’s failure to disclose the notes on appellant’s interview taken by Detective Gary Childs?
2. Did the trial court err in denying the defense request for mistrial based on the prosecution’s statement in closing argument that appellant had been ‘on parole and probation surveillance’?”

Finding no error, we shall affirm.

I.

Appellant was convicted by a jury in the Circuit Court for Baltimore County of attempted armed robbery, first degree assault, illegal possession of a regulated firearm with a prior felony conviction, and two counts of use of a handgun in the commission of a crime of violence. The court sentenced appellant to a term of incarceration of twenty years for attempted armed robbery, twenty-five years for first degree assault to be served

consecutively, five years for illegal possession of a firearm to be served consecutively, and five years for each use of a handgun to be served concurrently.

We state the following facts as set forth at trial. On December 7, 2015, two armed men attempted to rob Towson Wine and Spirits in Towson, Maryland. The men wore masks, and the victims, the storeowner and cashier, were unable to give a detailed description of their appearance to police. One of the robbers, later identified as Claude Mayo, was shot and killed by the storeowner as he fled from the store. The primary issue for the State at trial was establishing that appellant was the second robber.

Patricia Culotta was working near the store at the time of the robbery. She told police that she heard gunshots and saw an African American male wearing a light gray sweatshirt running through an alley.

At trial, the State introduced into evidence two Facebook pages. The records received from Facebook indicated that the individual associated with the “Solo Haze” Facebook page was a Facebook friend of “Claude Mayo 5” and subsequently removed his connection to Claude Mayo 5’s Facebook page on December 8, 2015, a day after the attempted robbery and death of Claude Mayo.

On the fourth day of trial, defense counsel became aware of notes written by Detective Gary Childs detailing appellant’s interview with Detectives Robert Caskey and Christopher Smith. During his testimony, Detective Childs mentioned the notes, which he took while observing the interview outside the interview room for the separate investigation he was conducting into the killing of Mr. Mayo by the storeowner as a possible homicide. Defense counsel objected and, even before looking at the notes, moved

for a mistrial, arguing that “the fact that those notes were not provided we believe are grounds for a mistrial.” The court sustained defense counsel’s objection and precluded Detective Childs from referring to the notes in his testimony. The trial continued with the rest of Detective Childs’s direct-examination and then with his cross-examination and re-direct examination. After excusing the jury, the court distributed copies of the notes it had made to the State and the defense, marked a copy as an exhibit, and asked Detective Childs to read his notes into the record. Subsequently, the trial recessed for the weekend.

On the following Monday, defense counsel requested a mistrial, alleging that had the notes been disclosed in discovery, the defense would have “prepared for trial differently” and may have filed “other pretrial motions.” The defense averred that the notes revealed the new information that appellant had trouble pronouncing the word “explanation” in his *Miranda* waiver form, which could bring into question the “voluntariness” of appellant’s statement to police. The defense also noted that the notes contained a different cell phone number for appellant than the one investigated by Detective Caskey and made no mention of appellant having access to a vehicle—something the police reports stated that he did. In response, the prosecutor claimed that she did not know the notes existed and that “the substance of Childs’ notes had been disclosed to the defense through Caskey and other witnesses.”

The court denied the motion for mistrial, finding “really nothing new” in the notes and that there was no evidence that the prosecutor knew of their existence prior to their mention at trial. The judge explained his ruling as follows:

“I specifically asked Detective Childs to give me his notes so

that I could make copies for everybody. We had him read them to make sure we didn't misunderstand anything. *There is really nothing new in those records to the extent they needed to be turned over*, and to the extent there is a suggestion that [the State] knew of those records prior to the moment that the Detective mentioned them, *I don't find any evidence to suggest that she did*. I think she was as surprised as anyone to learn that there were notes taken.”

In his closing argument, the prosecutor mentioned that appellant was “on the Parole and Probation surveillance” and “meeting in the City with Mr. Wilkins,” his parole officer, hours before the attempted robbery.¹ Appellant objected, arguing that the prosecutor’s statement violated the pre-trial agreement of the parties to make no reference to appellant’s probation for a prior conviction. Appellant requested a mistrial based on the prosecutor’s comment. The trial court denied the motion for mistrial, stating as follows:

“[I]f this were not a case . . . where he’s agreed that he’s been convicted of a crime, because he can’t have a regulated firearm, . . . *A it’s not evidence, B. it was an inadvertent blurt*. If you want me to highlight it by telling [the jury] not to even consider that, I would be happy to. We are in a situation [where] they already know that your client has been convicted of a crime. He has been convicted of a crime that prohibits him from having a regulated firearm. . . . I don’t [want] to say it’s not a big deal, but *it’s not a big deal*.”

Defense did not ask for a curative instruction or a remedy other than a mistrial.

As indicated, the jury convicted appellant, the court imposed sentence, and this

¹ The prosecutor stated as follows:

“The timeline of the events in this case is important. So, on December 7, 2015, at 3:55 p.m. we know [appellant is] at the meeting in the City with Mr. Wilkins. We know that and we know that he’s on the Parole and Probation surveillance.”

remand follows the Court of Appeals decision.

II.

We shall consider the two remaining issues presented by appellant. Appellant argues that the circuit court erred in not granting defense counsel’s motion for mistrial based upon the prosecution’s failure to disclose Detective Childs’s notes taken while he observed, in a different room, other detectives’ interview of appellant. He contends that the failure to turn over the notes was a discovery violation and warranted a mistrial. He argues that the court abused its discretion by denying his mistrial motion because the notes covered materials not included in the other materials given to the defense—*i.e.*, that appellant had two cell phone numbers and had difficulty pronouncing the word “explanation” in his *Miranda* waiver form. Had he received the notes timely, appellant argues that defense counsel “would have investigated the matter differently,” “would have prepared for trial differently” and “developed a different trial strategy,” and might have filed other pretrial motions such as one questioning the voluntariness of appellant’s statement to police.

Next, appellant argues that the circuit court erred in denying appellant’s request for a mistrial based on the prosecutor’s reference in closing argument that appellant was on probation. Appellant contends that this reference was evidence of a prior bad act that prejudiced him with the jury. He argues that even though the jury knew that he was convicted previously of a crime, because he was convicted of possessing a firearm after a criminal conviction, the statement prejudiced him. Appellant notes that the jury was not

told which conviction he was on probation for and could have surmised that he was on probation for a crime other than the one that precluded him from owning a firearm. Appellant argues further that the statement was a violation of the pre-trial agreement he had with the State to make no mention of appellant's probation. Appellant argues that the mention of his probation warranted the declaration of a mistrial, claiming that the error could not be harmless because the prosecution's case was based only on circumstantial evidence.

The State argues that the circuit court did not err when it denied appellant's motion for a mistrial based upon the State's failure to give Detective Childs's informal notes pre-trial to appellant. The State notes that the court never found expressly that there had been a discovery violation. Setting aside this issue, the State argues that there was no prejudice to appellant to warrant a mistrial. First, Detective Childs made a single request to reference his notes to confirm the time of the interview conducted by Detectives Smith and Caskey, and the court sustained the defense objection to that request. Second, the notes were informal and created for a different case investigation. Third, the State made no use of them at trial. Most importantly, the notes contained no information that was not known to the defense. Appellant's second cell phone number appeared in his waiver of rights form, which the defense had received, and Detective Caskey referenced appellant's difficulty with pronouncing the word "explanation" twice in his testimony. In addition, the State notes that appellant failed to articulate, even in theory, what relationship his ability to pronounce the word "explanation" could have with the "voluntariness" of his statement to police.

Finally, the State argues that the circuit court did not err in declining to grant a mistrial for the prosecutor's reference during closing argument to appellant's probation. The State argues that "mistrial is not a sanction designed to punish an attorney for impropriety." The State further contends that even if the prosecutor's statement was improper, appellant has not established that the error prejudiced him in any way or deprived him of a fair trial.

III.

Appellant's two issues remaining before this Court relate to the trial court's denial of his motions for a mistrial. His first motion was based upon a discovery violation. His second motion was based upon a remark by the prosecutor in closing argument.

We review the denial of a mistrial motion for abuse of discretion. *Dillard v. State*, 415 Md. 445 (2010); *Evans v. State*, 304 Md. 487, 500 (1985) (noting that what sanction, if any, should be imposed for a discovery violation is within the discretion of the trial court, and the exercise of that discretion includes evaluating whether the violation prejudiced the defendant), *cert. denied*, 478 U.S. 1010 (1986). Whether the trial judge abused his or her discretion in denying a mistrial motion following a discovery dispute depends upon the circumstances of the particular case. *Browne v. State*, 215 Md. App. 51, 57 (2013).

Maryland Rule 4-263 addresses discovery in the circuit court and provides, in pertinent part, that the State shall provide to the defense, without the necessity of a request, all exculpatory information concerning the defendant or impeachment information concerning a State's witness. Rule 4-263(d)(5), (6). The purpose of the discovery rules is

to “assist the defendant in preparing his defense, and to protect him from surprise.” *Hutchins v. State*, 339 Md. 466, 473 (1995). The State must disclose this kind of information to the defense within thirty days after defense counsel notes an appearance. This obligation to produce discoverable material to the other side is a continuing one. Rule 4-263(j).

The Rule provides sanctions for violations, stating as follows:

“If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances. The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness’s testimony, disqualification is within the discretion of the court.

Rule 4-263(n).

The trial court has broad discretion in fashioning a remedy for a discovery violation. Although not an exhaustive list, the 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) (internal citations and footnote omitted). A trial court should impose the “least severe sanction” that the circumstances warrant, and “drastic measures” excluding evidence or declaring a mistrial are not favored. *Id.* at 570–72. The trial judge, physically on the scene, is best able to

observe matters not usually reflected in a cold record and to assess prejudice. “That is to say, the judge has his [or her] finger on the pulse of the trial.” *State v. Hawkins*, 326 Md. 270, 278 (1992). “[A]lthough a reviewing court should not simply ‘rubber stamp’ a trial judge’s ruling of a mistrial, the trial judge is far more ‘conversant with the factors relevant to the determination’ than any reviewing court can possibly be” to determine if a mistrial is appropriate. *Simmons v. State*, 436 Md. 202, 212–13 (2013) (some quotation marks and citations omitted). The trial court has the discretion “to decide whether any sanction is at all necessary.” *Evans v. State*, 304 Md. 487, 500 (1985).

In the instant case, the trial court did not expressly find that there was a discovery violation, stating only that “[t]here is really nothing new in those records to the extent they needed to be turned over.” Whether the State violated the discovery rules or not, the court did not err or abuse its discretion in finding that the adequate remedy to the discovery of Detective Childs’s notes mid-trial was to sustain the defense objection to Detective Childs’s single mention of his notes in his testimony and to provide a copy of the notes to the defense.

There was no prejudice to appellant to warrant a mistrial, the most severe sanction, because the bulk of the information contained in the notes was information known previously to appellant. In addition, any violation was not in bad faith, as the notes were informal, taken by a detective investigating a different case, and were not used by the State at trial. As the State points out, not only did the defense not cross-examine Detective Caskey concerning appellant’s difficulty pronouncing this word, which the detective had mentioned twice in his testimony, but appellant has not articulated, even in theory, what

relationship his ability to pronounce the word could have with the “voluntariness” of his statement to police. In addition, appellant does not explain how or why he was prejudiced by the fact that Detective Childs’s notes did not mention that appellant had access to a car. The court did not err in denying appellant’s motion for mistrial on the basis of the non-disclosure of Detective Childs’s notes.

Next, appellant argues that the trial court abused its discretion in denying appellant’s motion for a mistrial based upon the prosecutor’s inappropriate statement in closing argument that appellant had been on parole at the time of the robbery, which the prosecutor and defense counsel had agreed not to divulge to the jury. During closing argument, the prosecutor stated to the jury as follows:

“The timeline of the events in this case is important. So, on December 7, 2015, at 3:55 p.m. we know [appellant is] at the meeting in the City with Mr. Wilkins. We know that and *we know that he’s on the Parole and Probation surveillance.*”

The trial court denied defense counsel’s motion for mistrial, reasoning as follows:

“[I]f this were not a case . . . where he’s agreed that he’s been convicted of a crime, because he can’t have a regulated firearm, . . . *A it’s not evidence, B. it was an inadvertent blurt.* If you want me to highlight it by telling [the jury] not to even consider that, I would be happy to. We are in a situation [where] they already know that your client has been convicted of a crime. He has been convicted of a crime that prohibits him from having a regulated firearm. . . . I don’t [want] to say it’s not a big deal, but *it’s not a big deal.*”

The court made the explicit finding that the State’s mention of appellant’s parole and probation status “wasn’t intentional” and that it “would [have been] different” if there had not been a concession that appellant had been convicted of a crime for purposes of the

charge of illegal possession of a firearm with a prior felony conviction. Based upon this charge, it is likely that the jury was aware that appellant had been convicted previously of some crime. The trial judge found little to no prejudice from the prosecutor’s brief comment.

As we have noted, ordinarily the trial judge is in the best position to assess prejudice from an improper remark during closing argument. The remark was not appropriate and violated an agreement between the parties. Even though the remark was improper, “[a] mistrial is not a sanction designed to punish an attorney for impropriety.” *Behler v. State*, 151 Md. App. 64, 142 (2003). As is his right, rather than call further attention to the comment, defense counsel strategically declined the judge’s offer for a curative instruction. The trial judge, finding little impact and no prejudice, did not abuse her discretion in denying the mistrial motion. We agree and so hold.

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