UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2579

September Term, 2015

JAMES EDWARD JACKSON

v.

STATE OF MARYLAND

Krauser, C.J.,
Nazarian,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 8, 2017

Convicted by a jury, in the Circuit Court for Prince George's County, of four counts of theft and a related conspiracy count, James Edward Jackson, appellant, claims that the trial court abused its discretion by allowing the State to recall a police officer to the witness stand after the officer had been excused as a witness. We affirm.

Before the jury was sworn, in response to defense counsel's request for a "rule on witnesses," the court instructed as follows: "Any and all persons who plan to testify in this matter, please have a seat outside the courtroom. Do not discuss your testimony with anyone either before you testify or after you complete your testimony."

At the beginning of the second day of trial, the prosecutor requested leave of court to recall a police officer who had been excused after his testimony was concluded at the end of the first day of trial. Defense counsel objected, claiming that the officer had discussed his testimony with the prosecutor, and that such contact violated the "rule on witnesses." The prosecutor explained that, after the officer testified, he told the prosecutor that a surveillance video, which had been shown to the jury during the officer's direct examination, had not been started from the beginning. The court then asked the prosecutor: "So you didn't have a discussion about his testimony and the substance of it?" The prosecutor responded, "No." The court then overruled the objection, having found that the rule on witnesses had not been violated. The officer was then recalled briefly to the witness stand, while the beginning of the video was played, and the officer was asked questions related to that portion of the video. The officer was then subjected to cross-examination by the defense.

"Whether a witness, after [their] examination has been completed, may be recalled, either to explain [their] original testimony, or to give additional testimony, is a matter resting solely in the discretion of the trial judge." *Stevenson v. State*, 94 Md. App. 715, 723 (1993) (citation omitted). "The rule is well established that the widest discretion has been given trial courts in the conduct of trials and this discretion should not be disturbed unless it is clearly abused." *Jones v. State*, 11 Md. App. 468, 481, *cert. denied*, 262 Md. 747 (1971).

Jackson first contends that the court abused its discretion by allowing the officer to be recalled as a witness, because the ruling was based on an erroneous finding that there was no violation of the "rule on witnesses," which was invoked at the beginning of trial at Jackson's request, pursuant to Md. Rule 5-615. We find no such violation.[1]

Rule 5-615(a) provides, in pertinent part, that, subject to certain exceptions, "upon the request of a party made before testimony begins, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses." The purpose of the rule is "to prevent one prospective witness from being taught by hearing another's testimony; its application avoids an artificial harmony of all the testimony; it may also avoid the outright manufacture of testimony." *Tharp v. State*, 362 Md. 77, 95 (2000)

[1] We note that, even where a witness sequestration rule has been violated, allowing the witness to testify does not constitute reversible error *per se*, as "it is within the sound discretion of the trial judge to determine whether to admit the testimony of the witness where there has been a violation of an exclusion order." *Jones*, 11 Md. App. 468, 481, *cert. denied*, 262 Md. 747 (1971) (citation omitted). Jackson submits, however, that because the judge stated that she would not allow the officer to be recalled if the rule she had invoked at the beginning of trial had been violated, we are constrained to find an abuse of discretion should we conclude that there was a violation of the court's order. As we find no violation of the court's order, we need not address that contention.

(citation and internal quotation marks omitted). To that end, once a witness has been excluded, a party or an attorney may not disclose to that witness "the nature, substance, or purpose of testimony, exhibits, or other evidence introduced during the witness's absence." Md. Rule 5-615(d)(1). "The court may exclude all or part of the testimony of the witness who receives information in violation of [the] rule." Md. Rule 5-615(e). As there is no indication in the record that the officer received any information regarding testimony or evidence that was introduced during his absence, we conclude that there was no violation of Rule 5-615.

Alternatively, Jackson asserts that, even if there was no violation of Rule 5-615, the officer's communication with the prosecutor violated the court's broader order that witnesses "not discuss [their] testimony with anyone[.]" Because the trial court determined that the officer did not discuss his testimony with the prosecutor or anyone else, Jackson's claim of error has no merit.

We reached a similar conclusion in *Jones*, *supra.* There, the trial judge directed the prosecutor to talk to a child witness, off the record, in the midst of cross-examination by the defense, to determine why the child was suddenly hesitant in his testimony, when he had not been so on direct examination. We held that there was no abuse of discretion in allowing the child's cross-examination to continue after the *ex parte* communication because "[b]efore allowing the witness to resume his testimony, the trial judge satisfied himself that the State's Attorney had in no way discussed the witness's testimony with the witness, but had merely sought to ascertain what, if anything, was bothering him in his testimony." 11 Md. App. at 480. Similarly, in the instant case, the court specifically

inquired whether the officer had discussed the nature or substance of his testimony with the prosecutor, and learned that the officer had only advised the prosecutor that the surveillance video had not been played in its entirety. Accordingly, there was no abuse of discretion in permitting the officer to be recalled as a witness in order to allow the remainder of the video to be played, and the officer to be questioned about it.

Jackson, nonetheless, seems to suggest that his right to a fair and impartial trial was violated because the supplemental testimony that was adduced when the officer was recalled to the stand established, for the first time during the trial, an element of one of the crimes with which he had been charged. The Court of Appeals has stated, however, that permitting a witness to be recalled in cases "in which counsel have inadvertently omitted to examine a witness in regard to matters directly bearing upon the question of the guilt or innocence of the accused . . . is a matter resting in the discretion of the court[.]" *Brown v. State*, 72 Md. 468, 475 (1890). In exercising that discretion, a trial court must take into consideration the rights of an accused. *Sanders v. State*, 1 Md. App. 630, 644-45 (1967). Contrary to what Jackson claims, we conclude that allowing the officer to be recalled did not prejudice his right to a fair and impartial trial. Jackson does not suggest that the substance of the officer's testimony, when he was recalled to the stand, was improperly withheld by the State, such that the defense was unprepared or taken by surprise. Moreover, Jackson was permitted to cross-examine the officer upon his recall to the witness stand and he does not claim that he was denied an opportunity to introduce evidence to rebut the officer's supplemental testimony.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.