UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 657

September Term, 2016

KEITH DAVIS, JR.,

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Friedman,
Raker, Irma S.
(Senior Judge, specially assigned),

JJ.

Opinion by Raker, J.

Filed: May 11, 2017

Keith Davis, Jr., appeals his judgment of conviction in the Circuit Court for Baltimore City of possession of a firearm after having been convicted of a disqualifying crime. He raises the following two questions for our review:

> "1. Did the circuit court abuse its discretion when it denied the motion in limine to exclude the testimony of the State's latent print analyst after the State failed to produce to the defense in discovery a copy of the known and latent prints examined by state?
>
> 2. Did the State violate *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose DNA evidence that contradicted the narrative presented by the State at trial?"

We shall hold that the circuit court did not abuse its discretion when it denied the motion *in limine* to exclude testimony of the State's latent fingerprint analyst. The *Brady* violation is not preserved for our review. Accordingly, we shall affirm.

I.

By indictment filed in Circuit Court for Baltimore City, Keith Davis, Jr., appellant, was charged with crimes related to an attempted robbery and subsequent altercation with police that occurred on June 7, 2015.[1] The jury convicted appellant of possession of a

[1] The charges included: attempted robbery with a dangerous weapon, attempted robbery, attempted theft under $100, assault in the second degree or first degree on Charles Holden, assault in the second or first degree on Officer Lane Eskins, assault in the second degree or first degree on Sergeant Alfredo Santiago, use of a firearm in the commission of a crime of violence, wearing, carrying and transporting a handgun, reckless endangerment as to Mr. Holden, reckless endangerment as to Officer Lane Eskins, reckless endangerment as to Sergeant Santiago, illegal discharge of a firearm, failure to obey a reasonable and lawful order of a law enforcement officer, and possession of a firearm after having been convicted of a disqualifying crime.

firearm after having been convicted of a disqualifying crime and acquitted appellant of all remaining charges. The circuit court sentenced appellant to a term of incarceration of five years without the possibility of parole.

The following evidence was presented at trial: On June 7, 2015, the Baltimore City Police Department responded to a report that an unidentified individual robbed an unlicensed cab driver at gunpoint. Officer Lane Eskins saw two individuals in a nearby car; the victim, Mr. Holden, exited the car, walked towards him, and told him that the passenger in his car had a gun. The passenger got out of the car "with a gun in his right hand."

Officers Catherine Filippou and Eskins chased the passenger into a nearby garage. Martina Washington and Bernard Berkley were cleaning the garage when a person that they could not identify ran in with a gun. While running out of the garage, Ms. Washington observed a female officer fire her gun into the garage. At least three more officers arrived at the scene.[2] Officer Eskins saw appellant point a gun at Sergeant Alfredo Santiago, who fired his weapon at appellant, and saw appellant run to the back of the garage and hide behind a refrigerator. Officers Brown, Filippou, Lopez, and Eskins all fired their weapons into the garage. Appellant came out from behind the refrigerator and held up a gun. Officer Eskins fired several shots from his weapon; appellant fell, grabbed the gun, and fell back behind the refrigerator. Officer Eskins gave more verbal commands to appellant, who

[2] These officers include: Sergeant Alfredo Santiago, Officer Israel Lopez, and Officer Diana Browne.

responded by placing the firearm on the top of the refrigerator before crawling to center of the garage. Baltimore police later recovered a firearm from the top of the refrigerator. The firearm was unloaded and there was no ammunition inside the weapon or magazine. Appellant sustained several gunshot wounds to the face, upper left extremity, and had a bullet lodged in his neck.

In a pre-trial motion, appellant requested the State to produce as follows:

> "[p]roduce and permit the Defendant to inspect and copy all written reports, memos, notes, or statements made in connections with the Defendant's case by each expert consulted by the State, including the results of any physical or mental examination, scientific test, experiment or comparison and by an police officers the State intends to call as an expert at trial."

The State produced a Latent Print Report compiled by the Baltimore Police Department Laboratory section ("the lab"). The Report detailed that the State's lab analyst observed a suitable partial latent print on the gun recovered at the garage, described the method used to observe the fingerprint as "visual" and "powder," and stated that "no computer search" was conducted. The lab analyst compared the prints to "three sets of fingerprints & one set of palm prints [that] were obtained" from appellant. The report did not contain any images, drawings, or photographs of the latent or known prints and summarized the analyst's conclusions that the "[p]artial latent prints from lift 1-A, 2-A, and 4-A have been identified as impression of the right palm and middle finger of [appellant] . . . ."

Appellant filed in the circuit court two motions to compel discovery. In the first motion, appellant stated as follows:

> "The State, through discovery process, has disclosed various lab reports and witness statements which challenge the veracity of the State's key witnesses, directly contradicts the State's Statement of Charges, and severely questions the weight of the State's case against [appellant]. The State, however, has failed to provide any of the above noted reports or statements as of the date of this Motion.
>
> ***
>
> Defendant seeks, and is entitled to, to the disclosure of all *witness statements*, including that of the involved shooting officers, regarding the facts and circumstances giving rise to the charges brought against [appellant]. This includes all *statements* to Internal Affairs, Use of Force Reports, Fire Arms Discharge Reports, Worker's Compensation Reports and any *reports or statements* provided to the Baltimore Police Department or any agency regarding the Defendant's charges."

(emphasis added).

In his second motion to compel, appellant again requested all witness statements, requesting, in pertinent part, as follows:

> "Specifically, defendant demanded the State comply with Md. Rule 4-263 and produce '*all witness statements* regarding the incident(s) giving rise to the various criminal charges against Mr. Davis.' The discovery incorporates by reference all averments made in his October 20, 2015 Motion to Compel Discovery Disclosures."

(emphasis added). Notably, he did not include any request for fingerprint cards.

One day before trial, defense counsel moved the circuit court to exclude the testimony of Elizabeth Patti, the State's latent print examiner. The defense argued that the State was required to do more than disclose the analyst's report and in addition, was required to deliver to the defense copies of the fingerprint cards that were the subject of

Patti's forensic comparison. The defense's theory was that the fingerprint cards were the "foundation of [Patti's] conclusion," and therefore, under Rules 4-236 and 5-702, the State was required to deliver the cards to the defense. The State responded that in addition to sending the defense Patti's report, the State invited defense counsel to "inspect [and] copy all written reports or statements made in connection with the case by the expert, including the results of any physical or mental examination, scientific tests, experiment or comparison."[3] The prosecutor told the court that defense counsel never approached the State for anything further, including fingerprint cards.

At the motions hearing, the circuit court compared appellant's discovery request to the State's production, and examined whether appellant had made a good faith effort to obtain a copy of the known and latent prints. Appellant's counsel detailed the efforts she took to obtain a copy of the known and latent prints from the State as follows:

> "THE COURT: All right, so, you're saying that you made phone calls, you were unable to connect with the Detective and you were unable to connect with [prosecutor], so you were unable to get the information for your expert. Is that what you're saying?
>
> [DEFENSE COUNSEL]: Your Honor, that's correct. And just to be very clear.
>
> ***
>
> [DEFENSE COUNSEL]: If in fact that is the procedure, that's what was represented to my office, that I have to first get a

[3] The State's initial disclosure response invited the defense to inspect, copy and photograph evidence to be used at trial, as well as "items obtained from or belonging to" appellant, regardless of the State's intent to use them at trial. Presumably, the State includes appellant's fingerprints in this response.

> detective on this case to call me back. And after the detective calls me back, then that detective will contact [prosecutor] and then they will confirm with [prosecutor]'s schedule, if you will. At no point in time am I allowed to simply come down and photograph and/or take a copy of the thing that I'm looking for.
>
> ***
>
> And so Your Honor yes, my representation to this Court is not only did I not get the stuff, but I'm not able to turn, and I wasn't able to turn it over to our own person to review, not only the procedure but the Conclusion itself. And again, we believe that is not just by error. It's not for lack of effort, but we believe if it's by design, it's by design but essentially the end result is the same. The [expert] does not have the documents or the reports that we needed for the experts to come to their conclusion, Your Honor."

The prosecutor denied defense counsel's representation that she had contacted her to inspect the known and latent prints. The circuit court asked appellant's counsel if she had any documents to prove that she had difficulty contacting the State; she responded that she did not have any evidence with her in court besides a post-it note with the Baltimore City Crime lab's number, but she could pull her phone records as proof.

The circuit court denied appellant's motion to exclude Patti's testimony, explaining as follows:

> "You've acknowledged that you received the lab—what's known as Latent Print Unit Report for this case. . . . I've looked at [the State's initial discovery disclosure] indicating that you can go down and get the information. You would contact—the State also provides the opportunity to "inspect and copy all written reports, statements made in connection."
>
> Without a good faith showing of that, the Motion is denied."

Appellant's counsel asked the circuit court to revisit the motion if she produced her phone records; the court said "no."[4]

In addition to the fingerprint argument, appellant's counsel informed the circuit court, for the first time, that she had not received DNA evidence conducted by the State. The State told the circuit court that it would not offer any DNA evidence at trial:

> "[DEFENSE COUNSEL]: And DNA is mentioned somewhere. And so of course I have to add DNA, Your Honor.
>
> THE COURT: Okay, State?
>
> THE STATE: Your Honor, the State is not proposing to submit any DNA evidence in this case. If it were, it certainly would have provided [defense counsel] with a copy of that report along with the DNA expert or trace analysis person for that."

At trial, several witnesses referred to blood, including testimony that the gun found at the scene had suspected blood on the grip. During discovery in a different case,[5] appellant received a copy of the State's Supplemental Forensic Biology Report, which summarized tests that were "analyzed and reported" on January 13 and 14, 2016, about a month before the trial at issue in this appeal. The summary report stated that the results were largely inconclusive, with the blood identified to an "unknown male #1."

[4] Appellant raised the same issue in a motion for a new trial. At that hearing, defense counsel did not produce any phone records but argued that the Maryland Rules require the State to deliver to the defense a copy of the fingerprint cards and that inviting inspection is insufficient.

[5] The record does not indicate the source of this report.

During trial, the State's eyewitnesses varied in their description of the firearm found at the garage.[6] Elizabeth Patti of the Baltimore State Police Department Latent Print Unit testified that she identified a "partially visible print" in a "suspected red substance" on the .22 firearm recovered from the garage. She made "four lifts" from the gun, and after comparing these prints to the known prints of appellant, concluded that three of the prints found on the trailside of the .22 firearm belonged to appellant.

The jury convicted appellant of possession of a firearm after having been convicted of a disqualifying crime, and acquitted him of all remaining charges.[7] The court sentenced appellant to a term of incarceration of five years, without the possibility of parole.

This timely appeal followed.

II.

During the pre-trial motions hearing, appellant sought to exclude Patti's print analysis testimony, arguing that the State did not disclose or provide the opportunity to inspect the known and latent prints examined by the State's analyst.

[6] Officer Holden testified on cross-examination that the firearm was "all silver, all shiny" and that it did not have a "multi-color handle." Ms. Washington testified that she saw a person run into the garage with a "black" gun. Officer Browne described the handle as having "like a greenish…I guess it was like green and silver." Sergeant Santiago described the firearm as "a dark colored gun." Finally, Officer Filippou testified that she only "saw the handgun from the beginning to the end in his hand. I didn't see the colors or anything like that 'til we reached the garage when it was recovered."

[7] The State dismissed voluntarily the four counts of reckless endangerment prior to closing arguments.

Before this Court, appellant argues that the State was required to provide him with a copy of the known and latent prints that the lab analyst used to conclude that the fingerprints on the trailside of the .22 firearm belonged to appellant. He asserts that he made efforts to obtain these documents, including the filing of an omnibus motion requesting the fingerprints from the State. And even if appellant's discovery motion did not, on its face, require the production of known and latent prints, he argues that Rule 4-263 required the State to deliver the known and latent prints without a formal request. Appellant maintains that fingerprint cards are not impracticable to deliver, and therefore, the State was obligated to provide a copy to appellant. Furthermore, even if the known and latent prints were impracticable to deliver, the circuit court erred in denying him from demonstrating that his counsel exercised good faith in attempting to view the evidence.[8]

Appellant argues that he was prejudiced because the State's failure to provide fingerprint cards prevented his expert witness from conducting his own analysis of the prints. He maintains that the circuit court, in its prejudice analysis, focused mistakenly on the measures his counsel took to obtain a copy of the known and latent prints, whereas the court should have focused on the low burden placed on the State to provide a copy of the material when compared to the probative value of appellant's ability to challenge the accuracy of any test. Appellant asserts that this is especially crucial given the conflicting testimony from police officers describing the gun found at the scene.

[8] Appellant's counsel told the court that she had telephoned the detective and the State's Attorney to arrange to visit the crime lab to view the fingerprints.

The Brady violation appellant relies upon is that the State failed to disclose the results of "inconclusive" DNA testing, inconclusive because the lab identified the blood found on the trailside of the gun recovered at the garage to an "unknown male #1." He says that he objected to not receiving the State's DNA evidence at the motion in limine hearing. His prejudice is that if the blood on the Trailside .22 firearm recovered from the scene was not his, despite the fact he was shot several times while the firearm was allegedly in his hand, it is improbable that his palm print would be found in another person's blood on the weapon.

The State argues that it satisfied the discovery requirements under the Maryland Rules and the requests by appellant. Neither the rules nor appellant's motions required the State to deliver copies of the fingerprint cards to the defense and that all the State was required to do was to provide an opportunity to inspect the originals. The State maintains that the Rule requires disclosure of *the substance of the expert's findings and opinions, and a summary of the grounds for each opinion.* Fingerprint cards, in the State's view, are not the substance of a print examiner's findings; instead, the substance of the expert's findings and opinions is the conclusions of the expert and not the raw data. Further, the State argues that the nature of fingerprint cards makes them impracticable to deliver physically because photocopies degrade an image's quality.

The State supports the trial court's finding that the defense did not make a good faith effort to obtain the fingerprint cards and argues that the trial court's finding was not clearly erroneous. The State represents that it sent defense counsel a copy of its expert

report and the initial disclosure packet invited the defense "*to inspect [and] copy all written reports or statements made in connection with the case by the expert, including the results of any physical or mental examination, scientific test, experiment or comparison.*" According to the State, the two motions to compel did not make any additional demand to deliver copies of the fingerprint cards. Further, the State asserts that appellant's counsel never made efforts to view the fingerprints.[9]

Concerning the alleged *Brady* violation for failing to disclose DNA evidence, the State argues that this issue is not preserved for our review because appellant never raised the issue below and it should not be reviewed for plain error. The State points out that defense counsel referenced briefly a desire for any DNA evidence in the State's possession, and when the prosecutor explained that she "was not proposing to submit any DNA evidence," defense counsel accepted this explanation and never mentioned DNA again at trial or during sentencing. Hence, according to the State, this issue was forfeited.

III.

Whether a discovery violation has occurred is a mixed question of law of fact. *See Cole v. Stat*e, 378 Md. 42, 56 (2003). This Court defers to the trial court's findings of fact, unless they are clearly erroneous, and appraises compliance with Maryland Rules de novo. *Id*. If a discovery violation has occurred, we review the trial court's remedy for an abuse

[9] According to the State, appellant had the prosecutor's personal cell phone number and never contacted the prosecutor by phone, voicemail, email, or even text message to arrange a time to inspect the fingerprint cards, or to say that she was having a problem doing so.

of discretion. *Logan v. LSP Mktg. Corp.*, 196 Md. App. 684, 699 (2010). This view is narrow as "appellate courts are reluctant to second-guess the decision of a trial judge to impose sanctions for a failure of discovery." *Warehime v. Dell*, 124 Md.App. 31, 44 (1998).

To interpret rules of procedure, we use the same principles as those we apply to interpreting statutes. *State ex rel. Lennon v. Strazzella*, 331 Md. 270, 274 (1993). We "look first to the words of the rule. . .[w]hen the words are clear and unambiguous, ordinarily we need not go any further." *Id.* We are to give effect to the entire rule, so that "no word, phrase, clause or sentence is rendered surplusage or meaningless." *State v. Williams*, 392 Md. 194, 207 (2006) (*quoting Montgomery County v. Buckman*, 333 Md. 516, 524 (1994)).

Md. Rule 4-263 governs discovery in the circuit court. Rule 4-263(b)(4) defines "provide" as follows:

> "(4) *Provide*. Unless otherwise agreed by the parties or required by Rule or order of court, "provide" information or material means (A) to send or deliver by mail, e-mail, facsimile transmission, or hand-delivery, or (B) to make the information or material available at a specified location for purposes of inspection if sending or delivering it would be impracticable because of the nature of the information or material."

Section(d) of 4-263 addresses disclosure by the State's Attorney, providing as follows:

> "(d) **Disclosure by the State's Attorney**. Without the necessity of a request, the State's Attorney shall *provide* to the defense:

> (8) *Reports or Statements of Experts*. As to each expert consulted by the State's Attorney in connection with the action:
>
> > (A) the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion;
> >
> > (B) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and
> >
> > (C) the substance of any oral report and conclusion by the expert;"

Appellant argues that the Latent Fingerprint Report disclosed by the State contained the State analyst's conclusions and not the underlying *substance*, in this case the latent or known fingerprints, of her expert opinion. The State counters that *substance* is "most naturally read to mean the content of the expert's conclusions" and that raw data (the fingerprints) analyzed by an expert is distinct from the substance of an expert's conclusion.

The State met its discovery obligation by providing to appellant all of the material in its possession with regard to fingerprint evidence. The State made available to appellant and his counsel an opportunity to view the fingerprint cards and latent prints, and were provided the print examiner's expert report. Nothing further was required, either under the Rules or based upon appellant's discovery requests. The original fingerprint cards and latent lifted fingerprints are not the *substance* of an expert's opinion, and as such, the State

is not required to deliver physical copies of the fingerprints to the defense under Rule 4-263(d)(8).[10]

Every motion to compel discovery must be accompanied by a certificate describing good faith attempts to resolve the discovery dispute. Rule 4-263(i)(4) states as follows:

> "*Certificate.* The court need not consider any motion to compel discovery unless the moving party has filed a certificate describing good faith attempts to discuss with the opposing party the resolution of the dispute and certifying that they are unable to reach agreement on the disputed issues. The certificate shall include the date, time, and circumstances of each discussion or attempted discussion."

Appellant argues that he requested the fingerprints in his pretrial omnibus motion. On its face, the motion required the State to "*[p]roduce* and permit the Defendant to *inspect* and copy all written reports, memos, notes, or statements." The State complied fully. Fingerprint cards are not written reports, and thus the motion did not obligate the State to deliver to the defense fingerprint cards. When the circuit court inquired what actions the defense undertook to avail itself of the State's invitation to inspect the fingerprint cards, appellant's counsel claimed she filed two motions to compel. On their face, neither motion raised the issue of the fingerprint cards.[11] Appellant's counsel claimed she contacted the

[10] Because we find that fingerprint cards are not the *substance* of an expert's conclusion, we need not address appellant's argument that extending the opportunity to inspect the fingerprints is insufficient because, in the absence of a special agreement between the parties, Rule 4-263(b)(4) expresses a preference for physical delivery of discovery material, whenever practicable.

[11] The first motion to compel sought the disclosure of "all witness statements." The second motion to compel included a list of documents appellant sought from the State, but it did not include a request for fingerprints.

State's Attorney and detective, but when the circuit court asked appellant's counsel if she had any documents to prove that she had difficulty contacting the State, she could only produce a post-it-note that recited the phone number of the crime lab and the firearm unit. As counsel moving for the preclusion of testimony, appellant's counsel had the burden to show the good-faith efforts she made to obtain copies of the known and latent fingerprints. The trial judge was not clearly erroneous in finding that appellant did not make a good faith effort to view the fingerprint cards or the latent lifted prints. The trial judge was in the best position to assess the facts and to make credibility findings. Nor did the judge abuse his discretion in declining to revisit the issue as requested by defense counsel.

IV.

We next address appellant's argument that the State committed a *Brady* violation by failing to disclose the results of DNA testing. "[T]he 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." *Brady*, 373 U.S. at 87. To establish a *Brady* claim, a defendant must show:

> "(1) that the prosecutor suppressed or withheld evidence that is (2) favorable to the defense-either because it is exculpatory, provides a basis for mitigation of sentence, or because it provides grounds for impeaching a witness-and (3) that the suppressed evidence is material."

Conyers v. State, 367 Md. 571, 597 (2002).

Under Md. Rule 8-131(a), we will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court . . . ." We hold that, after reviewing the record and the colloquy between the judge, the State, and defense counsel, this claim is not preserved for our review. Neither appellant's omnibus pretrial motion nor appellant's motions to compel directly referenced DNA evidence. Appellant's only reference to DNA evidence was at the motion in limine hearing. Although appellant expressed a desire for DNA, when the State advised that no DNA evidence would be introduced at trial, appellant made no objection and appeared satisfied. Thus, this issue is not preserved for our review.

Assuming arguendo the *Brady* issue was preserved for our review, "inconclusive" DNA opinions are not *Brady* material. *See Griffin v. Baltimore Police Dep't,* 804 F.3d 692, 695 (4th Cir. 2015); *Herring v. McEwen*, No. SA CV 11-781 DMG MRW, 2012 WL 960674, at *5 (C.D. Cal. Jan. 10, 2012), *report and recommendation adopted*, No. SA CV 11-781 DMG MRW, 2012 WL 960096 (C.D. Cal. Mar. 20, 2012); *Rhodes v. Sec'y, Dep't of Corr.*, No. 8:09-cv-1350-T-17AEP, 2010 U.S. Dist. LEXIS 108605 at *22-23 (M.D. Fla. Sep. 30, 2010); *Scott v. Fink*, No. 1:11-CV-752, 2011 WL 3664657, at *2 (W.D. Mich. Aug. 19, 2011); *Davila v. Commonwealth*, No. 3:11-1092, 2014 U.S. Dist. LEXIS 41879 at *21-22 (M.D. Pa. Mar. 28, 2014); *Rhodes v. State*, 986 So. 2d 501, 508 (Fla. 2008); *Sadler v. State*, 846 P.2d 377, 383 (Okla. Crim. App. 1993).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.