UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2748

September Term, 2013

LUISA D. PAIZ

v.

STATE OF MARYLAND

Leahy,
Reed,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: December 29, 2015

Appellant, Luisa D. Paiz, was convicted in the Circuit Court for Montgomery County of first degree assault and conspiracy to commit first degree assault. In this appeal, she raises one issue for our consideration related to the State's disclosure of impeachment evidence. Appellant characterizes the evidence as a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and poses the following question for our consideration, which we have rephrased[1]:

> Did the Circuit Court for Montgomery County exercise its discretion properly when it denied appellant's motion for a mistrial after an alleged *Brady v. Maryland*, 373 U.S. 83 (1963), violation?

We shall hold that the State did not suppress evidence under the strictures of *Brady* and shall affirm.

I.

Appellant was indicted by the Grand Jury for Montgomery County of attempted first degree murder, conspiracy to first degree murder, first degree assault, conspiracy to first degree assault, and solicitation. Following a jury trial, the jury convicted appellant of first-degree assault and conspiring to commit first-degree assault. On the attempted first degree assault charge, the court sentenced appellant to a term of incarceration of six years, all but eighteen months suspended, three years supervised probation. On the conspiracy to commit

[1]Appellant phrased the question presented as follows:

> "Did the [circuit] Court violate Appellant's Due Process rights when it found the State did not violate *Brady*?"

first-degree assault, the court sentenced appellant to a term of incarceration of six years, concurrent, all suspended.

On June 25, 2012, Khiry Blue assaulted Santiago Perez (with whom appellant Paiz had a relationship that resulted in one child), in Montgomery County.

While appellant was deployed with the U.S. Army in Afghanistan, she complained to her fellow soldiers about a custody dispute with Mr. Perez. Blue was one of those fellow soldiers. Blue testified at trial to the following:

> "THE STATE: Again, taking you back to Afghanistan—when you started having these conversations, tell us how they evolved.
>
> [BLUE]: I'd pretty much say, anger fueled them. I went from regular conversations about, you know, what was going on, until we started getting into conversations about, you know, how to actually deal with the problems.
>
> THE STATE: And deal with what problems?
>
> [BLUE]: Basically, we was talking about her problems with what was going on with her baby dad and how we'd deal with him.
>
> THE STATE: And, describe those.
>
> [BLUE]: Pretty much, we started out joking about different ways about how we can do it, then—
>
> THE STATE: Do what?
>
> [BLUE]: Kill him. And ultimately, we started out joking about simple stuff, like him stepping on an IED.
>
> THE STATE: What is an IED?

> [BLUE]: Improvised explosive device. Pretty much, talking about grenades, shooting him with M-16's, different stuff, but ultimately it got to the endpoint where, talking about breaking his neck.
>
> THE STATE: How do you get to that point? How do you even get to where you're even, as you said, joking? How do you get to the point where you start talking about killing her baby's father?
>
> [BLUE]: It just got to the point where me and her, like, on a daily basis, we kept talking, conversating about everything, and I pretty much just got fed up about hearing it, and we just got to the point where I said that I'd kill him."

Blue testified that appellant agreed to pay him $5,000.00 to carry out the plan as Blue described it.

When Blue returned to the United States from Afghanistan, he went to Montgomery County to find Mr. Perez. Their encounter resulted in the event that gave rise to this case.

Blue was indicted by the Grand Jury for Montgomery County with attempted first-degree murder and conspiracy to commit first-degree murder of Santiago Perez and was originally a co-defendant with appellant.

After discussions with the State's Attorney's Office, Blue elected to plead guilty. Blue's attorney and the assistant state's attorney prosecuting Blue (who also prosecuted appellant Paiz) met to discuss Blue's plea in chambers with Judge Richard Jordan, a circuit court judge different from appellant's trial judge. At the end of the meeting, the court indicated its inclination to give Blue a sentence within the Maryland Sentencing Guidelines range of five to ten years of incarceration. Blue pleaded guilty to all of the charges against

him; however, his attorney stated on the record that Blue would never say that he intended to kill Mr. Perez.

After Blue pled guilty, he had meetings with the State's Attorney's Office to discuss his testimony for appellant's trial with the two assistant state's attorneys prosecuting appellant. During a status hearing on September 20, 2013, appellant argued to the court that the State should disclose details about any meetings with Blue. Relying on *Brady* and *Giglio*, counsel for appellant argued in support of his "motion to produce evidence" including documentation of "any discussions with the co-defendant [Blue]," and "a demand for any information relating to [Blue's] guilty plea accepted by the court on August 23rd, including the terms of the plea, any promises, representations of leniency made, contents of any interviews, and any resulting evidence or information." Appellant related to the court that "[t]he State responded that there were no promises or representations made by the State." The State then explained to the trial court that "[t]he State does not believe that there were any promises made to [Blue], therefore [the State is] not in a position to turn any over." The court agreed that counsel was entitled to *Brady* material, stating as follows:

> "Yes, I think it's pretty clear. That's—if there's a co-defendant is going to testify, then cross examination is obviously an important aspect of the matter, insofar as defense being able to probe any issues of bias or motive, or to not tell the truth or whatever they may need to pursue."

The State agreed with the court, but maintained that the State had nothing to produce in response to the motion, as follows:

> "PROSECUTOR: No, I understand your honor, but the thing is there were no such conversations, which is what I put in my motion. There are no conversations. The only thing that I think has bearing on when [appellant] is asking for that the judge may have promised Mr. Blue, they already have that material because it's on public record, it was the transcript of the plea hearing. And there is nothing beyond that that we provide them. So [I] think it's quite frankly a moot motion at this point.
>
> THE COURT: So, they're affirming that there isn't anything else."

During the same September 20, 2013 hearing, counsel for appellant raised a second overlapping issue, asking of the court that even if the State did not make a formal plea agreement with Blue, the State should be compelled to disclose all facts related to any discussions in the court's chambers between Blue and the State's Attorneys. Appellant argued that " . . . [the] defense is entitled to have [time to] prepare to cross examine the State's witnesses to preserve the defendant's constitutional rights. And so, there may be a very general plea agreement, I'm sure there is." The State responded as follows:

> "There is no plea agreement, your honor. That's the issue that we've been reiterating, I think, with defense counsel. There is not plea agreement. The State, and I think Judge Jordan notes it in his transcript of the plea hearing, said absolutely nothing during our chambers chat other than, 'I'm not going to comment on that your honor.' And so, I certainly agree with the court's position and I just am looking for some direction on what your honor would like us to provide and I'd be happy to provide it because I don't think we're going to have it."

The court then described the disclosure required of the State, and the following colloquy took place:

"PROSECUTOR: Your honor, I can shed some light on this to give you an idea of where ultimately this will go. Judge Jordan and [DEFENSE COUNSEL], mainly judge and her were really the only one's to say anything, so really I'm going to be quoting the judge, as best I can. Obviously I can't quote him because I didn't take, I didn't write everything down, or anything for that matter. So I'd be quoting him off what I remember him saying. But the conversation was really between Judge Jordan [and DEFENSE COUNSEL]. It was after the motions hearing, he obviously knows what the defendant potentially would testify at trial because he viewed the video tape statement at length and then we had a suppression hearing in relation to it. And the trial was just about to start.

So, really this all started by the defense trying to see what he would or would not be sentenced to because we weren't offering anything. And we had no intention of offering anything. We were in a trial posture, we had witnesses flying out from Texas and we weren't doing anything, especially at the last minute. And that's why when presented with exactly what is on the record, is really Judge Jordan then reiterates the colloquy that he had with [DEFENSE COUNSEL], and the two representatives of the State that sat there, he reiterates it on the record. Like I talk to your counsel and I said I'd be inclined to give you, 'I'd be more inclined to give you a guidelines sentence, if you were to plea guilty and testify, than had you gone to trial.' And that's basically what he said. And that's ultimately, then he came and pled straight up because we weren't giving anything. And then he continues to spell out all the terms, if you can even use that word.

But, what he was thinking that Mr. Blue would ultimately do to potentially get even a consideration of a guidelines sentence, was that he would testify truthfully, and by truthfully, he meant at least that what was on the video tape that he had already heard. And, that was also out on the record. There's not much more that the State could provide other than to say that that conversation happened and the judge had asked the state and defense what the guidelines on the different counts were. And that's why he then asked us again in the courtroom just to make

> sure he had the numbers properly and whatever notes he must have taken. So, that's really all that there is to it. There wasn't anything. It's not one where we said, well, wink, wink, nod, nod. If you testify the State's going to recommend something. We never said what we recommend at any point, whether it was for trial, whether it was toward trial. We didn't even have a proper session with Mr. Blue leading up to his pleading guilty. Never met with him, never saw him beyond the video tape or in court. So it wasn't one of those situations where the State had—had him come in, proffer him, you know, king for a day kind of thing. Talk to him, see if we even would want to use him. We had never met with him or had any discussions with him period.
>
> THE COURT: Okay.
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> PROSECUTOR: And all of that took place right after the—a day or two after the suppression hearing leading up to the trial, with [DEFENSE COUNSEL] trying to figure out what to ultimately do, instead of having a trial with him on that Monday, which is what the State was prepared to do. He actually plead guilty late Friday afternoon with a trial on Monday.
>
> THE COURT: Okay.
>
> PROSECUTOR: So there's not much more additional than what I just said, that I can reduce to writing. Because that is really all there is to it.

Still dissatisfied with the State's response, appellant argued to the court that the disclosure was insufficient to allow appellant to confront Blue when he took the stand. The court clarified its expectations as follows:

> THE COURT: I think they are entitled to anything that's even remotely potentially exculpatory, anything that could go to his bias, motive, recollection, and ability to perceive the surroundings; as it relates to anything that he might be testifying to. Now, you don't have to tell them everything he's going to

> say, but I think they are certainly entitled to anything that could possibly be exculpatory as; to this; even in the widest painted, broadest brush you can find as it relates to this defendant. The charges here are conspiracy, right?
>
> PROSECUTOR: Correct. Solicitation.
>
> THE COURT: Right, so, it goes hand in hand that now everybody has retreated to their own corner, and worrying about their own issues and so that certainly brings that to the forefront as it relates to this defendant being prosecuted for these crimes as well. So, I think they are entitled to that type of information. I agree with you, they are not entitled to your notes, and if you don't take any, and if [AN ASSISTANT STATE'S ATTORNEY] takes notes, then that's fine . Those are her trial preparation notes. But, anything that is remotely exculpatory, they are entitled to. And that goes all the way up until the time he testifies.

The State responded to the court that the State "[a]bsolutely" would have shared any exculpatory evidence if appellant had requested that information, but that the State's Attorneys had none to offer based on the first meeting with Blue.

Appellant then confirmed with the court that appellant would be allowed to cross examine Blue about his meetings with the prosecutors and the particulars of how he might establish the facts surrounding Blue's meetings with them. Appellant raised his expectation that the State would provide time logs tracking Blue's movements to meet with the prosecutors. The State disagreed, arguing that appellant was not entitled to detailed date and time records of when Blue was where, and with whom Blue met. The court disagreed with the State, reiterating the *Brady* disclosure requirements but also affirming that the State need not provide a "map of everything [THE STATE does] between now and the trial. [THE

STATE] certainly [is]—I have equal respect that [THE STATE] certainly know[s the] obligations and if Mr. Blue says anything that is different substantially from what he may have apparently already said. Or, it could even remotely be exculpatory. [THE STATE knows the] obligations."

The State expressed concerns about the relevant prosecutors being called to testify about the meetings.[2] The court disabused the State of such concerns, and further elaborated on the expectations of the court, in the following colloquy:

> PROSECUTOR: Your honor, my fear about some of these questions is ultimately, you know, in all candor with the court, is that I think they're building up to potentially call to me or [AN ASSISTANT STATE'S ATTORNEY] as a witness. And, even going back to when they're talking about what Mr. Blue was informed of in reference to a chambers chat, that's [DEFENSE COUNSEL]. She went down stairs, and she spoke to Mr. Blue, or she visited him at MCC, or wherever he's housed—
>
> THE COURT: No, I'm not having [DEFENSE COUNSEL], is not testifying to anything she discussed with her client. I can assure every single one of you, that's not happening. She doesn't have to put herself in violation of her own canons of ethics to—she's not defending Ms. Paiz. And I'm not asking for what she said to him, or he said to her. What I'm talking about in the other discussion is about what was discussed as it relates to any scenario that's a place leading up to this man entering a plea of guilty, as it relates to the possibility of him being called

[2] The State expressed concern earlier in the hearing that appellant might call Judge Richard Jordan to testify about the meeting in chambers between the State's Attorneys and Blue. The court dispelled that fear immediately, saying "[n]o we're not ending up with Judge Jordan as a witness. As I just said, I can assure you he is always welcome in my office, but not in that capacity. So, I'm not asking him to tell me anything."

> as a witness by the State, I think I've—I'm not sure I'm making any sense today. But, I'm trying to think that the defense is entitled to anything potentially exculpatory, painting with a very broad brush. And I certainly expect both of you to follow that pre—and I don't think you need to lay out your calendar for the next 30 days of everything you're planning to do. But, I certainly think the defense is entitled to probe every aspect of his testimony, because especially given the nature of these charges, —it's going to happen in any case, but especially here, where the allegations and agreement between these two people to kill somebody—is certainly a reason to now possibly not tell the truth. And, so if the tables were turned, [DEFENSE COUNSEL] would be sitting right there doing the same thing. So, I, you know, I—they each have incentive, and they each have rights, and so, I'm not going to have her even remotely telling us anything he said to hers and I don't see any request for that."

On October 15, 2013, fulfilling the ongoing discovery obligation, in a letter dated October 7, 2013, the State disclosed to appellant that the State had met with Blue, writing in pertinent part, "[a]s part of trial preparation, the State has had the opportunity to meet with Khiry Blue. I am writing to inform you of the sum and substance of the additional statements that Mr. Blue has made during the course of those meetings that are not already contained in discovery." The State detailed in the letter the substance of Blue's statements to the State during the meetings, but did not describe the tenor of the meetings.

Blue testified at appellant's trial, in direct examination by the State, that during his meeting with the State's Attorney's Office, "[t]he first time, I was still trying to stick with the story that I was only there to assault the guy. The State's Attorney then got mad. It got

heated. Started yelling. So that's when I started to cooperate with them . . . ." Blue described the first meeting as follows:

> "PROSECUTOR: After you plead guilty you had meetings with the State's Attorney's Office, correct?
>
> [BLUE]: Yes, sir.
>
> PROSECUTOR: And at these meetings, what did we do?
>
> [BLUE]: Pretty much we talked about that case. Pretty much we got down to the truth after a couple of tries.
>
> PROSECUTOR: And at those meetings what were you asked to do?
>
> [BLUE]: Tell the truth.
>
> PROSECUTOR: And when you first came to the meetings—you said, "a couple of tries"—what happened?
>
> [BLUE]: The first time, I was still trying to stick with the story that I was only there to assault the guy. The State's [A]ttorney then got mad. It got heated. Started yelling. So that's when I just started to cooperate with him. Then we ultimately, after a little while of just going back and forth, we ultimately just decided that we'll try the next day. So we just went home from there.
>
> [DEFENSE COUNSEL]: Your honor, I would ask to approach the bench.
>
> THE COURT: Come on up.
>
> BEGIN BENCH CONFERENCE
>
> [DEFENSE COUNSEL]: This is the first I've heard that he lied at the State's Attorney's Office a couple times. We have no information about that. All we have is a summary of what they

> thought he was going to testify. And if this is a prior inconsistent statement it's *Brady* information, it's *Giglio* information; it's undisclosed.
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> PROSECUTOR: It's the same thing–he came in the first time and just said the same thing—
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> [DEFENSE COUNSEL]: Well, I don't need it now. I needed it ahead of trial.
>
> PROSECUTOR: It's the same. It's just a video. It's the same statement.
>
> [DEFENSE COUNSEL]: How would I know that, though? And the fact of the lie—
>
> PROSECUTOR: Well, that's not what he said. He just said that he met with the state's attorney and he tried to do the lying thing.
>
> [DEFENSE COUNSEL]: "A couple of times."
>
> PROSECUTOR: He said the same story he had told before. That's what he just said, the same one he—
>
> [DEFENSE COUNSEL]: But he told five stories before.
>
> PROSECUTOR: He didn't really–it's not really how it—
>
> [DEFENSE COUNSEL]: I mean, this is all great for [THE STATE] to sort of clarify it now. But we have a jury in the box. We're at the end of the State's case. I'm entitled to this pre-trial. This is not right. This is not. This is a total *Brady* violation—total *Brady* violation."

Appellant moved for a mistrial, based on the alleged *Brady* violation. The court denied the motion.

As noted above, the jury convicted appellant of first-degree assault and conspiracy to commit first-degree assault. This timely appeal followed.

II.

Appellant makes several arguments before this Court, all characterized as *Brady* violations. He argues that several mid-trial disclosures related to the State's witness, Khiry Blue, warrant a new trial. Appellant argues that the State did not disclose to defense counsel that its main witness, Khiry Blue, met with the prosecutors multiple times and made multiple conflicting statements about whether he intended to kill Santiago Perez. Appellant maintains also that the State failed to disclose that when Blue made those exculpatory statements, the prosecutors and State's Attorney's Office investigators yelled at and threatened Blue to get him to change his statements to support the State's theory of prosecution. Finally, appellant asserts that the State violated *Brady* because it suppressed the details of Blue's guilty plea agreement with the State.

The State's first response is that there was no *Brady* violation because the State did not suppress any evidence. According to the State, appellant learned of the alleged impeachment information during the trial and she then moved for a mistrial. As to the State's meetings with Khiry Blue, the State denies that anyone yelled at Blue or threatened him to get him to change his story.

In regards to the number of meetings the State had with Blue, as part of pre-trial discovery, the prosecutor had sent a letter to defense counsel on October 15, 2013, which stated as follows:

> "As part of trial preparation, the State has had the opportunity to meet with Khiry Blue. I am writing to inform you of the sum and substance of the additional statements that Mr. Blue has made during the course of those meetings that are not already contained in discovery."

The State notes that defense counsel, during its motion for mistrial, advised the trial court that he knew that Blue had been transported seven times to the State's Attorney's Office. As to the alleged suppression of any argumentative discussion the prosecutor may have had with Blue, defense counsel told the trial court that he had subpoenaed Blue's jail phone calls prior to trial and he knew that Blue was talking about an argument with the State's Attorney in one of the calls. In any event, assuming *arguendo* that appellant did not have notice of this argumentative discussion, the information came out during the direct examination and counsel was able to fully cross-examine Blue. In addition, during the luncheon recess, the court gave defense counsel an opportunity to speak with the investigators from the State's Attorney's Office. Counsel represented to the court that they were "very forthcoming and cooperative." The trial court permitted appellant to cross-examine Blue again and counsel played a portion of Blue's jail call where he recounted Blue's argument with the State. The State concludes, that, therefore, there is no *Brady* violation.

As to the State's alleged suppression of the nature of Blue's plea agreement and prior inconsistent statements, the State presents facts to support its position that appellant was aware of this information. Blue pled guilty on August 23, 2013. Appellant's counsel had a copy of the plea hearing transcript by September 20, 2013, and defense counsel knew that Blue had told the plea judge that he did not have the intent to kill Santiago Perez. The State had provided appellant with the "sum and substance" of any off the record discussions which had taken place in the plea judge's chambers. Defense counsel, in his opening statement to the jury, stated that Blue told the judge at his plea hearing that he never intended to kill Santiago Perez. The State denies that anyone threatened Blue with revocation of his plea agreement if he didn't change his story and appellant's statement to that effect is simply a "bald allegation" based only upon suspicion and supposition. Finally, the State maintains that even assuming *arguendo* that the State suppressed evidence, "there is no basis to conclude that had Paiz been privy to this information at an earlier time the jury would have reached a different result. . . . Paiz never requested a continuance." And appellant was able to fully and effectively cross-examine Blue—so much so, that Paiz was acquitted of solicitation of first degree murder, attempted first degree murder and conspiracy to commit first degree murder, all the counts most relevant to Blue's intent to kill.

III.

Before this Court, appellant characterizes the error below as prosecutorial misconduct and *Brady* violations. Nowhere does she brief or argue that the trial court erred in denying her motion for mistrial. We shall, however, review her appeal in the context of whether the trial court erred or abused its discretion in denying her motion for a mistrial in addition to her allegations of prosecutorial misconduct.

It is black letter law that the declaration of a mistrial is an extraordinary act, which should only be granted if necessary to serve the ends of justice. *Hunt v. State*, 321 Md. 387, 422 (1990). A motion for a mistrial lies within the discretion of the trial judge. *Nash v. State*, 439 Md. 53 (2014). A trial court's denial of a motion for mistrial will not be reversed unless the defendant was so clearly prejudiced that the denial constituted an abuse of discretion. *Hunt*, 321 Md. at 422.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon 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." *Id.* at 87. The prosecutor has a duty to disclose this evidence even though the accused makes no formal request. *Strickler v. Greene*, 527 U.S. 263, 280 (1999). The reach of *Brady* encompasses both exculpatory and impeachment evidence, with no distinction between the two types of evidence for *Brady* purposes. *United States v. Bagley*, 473 U.S. 667, 676 (1985). Evidence is favorable to an

accused, when, "if disclosed and used effectively, it may make the difference between conviction and acquittal." *Id.* Delay in disclosure or even disclosure during trial does not in and of itself violate due process. Due process requires only the disclosure of exculpatory information at a time when the defendant may make effective use of the material. *United States v. Vgeri*, 51 F.3d 876, 880 (9th Cir. 1995) (no *Brady* violation when disclosure during trial enabled the accused to make use of the evidence).

Thus, in order to establish a *Brady* claim, a defendant must show that (1) the State suppressed evidence; (2) the evidence is favorable to the accused, *i.e.*, exculpatory or impeaching; and (3) the evidence is material to guilt or innocence. *Bagley*, 473 U.S. at 674-75. In addition to establishing that the withheld information is favorable to him or her, the defendant must prove that the withheld evidence is "material." *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Yearby v. State*, 414 Md. 708, 717-18 (2010); *Conyers v. State*, 367 Md. 571, 597 (2002). In *Bagley* the Supreme Court set out a uniform standard to determine "materiality," stating as follows:

> "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

473 U.S. at 682. Stated another way, evidence suppressed by the prosecution is a *Brady* violation only if there is a "reasonable probability" that the result of the trial could have been

different if the evidence had been disclosed to the defense. *Kyles v. Whiteley*, 514 U.S. 419, 433-34 (1995).

With respect to the timing of disclosure, most courts that have considered the factual scenario where *Brady* material is discovered or disclosed during trial have held that there is no *per se* violation of *Brady* and that the relevant question is whether the defendant was prejudiced by a late or untimely disclosure. *See e.g.*, *United States v. Neal*, 27 F.3d 1035, 1050 (5th Cir. 1994); *United States v. McKinney*, 758 F.2d 1036, 1050 (5th Cir. 1985); *State v. Payne*, No. 09AP-107, 2010 WL 927188 ¶ 31 (Ohio Ct. App. Mar. 16, 2010), (" . . . if the evidence is disclosed *during* the trial, there is no *Brady* violation."); *United States v. Smith Grading & Paving, Inc.*,760 F. 2d 527, 532 (4th Cir. 1985) (stating that no due process violation occurs as long as *Brady* material is disclosed to a defendant in time for its effective use at trial).

The disclosures relating to Khiry Blue were favorable to appellant because the evidence bore on Blue's credibility and incentive not to tell the truth, but appellant cannot show that any untimely disclosures had any impact on the outcome of the trial. Based on the record before us, it appears that appellant knew most, if not all, of the information before trial. Nevertheless, even if this disclosure was belated and disclosed only during the trial, we hold that it was not "suppressed" by the State within the meaning of *Brady* because the State's disclosure during the trial was in sufficient time to afford the defense an opportunity to use the evidence. Not only does the record reflect that appellant had the plea transcript,

access to Blue's jail phone call, and a letter from the prosecutor advising of the State's Attorney's Office meetings with Blue, but the circuit court granted appellant a recess so that his counsel could interview the State's Attorney's Office investigators and then permitted re-cross-examination of Blue. Also, throughout pre-trial, during the trial and in this appeal, the State denied that the information appellant sought existed— that the conversations appellant believed happened simply did not occur. Because the State denied that exculpatory evidence of the kind appellant sought existed, it could not disclose it. Under these circumstances, any belated disclosure by the State, if there be any, did not violate *Brady*.

In addition, appellant was not prejudiced by the timing of the disclosures. To justify relief under *Brady*, appellant must show that there is a "reasonable probability" that the disclosure of the suppressed evidence would have led to a different result. *Yearby v. State*, 414 Md. 708, 716 (2010). The Court of Appeals explained the prejudice requirement as follows:

> "The prejudice prong is closely related to the question of materiality. The standard is whether there is a '*reasonable probability*' that disclosure of the suppressed evidence would have led to a different result. A 'reasonable probability' of a different result is . . . shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. Strictly speaking, 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."

Id. at 716-717. As the State points out, appellant was acquitted of the three charges most connected to Blue's inconsistent testimony concerning Blue's intent to kill, *i.e.*, attempted

first degree murder, solicitation to commit first degree murder and conspiracy to commit first degree murder. In addition, appellant was able to fully cross-examine Blue with the information and to use the jail phone call recording at trial. We see no prejudice.[3]

For the reasons stated above, we hold that the trial court did not err or abuse its discretion in denying appellant's motion for a mistrial. Nor was there any prosecutorial misconduct or suppression of *Brady* material.

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

[3] It bears noting that the basis for a *Brady* claim under the Due Process Clause and Fifth and Fourteenth Amendments, are "fundamentally distinct from discovery rules, which further spell out the State's (and to a lesser extent, the defendant's) obligations to disclose information prior to trial, but are not grounded in either the Federal or State Constitution." *Yearby v. State*, 414 Md. 708, 720 (2010). As Judge Charles E. Moylan, Jr., wrote for a panel of this Court, "*Brady* and its progeny deal not, as here, with discovery sufficiently timely to enable the defense team to calibrate more finely its trial tactics but with the very different issue of withholding from the knowledge of the jury, right through the close of the trial, exculpatory evidence which, had the jury known of it, might well have produced a different verdict." *DeLuca v. State*, 78 Md. App. 395 (1989).