UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 168

September Term, 2016

PAOLO DOMINIC BELARMINO

v.

STATE OF MARYLAND

Krauser, C.J.,
Berger,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: April 10, 2017

This is an interlocutory appeal of the Circuit Court for Montgomery County's denial of appellant Paolo Dominic Belarmino's ("Belarmino") motion to enforce a plea agreement. Belarmino was charged with sexual abuse of a minor and related charges. Belarmino's defense attorney, Kathleen Dolan, Esq. ("Dolan"), engaged in plea negotiations with Assistant State's Attorney Curtis Zeager. In this interlocutory appeal, Belarmino contends that Dolan and Zeager reached a plea agreement during a meeting on December 16, 2015. The State acknowledges that the parties engaged in plea negotiations but maintains that no definitive plea agreement was reached.

Following an evidentiary hearing, the circuit court denied Belarmino's motion to enforce a plea agreement. Belarmino appealed. For the reasons explained herein, we perceive no error and shall affirm.

BACKGROUND

In August 2015, Belarmino was charged with sex abuse of a minor, six counts of second-degree rape, and five counts of second-degree sex offense. In December 2015, Dolan reached out to Zeager and requested an in-person meeting to discuss a potential plea agreement for Belarmino. Both attorneys agreed to meet on December 16, 2015. The substance of the attorneys' conversation at the December 16, 2015 meeting is characterized differently by Dolan and Zeager. Dolan filed a motion to enforce a plea agreement on December 22, 2015.

The circuit court held an evidentiary hearing on Belarmino's motion to enforce a plea agreement on March 3, 2016. Dolan and Zeager both appeared, each with separate

counsel in order to facilitate testimony from the attorneys, and both attorneys testified as to the substance of the December 16, 2015 meeting.

Dolan testified that she emailed Zeager and requested an in-person meeting to discuss the Belarmino case. In her email, Dolan told Zeager that she would "bring a bunch of creative ideas" and asked Zeager to "bring an open mind." Zeager responded, agreeing to meet. Zeager said that he would "keep an open mind" but commented "it won't be that open" because Belarmino "groomed and too[k] advantage of a child." The attorneys set the meeting for Wednesday, December 16, 2015, in Zeager's office at the Family Justice Center.

Dolan testified that Zeager initially indicated that "what [he was] looking for here [was], [a plea] for child sex [offense] and a guideline sentence" of approximately seven years. Dolan explained that Zeager was "not willing to give up jail time." Dolan countered with "a 2nd degree assault or a 4th degree sex offense where we would be in a position at some point to ask the judge for probation before judgment so [Belarmino] didn't get deported or have to register as a sex offender." According to Dolan, Zeager offered a plea agreement in which Belarmino would plead guilty to both second-degree assault and fourth-degree sex offense, with a sentence capped at eighteen months, and that Belarmino "could do local time." The attorneys "went back and forth on" whether Belarmino would be entitled to credit for time served while on home detention.[1] According to Dolan, Zeager

[1] Belarmino had been on home detention with electronic monitoring since June 2015.

indicated that the State would initially "object to a [probation before judgment] on the 4th degree sex offense" but that Dolan "was always free to allocute."

Dolan testified that she believed they had reached a deal for Belarmino to plead guilty to second-degree assault and fourth-degree sex offense, for which Belarmino would receive a sentence of eighteen months imprisonment. Dolan explained that, in her view, the only part of the plea deal that was unsettled was "what the 18 months would look like" in terms of whether Belarmino would receive credit for time served on home detention and whether Belarmino would receive probation before judgment for the fourth-degree sex offense. Dolan testified that Zeager said, "I'll memorialize this in a plea memo." Dolan emphasized that Zeager said "plea memo" and not "plea offer." Dolan explained that she found this significant because a plea memo "triggers setting [the case] in front of [the] plea judge." Dolan testified that this indicated "[t]hat it was a done deal."

At the end of the meeting, Dolan provided Zeager with a report written by Dr. Ronald Weiner based upon a psychological evaluation Dr. Weiner had performed on Belarmino. Dolan explained that she would not have given the report to Zeager if she had not believed that a deal had been reached. Dolan testified that, in her view, "it would be inappropriate to show [Zeager the report] before there was a final resolution of the case."

Dolan testified that at the end of the meeting, she asked Zeager "what's going on here?" Dolan explained that she had been wondering, "why is he letting this client resolve this case this way" and wondered whether the witness had died or left the country. According to Dolan, Zeager responded that "the witness [was] just very hesitant to testify." Dolan testified that it was never suggested that Zeager had to consult with anyone before

finalizing a plea agreement. Dolan testified that she was "really happy for her client" after the meeting because she believed a favorable plea agreement had been negotiated. Dolan denied that Zeager ever told her that he would need to speak to the victim's mother before he could make an official plea offer.

Zeager agreed with certain aspects of Dolan's testimony. First, however, Zeager emphasized that his practice is to never agree to a resolution of a sexual crime case without consulting the victim and/or the family of the victim.[2] Zeager confirmed that the attorneys had discussed a potential plea to second-degree assault and fourth-degree sex offense, but Zeager emphasized that the meeting was "a discussion" and "there were absolutely no offers made." Zeager testified that he was "[o]ne hundred percent" sure that he told Dolan that he would "have to run [any potential plea agreement] past the mo[ther of the victim]." Zeager acknowledged that the attorneys were "close" to reaching an agreement and "basically had wrapped it up with the contingency that [Zeager] had to talk with the mom, make sure she was good with it and then [he] would give the unequivocal memorialized offer."

Zeager explained that, at the time of the meeting, he did not believe the victim was going to testify. The victim's mother had "told [him], on several occasions" that she did "not want [her] daughter testifying." Zeager further explained that the State does not push a parent of a minor when the parent does not want a child to testify, commenting, "We

[2] Zeager explained that "one time" he made an offer without notifying the family of the victim. He explained that this was during his "first case on the Family Justice Center," that it "didn't go so well" and that he would "never forget it."

think it retraumatizes the victim if the guardian isn't on board and so we're very sensitive to that."

The day after the meeting, Zeager called the victim's mother and told her about the potential offer. Zeager explained that the mother "basically did an about face" and wanted a more significant sentence. Zeager testified that he explained to the mother that if the daughter was "not willing to testify, [the State did not] have any evidence." Zeager explained that the mother responded that the daughter would testify. Zeager confirmed with the mother that she was sure because "this changes the whole landscape."

Zeager also testified about the psychological report prepared by Dr. Weiner. Zeager explained that he did not have any hesitancy in accepting the report from Dolan and did not believe there was any reason he should not see the report even though, in his view, the attorneys had not reached a final deal. Zeager explained further:

> [W]e often require, particularly in these types of cases where you have someone who's quite young, the victim in this case is 13. We require before we even have a discussion or give an offer to have the defendant evaluated. So that's not -- to me, that was extremely normal to look at [Dr.] Weiner's report and I thought that's great, Ms. Dolan did a good job.

In addition to testimony about the substance of the December 16, 2015 meeting, the circuit court also heard testimony and received evidence about communications between the attorneys following the meeting. Zeager testified that after getting off the phone with the victim's mother, he "immediately called" Dolan. Zeager explained that he knew that Dolan "would be surprised and disappointed because" the potential plea they had discussed "would have been an incredible outcome for her client and it would have been appropriate

if [the State] didn't have much evidence." Zeager explained that he knew Dolan would be disappointed because they "were close to -- we basically had wrapped it up with the contingency that [Zeager] had to talk with the mom, make sure she was good with [the plea agreement] and then [Zeager] would give the unequivocal memorialized offer." Dolan did not answer the phone, and Zeager left a voicemail message, which was played for the circuit court and transcribed[3] as follows:

> Hey Kathleen, it's Curt Zeager. I hope you're doing well. Um, I have bad news and bad news.
>
> I mean, I talked with the [victim's] mom today and her story about her willingness to have her daughter testify and her daughter's willingness to testify was different than what she's been telling me when I've -- when I've talked with them several times in person. And she is now saying oh no, her daughter's totally willing to testify and so on and so forth.
>
> And I did read the -- I took some time to read the report from Weiner. Anyway, so, it may shift our conversation -- um -- from where we were, which, I'm not trying to catch you off guard. I was going on basically what the mother was telling me for the several times that we met.
>
> So, we need to kind of revisit it. I'll also send you an email to this effect. And, uh, I wanted to call you right after I kind of had, you know, just had this conversation with the mom. So anyway, sorry. Call me . . . Thanks.

[3] The audio recording was played for the court and a transcript, agreed to by both attorneys, was entered into evidence as Defendant's Exhibit 1. We set forth the content of the voicemail as depicted in Defendant's Exhibit 1 with minor capitalization, punctuation, and formatting modifications.

As he had referenced in the voicemail message, Zeager sent an email message to Dolan which contained content similar to the voicemail message. The email, which was sent on December 17 at 2:37 p.m., provided the following:

> Kathleen,
>
> I write w/ bad news regarding our conversation yesterday ☹. I spoke w/ the mother today about the potential offer we talked about, and as a result of that conversation, the mother did a 180 on her daughter testifying - before she was adamant that she did not want her in the courtroom, but today she said she wants her daughter to testify.
>
> I also took time to read Weiner's report and I do not take away from it that this was "puppy love" but rather a young man who is opportunistic with young girls.
>
> I wanted to call/email you immediately b/c I know this is bad news for you, and quite frankly, the 180 from the mother was very surprising to me given the many conversations I had with her prior to our meetings.
>
> Anyway, I wanted to shift your and your client's expectations towards a guidelines offer (I think as I mentioned Sex Abuse of a Minor would start at 4-9 years). This isn't an offer yet, but I wanted to reach out right away given this is in a different direction than discussed yesterday.
>
> Call me when you can.
>
> Best as always,
>
> Curtis L. Zeager

Dolan responded at 2:48 p.m. with the following:

> Totally shocked and disappointed, given I had already relayed information to client and family. Given this, I think we need to get case back on track procedurally and file consent motions for pretrial/motions/trial. I would be happy to let you speak with Weiner, directly. You always said that you knew

> daughter would testify, though she was hesitant. I didn't know mothers had control of whether (now) 14-year-olds were required to testify . . . . Given everything we talked about yesterday, I am surprised you didn't invoke your powers and tell her that you are making a decision about the case. I think we need to get the whole case back on track. Will you consent to Motion to Continue Trial and schedule Motions/Pretrial? I didn't see anything in report that made him seem "opportunistic." And since when do mothers of victims control your decisions. If you recall, I said this would be a trial on nullification if we couldn't work it out otherwise. Kathleen.

There was additional back-and-forth between the attorneys that afternoon regarding motions, witnesses, and trial dates. At 3:08 p.m., Dolan attempted to send another email. Zeager, however, never received the email because it was addressed to "curt.zeager" rather than the correct email address of "curtis.zeager." The email provided:

> Curt, you cannot "retract" the offer that I accepted on behalf of my client, yesterday. There is absolutely nothing in our conversation or at the elevator yesterday that indicated that our agreement was anything but finalized, and was just going to be formalized in writing by you yesterday. There was never any indication that you had to talk to the mother again. Had there been ANY equivocation on your part, I would NOT have 1) accepted it on client[']s behalf (actually, it was YOU accepted OUR offer, if you recall) and 2) relayed it to my client. You spoke about doing a plea memo and getting in before the end of the year. I do not know what happened giving rise to your e-mail, but I am absolutely clear that we had an agreement yesterday and you CANNOT retract it. We talked about how long in PRC . . . we talked about your objecting to PBJ "now" on the 4th degree sex offense. One of the motions I will be filing will be to enforce the agreement you and I made yesterday where I formally accepted your offer to two misdemeanors (2nd Assault and 4th Degree Sex Offense) with 18 months in PRC. I hope you will take all of this into consideration and send me over a plea memo that incorporates the terms we agreed to yesterday. Kathleen.

(Ellipses in original.)

After considering the evidence presented, the circuit court issued its ruling. The court observed that it was not unusual for two attorneys to have different interpretations of a conversation, commenting that "we all hear what we want to hear." The circuit court found that there were "two diametrically opposed positions from each of the attorneys here as to what if anything was said regarding contingencies in the plea agreement." The court commented that both attorneys were knowledgeable, reputable, and honest. The court observed that "[i]t's a normal human phenomenon when we believed something happened, is to convince ourselves of what we heard and the significance of it and it's just normal."

The court emphasized that what it "really f[ou]nd the most telling, is to go back at the point closest in time to what the parties were representing." For that reason, the circuit court explained, it found the voicemail message and the initial email from Zeager, as well as the first response from Dolan, particularly relevant. The court found it telling that Dolan's initial response to Zeager was to discuss how, procedurally, to move forward with the trial. The circuit court explained:

> My belief would be that if what had happened was Mr. Zeager had extended an offer, the first thing that we would expect to read in this e-mail would be, sorry Curt, you're kind of stuck with it. You made me an offer and you can't take it back.

The circuit court acknowledged that "about 20 minutes later," in the "email that Mr. Zeager did not get," Dolan asserted that Zeager could not rescind the offer, but the court emphasized, "what's curious is to me . . . I don't know why that would not be the first thing

you would say."[4] The court characterized the situation as one in which "the parties sort of grasp what they want to have heard."

The circuit court emphasized that it found both attorneys to be credible, explaining:

> So what I'll say is this really, and you know, I listed to what Ms. Dolan said and very frankly she sounded quite credible to me and at the conclusion of the plaintiff's case said, okay, Mr Zeager, you know, let me hear what you have to say. Mr. Zeager told me what he had to say and I thought, I think he's telling the truth. So as the parties well know when that happens, the party with the burden of proof does not prevail.
>
> I find both of you to be credible. I've looked for these other sort of indications that might tip the scale and I've told you what they were but I just -- I don't know what happened. It's one of those things that happens in the profession. It's unfortunate . . . Parties were apparently not communicating with one another as effectively as they might have been, or maybe they were, I just don't know. So for that reason, I'm going to deny the motion to enforce [the plea agreement].

Dolan filed a timely interlocutory appeal.

[4] The court commented that it was "not sure how" Dolan sent an email to an incorrect address, explaining:

> I'm not sure how that happens and I don't certainly cast any suspicions on it but typically when you are e-mailing somebody and you've e-mailed them recently as soon as you start to type in the e-mail address, the one you just typed in pops up, so it's curious to me but I don't ascribe anything to it significant. He didn't see it, that's really not the point. The point is, from Ms. Dolan's point of view, that she made it known that he couldn't retract an offer but again, what's curious is to me is I don't know why that would not be the first thing you would say.

DISCUSSION

I.

Judicial review of plea negotiations is rooted in contract law principles. *Rios v. State*, 186 Md. App. 354, 367 (2009). We have recognized that "the rigid application of contract law to plea negotiations would be incongruous since, for example, the trial court is not ordinarily bound by the compact and, as the State concedes, it cannot obtain 'specific performance' of a defendant's promise to plead guilty." *Id.* at 367 (quoting *State v. Brockman*, 277 Md. 687, 697 (1976). Nonetheless, although we recognized that contract law is not strictly applicable to judicial review of plea negotiations, we applied contract law principles in *Rios*, explaining:

> [T]he issue before us is not the construction of a plea agreement, but rather whether any contract was formed. Given that Rios has not detrimentally relied upon the existence of the alleged plea agreement[5] and that there is no suggestion of unfair conduct by the State in the course of the plea negotiations, we see no reason to depart from standard principles of contract law in determining whether the parties ever reached an enforceable plea agreement.

Id. In this appeal, we are similarly faced with the issue of whether any contract was formed rather than the construction of a plea agreement. Accordingly, we shall similarly apply standard principles of contract law.

We apply a deferential standard of review for the motions court's factual findings, and we "view the evidence and inferences that may be reasonably drawn therefrom in a

[5] In this appeal, Belarmino argues that there was detrimental reliance. We address this issue in Part II, *infra*.

light most favorable to the prevailing party on the motion." *Lee v. State*, 418 Md. 136, 148 (2011) (internal quotation and citation omitted). "We defer to the motions court's factual findings and uphold them unless they are shown to be clearly erroneous." *Id.* We review legal issues applying a *de novo* standard of review. *State v. Hart*, 449 Md. 246, 264 (2016). The moving party bears the burden of proof with respect to a motion to enforce a plea agreement. *Y.Y. v. State*, 205 Md. App. 724, 743 (2012) ("[A]ppellant, as the party alleging the breach [of a plea agreement], has the burden of proof on all of his breach of contract claims.") (internal quotations omitted).

With these principles in mind, we turn to the circumstances of the present appeal. After considering all of the evidence presented, the motions court ultimately denied the motion to enforce, finding that Belarmino had not proved, by a preponderance of the evidence, the existence of a plea agreement. The motions court explained various reasons for its finding, but emphasized that the voicemail, initial email from Zeager, and initial response from Dolan were "the most telling." The court emphasized that Dolan's first reaction to being informed that the State no longer intended to offer the plea which had been discussed the day before was to discuss how to move forward with the case in a trial posture. The court emphasized that, if Dolan truly had believed a plea agreement had been reached, "the first thing that we would expect to read in this e-mail would be, sorry Curt, you're kind of stuck with it. You made me an offer and you can't take it back."

The motions court emphasized that both attorneys were trustworthy and found it most likely that an honest misunderstanding had occurred, emphasizing that it is "a normal human phenomenon when we believed something happened" . . . "to convince ourselves

of what we heard and the significance of it." The court ascribed no ill intent to either attorney, but commented that the attorneys "were apparently not communicating with one another as effectively as they might have been." Unable to credit one attorney's testimony over the other, the motions court emphasized that when the court finds two conflicting accounts credible, "the party with the burden of proof does not prevail."

On appeal, Belarmino urges this Court to re-weigh the evidence presented below and reach a different conclusion than that reached by the motions court.[6] This we will not do. It is the role of the circuit court, and not the appellate court, to weigh conflicting evidence and make factual determinations. *Longshore v. State*, 399 Md. 486, 499 (2007) ("Making factual determinations, *i.e.* resolving conflicts in the evidence, and weighing the credibility of witnesses, is properly reserved for the fact finder."). "[T]he fact finder has the discretion to decide which evidence to credit and which to reject." *Id.* The circuit court carefully considered the evidence presented and explained why it was not persuaded, by a preponderance of the evidence, that a plea agreement had been reached. In our view, the

[6] Belarmino points to various pieces of evidence in this context. For example, Belarmino observes that Zeager, in his testimony at the motions hearing, at one point referred to an "offer" when describing the content of his telephone conversation with the mother of the victim. Belarmino further points to Zeager's testimony about his conversation with the mother in which Zeager said, "but I gave a sweetheart offer -- I didn't give an offer but, this would be a sweetheart offer." Belarmino comments that these were "perhaps Freudian slips" which are "revealing."

First, we observe that it is conceivable for a person to refer to an "offer" when, in fact, an actual offer, as defined under Maryland law, has not been made. Indeed, Zeager also referred to a "potential offer" at different points. Second, and more importantly, precisely what weight Zeager's use of the word offer should be given in the context of determining whether a plea agreement had been reached was a determination for the circuit court, not the appellate court. We will not re-weigh the evidence on appeal.

motions court's analysis was reasonable. Furthermore, the motions court's factual findings were based upon the evidence presented. To the extent the evidence presented two conflicting narratives, the motions court was entitled to credit the testimony it found credible and disregard any testimony it did not find credible. Finding both sides credible, and unable to reconcile the "two diametrically opposed positions from each of the attorneys," the motions court reasonably concluded that Belarmino had failed to satisfy his burden. We shall not disrupt this conclusion on appeal.

II.

In addition to contract principles, Belarmino alleges that the principles of equity, due process and fair play require that we reverse the circuit court's ruling. Specifically, Belarmino argues that the equitable principle of detrimental reliance entitles him to enforcement of the purported December 16, 2016 plea agreement between Dolan and Zeager. These three issues are intertwined with one another and Belarmino grounds his argument for all on the same facts. Belarmino, however, did not raise any of these arguments before the trial court as a basis to enforce the plea agreement. Indeed, Belarmino conceded before the trial court that this case did *not* involve issues of detrimental reliance or unfair conduct of the State, and he made no argument that any application of due process compelled the enforcement of the alleged guilty plea agreement. We, therefore, hold that the issues of detrimental reliance, due process, and fair play are not preserved for our review.

Md. Rule 8-131(a) provides that "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by

the trial court . . . ." In the narrowest of circumstances, we may address the issue by engaging in a plain error review, even though the litigant failed to adequately preserve the argument. We undertake plain error review, however, only when we determine that an error is "so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial." *Steward v. State*, 218 Md. App. 550, 565 (citation and quotation marks omitted), *cert. denied*, 441 Md. 63 (2014). Review for plain error is reserved for error that is "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Savoy v. State*, 420 Md. 232, 243 (2011). Without this fundamental error and compelling circumstances, we will not review an issue that was not "unmistakably articulated before the trial judge" so that the trial court had "the opportunity to rule thereon." *Williams v. State*, 34 Md. App. 206, 209 (1976) (citations omitted).

Not only did Belarmino fail to articulate this argument before the circuit court, but in his complaint, he stated the following:

> Plea agreements are adjudicated both by standard principles of contract law and considerations of fair play and equity. [*Rios*, 186 Md. App. 354 (citing *State v. Brockman*, 277 Md. 687 (1976)]. *Where, as here, there has been no detrimental reliance or unfair conduct, the Court applies standard contract principles. Id.*

(Emphasis added.) Belarmino concedes in his complaint that there is no detrimental reliance and, therefore, the case should be adjudicated based on standard contract principles. Even if he now claims that he did in fact detrimentally rely on the prosecutor's promise, our focus is whether Belarmino raised the argument for the circuit court to review before ruling on the motion.

Belarmino did not raise any argument based on detrimental reliance or due process at the motions hearing. During oral argument before the circuit court, Belarmino's attorney, Timothy Altemus,[7] began his closing argument by explaining that it was Belarmino's burden to establish that there was a contract between Dolan and Zeager, and more importantly, that "what we need to establish is that there was an offer and an acceptance." In his closing argument, Belarmino presented no alternative argument under a theory of detrimental reliance or due process.

Finally, during the hearing on the motion, the court requested whether either party was relying on a theory of detrimental reliance. Prior to hearing closing argument by the State, the following exchange occurred:

> THE COURT: I think we can all agree that, if not I'd like to hear dissent, I think it would come from the State, the burden on the defendant in this case is to show the existence of a contract. There does not have to be any reliance on it.
>
> [MR.] WECHSLER: Right.
>
> THE COURT: If it's made --
>
> [MR.] WECHSLER: And accepted.
>
> THE COURT: Okay.

Even after the court expressed concern whether either party was relying on a theory of detrimental reliance, the State agreed that reliance was not at issue in this case. Moreover, Belarmino's attorneys never expressed any disagreement with that assessment.

[7] Timothy Altemus appeared on behalf of Belarmino at the motions hearing to facilitate Dolan's testimony.

Neither party raised the issues of detrimental reliance, due process, or any other equitable principle during any oral argument on the motion to enforce a guilty plea. Indeed, the main focus of the hearing, and the scope of the arguments presented before the circuit court, was limited to standard contract principles of offer and acceptance. The question before the court was whether the statements made by Zeager at the December 16, 2015 meeting constituted a clear and definite offer, such that once Dolan accepted, the bargain was final.

With this focus on standard contract principles alone -- and not on the application of detrimental reliance, due process, or other equitable arguments -- the motions judge took a recess to consider the evidence. The evidence included the testimony of both Dolan and Zeager, the voicemail that Zeager left for Dolan after changing his position, as well as email correspondence between Dolan and Zeager following the meeting. At no point was the motions judge presented with a "detrimental reliance" argument -- that Zeager's statements at the meeting constituted a promise on which Belarmino's attorney reasonably and detrimentally relied. Accordingly, Belarmino failed to preserve any argument that we should reverse based on a theory of detrimental reliance.

The circuit court found both Dolan and Zeager were credible witnesses, but that Dolan's version of the December 16, 2015 meeting was not more credible than Zeager's version. Therefore, Belarmino did not establish that Zeager had made a definite offer, or promise, to enter into a plea agreement. The circuit court explained why it was not persuaded that a plea agreement had been reached. We conclude that the circuit court did

not err in finding that Belarmino had not proved, by a preponderance of the evidence, the existence of a plea agreement.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.