Circuit Court for Wicomico County
Case No. 22-K-15-000572

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2187

September Term, 2016

DELONTE BRYANT

v.

STATE OF MARYLAND

Leahy,
Friedman,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: April 25, 2018

On August 18, 2016, a jury sitting in the Circuit Court for Wicomico County convicted Delonte Bryant ("Appellant") for the murder of Dommeir Deshields. Two months later, Appellant moved for a new trial based on newly discovered evidence. Appellant's counsel had recently discovered an internal report from the Maryland State Police that concluded the State's ballistics expert, a core witness at trial, had performed her job requirements unsatisfactorily. The circuit court denied the motion, finding that the evidence was neither newly discovered nor material. Appellant filed a timely notice of appeal, presenting three issues for our review:

1. "Did the court err in admitting prior bad acts evidence?"
2. "Did the court abuse its discretion in denying Mr. Bryant's motion for a mistrial?"
3. "Did the court err in denying Mr. Bryant's motion for a new trial?"

Appellant's third question presents the pivotal issue in this appeal.[1] We hold that the circuit court erred when it denied Appellant's motion for a new trial for two reasons. First, in finding that evidence of the ballistics expert's professional deficiency did not qualify as "newly discovered evidence" under Maryland Rule 4–331(c), the circuit court determined incorrectly that the Public Defender did not conduct the requisite due diligence.

[1] Because we reverse on the third issue raised by Appellant, we do not reach the other issues raised by Appellant: the first, challenging the court's decision to admit evidence of the July 4 shooting under the identity exception to Rule 5–404(b); and the second, challenging the court's decision to deny Appellant's motion for a mistrial after a witness testified that he had purchased marijuana from Appellant. We do not reach Issue 1 because the decision whether to permit testimony concerning the July 4 shooting under the identity exception to Rule 5–404(b) is inexorably intertwined with the ballistics expert's testimony.

Second, the circuit court wrongly concluded that the internal police report did not qualify as *Brady* material. The ballistics expert's testimony was the crux of the State's case, and the defense could have used evidence of professional ineptitude to impeach her credibility. We cannot deduce that if the jury had heard this evidence, there would not be a substantial possibility nor a reasonable probability of a different verdict. We therefore vacate Appellant's convictions and remand for a new trial. Accordingly, in light of our decision, we do not address Appellant's remaining questions.

BACKGROUND

On October 5, 2015, a grand jury indicted Appellant for the murder of Deshields. Appellant was charged with first-degree murder, second-degree murder, and several other crimes related to the murder. On October 14, during the entry of appearance, Appellant's counsel requested all material and information from those "who have participated in the investigation or evaluation of the case and who . . . with reference to the particular case, have reported to the State's Attorney or his office." Counsel further requested any such material and information that the State discovered after its initial disclosure.

Appellant was tried before a jury over three days, from August 16, 2016 to August 18, 2016. The following evidence was presented at his trial.

A. The Shootings

On the morning of August 3, 2015, Dommeir Deshields died from eleven gunshot wounds from at least nine different gunshots.[2] The shooting occurred at roughly 11:30

[2] Dr. Ling Li, M.D., is the Assistant Medical Examiner who performed the autopsy

a.m., at the corner of Anne and Baker Streets in Salisbury, Maryland. While processing the scene, a crime scene technician found six shell casings and after the autopsy, recovered four projectiles from Deshields's body. Investigators retrieved other items, including a broken cell phone. The gun was never found.

Melissa Byrd testified that she was sitting on a porch on Baker Street on the morning of August 3 when Deshields approached her, introduced himself as "Ghost", and struck up a conversation. She said that when the two left the porch, she heard Deshields call a cab. She walked away from Deshields. Then she heard shots and ran. At trial, Ms. Byrd wholly denied witnessing the actual shooting.

Sergeant Sabrina Metzger testified that she interviewed Ms. Byrd on August 4 and that Ms. Byrd presented a different version of events.[3] According to Sgt. Metzger, Ms. Byrd described that a "kind of thin built" man wearing sunglasses, a big dark T-shirt, dark khaki pants, and a tan fishing hat with a string that covered his dreads, which were in a ponytail, came out from a parking lot and started shooting Deshields. Ms. Byrd further told investigators that she ran onto a front porch and looked back to see the man shoot Deshields three more times. Finally, Sgt. Metzger testified that Ms. Byrd said that she did

on Dommeir Deshields. Deshields had eleven gunshot wounds, but Dr. Li concluded that multiple wounds could have been associated with the same gunshot. For example, Dr. Li believed, given the "free movement" of the arm, that the wound to the arm and to the head could have been caused by the same gunshot.

[3] Sgt. Metzger related that Sgt. Chastity Blades was also present at the interview. Sgt. Blades did not testify at Appellant's trial, but Sgt. Metzger did read several portions of the interview transcript into the record, which included questions and statements from Sgt. Blades.

not know the man and because he wore sunglasses and a hat, would not be able to identify him.

Several others, who did not witness the shooting, described what they saw around the time of the shooting. One witness for the State, Jean Guirand, was driving his taxi on Anne Street when he saw Deshields lying on the road and a black male, wearing a light-colored shirt, running toward the back of a nearby building. Mr. Guirand later selected Appellant from a photo array as the runner, but he wrote "fifty percent" on the photo because he was uncertain.

On the day of the shooting, Sergeant Steve Hall supervised the investigation at Anne Street and Baker Street. While there, Sgt. Hall, along with Sgt. Todd Liddick, approached a "tall African-American male [who] had approached the crime scene several times" who wore dark clothing and had "short dreads or braids." He refused to speak with police, instead pointing to a note on the ground that read, "7311 Maryland tag, tan, Dodge Durango, two males, one shooter, six foot three, around 180 pounds, black driver, black beard." As a result, the police radioed a description for a Maryland-licensed vehicle with the partial tag number of 7311. Corporal Richard Hagel saw a car matching the description on the note in the backyard of the residence located at 157 Delaware Avenue in Salisbury. He knocked on the front door and after Michael Green answered, Cpl. Hagel called Sgt. Chastity Blades, who informed him that she would send someone to speak with Mr. Green.

On August 5, Sgt. Metzger and Detective Kyle Clark interviewed Mr. Green about the August 3 shooting. Sgt. Metzger testified that originally Mr. Green was not

forthcoming. Eventually, he identified Appellant as "Haze." Sgt. Metzger related that Mr. Green told her Appellant "was wearing a white tee shirt, . . . camo shorts, and a, what he described as a bucket hat and sunglasses."

At the outset of Mr. Green's testimony, the State asked how Mr. Green knew Appellant to which Mr. Green replied, "I bought marijuana from him." The defense moved to strike, and after approaching the bench, moved for a mistrial, contending that this uncharged, alleged criminal activity was highly prejudicial and that a curative instruction would be insufficient. The State contended that such an instruction would cure any prejudice and that it would caution Mr. Green not to discuss that conduct again. Out of the jury's presence, the circuit court denied the motion for a mistrial but precluded Mr. Green from discussing any alleged criminal activity with Appellant apart from that at issue in trial. The defense opted not to seek any additional curative relief.

Once the jury returned, the State repeated its question, and Mr. Green responded that Appellant sometimes hung out behind his house and that he would sometimes call Appellant. He said that he knew Appellant as "Haze", "Jell", and other names. Mr. Green testified that on August 3, at roughly 11:00 a.m., he picked up Appellant in the Durango and dropped him off roughly 15 to 20 minutes later at the Grace Methodist Church, near the corner of Church and Anne Streets. He said that he drove to see someone nearby and heard gunshots a few minutes later coming from the direction of Anne Street.

Mr. Green claimed that, prior to that day, he had not seen Appellant since June; however, on cross examination he admitted that he drove Appellant on July 4 to East Road

Apartments. He stated that when they pulled up to those apartments, they saw an individual who Mr. Green divulged was somehow involved with the mother of Appellant's child. According to Mr. Green, Appellant jumped out of the Durango and fired toward the apartment complex's parking lot as someone returned fire. Mr. Green testified that he had no previous knowledge of Appellant's intentions that day.

On August 4, 2015, the day after Deshields's murder, Brittney Dozier spoke to the police about Appellant's involvement in a July 2015 shooting at East Road Apartments. Ms. Dozier stated that she was returning home when she saw Appellant, standing near a "silver or gray" Durango firing a gun in front of her building. She then informed the police that, while still shooting, Appellant moved to the front of the Durango and then back to its passenger side. Throughout the interview, Ms. Dozier referred to Appellant by his nickname "Haze".

On August 12, 2015, the police located Mr. Bryant at the home of his cousin, Tatayana Taylor, on Fairground Drive.

B. The Ballistics Evidence

The State analyzed the ballistics evidence from both shooting incidents. On November 23, 2015, Dorothy Vernoy, then an employee of the Maryland State Police Forensic Science Division ("MSPFSD"), received two fired bullets and six fired cartridge cases from the July 4 shooting, and five fired bullets and six fired cartridge cases from the August 3 shooting. After analyzing the evidence, Ms. Vernoy issued reports on December 4, 2015.

The State designated Ms. Vernoy as its ballistics expert prior to trial on December 17, 2015. Her testimony was to establish that "the fired bullets from the murder scene and victim's body . . . were all fired from the same firearm and were also fired from the same firearm as the bullets recovered at the July 4, 2015 shooting scene [and] that the casings from the murder scene were all from the same firearm as the bullets." On August 12, 2016, Appellant moved *in limine* to exclude evidence connecting him to the July 4 shooting. He argued that evidence of the earlier shooting was impermissible "prior bad acts" evidence under Maryland Rule 5–404(b) because "[t]he only thing that gets them remotely close to a claim that this is identity information is the fact that they have a ballistics match according to their ballistics expert." The circuit court, however, disagreed and denied Appellant's motion after determining that evidence from the July 4 shooting satisfied the identity exception to Rule 5–404(b).

On August 17, 2016, the second day of trial, the State qualified Ms. Vernoy as an expert in firearms and tool marks examination. The State elicited that Ms. Vernoy completed multiple degrees, trainings, and programs in Forensic Science and that during her five-year employment at MSPFSD, she completed 1,065 cases. Additionally, she had previously been qualified as an expert in several counties, including Wicomico County and Charles County. Ms. Vernoy also explained that under MSPFSD's review process, a "qualified and experienced examiner" evaluates the initial examiner's conclusions as to the evidence; then another examiner ensures that the standard operating procedure was followed; and finally, the report undergoes an administrative review to examine whether

technical requirements were satisfied.

Appellant objected to Ms. Vernoy's qualifications as an expert. Although offered through the Association of Firearms and Tool Mark Examiners, Ms. Vernoy had not yet tried to become certified in firearms and tool mark identification. When working for MSPFSD, Ms. Vernoy did not hold a certification in firearms and toolmark identification nor, at the time of trial, was she certified in her subsequent job with the Army. Ms. Vernoy stated that the Army does not require certification, noting that while "[i]t is something that [the Army] would like for you to do[,] . . . at this point it's at the discretion of each individual examiner[.]" Over Appellant's objection, however, the circuit court recognized Ms. Vernoy as "an expert in the field of firearms and tool marks examination."

Ms. Vernoy then testified as to how she linked the ballistics evidence from the July 4 shooting and the underlying incident on August 3. Although the gun was never recovered, she analyzed the fired bullets and cartridge cases to determine the firearm's class characteristics—the features set by the manufacturer prior to production, such as caliber and breech face marks. She determined that the firearm used in each shooting was within the "40-caliber class" and that the resulting breech face marks were "granular", "cross-hatch", and "parallel" or a combination thereof. Ms. Vernoy determined that such similarities warranted a consideration of the individual characteristics, which are the irregularities that occur "with the use and abuse of that particular tool[]" and can include identifiers such as the height and width between markings or "the displacement of the metal[.]" From her conclusions, she opined that, based on "a reasonable degree of

scientific certainty[,]" the projectiles recovered from the scene of both shootings were fired from the same gun and the cartridge cases were fired from the same gun.[4] When asked on cross-examination whether an objective standard existed for making such conclusions, Ms. Vernoy stated the following:

> **For firearms and took [sic] marks identification, we're based off our training, experience, as well as our interpretation of it.** And then the peer review process behind that, the verification of it, I can't just say it's an ID or that it's an elimination or anything of those, without having another qualified examiner behind me looking at it again.

(Emphasis added).

The jury convicted Appellant on all counts, including first-degree murder, for the murder of Deshields.

[4] Ms. Vernoy could not, however, testify that the bullets were fired from the same firearm as the cartridge casings, as reflected in the following testimony:

> [THE STATE]: So all the cartridge casings from both cases that we've spoken of for the past hour or so, those are identified as having been fired in the same firearm?
> [MS. VERNOY]: Yes, they were.
> [THE STATE]: All the fired bullets or projectiles that we've discussed up until now, those were fired from the same firearm?
> [MS. VERNOY]: Yes.
> [THE STATE]: And . . . you're unable to determine whether the cartridge casings were in the same firearm that those bullets were in?
> [MS. VERNOY]: Yes.

The reason she could not conclude that the bullets were fired from the same firearm as the cartridge casings was: "[b]ecause the two items come into contact with separate portions of a firearm, you need a firearm to . . . say that, yes, these were fired from and in the same firearm."

C. Motion for New Trial

On October 26, 2016, over two months after his conviction, Appellant moved for a new trial pursuant to Maryland Rule 4-331. He alleged that his counsel recently discovered evidence that Ms. Vernoy was subject to MSPFSD discipline several months before his trial. In October 2015, roughly one month before she examined the ballistics in Appellant's case, Ms. Vernoy had determined that the ballistics in a separate case in Charles County case were "inconclusive"; however, in December 2015, a crime scene technician told her about additional ballistics information that could alter her conclusion, and after re-examination, Ms. Vernoy changed her result.

Appellant noted that on January 21, 2016, MSPFSD issued a Report of Nonconformance ("Report") stemming from Ms. Vernoy's altered conclusion that determined Ms. Vernoy "lacked experience, knowledge, and worked [the Charles County] case with[]out sufficient attention." The Report continued that the impact of Ms. Vernoy's error or "deficiency" was "Major/Severe" and that she would "be taken off of casework until going through remedial training[.]" Finally, the Report determined that such error was "Level 1 Nonconformance[,]" meaning it fundamentally impacted the work product or integrity of the evidence such that, if uncorrected, it "could have serious adverse impact on validity or credibility of work performed."

Even though the State had disclosed Ms. Vernoy as a potential expert witness in the underlying case on December 17, 2015, the State did not provide the Report to the Public Defender. The State contended, however, that Appellant's motion was untimely pursuant

to Maryland Rule 4–331(a), and even if the Report could be construed as newly discovered evidence per Maryland Rule 4–331(c), Appellant failed to show that due diligence would not have uncovered the Report. Furthermore, the State argued that this evidence was, at best, "merely impeaching" and would not have affected the ultimate verdict. Finally, the State contended that the Report was available to the Office of the Public Defender in the Charles County case in July 12, 2016, and therefore, with due diligence, the Public Defender in Wicomico County could have obtained the report. For all of these reasons, the State maintained that Appellant was not entitled to a new trial.

On December 1, 2016, prior to sentencing, the circuit court heard argument on Appellant's motion. Appellant's counsel focused on the import of Ms. Vernoy's testimony in linking the two shootings and how her professional discipline could impact her credibility. Counsel argued that Ms. Vernoy was the only expert ballistics witness in a case that relied heavily on the ballistics evidence: "Without her testimony, the other crimes evidence is of no use to the State. And without the other crimes evidence, I can contend that it would have been very difficult, if not impossible, for the State to meet its burden with respect to the homicide allegations." Counsel also pointed out that the exhibits in the court file made it clear that there were inconsistencies between the bullets and the casings from the July 4 and August 3 crime scenes.

Counsel claimed that the information was newly discovered evidence and *Brady* material and that the onus was on the State to turn it over. Counsel cited to several cases in support of the motion, including *State v. Hunt*, 443 Md. 238, 264 (2015) (ruling that

although dependent on the entire body of evidence in a case, when an expert testifies, "falsity regarding an expert's credibility and qualifications" could create a sufficient possibility that a different result may have occurred). Counsel urged that in cases where the firearms examiner's testimony is crucial, the information pertaining to that expert's qualifications is equally crucial. Counsel stated that had the information been provided to defense counsel in this case, there would be a significant possibility that "had the jury been aware that on the 18th day of January 2016 her unit supervisor indicated that the examiner lacked experience, knowledge, and worked the [Charles County] case without sufficient attention . . . , which was something that was happening at the same time as the analysis of the cases related to [Appellant], that the outcome of [Appellant's] case could have been different[.]"

The circuit court was more convinced, however, by the State's argument that the Report was not *Brady* material. The court noted that the MSPFSD deficiency report related to a separate case:

> . . . in other words, the statements regarding the possible causes of deficiency related to how she handled this particular examination where -- not the one in the case at hand. In other words, I have as part of the defense's argument that there was a report of non-conformance in an entirely separate case. It had nothing to do with this case. There was never any question raised about her performance in this case as it relates to any internal compliance with her policies and procedures at the forensic division services of the Maryland State Police.
>
> * * *
>
> So the point of all of this is, it appears to me that, you know, they self-reported what they perceived to be a non-conformance with their internal policies and procedures for making sure that evidence is professionally and

> accurately analyzed. And based upon that they took remedial action to [e]nsure that this didn't indicate that there was a problem with any pending cases.

The court stated that, unlike in the Charles County case, Ms. Vernoy did not change her finding here. The court further found, "I believe that, in the State's mind, in the Charles County case they made that information known because the examiner had made a change in her original findings and her non-conformance does not appear to have been a false misrepresentation[.]" The court then decided that "I don't believe that the evidence in question is newly discovered evidence as evidenced by the Office of the Public Defender's use of it in a case heard in Charles County in July[]"—a month before Appellant's trial. Finally, because MSPFSD would have reviewed Ms. Vernoy's conclusions per its internal policies, the court concluded that her "credibility and qualifications would [not] create a substantial or significant possibility that the result might have been different[.]" Thereafter, the circuit court denied the motion for a new trial.

Appellant timely filed his appeal to this Court on January 1, 2017.

DISCUSSION

I.

MOTION FOR NEW TRIAL

Appellant challenges the circuit court's decision denying his motion for a new trial on several grounds. First, he alleges a *Brady* violation, claiming that the State suppressed MSPFSD's Report that Ms. Vernoy "lacked experience, knowledge, and worked [a] case without sufficient attention[]" and contends that the circuit court erred by failing to

acknowledge the State's obligation to provide it to the defense. Appellant asserts that the circuit court incorrectly found that the Public Defender did not perform due diligence because the Report was used in the Charles County case; he contends that the importance is that the Report was not disclosed *in this case*. Appellant insists that the information was favorable both as impeachment and exculpatory evidence. Appellant believes this evidence was material to his defense, making its withholding prejudicial, because Ms. Vernoy's conclusions were the direct link between the two crimes. Appellant urges that because disclosure of this information could have altered the trial's result, reversal is necessary.

The State responds that Appellant blurs the difference between a motion for new trial under Maryland Rule 4-331 based on newly discovered evidence and one for a *Brady* violation. The two standards are similar, but the State points out that newly discovered evidence can be the basis for a new trial whether the State was aware of it or not, and there is no need for the court to find that evidence was suppressed. Regardless of which standard applies here, the State argues, the court did not err in denying Appellant's motion. The State contends that it is unreasonable to place the responsibility to know "everything that has ever happened in any case involving that expert anywhere in the State" on one prosecutor, while the Public Defender maintains a centralized database on forensic experts and has access to the same information. Further, the State notes that *Brady* does not relieve the defense of the obligation to investigate the case thoroughly and prepare for trial diligently. Finally, the State argues that Ms. Vernoy's disciplinary action was potentially

helpful to Appellant's defense but, like the circuit court concluded, was not material.

"Whether to grant a new trial lies within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent an abuse of discretion." *Brewer v. State*, 220 Md. App. 89, 111 (2014) (citing *Argyrou v. State*, 349 Md. 587, 600 (1998)). An abuse of discretion occurs when a trial court adopts a position that is "'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Jackson v. State*, 164 Md. App. 679, 727 (2005) (emphasis omitted) (quoting *North v. North*, 102 Md. App. 1, 14 (1994)). Therefore, a trial court does not abuse its discretion "unless the judge exercises it in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law." *Brewer*, 220 Md. App. at 111 (internal quotations and citations omitted).

Our review of a claimed *Brady* violation, however, is not deferential. *See Ware v. State*, 348 Md. 19, 48 (1997). When constitutional claims are raised, we review the determinations *de novo*. *Id.* Such a review requires that "[w]e independently evaluate the totality of the circumstances as evidenced by the entire record." *Id.* (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976).

A. Threshold Requirement under Rule 4–331(c)

The circuit court determined that the Report was not *Brady* material before finding that the evidence in question was not newly discovered under Md. Rule 4-331(c). We must consider the Rule 4–331(c) determination first, however, as our decisional law directs that

it is a threshold issue.[5]

> Maryland Rule 4–331(c) states, in pertinent part, the following:
>
> **(c) Newly Discovered Evidence.** The court may grant a new trial or other appropriate relief on the ground of **newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule**:
>
> > (1) on motion filed within one year after the later of (A) the court imposed sentence or (B) the date the court received a mandate issued by the final appellate court to consider a direct appeal from the judgment or a belated appeal permitted as post conviction relief[.]

Md. Rule 4-331(c) (emphasis in text added).

Of the grounds for a new trial provided under Rule 4-331, Section (c) is the most prohibitive substantively but has the most permissive time requirement for filing. The one-year time period assumes "that the evidence ha[d] been discovered more than ten days after a verdict so that it was no longer timely 'to move for a new trial pursuant to section (a) of this Rule.'" [6] *Jackson*, 164 Md. App. at 689-90 (emphasis omitted) (quoting *Love v. State*,

[5] In *Love v. State*, Judge Moylan clarified that "[u]nless and until there is found to be 'newly discovered evidence which could not have been discovered by due diligence,' one does not weigh its significance." 95 Md. App. 420, 432 (1993); *see also State v. Hunt*, 443 Md. 238, 264 ("If the Respondents [who sought writs of actual innocence] prove their newly discovered evidence and also persuade the trial judge that they could not have discovered it in time to move for a new trial pursuant to Rule 4-331, the Circuit Court must determine whether the new evidence . . . creates a substantial or significant possibility that the result of their trials may have been different."). Here, the record reflects that the trial court first decided the evidence was not *Brady* material because Ms. Vernoy did not change her conclusion in this case, and then the trial court concluded that the Public Defender did not meet the due diligence test because the Report had been used in the Charles County case in July 2016.

[6] Maryland Rule 4-331(a) states, in pertinent part, that "[o]n motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new

95 Md. App. 420, 430 (1993)). To justify this more permissive time limit, however, Section (c) applies only to evidence that the defendant could not have discovered with due diligence. *Id.* at 689. Due diligence does not depend on whether counsel was to blame for the failure to discover the evidence; instead, it centers on when the evidence could have or should have been discovered. *See Argyrou v. State*, 349 Md. 587, 602 (1998). For Section (c)'s purposes, due diligence "contemplates that the defendant act reasonably and in good faith to obtain the evidence, in light of the totality of the circumstances and the facts known to him or her." *Id.* at 605.

Due diligence does not relieve the State of its duties, especially when the State's case "relies on the testimony of an essential witness, the State has a duty to discover anything, and everything, that concerns that witness's credibility and, thus, potential for impeachment." *State v. Williams*, 392 Md. 194, 210 (2006). If the State fails to satisfy its burden, a court will penalize it, not the defendant. *Id*. at 226 (quoting *United States v. Osorio*, 929 F.2d 753, 762 (1st Cir. 1991) ("[R]esponsibility for failure to meet disclosure obligations will be assessed by the courts against the prosecutor and his office.")). This is in line with the tenets of our justice system, as "[a] rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 227 (quoting *Banks v. Dretke*, 520 U.S. 668, 696 (2004).

We hold that the circuit court abused its discretion in concluding that the Public Defender in Wicomico County did not perform due diligence. In his entry of appearance

trial."

in October 2015, Appellant's counsel requested all material and information from those "who have participated in the investigation or evaluation of the case and who . . . with reference to the particular case, have reported to the State's Attorney or his office." As Ms. Vernoy examined the ballistics in this case and was the sole expert witness for the State, she would certainly be included in this description. Counsel further requested any such material and information discovered after the State's initial compliance.

In this case, neither the State's Attorney in Wicomico County nor the Public Defender in Wicomico County had the Report. The circuit court, however, seemingly excused the State's failure to possess the report, yet faulted the Public Defender for not having it. As a result, the circuit court concluded that the Report did not qualify as newly discovered evidence because the Public Defender in Charles County had used the Report in a trial in July 2016, a month before Appellant's trial. Apart from that separate Public Defender's singular use of the Report in a different case in a different county, however, there is no evidence that the Report was available outside of the MSPFSD or otherwise made available as public information.

The circuit court failed to attribute any significance to the State's relationship with the Maryland State Police. The law places the burden to discover the Report from MSPFSD in this case on the State along with the duty to disclose it to the Public Defender. *See Williams*, 392 Md. at 232 (ruling that "the State has a duty to seek out and disclose all favorable *Brady* evidence, and that responsibility cannot be shifted onto another party."). MSPFSD issued the Report on January 21, 2016, meaning the State had roughly seven

months to discover and disclose it to Appellant's counsel before trial. Appellant's counsel had a right to rely on *Brady v. Maryland*, 373 U.S. 83 (1963), and assume that the State would adequately perform its duty of continual disclosure.

Nothing suggests that the Public Defender here could have, or reasonably should have, discovered the Report. Efforts by the defense, for example, to receive Ms. Vernoy's personnel files from MSPFSD likely would have been futile. We discern no evidence that, because one public defender's office in a faraway county had the Report a month before the trial, the Wicomico County Public Defender's office had any way of knowing this.

As we discuss next, the circuit court's decision contravenes the rationale of *Brady* and its progeny—it transferred to the Public Defender the State's burden to divulge information that the Public Defender requested and that the State had a duty to discover and disclose. This error then led the court to erroneously conclude that the Public Defender did not conduct due diligence by failing to uncover that information. This was an abuse of its discretion.

B. Materiality and *Brady*

Having determined that Appellant satisfied the threshold issue of whether the Report constituted newly discovered evidence, we now evaluate whether the circuit court erred in finding that the Report was not *Brady* material. As set out above, the circuit court relied heavily in its determination on the finding that: 1) the Charles County case was a separate case; 2) that Ms. Vernoy did not alter her conclusion in this case as she did in the Charles County case; and 3) that the Report did not state that Ms. Vernoy had made a "false

misrepresentation." The court did note, however, that Appellant's counsel could have used the Report to attack Ms. Vernoy's credibility and qualifications as a ballistics expert, and therefore it "is the definition of impeachment evidence." Even without the Report, the circuit court noted, "I was the presiding judge in this case so I recall . . . Ms. Vernoy's testimony and the challenge by the defense, which was vigorous and thorough, regarding her findings and ballistics report." Still, the court found that since MSPFSD verified Ms. Vernoy's conclusions made after the Report's issuance, Ms. Vernoy's testimony would have been subsequent to such re-evaluations. The court stated that, as a result, impeaching Ms. Vernoy's credibility and qualifications would not have resulted in "a substantial or significant possibility that the result might have been different in this case."

In *Brady v. Maryland*, the Supreme Court ruled that the prosecution's suppression of evidence favorable to the defense, after the defense's request, "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). Since its initial ruling in *Brady*, the Supreme Court has refined *Brady*'s scope, announcing that "there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). This refinement was necessary, the Supreme Court explained, because "a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor[.]" *United States v. Bagley*, 437 U.S. 667, 675 n.7

(1985).

The Court of Appeals has wholly adopted this approach. *See Yearby v. State*, 414 Md. 708, 716-17 (2010). Therefore, the Court of Appeals reiterated the following from *Strickler*:

> There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Yearby v. State, 414 Md. 708, 717 (2010) (quoting *Strickler*, 527 U.S. at 281-82); *see also* Md. Rule 4–263(d)(5)-(6) (discussing the State's obligation to disclose, without request, exculpatory and impeachment evidence to the defense).

The final *Brady* prong—prejudice to the defendant—is "'closely related to the question of materiality.'" *Yearby*, 414 Md. at 718; *see also Adams v. State*, 165 Md. App. 352, 362 (2005) (distilling the three *Brady* elements as helpful, suppressed, and material). Evidence qualifies as material under *Brady* when "'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict.'" *State v. Williams*, 392 Md. 206, 229 (2006) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). The defense is not required to demonstrate that remaining inculpatory evidence would not have been sufficient to convict; instead, "[a]ll that is required is a showing of a 'reasonable probability of a different result.'" *Id.* (quoting *Kyles*, 514 U.S. at 434). This is especially applicable in cases where the "core of the State's argument" is based on "an essential witness[]" and "when the reliability of [that] witness is determinative of guilt or innocence[.]" *Id.* at 210. Accordingly, "nondisclosure of such

evidence falls within *Brady*." *Id.*

In *Williams*, the Court of Appeals discussed the materiality of evidence that forms the direct link between the defendant and the crime.[7] 392 Md. at 229. Although the defense and that particular prosecutor were unaware, a key witness for the State, who implicated the defendant in a murder, was a registered police informant for a decade and had tried to get his sentence reduced based on his cooperation. *Id.* at 199-202; *Williams v. State*, 152 Md. App. 200, 228 (2003). After learning of this, the defendant argued that the evidence was material and that the State's failure to disclose it prejudiced his defense. *Williams*, 392 Md. at 202. We held that the evidence was material and, given the import of the informant's testimony to the case, could not say that the same result would have occurred without his testimony. *Williams*, 152 Md. App. at 228. The Court of Appeals was likewise unconvinced that defendant's conviction could be sustained without the informant's testimony and granted a new trial because "'the taint of the *Brady* suppression matters on this record so undermines our confidence in the murder conviction[.]'" *Williams*, 392 Md.

[7] The Court's discussion in *Williams v. State*, 392 Md. 194 (2006), which addresses the State's burden to discover and disclose *Brady* material, was not the Court's final discussion regarding that duty in that particular case. In its 2006 ruling, the Court granted a new trial. 392 Md. at 206, 234. Prior to that new trial, a police officer disclosed that an eyewitness—who had testified in the first trial and was not mentioned in the 2006 case—had told him she was "legally blind" during the initial investigation. *Williams v. State*, 416 Md. 670, 674, 683 (2010). She had since died, and, over objection, the trial court admitted her videotaped testimony. *Id.* at 684-686. The Court discharged the *Brady* claim, ruling that this was not a *Brady* violation since the State disclosed it prior to the second trial. *Id.* at 692-93. The thrust of the Court's analysis focused, however, on resolving the issues of hearsay and the petitioner's ability to cross-examine the witness in addition to sanctions for a discovery violation. *See id.* at 695-700. Given that the 2010 decision did not affect the Court's previous ruling, we rely on the 2006 decision to guide our analysis.

at 230 (quoting *Williams*, 152 Md. App. at 227) (additional citations omitted). Moreover, the Court ruled that although defense counsel exhibited particular adroitness during cross-examination, that has no bearing on the materiality of the evidence withheld, nor does it discharge the State's duty to disclose *Brady* material. *Id.* at 233-34. The Court then adopted this Court's reasoning:

> Nevertheless, counsel had no direct evidence with which to cross-examine [the informant] as to his receipt of benefits for the information he had provided to police. For these reasons, we cannot say that, if the jury had been informed of the 'totality of the circumstances' surrounding [his] status as a paid police informant and his attempts to have [the judge] reduce his sentence because of his cooperation with the police, there would be neither a substantial possibility nor a reasonable probability 'that the outcome would have been different.'

Id. at 233 (quoting *Williams*, 152 Md. App. at 228) (additional citations omitted).

The present case is substantially similar so as to warrant the same result. Here, Ms. Vernoy was the State's only expert witness and her testimony regarding ballistics directly connected Appellant to both shootings. As the circuit court noted, the Report could have been used to impeach her credibility as a ballistics expert. Qualification as an expert requires demonstration of experience and knowledge, and the Report directly calls into question those very qualities in Ms. Vernoy. *See State v. Hunt*, 443 Md. at 264 (noting that in a case utilizing an expert's testimony, "falsity regarding an expert's credibility and qualifications" may demonstrate that a result could have been different). The skill and thoroughness of Appellant's counsel, as noted by the circuit court, does not make the Report any less material. Appellant's counsel had no direct evidence to cross-examine the State's only expert witness regarding her qualifications. There was eyewitness testimony

from both shootings, but like the import of testimony from the informant in *Williams*, we cannot say that without Ms. Vernoy's testimony, "the evidence would have been sufficient to find, beyond a reasonable doubt," that Appellant committed the crimes for which he was charged. *See Williams*, 392 Md. at 230 (citations omitted).

The evidence here is material under *Brady* such that it "undermines our confidence in [Appellant's] conviction[,]" and we are unconvinced that the remaining evidence would prove Appellant's guilt beyond a reasonable doubt. *See id.* (internal quotation omitted). We are unpersuaded that "if the jury had been informed of the 'totality of the circumstances'" regarding Ms. Vernoy's qualifications as a ballistics expert, "there would be neither a substantial possibility nor a reasonable probability 'that the outcome would have been different.'" *Id.* at 233 (quoting *Williams*, 152 Md. App. at 228).

Assuming the State's failure to discover and disclose the report was unintentional, which we do because there is nothing in the record to suggest otherwise, the penalty for failing to discover the evidence applies against the State, not the Public Defender. *See id.* at 226 (citation omitted). Therefore, we hold that the circuit court abused its discretion, and we remand for a new trial.

JUDGMENT VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR WICOMICO COUNTY FOR A NEW TRIAL. COSTS TO BE PAID BY WICOMICO COUNTY.