Circuit Court for Prince George's County
Case No. JA-16-0457

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2044

September Term, 2016

IN RE: M.V.

Woodward, C.J.,
Graeff,
Berger,

JJ.

Opinion by Graeff, J.

Filed: May 1, 2018

The Circuit Court for Prince George's County, sitting as a juvenile court, found appellant, M.V., involved in acts that, if committed by an adult, would constitute armed robbery and included offenses.[1] On appeal, appellant presents the following questions for the Court's review, which we have rephrased slightly, as follows:

1. Did the circuit court err when it denied appellant's request to compel the State to produce a "use of force" report about the use of a taser on appellant prior to his arrest?

2. Did the circuit court err when it restricted appellant's cross-examination of a police officer about his use of a taser on appellant?

3. Did the circuit court err when it did not *sua sponte* grant appellant a continuance to secure a witness?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 10:00 p.m. on August 8, 2016, three individuals were at the Penn Mar Apartment complex in the 3700 block of Donnell Drive when they were approached by a group of four teenagers. The teenagers demanded the victims' valuables, and one of the teenagers produced a gun. Cash, personal items, and cellular phones were taken from the victims, after which the four robbers fled, running out the front of the apartment complex toward Route 4. A person from the complex called the police.

[1] Appellant was found involved in three counts each of armed robbery, robbery, first-degree assault, second degree assault, and theft of property valued at less than $1000. Following adjudication, appellant was committed to the custody of the Department of Juvenile Services at a Level B Placement facility.

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Officer Thomas Anderson and his partner, Officer Ashley Russell, members of the Prince George's County Police Department, testified that they were in a marked police car when a service call came in regarding an armed robbery by black males in the Penn Mar apartment complex, about a block away. As the officers drove toward the area, they saw a group of black males running away from the entrance of the complex and across Route 4. Two from the group doubled back toward the apartment complex, one wore a dark colored shirt, and the other, later identified as appellant, wore a red shirt and black ski mask.

As the two teenagers ran back into the complex, Officer Anderson exited the car and pursued them on foot, focusing on appellant, who was never more than 10 yards in front of him. Officer Anderson saw appellant crawl under a parked car and then throw a cellular phone out from under the car into the parking area. The officer ordered appellant to get out from under the car, but appellant refused. Appellant eventually was extricated from under the car and arrested, after Officer Anderson "tased" appellant. A second cellular phone was found under the car where appellant had been.

Officer Brandon Farley, a member of the Prince George's County Police Department who was riding in a marked police car with his partner, Officer Travis Popalarchek, also was near the complex when the call for the robbery occurred.[2] He drove to the area and observed a group of young black males running away from the entrance of the complex. He testified that he saw two from the group, one wearing a gray shirt and

[2] Officer Travis Popalarchek's surname appears throughout the record with different spellings. We have adopted "Popalarchek."

one, later identified as appellant, wearing a red shirt, run back toward the apartment complex. As the two ran, Officer Farley saw appellant throw a dark object that he believed was a handgun. Officer Farley drove after the two suspects, who ran back into the apartment complex and crawled under cars parked near each other. Officer Farley concentrated on the suspect with the gray shirt, who eventually was extricated from under the car and arrested. Two cellular phones and a ski mask were recovered from him. The police searched the area where appellant had thrown the object and recovered a black BB gun.

The victims were given their cell phones. Appellant had possession of one of the phones, and the teenager in the gray shirt had possession of the other. The victims were not able to identify the two individuals arrested, but when the police showed them a picture of the gun recovered, they stated that it looked "similar" to that used in the robbery.

Appellant was taken to the police station, where he waived his *Miranda* rights.[3] He told the police that he did not own a cell phone, he had been with a group of friends shooting dice prior to the robbery, and he had been walking home when the police came on the scene. At trial, one of the victims testified that the gunman wore a dark colored t-shirt, and another victim testified that one of the robbers wore a red shirt.

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

DISCUSSION

I.

Appellant's first contention involves a "use of force" report that was generated because Officer Anderson used a taser in arresting appellant. The State proffered that the report contained three distinct items: (1) a statement by Officer Anderson regarding his use of a taser; (2) a review by his supervisor and chain of command on the use of force; and (3) a determination regarding whether the level of force used was appropriate.

In accordance with *Riggins v. State*, 223 Md. App. 40, 55-56 (2015) (use of force report written by testifying officer involved in arrest subject to disclosure as written statement of a prosecution witness pursuant to Rule 4-263(d)(3)), the State provided the defense in discovery Officer Anderson's statement, but it redacted the last two items provided to the defense. In response, defense counsel filed a motion requesting that the court order the State to provide the entire report, dismiss the case due to the State's failure to provide the report, or sanction the State for nondisclosure by excluding Officer Anderson's testimony.

On the morning of the delinquency hearing, defense counsel argued its motion before the circuit court. The State opposed the motion, and because the motion had just been filed that morning, the court stated that it would reserve ruling on the issue.

When the State called Officer Anderson to testify, defense counsel renewed its objection to the State's failure to disclose the entire use of force report. The court denied the motion.

On appeal, appellant argues that the circuit court erred in failing to require disclosure of this document. He asserts that Md. Rule 11-109a.3.(b)(1) requires disclosure of "any relevant material or information regarding . . . specific searches and seizures," and because use of a taser is a seizure, the State was required to produce the use of force report.

The State contends that the circuit court properly exercised its discretion in refusing to compel the prosecutor to disclose the entirety of the use of force report. It asserts that, other than Officer Anderson's statements, which were provided in discovery, the report was irrelevant.

Md. Rule 11-109 governs discovery in juvenile cases. The Rule states that, "without the necessity of a request," the State shall provide "any **relevant** material or information regarding . . . specific searches and seizures." Md. Rule 11-109a.3.(b)(1) (emphasis added). Information in the hands of a police department is charged to the State for purposes of discovery. *See* Md. Rule 11-109a.3.(i) (the State's Attorney's obligations under the discovery rules extends "to material and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case."). "'[W]e exercise independent *de novo* review to determine whether a discovery violation occurred.'" *Cole v. State*, 378 Md. 42, 56 (2003) (quoting *Williams v. State*, 364 Md. 160, 169 (2001)).

As the State notes, however, the discovery obligation is limited to "relevant" information. We review de novo the determination of whether evidence is legally relevant. *State v. Simms*, 420 Md. 705, 724-25 (2011).

Here, the portions of the report that the State failed to provide, Officer Anderson's supervisors' review, and the determination regarding the appropriateness of the officer's use of force, was irrelevant to whether appellant was involved in the offenses of which he was accused. The reasonableness of the force used to apprehend appellant was not material to, nor probative of, appellant's involvement in the crimes. Accordingly, the trial court did not err in refusing to compel the State to produce the entire use of force report.

II.

Appellant next contends that the trial court erred when it restricted his cross-examination of Officer Anderson regarding his use of the taser. He argues that this line of inquiry was relevant regarding "what, precisely, occurred prior to [the] deployment of a taser to subdue" him, asserting that, "[g]iven that the State focused on [his] actions, while underneath the parked car, [he] had a corresponding right to challenge the officer concerning that moment in time." The State disagrees, and so do we.

Officer Anderson testified on direct examination about what occurred prior to appellant's arrest. He testified that he saw appellant crawl under a car, after which appellant threw out a cell phone, which landed on the ground of the parking lot. The officer testified that appellant then "saw me, went back under the car. I ordered him to get out from under the car. He didn't. He started to crawl out again, saw I was still standing there. Went back under. Then he came out one final time and I tased him."

On cross-examination, defense counsel asked Officer Anderson: "Okay. Let's go -- let me ask you about the taser in this incident." The State objected, arguing that the

question was outside the scope of direct examination and irrelevant to the charges. The court sustained the objection. Appellant advised the court that he wished to inquire into the use of the taser to elicit "what happened when [appellant] was supposedly underneath this car." The court again sustained the objection.

"The Confrontation Clause of the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant the right to confront the witnesses against him." *Martinez v. State*, 416 Md. 418, 428 (2010) (citations omitted). These guarantees afford a defendant the right to cross-examine witnesses regarding matters that affect the witnesses' bias, interests, or motive to falsify. *Pantazes v. State*, 376 Md. 661, 680 (2003). This right, however, is not unlimited. *Id*. On the contrary, a "trial court may impose reasonable limits on cross-examination when necessary for witness safety or to prevent harassment, prejudice, confusion of the issues, and inquiry that is repetitive or only marginally relevant." *Martinez*, 416 Md. at 428 (citation omitted).

The extent to which a witness may be cross-examined rests within the sound discretion of the trial court. *Pantazes*, 376 Md. at 681. Discretion is exercised by balancing the probative value of the inquiry against the unfair prejudice, to assure that the inquiry does not "'reduce itself to a discussion of collateral matters which will obscure the issue and lead to the [jury's] confusion.'" *Id*. at 681 (quoting *State v. Cox*, 298 Md. 173, 178 (1983)).

Here, we agree with the State that the officer's use of a "[t]aser to subdue Appellant was collateral to the issue of whether Appellant was involved in the alleged armed robberies." Appellant has proffered no legitimate basis, either below or on appeal, that would render this collateral matter relevant to the charges against him. Accordingly, the circuit court did not abuse its discretion in limiting appellant's cross-examination of Officer Anderson regarding the use of the taser.

III.

Appellant argues that the circuit court erred in failing to grant him a continuance, or other relief, to allow him to call Officer Popalarchek as a witness in his defense. The State contends that the issue is not preserved for appellate review, but in any event, it is without merit.

The issue regarding Officer Popalarchek arose near the end of the State's case, after the three victims and three of the officers testified. Defense counsel advised the court: "We would ask that before the close of our case that we have the opportunity to call [Officer Popalarchek]." In response to the court's question whether the defense had subpoenaed him, defense counsel stated that he had not. Defense counsel explained that the relevance of the officer's testimony came to light only after the State disclosed, at 5:00 p.m. the evening before, that Officer Popalarchek's statement of events was different from that of Officer Farley regarding which suspect threw the gun. Defense counsel argued that, given the timing of the disclosure by the State, he had not had time to subpoena Officer Popalarchek, and he had relied on the fact that the officer was on the State's witness list.

The State responded that it was not required to call anyone on its witness list, and defense counsel could have served the officer with a subpoena when he was present in court that morning. Defense counsel then requested that "the State be ordered to have Officer Popalarchek available."

The court denied the request, rejecting the proffer that the defense did not have time to subpoena the officer and noting that the defense had delayed the start of the proceedings that morning for approximately one hour to file a written motion regarding the State's failure to provide the use of force report in discovery. The State called two additional witnesses and rested.

Defense counsel then revisited the issue and asked the court to dismiss the case and "for sanctions due to the dismissal of Officer Popalarchek." Defense counsel explained:

> [M]y motion is, again, is to dismiss this case and for sanctions for a violation. The spirit of the Brady Rule[4] is that [ex]culpatory information, of course, should be made available and I would like to emphasize that this information was not made available during discovery but was rather e-mailed to us with the exhibit marked with Madam Clerk.
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> It was rather e-mailed to us at 5 o'clock yesterday. The suggestion that we could have secured the officer under a subpoena after 5 o'clock yesterday, I have tried many times to subpoena officers.

Defense counsel then stated that Officer Popalarchek was "here this morning and was apparently instructed or allowed to leave does not meet either the spirit or the letter of the

[4] *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that the suppression by the prosecution of evidence favorable to an accused upon request violates due process regardless of the good or bad faith of the prosecution).

Brady rule." Defense counsel reiterated his request for sanctions, specifically, dismissal of the case based on the purported *Brady* violation.

The State responded that Officer Popalarchek was disclosed to the defense as a possible witness in discovery, but the State had not intended to call the officer because he "did not contribute anything meaningful to the State's case."[5] On the evening of trial, the State spoke to the officer, and the officer disclosed that he had seen the teenager in the gray shirt throw an object to the ground. The State immediately informed the defense of this new information. The State argued:

> So to suggest that the State is sitting on this information, this Brady information or to suggest that the State[] has dismissed Officer Popalarchek from its case in an attempt to undermine the spirit of Brady is just patently wrong.
>
> They had every subpoena opportunity to subpoena Officer Popalarchek before this. They had every opportunity to call him and talk to him about his statement. They had his name, his badge number, they knew where he worked. Why they did not do their investigation, I do not know.
>
> They had the opportunity to examine and cross-examine Office[r] Farley on the contradictions. They failed to appropriately do that. Officer Popalarchek was present today under the State's subpoena and, in fact, I told them he is on call. So if they want to call him in their case in chief, he is on call today. He is under the State subpoena.
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> The State is not required to put on evidence that Defense counsel wants us to put on to assist them in their case. They could have interviewed Officer Popalarchek. These are very serious charges. Why they did not do that, I do not know. I cannot speak to that.

[5] The prosecutor explained that, in his written statement, Officer Popalarchek did not say that he had seen any items thrown.

> But I only learned about this evidence yesterday doing my own investigation and promptly provided it to them. Why they did not reach out to him last night, I do not know.

The circuit court clarified that the statement referred to was not written down, the first time the prosecutor heard it was approximately 4:00-5:00 p.m. the day before, and she immediately relayed this information to the defense. The court noted that "all the identifying information regarding this officer, along with other witnesses, had been provided to the Defense some time ago and no one had precluded the Defense from contacting this witness."

It then ruled:

> I do not see how the State can be held upon doing their further investigation, they find out something and they immediately notify the Defense and, further, what the Court has heard that if anyone else had contacted this witness, they would have found out the same thing such that if the Defense had contacted this witness, and the officer was available to talk to him, the officer could have told the Defense the same thing they told the State. For those reasons, I am not going to continue these proceedings as I was just about to do.

The court then asked the defense if it had any witnesses. Defense counsel played the 911 tape, and rested its case. Defense counsel did not ask for any accommodation to allow Officer Popalarchek to testify.

The State initially argues that appellant has not preserved his argument that the circuit court erred in not granting a continuance because appellant did not raise it below. Appellant acknowledges that the relief requested was dismissal of the charges based on an alleged *Brady* violation, but he notes that he initially requested that he "have the

opportunity to call" Officer Popalarchek, and the court ultimately stated that it was "not going to continue these proceedings."

Md. Rule 8-131 provides that the appellate courts generally will review only issues "raised in or decided by the trial court." Md. Rule 8-131(a). Here, defense counsel never requested a continuance. And although the circuit court stated that it would not grant a continuance, it did so in the context of the claim submitted, a *Brady* violation. Finding no *Brady* violation, a finding that appellant concedes on appeal was proper, the court decided not to continue the proceedings. The court did not, however, consider whether a continuance was proper under the criteria cited by appellant on appeal, including the expectation of securing the evidence within a reasonable time. Under these circumstances, appellant's contention on appeal, that the court erred in denying him a continuance that would have been a "modest temporal accommodation," is not preserved for this Court's review.[6]

Even if the issue were preserved for review, we would conclude that it is without merit. Md. Rule 2-508(a) provides: "On motion of any party or on its own initiative, the court may continue or postpone a trial or other proceeding as justice may require." The decision whether to grant a request for continuance, however, is committed to the sound discretion of the trial court. *Abeokuto v. State*, 391 Md. 289, 329 (2006).

[6] Indeed, even in appellant's motion for a new trial, he never argued that the circuit court erred in not granting a continuance but only that he should be granted a new trial because the State failed to comply with the spirit of the *Brady* rule by disclosing the exculpatory information on the eve of trial.

The burden of demonstrating an abuse of discretion on a motion for a postponement is on the party challenging the ruling. *State v. Taylor*, 431 Md. 615, 646 (2013) (citation omitted). An "abuse of discretion" occurs:

> "where no reasonable person would take the view adopted by the [trial] court," or when the court acts "without reference to any guiding rules or principles." It has also been said to exist when the ruling under consideration "appears to have been made on untenable grounds," when the ruling is "clearly against the logic and effect of facts and inferences before the court," when the ruling is "clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result," when the ruling is "violative of fact and logic," or when it constitutes an "untenable judicial act that defies reason and works an injustice."

Dabbs v. Anne Arundel County, 232 Md. App. 314, 331-32 (2017) (quoting *North v. North*, 102 Md. App. 1, 13 (1994)).

To show an abuse of discretion in a decision not to continue a case due to the absence of a witness, the party requesting the continuance must show: (1) there was a "reasonable expectation" of securing the witness "within some reasonable time"; (2) the witness' testimony was competent, material, and the case could not be "fairly tried" without it; and (3) "diligent and proper efforts" were made to secure the witness. *Jackson v. State*, 288 Md. 191, 194 (1980). *Accord Wright v. State*, 70 Md. App. 616, 623 (1987).

Here, the record does not reflect that defense counsel made diligent efforts to secure the witness. The record reflects that, although the officer was identified as a possible witness in discovery, and defense counsel had the opportunity to call the officer or subpoena him, counsel did not do so. Moreover, after the State disclosed the new information obtained from Officer Popalarchek, defense counsel did not seek to speak with

the officer or subpoena him, despite the prosecutor's representations that he was "present today under the State's subpoena and . . . on call" if they wanted to call him. Under these circumstances, the trial court did not abuse its discretion when it declined, without a request, to grant a continuance of the trial.

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