

Circuit Court for Montgomery County
Case No. 135348C

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1721

September Term, 2019

JABARI IBREHIM BOLDEN

v.

STATE OF MARYLAND

Arthur,
Reed,
Friedman

JJ.

Opinion by Friedman, J.

Filed: April 6, 2021

*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.

Maryland Rule 5-615 is colloquially known as the “rule on witnesses” as if it was a one-part rule. In fact, however, there are three distinct parts of the Rule. The *exclusion* portion of the Rule provides that the trial court may, on its own initiative or upon the request of a party, order the exclusion of witnesses from the courtroom so that they will not hear the testimony of other witnesses. The *nondisclosure* portion of the Rule prevents parties, attorneys, witnesses, and others in the courtroom from disclosing the contents of testimony to excluded witnesses, and thereby frustrating the purpose of the exclusion portion of the Rule. Finally, the *remedy* portion of the Rule gives the trial court discretion to preclude all or part of the testimony of witnesses who receive information in violation of an exclusion or nondisclosure order.¹

Here, the State requested a “rule on witnesses,” and the trial court announced an exclusion order. The language of the exclusion order, however, did not include a nondisclosure order that would prohibit those in the courtroom from revealing testimony to those who were excluded. A spectator in the courtroom disclosed the contents of testimony to two excluded defense witnesses, and the trial court then precluded those two witnesses from testifying. We will hold that the trial court erred by precluding testimony for a violation of an unannounced nondisclosure order, but that this was harmless error.

¹ Although not necessary to the analysis here, we will also discuss the factors that a trial court must consider before imposing this remedy. *See infra* n. 4.

BACKGROUND

Appellant Jabari Bolden was in a romantic relationship with Terri Brady from 2013 until they broke up in 2017. On January 27, 2019, Bolden and Brady separately attended a music show. Bolden was with two other women at the show. Brady asserted that she was unbothered by this, but Bolden became angry when one of the women greeted Brady. Regardless, they seemed to patch things up and Bolden spent the night at Brady's apartment in Silver Spring, where she lives with her two children, Kayla McDade and Isaac McDade.

The next afternoon, Bolden and Brady exchanged text messages and calls discussing “what happened the night before at [the music show].” One of their calls ended abruptly after Brady mentioned their prior unsuccessful attempts to have a child together. Brady anticipated they'd speak on the telephone again later that evening, or that Bolden would come to her apartment. According to Brady, however, Bolden did not have a key to her apartment and was actually not invited to come over. Still, Bolden made his way into Brady's apartment sometime after 9:00 p.m. How Bolden actually entered into the apartment is not clear. There was conflicting testimony that he climbed up the downspout and entered through the balcony, testimony from a police officer that climbing the downspout would be “pretty difficult,” and testimony that he simply entered through the front door with Brady. Regardless of how Bolden entered the apartment, once he was inside, there was a physical altercation, in which Bolden allegedly hit all three residents of the apartment: Brady, Kayla McDade, and Isaac McDade. After Brady told Isaac to call the police, Bolden fled. Bolden was charged with one count of third-degree burglary and

three counts of second-degree assault: one for hitting each Brady, Kayla McDade, and Isaac McDade.

Before calling its first witness at Bolden's trial, the State requested "a rule on witnesses" from the trial court. The court announced:

[A]nyone in the courtroom who is expected to testify in this proceeding, or even may testify, I'll need you to leave the courtroom now and remain outside until such time as you are called to come in. If you stay in the courtroom, you're ineligible to testify. All right, thank you.

The trial court's oral order covered the exclusion portion of Rule 5-615(a) but did not cover the nondisclosure portion of Rule 5-615(d). Neither party objected to nor requested clarification of the trial court's order. All of the prospective witnesses left the courtroom.

Two prospective defense witnesses, Caprecia Mitchell and Jasmine Brooking, spent the morning in the hallway outside the courtroom. Mitchell and Brooking did not witness the alleged burglary or the assault, but were with Bolden and Brady at the music show on January 27th. Each was expected to testify about animosity between Brady and Bolden and to impeach the credibility of Brady and her two children.

The State began its case-in-chief and the jury heard from Brady and Kayla McDade. Each testified that Bolden broke into their apartment and attacked them. Bolden's mother, Joanie Jones, was a spectator at the trial. Jones was in the courtroom while Brady and Kayla McDade testified.

During a trial recess, the prosecutor saw Mitchell and Brooking speaking with Jones outside the courtroom. After the recess, the prosecutor then told the trial court that she had heard Jones discussing the contents of Brady and Kayla McDade's testimony with Mitchell

and Brooking. The prosecutor expressed concern to the trial court that this conduct violated the trial court's order.

The trial court questioned Mitchell, Brooking, and Jones on the record to determine whether and to what extent Jones had told Mitchell and Brooking about Brady and Kayla McDade's testimony. Jones testified that she did, in fact, speak with Mitchell and Brooking, but she claimed that it was only to express her frustration that her son, Bolden, was on trial, and her belief that Brady and Kayla McDade's testimony was not truthful. Jones told the trial court, however, that she did not share particular details about the testimony she had heard. Mitchell and Brooking corroborated Jones' description of the conversation. Despite this, the trial court found that its order had been violated, and precluded Mitchell and Brooking from testifying pursuant to Rule 5-615(e).

Bolden's counsel objected. He argued that the trial court's order, quoted above, did not contain the nondisclosure portion of Rule 5-615(d), explained why the circumstances did not warrant precluding Mitchell and Brooking from testifying, and requested a mistrial. The trial court overruled the objection and denied the request for a mistrial. Trial proceeded without the testimony of Mitchell and Brooking.

The jury convicted Bolden of a second-degree assault of Kayla McDade, and acquitted him of the remaining counts: third-degree burglary, second-degree assault on Brady, and second-degree assault on Isaac McDade.

DISCUSSION

In Section I, we explain why it was error for the trial court to conclude that Mitchell and Brooking had violated the unannounced nondisclosure order and prevent them from testifying. In Section II, however, we hold that this error was harmless.

I. THE TRIAL COURT ERRED.

Maryland Rule 5-615 governs courtroom conduct. The Rule applies to lawyers but also to laypeople. In applying the Rule, we must be mindful that different people in our courtrooms arrive with different knowledge. The cases interpreting Rule 5-615 reflect this. In *McGill v. Gore Dump Trailer Leasing, Inc.*, the trial court gave an exclusion order but not a nondisclosure order. 86 Md.App. 416, 422-24 (1991). This Court held that a lawyer who heard the exclusion order, by virtue of his knowledge, experience, and training, was also deemed to have received notice of a nondisclosure order and could, therefore, be subject to the remedy for noncompliance. *Id.* We noted, however, that a layperson, unfamiliar with courtroom rules, would likely not be deemed to have received notice, and therefore would not be subject to the same remedy for noncompliance. *Id.* That is precisely what happened here.

The trial court here gave an exclusion order but not a nondisclosure order.² Because Jones, Mitchell, and Brooking are not lawyers, they had no way to know that a trial court

² The State makes four arguments all to the effect that Bolden did not do enough to preserve the arguments that he now advances. We reject each of these arguments. *First*, the State argues that Bolden should have objected to the incomplete “rule on witnesses” at the time given, and his failure to do so dooms the issue on appeal. We disagree. It was the State, not Bolden who requested the order and, if anyone should have objected, it should have been the State. Moreover, the order given was a complete exclusion order. The

giving an exclusion order might also be deemed to include a nondisclosure order. Therefore, both the trial court and this Court must treat them as if no nondisclosure order was given. In the absence of an explicit nondisclosure order,³ a layperson cannot be subject to the remedy for its violation.⁴ We hold, therefore, that it was error for the trial court to preclude Mitchell and Brooking from testifying.

problem only arose when the trial court precluded Mitchell and Brooking from testifying for violating a nondisclosure order that the trial court had not expressly given. *Second*, the State argues that Bolden waived his argument by not objecting to the trial court's decision to preclude the witnesses from testifying at the time they were precluded from doing so. Having carefully reviewed the record, we hold that Bolden's counsel was sufficiently clear that he objected to the trial court's decision, thought it was unwarranted, worried that it would cause him to be ineffective, and requested a mistrial. These actions were sufficient to preserve the objection. *Third*, the State argues that Bolden did not proffer the substance of Mitchell's and Brooking's testimony, thereby leaving it impossible for us to review whether the exclusion was harmful. The record shows, however, that the trial court was well-aware of Mitchell's and Brooking's expected testimony and that Bolden's counsel made a more than sufficient proffer. *Sowell v. State*, 122 Md. App. 222, 229 (1998). As explained in the next section, we are fully versed in their proposed testimony. There was no failure to proffer here. *Finally*, as described *infra* at n. 4, there are six steps that a trial court must consider before precluding a witness from testifying for violating Rule 5-615. According to the State, Bolden was required to separately object to each missed step in this analysis. This analysis only applies, however, where a nondisclosure order has been properly given and subsequently violated, and, as a result, it would not be error to preclude the witness from testifying. Because that is not the case here, we need not reach this part of the analysis. As a result, we conclude that Bolden has sufficiently preserved each of the arguments that he makes in this appeal and, as discussed above, reach the merits of his claims.

³ We do not hold that a trial court's failure to expressly announce a nondisclosure order necessarily means that all laypeople in attendance are free to talk to excluded witnesses. Of course, if the record demonstrated that laypeople had actual knowledge of an unannounced nondisclosure order (for example, if there was evidence that the trial court or an attorney explained what conduct was prohibited by the unannounced nondisclosure order) we would not say that the laypeople would not be bound.

⁴ Because we conclude that Mitchell and Brooking were not bound by the unannounced nondisclosure order, we do not reach the question of whether their testimony

II. THE ERROR WAS HARMLESS.

Although the trial court erred by precluding Mitchell and Brooking from testifying, we hold that this error was harmless beyond a reasonable doubt. *See Dionas v. State*, 436 Md. 97, 108 (2013) (explaining that for an error to be harmless it must be harmless beyond a reasonable doubt). We so hold because there was no chance that the error influenced the jury's verdict.

As noted above, Mitchell and Brooking were not at the apartment and could not testify to what did or did not occur there. Rather, they were at the music show the night before, and their testimony was offered for the limited purposes of: (1) describing the alleged animosity between Bolden and Brady that they witnessed at the music show; and (2) offering general impeachment of Brady, and her two children, Kayla McDade and Isaac McDade. As such, the testimony of Mitchell and Brooking was of very limited value:

was properly precluded. For completeness, however, we note that in *McGill*, we set forth a six-step process for a trial court to use in deciding whether to preclude a witness from testifying as a penalty for noncompliance:

[The court] should: (1) excuse the jury temporarily; (2) order the witnesses to and the participants in the alleged infraction not to discuss the matter; (3) then have each witness and participant testify under oath regarding the infraction; (4) make his or her findings of fact on what occurred and determine what harm, if any, was done; (5) let the parties suggest dispositions that best fit the case; and (6) decide upon the least onerous sanction that will protect the litigants.

86 Md. App. at 427. Here, while the trial court clearly followed steps one through three, it is not apparent from the record that the trial court followed steps four through six. Worse, it is not clear that the trial court would have come to the same result if it had followed the missing steps. We caution all concerned that all six *McGill* steps are important and must be followed.

- To the extent that Mitchell and Brooking would have impeached Terri Brady, it is apparent from the jury’s verdict that even without that impeachment, the jury did not believe Brady’s testimony or her version of events, and acquitted Bolden of both the burglary and the assault on her. Additional impeachment of Brady would not have made a difference.
- Similarly, to the extent that Mitchell and Brooking would have impeached Kayla McDade, it is apparent from the verdict that the jury did not believe Kayla’s testimony or her version of the events. Kayla McDade testified that Bolden broke into the apartment from the balcony and hit both her and Brady. Obviously, disbelieving Kayla’s testimony, the jury acquitted Bolden of both the burglary and the assault on Brady. Moreover, Bolden’s conviction for the assault on Kayla did not depend on Kayla’s credibility. Kayla’s testimony that Bolden hit her was corroborated by Isaac McDade’s testimony, and there was no evidence that Isaac was biased against Bolden. As a result, we hold that additional impeachment of Kayla McDade would not have made a difference.
- The jury’s verdict indicates that the only testimony that the jury credited was Isaac McDade’s. His testimony largely contradicted that of his mother and sister and overall was quite favorable to Bolden. Isaac did not testify that Bolden broke into the apartment and denied that Bolden assaulted him. Impeachment of Isaac’s testimony would not have helped Bolden. In fact, Bolden’s defense would have been hindered by testimony designed to impeach Isaac McDade.

Thus, although the trial court erroneously precluded Mitchell and Brooking from testifying, we are persuaded that their testimony would not have assisted Bolden’s defense in any way. Moreover, Bolden does not suggest to the contrary—he offers no argument about how Mitchell’s and Brooking’s impeachment testimony might have affected the jury or undermined its verdict. We, therefore, hold that the trial court’s decision to preclude their testimony was harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, we hold that the exclusion of Mitchell's and Brooking's testimony was erroneous but that the error was harmless beyond a reasonable doubt.

**JUDGMENT OF THE CIRCUIT COURT
FOR MONGTOMERY COUNTY IS
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**