UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0886

September Term, 2015

TONY WILLIAMS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Alpert, Paul, E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: September 8, 2016

On May 28, 2015, Tony Williams, appellant, was convicted *pro se* at a bench trial in the Circuit Court for Baltimore City of second-degree murder, use of a handgun in the commission of a crime of violence, and wearing, carrying, and transporting a handgun. He was subsequently sentenced to 30 years of imprisonment for the murder charge, and a consecutive ten years, the first five years to be served without the possibility of parole, for the use of a handgun charge. Sentence was merged on the wearing, carrying and transporting a handgun charge. Appellant raises three questions on appeal, which we have slightly reworded:

I. Did the trial court err when it accepted appellant's waiver of his right to counsel in violation of Md. Rule 4-215?

II. Did the trial court commit plain error when it admitted a letter written by the State's main witness detailing appellant's confession because the letter's probative value was outweighed by the danger of unfair prejudice?

III. Did the trial court err in denying appellant's motion to dismiss based on the State prosecutor's familiarity with material previously ordered to be destroyed?

For the following reasons, we shall affirm the judgments

FACTS

On February 21, 1998, Dana Drake, appellant's fiancé, was shot and fatally killed at the bottom of the stairs of the apartment where she and appellant lived in Northeast Baltimore. The State's theory of prosecution was that appellant killed Drake to collect proceeds from an insurance policy he had taken out on her life. This was appellant's fourth

trial for the murder of Drake.[1] We shall provide a brief recital of the facts from appellant's fourth trial, which have been recounted several times in appellant's various appeals and post convictions proceedings, to provide context to the questions raised in this appeal.

Because there was no forensic evidence directly connecting appellant to the murder, the State relied heavily on the testimony of Sean Williams ("S.W."), a paid jail house informant. Appellant and S.W. had been incarcerated together at the Baltimore City Detention Center shortly after the murder. According to S.W., appellant told him that he had shot his fiancé in the hallway of her apartment building when she had returned home from a party, and that he had used a .22 handgun he had purchased. Appellant said he had killed her to collect the $100,000 life insurance policy to be paid to him on her death.

The State also introduced evidence of appellant's contradictory statements and suspicious conduct shortly after the murder. After Drake was shot, appellant called Drake's sister and "calmly" told her that she needed to "come get" Drake, without suggesting in any way that anything serious had happened. Although appellant and Drake were engaged, lived together, and had a child together, appellant told a patrol officer and a detective who arrived at the scene that he and Drake were no longer in a relationship. Instead, he told the

[1] Appellant was represented by counsel at his first three jury trials in 1999, 2007, and 2011. Appellant's first trial was affirmed on appeal in an unreported opinion. *See Williams v. State*, No. 765, Sept. Term, 1999 (filed March 23, 2000), *cert. denied*, 359 Md. 31 (2000). Appellant appealed the denial of his motion for post-conviction relief and we reversed his convictions and remanded for a new trial. *See Williams v. State*, 152 Md. App. 200 (2003), *aff'd*, 392 Md. 194 (2006). Appellant appealed his convictions following his second trial, and the Court of Appeals reversed and remanded for a new trial. *See Williams v. State*, 183 Md. App. 517 (2008), *rev'd*, 416 Md. 670 (2010). Appellant appealed his convictions following his third trial, and we reversed and remanded for a fourth trial. *See Williams v. State*, No.2303, Sept. Term, 2011 (filed July 26, 2013).

officers that Drake was in a relationship with someone else who had threatened her. The man whom appellant implicated in the murder, however, had an alibi for the time of the murder. The man testified that he and Drake had been friends for almost 20 years, they had never had an intimate relationship, and he did not murder Drake.

Within an hour of the shooting, appellant was taken to the police station for questioning. Appellant appeared relaxed and cooperative and told the police that he was not at the party Drake attended shortly before her murder. An attendee of the party testified, however, that appellant was at that party, although appellant and Drake did not interact. When an officer started to perform a gunshot residue test on appellant's hands, appellant said he had fired a gun earlier that day at a gun range. Appellant told a different detective, however, that he had recently fired a gun an acquaintance had handed him and wanted to sell him.

Twenty-two caliber bullets were recovered from the crime scene. Although the handgun was never recovered, the State introduced evidence that appellant had bought a .22 caliber handgun and ammunition a few days before the murder. A search warrant was executed for appellant's Corvette, and the police recovered a $3,030 receipt for a diamond ring he had given to Drake, and a $11,500 receipt for another diamond ring appellant had given to another woman he was seeing at the time.

We shall provide additional facts as necessary in our discussion of the issues presented.

DISCUSSION

I.

Appellant argues that the trial court erred when it accepted his waiver of counsel in violation of Md. Rule 4-215. Appellant argues that the trial court erred in three respects. Specifically, the trial court did not: (1) assure he had received a copy of the charging document containing notice of his right to counsel, Rule 4-215(a)(1); (2) inquire into whether appellant had appeared before a judicial officer at his initial appearance or at a bail bond hearing where he was informed of his right to counsel, Rule 4-215(a)(6); or (3) make adequate inquiry into whether his waiver of his right to counsel was voluntary nor have sufficient facts to determine that his waiver was voluntary, Rule 4-215(b). The State argues that the trial court properly complied with the Rule. We agree with the State.

A defendant in a criminal prosecution has a constitutional right to the effective assistance of counsel and the corresponding right to reject that assistance and represent himself. *See Powell v. Alabama*, 287 U.S. 45, 71 (1932)(recognizing the constitutional right to the effective assistance of counsel) and *Faretta v. California*, 422 U.S. 806, 807 (1975)(recognizing the constitutional right to defend oneself). Md. Rule 4-215, governing waiver of counsel, protects these offsetting rights and sets forth the procedure a court must follow when a defendant waives his right to counsel. *Broadwater v. State*, 401 Md. 175, 180 (2007).

Section (a) and (b) are relevant here. Section (a) provides:

> (a) **First Appearance in Court Without Counsel.** At the defendant's first appearance in court without counsel, or when the defendant appears in the District Court without counsel, demands a jury trial, and the

record does not disclose prior compliance with this section by a judge, the court shall:

(1) Make certain that the defendant has received a copy of the charging document containing notice as to the right to counsel.

(2) Inform the defendant of the right to counsel and of the importance of assistance of counsel.

(3) Advise the defendant of the nature of the charges in the charging document, and the allowable penalties, including mandatory penalties, if any.

(4) Conduct a waiver inquiry pursuant to section (b) of this Rule if the defendant indicates a desire to waive counsel.

(5) If trial is to be conducted on a subsequent date, advise the defendant that if the defendant appears for trial without counsel, the court could determine that the defendant waived counsel and proceed to trial with the defendant unrepresented by counsel.

(6) If the defendant is charged with an offense that carries a penalty of incarceration, determine whether the defendant had appeared before a judicial officer for an initial appearance pursuant to Rule 4-213 or a hearing pursuant to Rule 4-216 and, if so, that the record of such proceeding shows that the defendant was advised of the right to counsel.

(Emphasis added). Section (b) provides:

(b) Express Waiver of Counsel. If a defendant who is not represented by counsel indicates a desire to waive counsel, the court may not accept the waiver until after an examination of the defendant on the record conducted by the court, the State's Attorney, or both, the court determines and announces on the record that the defendant is knowingly and voluntarily waiving the right to counsel. If the file or docket does not reflect compliance with section (a) of this Rule, the court shall comply with that section as part of the waiver inquiry. The court shall ensure that compliance with this section is noted in the file or on the docket. At any subsequent appearance of the defendant before the court, the docket or file notation of compliance shall be prima facie proof of the defendant's express waiver of counsel. After there has been an express waiver, no postponement of a scheduled trial or

> hearing date will be granted to obtain counsel unless the court finds it is in the interest of justice to do so.

(Emphasis added).

Although "[s]trict, not substantial, compliance" is required to support a valid waiver, *Broadwater*, 401 Md. at 182 (citing *Moten v. State*, 339 Md. 407, 411-12 (1995)), the Court of Appeals has recognized that a piecemeal approach to the required advisements is acceptable where different judges in different courts at different times have properly advised the defendant as a whole. *Id.* at 201 ("the Rule contemplates that the mandatory advisements may be given by a court or courts over multiple encounters with a defendant, and that judges may supplement the advisements omitted or incorrectly given by their predecessors.")(citations omitted). "The provisions of the rule are mandatory and a trial court's departure from them constitutes reversible error." *State v. Hardy*, 415 Md. 612, 621 (2010)(quotation marks and citation omitted).

a. Rule 4-215(a)(1) – Did appellant receive a copy of the charging document containing notice of the right to counsel?

In *Muhammad v. State*, 177 Md. App. 188, 248 (2007), *cert. denied*, 403 Md. 614 (2008), we explained that section (a)(1) is unlike the other subsections of Rule 4-215(a):

> [I]t is important not to treat all of the provisions of Rule 4-215 the same but to recognize the fundamental difference, in terms of essential character, between subsection (a)(1), which concerns the happening of an event, and most of the other provisions of Rule 4-215, which involve the actual and direct imparting of specific information by the judge to the defendant.

We expounded on this difference, stating:

> [T]he satisfaction of subsection (a)(1) does not require a judge to make inquiry of, or say anything to, a defendant in a courtroom. If evidence objectively establishes that the defendant actually received a copy of the

> charging document, moreover, the fact that the judge failed to "make certain" of that fact is immaterial. The very occurrence of receiving the document speaks for itself and *ipso facto* satisfies the subsection.

Id. at 250. We held that if the record contains a copy of the charging document, and the document contains a notice of the right to counsel and bears the defendant's signature, the document demonstrates compliance with subsection (a)(1). *Id*. at 250 (citing *Fowlkes v. State*, 311 Md. 586, 609 (1988)).

We further held in *Muhammad*, that harmless error applies to a claim that a trial court failed to comply with Rule 4-215(a)(1). We stated:

> As we have already discussed fully, subsection (a)(1) deals with a requirement of an entirely different nature. Even if we were to hypothesize, *arguendo,* a subsection (a)(1) violation [in this case], we are persuaded beyond a reasonable doubt that that fact would not have made any difference whatsoever to Muhammad's knowing and intelligent decision to waive the assistance of counsel in this case and to assert his constitutional right to represent himself. Muhammad's decision was not flawed by any lack of knowledge. A compelled reversal of the convictions in this case on the basis of something that clearly did not make any difference would be senseless.

Id. at 256.

Here, the record contains a "bail review" document signed by the district court judge on February 24, 1998, stating that the court "made certain the defendant received a copy of the charging document[.]" That document additionally provides that the court "informed the defendant of [the] right to, and importance of, counsel." The record also contains an "initial appearance" document dated the same day and signed by appellant. A box was checked on the document stating that he had had read to him, and received a copy of, "the offense with which I am charged, the conditions of release, the penalty for violation of the conditions of release, the Notice of Advice of Right to Counsel, and I acknowledge receipt

of a copy hereof." These extrinsic documents are sufficient to show that Rule 4-215(a)(1) had been met.

Moreover, we are persuaded that had no extrinsic evidence existed any error was harmless. This was appellant's fourth trial. Given the many trials, post conviction proceedings, and appeals that have come out of this case's 17-year history, we are persuaded that the trial court's failure to "[m]ake certain" that appellant had received a copy of the charging document had no effect whatsoever on appellant's "knowing and intelligent decision to waive the assistance of counsel . . . and to assert his constitutional right to represent himself." *Muhammad*, 177 Md. App. at 256.

b. Rule 4-215(a)(6) – Was appellant advised of his right to counsel at his initial appearance or at a pre-trial release hearing?

The State argues that this section is inapplicable because appellant's initial appearance hearing, *see* Md. Rule 4-213, and pre-trial release hearing, *see* Md. Rule 4-216, both of which occurred prior to his first trial in February 1999, took place many years before the effective date of the recent adoption of this section to Md. Rule 4-215(a). The State points out that section (a)(6) to Rule 4–215, went into effect January 1, 2014. The State posits that the new section appears to be a "conforming amendment," an amendment that was adopted to conform the Rules to new law regarding the right to counsel at bail hearings. *See DeWolfe v. Richmond*, 434 Md. 444, 464 (2013)(holding that an indigent defendant is entitled to state-furnished counsel at an initial appearance before a District Court Commissioner pursuant to Md. Rule 4–213). According to the State, the new section does not apply retroactively.

We believe this section is analogous to section (a)(1) for it does not require the trial court "to make inquiry of, or say anything to, a defendant in a courtroom." *Muhammad*, 177 Md. App. at 250. As related above, the record contains documents relating to appellant's initial appearance hearing (Rule 4-213) showing that appellant was advised of his right to counsel. Therefore, regardless of whether new section (a)(6) applies retroactively or not, in keeping with the reasoning of *Muhammed, supra*, we are persuaded that this subsection has also been satisfied.

c. Rule 4-215(b) – Was appellant's express waiver of counsel made knowingly?

Lastly, appellant argues that "the record reflects neither an adequate showing that the waiver of counsel was indeed voluntary, nor an adequate finding and determination of that critical fact." Appellant is mistaken.

After appellant advised the court of his desire to proceed without the assistance of counsel, the trial court requested the presence of an attorney from the Office of the Public Defender and gave appellant the opportunity to speak with him. After appellant and the public defender did so, the trial court asked the public defender if there was anything that "needs to be brought to my attention?" The public defender responded: "No, Your Honor. I spoke with [appellant]. He wishes to represent himself." The trial court then asked appellant a number of questions related to voluntariness: whether he could read and write English (yes); whether he had completed high school (yes); whether he had ever been under psychiatric care (no), and whether he was under the influence of narcotics or alcohol (no). The trial court also specifically asked appellant: "[H]as anyone threatened you, forced you in any way to waive your right to counsel?" Appellant responded, "No, sir." Under the

circumstances presented, the trial court engaged in a sufficient inquiry to show and determine that appellant voluntarily waived his right to counsel.

In sum, we are persuaded that the trial court did not err in accepting appellant's waiver of his right to counsel under Md. Rule 4-215.

II.

Appellant argues that the trial court erred when it admitted into evidence a letter written by fellow inmate, S.W., while he and S.W. were incarcerated together about a month after the murder. In the letter, S.W. wrote that appellant told him that he had murdered Drake, that he had shot her with a .22 handgun in the hallway of the apartment building where she lived, and that he had killed her for the insurance money. Appellant argues that the letter contained inadmissible hearsay and was extremely prejudicial. Appellant admits that he did not object to the admission of the letter but, because of his *pro se* status, argues that we should reverse his convictions under the doctrine of plain error.

When an unobjected error is claimed, we look to Md. Rule 8-131(a). That Rule provides: "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" "[T]he Court may [however] decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." Md. Rule 8-131(a).

We have said: "The purpose of Maryland Rule 8-131 is to allow the court to correct trial errors, obviating the necessity to retry cases had a potential error been brought to the attention of the trial judge." *Sydnor v. State*, 133 Md. App. 173, 183 (2000), *aff'd*, 365 Md. 205 (2001), *cert. denied*, 534 U.S. 1090 (2002). We have added that "[t]he Rule is

also designed to prevent lawyers from 'sandbagging' the judge and, in essence, obtaining a second 'bite of the apple' after appellate review." *Id*. Nonetheless, an appellate court should recognize unobjected to error when "compelling, extraordinary, exceptional or fundamental to assure the defendant of fair trial." *Rubin v. State*, 325 Md. 552, 588 (1992) (quotation marks and citations omitted). The standard is high: "Every error that, if preserved, might have led to a reversal does not thereby become extraordinary." *Perry v. State*, 150 Md. App. 403, 436 (2002), *cert. denied*, 376 Md. 545 (2003). We have said: "[T]he notion of 'plain error' requires, as a rock-bottom minimum, a legal error by the judge, not a tactical miscalculation by defense counsel; the judge does not sit as co-counsel for the defense. Neither does the appellate court." *Nelson v. State*, 137 Md. App. 402, 424 n.5 (2001).

As to the standard by which we review appeals by *pro se* appellants, the Court of Appeals has stated that although we shall liberally construe the contents of pleadings filed by *pro se* litigants, unrepresented litigants are subject to the same rules regarding the law, particularly, reviewability and waiver, as those represented by counsel. *Simms v. State*, 409 Md. 722, 731-32 n.9 (2009)(citation omitted).

When the State sought to admit the letter at appellant's trial, appellant stated twice that he had no objection. The trial court then admitted the letter into evidence. On appeal, appellant argues that the letter was inadmissible because it contained inadmissible hearsay and was extraordinarily prejudicial because S.W. was a central testifying witness and the letter improperly bolstered his testimony. We have reviewed appellant's argument and do not find it extraordinary or compelling. Accordingly, we decline to exercise whatever

discretion is afforded to us under Rule 8-131(a). *See Morris v. State*, 153 Md. App. 480, 506-07 (2003)(that five-word holding, "We decline to do so[]" is all that need be said for the exercise of our unfettered discretion under Rule 8-131(a)), *cert. denied*, 380 Md. 618 (2004).

III.

Appellant argues that the trial court erred when it denied his motion to dismiss based on the State prosecutor's misconduct in not destroying documents that had been previously ordered destroyed. Citing *Taylor v. State*, 428 Md. 386 (2012), which in turn cites *Cuyler v. Sullivan*, 446 U.S. 335 (1980), appellant argues that the circumstances here warranted a "presumption of prejudice" that the State failed to overcome. The State responds that the trial court properly denied appellant's motion to dismiss because the new State prosecutor affirmatively and repeatedly stated that she had not seen the privileged material.

Background

During the appeal from his second trial in 2007, a search warrant was executed for appellant's jail cell based on information that he had solicited someone to murder S.W., the jailhouse informant. During execution of the warrant, documents were seized from appellant's cell, including documents appellant had made concerning his second trial and how he wished to proceed in the event of a third trial. We reversed appellant's convictions on appeal and remanded for a third trial.

Three years after the documents were seized and on the eve of appellant's third trial, appellant asked the trial court to appoint a new State prosecutor to his case. Appellant alleged that some of the documents that had been seized were protected by the attorney-

client privilege, and the State's Attorney assigned to the case had not been shielded from those documents. Although the State conceded that some of the documents were privileged and that the State prosecutor had seen some the documents, the trial court determined that the proper remedy, due in part because of the lateness of appellant's motion, was not to replace the State prosecutor but to exclude the admission of the privileged documents at trial. Appellant was ultimately convicted of first-degree murder and use of a handgun and appealed his convictions.

In his appeal, appellant argued, among other things, that the trial court erred in denying his motion to appoint a new State prosecutor. We reversed appellant's convictions on grounds not relevant here and remanded for a fourth trial. Although we did not reach appellant's argument regarding appointment of a new State prosecutor, we stated in our unreported opinion:

> [Appellant's] argument is complicated by the fact that [appellant] made his motion on the eve of a seven day trial; moreover, not only were the documents seized nearly three years old prior to trial, but the State provided these documents to [appellant] during discovery. Defense counsel's explanations for the lateness of the motion – that the defense was unaware that it had the documents . . . – rings hollow. However, because we remand this matter for retrial, we need not determine whether, on the record before us, the trial court erred in denying [appellant's] request. It suffices to say that, at this point, the fish is out of the water, so to speak, and all parties are now fully aware of both the existence of the privileged documents and the fact that certain Assistant State's Attorneys have reviewed them. On remand, in order to curtail any improper advantage the State may have obtained by viewing the privileged material, we deem it necessary to require that a new prosecutor be assigned to retry the case, a prosecutor who has not been exposed to the privileged material. *See Ly*[*kins v. State*], 288 Md. 71, 85 (1980)(when circumstances are present which adversely affect the administration of justice, it may be necessary to supplant the prosecutor).

> In so holding, we recognize that the concerns expressed by defense counsel in connection with the prosecutor's viewing of the privileged material may have, in large part, abated. This is because these concerns involved the defense's plan to attack the credibility of Detective Massey's testimony at Williams' third trial. Not only did the defense do just that at the third trial, but it also argued about this strategy during the motions hearing. Thus, the contents of Williams' notes and comments are now contained in the record of this case and are well-known by the parties. Despite this observation, in order to cure all potential prejudice stemming from the violation, we conclude that the assignment of a new prosecutor is a necessary remedy.

Williams v. State, No. 2303, Sept. Term, 2011, slip op. at 30-31 (filed July 26, 2013).

On remand, the State assigned a new State prosecutor and proceeded to trial again. On the morning of the second day of his fourth trial, after five State witnesses had already testified, appellant moved to dismiss his case because of State prosecutor misconduct. Appellant argued that the State had failed to destroy the documents that they had in their possession in violation of the trial court's order at his third trial. Appellant explained that he had become aware that the documents had not been destroyed when he had looked through the discovery package provided by the new State prosecutor and found the documents on a CD. The new State prosecutor advised the trial court that she had "not reviewed any of the [privileged] documents." When the trial court specifically asked her whether she had seen the privileged documents prior to today, she responded, "No." The trial court then denied appellant's motion. The trial court noted, wrongly, that in our unreported opinion we had ordered the documents destroyed and that the State was in violation of that mandate. Based on the State prosecutor's statements, however, the trial court found that although there was a "violation or the apparent violation of the order, []

the [c]ourt fails to see, at this juncture, any use of it in a negative impact to the [d]efendant and his case before the [c]ourt." The trial court stated:

> [I]t appears that the information primarily was generated in relationship to that which is a separate and distinct case from that which is before the [c]ourt at this time. It does not mean that the information was not gathered in that case. Any question of it[]s use in this case is a primary concern being raised by the [d]efendant.
>
> However, the [c]ourt also notes is that the reference to use of any information as to the solicitation case in Anne Arundel County, this [c]ourt granted as part of preliminary motions in this case granted [d]efendant's objection to any part of it being raised in this case.
>
> Therefore, is that the negative use or any use of the information in this case is not being allowed nor has the [d]efendant shown any harm or benefit to the State in this case, itself[.]

The trial court then denied the motion to dismiss.

In sum, the trial court in appellant's third trial denied appellant's motion for a new prosecutor but ruled that the privileged documents should be destroyed or sealed[2] and not admitted into evidence. On appeal from that conviction, we did not reach whether the trial court had erred in denying the motion, but required on remand that a new prosecutor who had not been exposed to the privileged material be assigned to the case. At his fourth trial, appellant found that the documents had not been destroyed and moved to have his case dismissed because the State had not destroyed the documents. The trial court, after finding

[2] According to appellant, the trial court ordered the documents destroyed, but he directs us to no statement or order by the trial court. The State directs us to an order dated December 20, 2011, that the "documents containing the attorney-client privileged communications shall be SEALED."

that the new State prosecutor had not seen the privileged documents, ruled that there was no prejudice and denied the motion.

Instant argument

Appellant argues that the trial court erred in denying his motion to dismiss. He argues that:

> Under certain circumstances, impairment of the relationship between lawyer and client carries a presumption of prejudice. *Taylor v. State*, 428 Md. 386 … (2012). . . . Here, the facts amply justify a presumption of prejudice. . . . The motion was denied solely on the basis of lack of prejudice. The State, however, had not been asked to, and did not, rebut a presumption of prejudice. Instead, the trial court appears to have placed the burden upon [appellant] to prove prejudice. . . . The State's double error in seizing privileged materials and failing to destroy then more justifies a *Cuyler v. Sullivan* presumption of prejudice. Accordingly, the motion to dismiss should have been granted unless the State rebutted the presumption – a burden which it never shouldered.

We disagree for several reasons.

The analysis used in *Taylor/Sullivan* is inapplicable to this case. *Taylor* concerned an ineffective assistance of counsel claim and an exception, set out in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), to the two-prong test in *Strickland v. Washington*, 466 U.S. 668 (1984). The *Taylor* Court noted that the exception provides that a defendant is entitled to a presumption of prejudice in the second prong of the *Strickland* test where a defendant shows that his counsel was "burdened by an actual conflict of interest . . . [a conflict] that actually affected the adequacy of [counsel's] representation[.]" *Taylor*, 428 Md. at 391 (quotation marks and citation omitted)(some brackets in original). The *Taylor* court concluded:

> We hold, therefore, that the *Sullivan* analysis and presumption of prejudice applies when a defendant alleges ineffective assistance of counsel based on an attorney's personal conflict of interest due to the attorney's filing suit against the client before trial for unpaid legal fees arising from the very action where the attorney is representing the client, creating an adversarial relationship during the course of representation.

Id. at 410 (footnote omitted).

Appellant does not raise an ineffective assistance of counsel claim, nor could he, for he proceeded at trial *pro se*. We fail to see how the highly specific review and analysis in ineffective assistance of counsel claims apply to appellant's argument. Rather, we believe that an abuse of discretion is the proper way by which we should review appellant's motion to dismiss, for under the unusual circumstances presented, our situation is akin to a discovery violation.

When faced with a discovery violation, the trial court "may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances." Md. Rule 4-263(n). The question of what sanction, if any, is to be imposed for a discovery violation, is committed to the discretion of the trial court, and the exercise of that discretion includes evaluating whether the violation prejudiced the defendant. *Evans v. State*, 304 Md. 487, 500 (1985)(citation omitted), *cert. denied*, 478 U.S. 1010 (1986).

The trial court here credited the new State prosecutor's statement that she had not seen the privileged documents and made a factual finding to that effect. The trial court

then denied appellant's motion to dismiss because there had been no prejudice from the alleged discovery violation. We cannot say under the circumstances that the trial court abused its discretion. Accordingly, we find no error by the trial court in denying appellant's motion to dismiss.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.