Circuit Court for Baltimore City
Case No. 112062017
Case No. 112062018
Case No. 112062019

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2739

September Term, 2015

ANTOMAR JONES

v.

STATE OF MARYLAND

Woodward, C.J.
Leahy,
Friedman,

JJ.

Opinion by Leahy, J.

Filed: December 8, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

A jury in the Circuit Court for Baltimore City convicted Antomar Jones ("Appellant") of two counts of robbery with a dangerous weapon; one count of felony murder; one count of attempted second-degree murder; two counts of use of a handgun in the commission of a felony or crime of violence; and one count of wearing, carrying, and knowingly transporting a handgun in a vehicle. Appellant was sentenced to prison for life plus twenty years. In this appeal, he presents the following two questions:

1. Did the trial court fail to properly exercise discretion or, in the alternative, abuse its discretion in refusing to permit three defense witnesses to testify at trial?[1]

2. "Is the evidence legally insufficient to sustain Appellant's convictions?"

We hold that the trial court was within its discretion to exclude the defense witnesses because the defense failed to provide sufficient notice as required by Maryland Rule 4-263(e)(1). We also hold that there was legally-sufficient evidence to convict Appellant on each charge.

BACKGROUND

In 2013, Appellant was arrested and tried for the murder of Corey Alexander and the attempted murder of Anthony Taylor. *Jones v. State,* 217 Md. App. 676 (2014). Appellant was convicted, and he appealed. *Id.* This Court reversed Appellant's convictions, and a new trial was held. *Id.* The following facts were adduced from testimony at Appellant's second trial, which took place from October 21-23, 2015.

[1] In his "Questions Presented," Appellant asks whether the trial court erred in "refusing to permit *two* defense witnesses to testify at trial." Appellant argues, however, that the trial court erred in excluding the testimony of three witnesses. We have therefore rephrased Appellant's question to more accurately reflect his argument.

A. The Incident

Around 9:00 p.m. on February 1, 2012, Corey Alexander told his roommate, Anthony Taylor, that he was "getting ready to pick up [Appellant]" to take him to Appellant's cousin's house. Mr. Taylor decided to tag along, so he drove his 2001 Buick Sentry with Mr. Alexander in the front passenger seat. When they arrived at Catalpha Avenue, Appellant he got into the back seat, and then Mr. Taylor then began driving to where Appellant's cousin lived.

Suddenly, Appellant told Mr. Taylor to "stop at the corner," which he did. Mr. Taylor turned to face Appellant and saw that he was brandishing a gun. Appellant told the men, "you know what time it is" and ordered them to give him everything they had in their pockets. Mr. Taylor had around $16 and two cell phones. He threw the money and one of the cell phones onto the backseat but kept the other. Mr. Alexander threw his wallet, a cell phone, and around $30 onto the backseat.

Appellant then instructed Mr. Taylor to drive the car back to the house he shared with Mr. Alexander. When they got there, they saw a woman on a porch across the street, so Appellant told Mr. Taylor to "pull around back." As Mr. Taylor did, he pleaded with Appellant, "[Y]ou don't have to do this. . . . [I]f it's money that you need, . . . that's not the problem here. . . . Like we supposed to be friends." According to Mr. Taylor, Appellant rebuffed his pleas, saying he "wasn't trying to hear any of that[,]" and to "shut the –F– up. Don't look at me, just drive."

When they pulled up behind the house, Appellant said, "[L]et's go in the house."[2] Mr. Taylor informed Appellant that the neighbor had a security camera system installed. Appellant cursed and told Mr. Taylor to "pull off," directing Mr. Taylor to drive the car to the end of an alley and park. Once they reached the alley, Mr. Taylor "slammed the car in park" and "reached for the door handle to jump out." But as he did, Appellant shot him in the right side of the face. Despite his head wound, Mr. Taylor managed to escape the car and run toward Good Samaritan Hospital. At trial he would testify that he may have heard another gunshot as he fled but cannot be sure because of all the adrenaline as he ran for his life.

At the hospital, Mr. Taylor informed the security guard at the front desk that he had been shot and sat down on the floor to await a gurney. After he was given a hospital bed, a uniformed police officer asked Mr. Taylor who shot him, to which he replied, "I don't know[.]" He would later testify that, at the time, helping the police determine who shot him "wasn't important to [him]. . . . Finding out where [Mr. Alexander] was at" was. So when the police would ask him who shot him, he would respond by asking where his friend was. He explained that he felt no urgency to tell the police who shot him because he "knew who sho[t] [him] because [he] knew where he lived at. [He] knew where [he] picked him up" from. He also testified that the night of the incident, when he was interviewed by the police, he was in a "state of shock."

[2] Presumably, Appellant intended to burglarize Mr. Taylor and Mr. Alexander's home. At trial, Mr. Taylor testified that Appellant had been in his home before, and that the house contained, among other things, "[l]aptops, PlayStations, tv(s)" and a desktop computer.

Mr. Alexander's body was eventually discovered when police responded to a call about a suspicious car in an alley with its door open. Paramedics transported his body to the hospital, where he was pronounced dead from a gunshot wound to the back of the head.

B. The Investigation

On February 1, 2012, Detective Shawn Reichenburg of the Baltimore Police Department's Homicide Unit responded to a call at the 5700 block of Nasco Place to investigate the homicide of Mr. Alexander and the shooting of Mr. Taylor. When he arrived at the scene, officers had cordoned off the area with police tape. Det. Reichenburg saw a vehicle with the "driver's side door . . . open and ajar." He observed a "large amount of blood on the sidewalk, in the alley, and in the vehicle and then a blood trail leading away from the vehicle going southbound on Nasco Place toward Good Samaritan Hospital." Several other vehicles in the vicinity had blood on them, forming a trail that "appeared as [if] it went towards the hospital." After concluding his initial investigation of the crime scene, Det. Reichenburg arranged for the vehicle to be transported to the crime lab bay for further analysis. A later search of the vehicle produced a bullet casing, two cell phones, and five one-dollar bills, all of which were located in the rear seating area.

The following day, Det. Reichenburg went to speak with Mr. Taylor, who by then was at University of Maryland Shock Trauma. Mr. Taylor gave a description of the man who had shot him and a first name: Antomar. Relying on this information, Det. Reichenburg returned to his office and ran the name Antomar through police databases. The search yielded an individual with the name Antomar who matched the physical description Mr. Taylor provided. Det. Reichenburg prepared a photo array and returned to

Shock Trauma to show the array to Mr. Taylor. Mr. Taylor identified Appellant as the shooter "almost immediately. Within ten seconds." After circling Appellant's picture, Mr. Taylor wrote in the comments section: "Antomar shot me and Corey. I was shot in the face. He wanted to kill me."

Not long after the hospital identification, Det. Reichenburg obtained a warrant for Appellant's arrest, which police executed two days after the shooting, around 3:30 a.m. on February 3. The police found Appellant and transported him to police headquarters. They searched Appellant's home, but found no evidence that connected him with the murder investigation. Appellant agreed to make a recorded statement after being read his Miranda rights. Appellant told Det. Reichenburg that he knew Mr. Taylor and Mr. Alexander and was in the backseat of Mr. Taylor's Buick on the night of the murder to purchase marijuana. But according to Appellant, he exited the vehicle after the purchase and then Mr. Taylor and Mr. Alexander drove away.

C. Trial

Appellant was indicted for the murder of Mr. Alexander, the attempted murder of Mr. Taylor, and a number of other crimes. Following Appellant's first trial in the Circuit Court for Baltimore City, a jury convicted him of felony murder, illegal use of a handgun, armed robbery, and attempted murder in the second degree. On appeal, this Court reversed and remanded the case for a new trial because the prosecutor improperly argued facts not in evidence during closing arguments. *Jones v. State*, 217 Md. App. 676, 693, 709 (2014). Relevant to our discussion below, we also held that the State presented evidence sufficient to support Appellant's conviction for robbery with a deadly weapon. *Id.* at 699-703.

On October 19, 2015, two days before the second trial, defense counsel informed the State that she intended to call three witnesses: Devon Jones, who would provide alibi testimony, and Nicholas Mays and Tyrell Watkins, who would "provide the same testimony" that would "sort of act[as] parentheticals around Mr. Jones." At trial, the State moved to exclude the testimony of all three witnesses, noting that defense counsel's disclosure was untimely under the Maryland Rule 4-236.

Defense counsel conceded that notice was not timely given but argued that the "spirit of the rule" was satisfied because Appellant's previous counsel had disclosed Devon Jones as an alibi witness prior to the first trial in 2013. She argued that the prior disclosure should suffice because the State had known of Devon Jones' potential as an alibi witness for several years.

The State admitted that Appellant's previous attorney had disclosed Devon Jones as an alibi witness prior to the first trial but added that this disclosure was also untimely, as it came "on the last trial date in May of 2013." The State noted further that the prosecutor only spoke with Devon Jones for "five minutes" during the first trial and that, in the end, Devon Jones did not testify.

The court then addressed defense counsel directly:

> THE COURT: You do understand [that the State] would have prepared her case however she chooses to present it at this time without any knowledge from the defense that Mr. Jones would be presented as an alibi witness. You do understand that.
>
> [THE DEFENSE]: That, that was not, that was not my understanding because this whole conversation had happened previously.

THE COURT: What conversation?

[THR DEFENSE]: When it was before [the previous trial judge].

THE COURT: No, no, no, no, no. Forget that. What I'm saying is, that case was tried. . . . and then she's preparing now for the retrial. There's been no notice to her from the defense that Devon Jones is going to be an alibi witness. So she wouldn't have prepared her case with that in mind. That's what I'm saying to you. This case. This trial.

The court ultimately granted the State's motion to exclude Devon Jones' testimony. It then asked defense counsel whether Mr. Mays and Mr. Watkins were alibi witnesses or impeachment witnesses. Defense counsel responded, "I believe all of them are going to – they're all rebuttal witnesses for what the State's case is." The court reiterated its question: "**[A]re they impeachment witnesses**; Mr. Mays and Mr. Watkins? **Is that a yes?**" "**Yes, Your Honor[,]**" defense counsel answered. (Emphasis added).

Given the defense's response, the court engaged in the following colloquy with the State:

THE COURT: Okay. Well then, [madam prosecutor], you know according to the rules, they do not have to give you that information.

[THE STATE]: Your Honor, when [defense counsel] indicated why these two were called as witnesses, they were supposed, it's my understanding that Mr. Mays was going to say that he dropped off Devon Jones at [Appellant's] house and [Appellant] was there. So either he's going to say –

THE COURT: He dropped off Devon Jones at . . . [Appellant's] house and [Appellant] was there.

[THE STATE]: Yeah.

THE COURT: At what time?

[THE STATE]: They didn't indicate the time.

THE COURT: All right.

[THE STATE]: So either he's an alibi witness or it's going to be he's testifying about it after the event.

THE COURT: Okay…this is going to be my ruling and you can guide yourself accordingly. If they are impeachment witnesses, then I will allow them to testify. If they are going to start talking about anything that Devon Jones did because I don't see how even that would come into the case because that's going to be hearsay, so you guide yourself accordingly. But if you're saying that you think they're impeachment witnesses to rebut the State's case, then I will allow them to testify.

The next day, prior to trial, the defense raised an objection to the court's prior ruling:

[THE DEFENSE]: Your Honor, pursuant to the Court's ruling which uh, we did object to regarding the defense witnesses, we would have no other witnesses other than –

THE COURT: Well, I only denied it as to, I mean I only granted it as to Mr. Jones.

[THE DEFENSE]: Correct, Your Honor. As to the other two witnesses, I have advised [the State] that they supported Mr. Jones'…version and also supported the original version that [Appellant] had given in his taped statement.

THE COURT: Okay. I got it.

[THE DEFENSE]: They are essentially alibi witnesses. The only reason we were calling them was when we could not originally find Mr. Devon Jones and . . . they acted as book ends around Mr. Devon Jones' testimony. For the record, we are objecting to the Court's decision regarding Mr.

Devon Jones and pursuant to that other than [Appellant], we would have no witnesses.

THE COURT: Okay. Very good, thank you.

The State then presented its case, which included seven witnesses. Among those witnesses was Mr. Taylor, who testified to his version of what occurred on the night of the shooting as well as his subsequent identification of Appellant as the shooter. He also testified that he was familiar with Appellant prior to the shooting, having met him at least five times through his work in a mentoring program in which Mr. Alexander mentored Appellant. Tatum Joseph Singleton, a psychiatric rehabilitation counselor with that mentoring program, corroborated Mr. Taylor's testimony that he and Mr. Alexander worked as mentors and Mr. Alexander was Appellant's mentor. Det. Reichenburg also testified about his investigation of the shooting and that Appellant admitted to him that he was in the backseat of Mr. Taylor's Buick that night. The defense rested its case without calling any witnesses. Following deliberations, the jury found Appellant guilty of two counts of robbery with a dangerous weapon; the felony murder of Mr. Alexander; the attempted second-degree murder of Mr. Taylor; two counts of the use of a handgun in the commission of a felony or crime of violence; and wearing, carrying, and knowingly transporting a handgun in a vehicle. The jury found Appellant not guilty of first-degree attempted murder of Mr. Taylor.

D. Motion for New Trial and Sentencing

At Appellant's sentencing hearing, he filed a motion for a new trial, arguing that the trial court erred in excluding Devon Jones' testimony.[3] The court denied the motion, finding that defense counsel had ample time and opportunity to notify the State regarding Devon Jones as an alibi witness, particularly given that defense counsel had named and subpoenaed several other witnesses in the months leading up to trial. The court also noted that Appellant's trial had been postponed several times and that Appellant had expressed concerns about any further postponements. Finally, the court found the discovery violation to be "substantial" and addressed defense counsel directly:

> Um, we're at trial. You . . . wanted to put on three witnesses. Two witnesses I told you you could put on. You at some point decided you're going to put those on. So that's your call, but then I said, you could not put on Devon Jones for the reasons that I find that you . . . had plenty of time to file the notice requirement in the rules and you didn't do it. I mean [] your excuse was that two years ago, his name was mentioned and therefore the State is supposed to know. . . . In this case, we've got two different lawyers, two different firms and you want the State just to know that because [Appellant's prior defense counsel] did something you were going to do something without giving her notice. I didn't find that compelling at all. Clearly, the State was prejudiced by your late notice of this witness testifying. I don't think it would have been cured by a postponement because the postponement would have prejudiced [Appellant] even further.
>
> * * *
>
> [A]ll it took was to file the correct subpoena and to file the notice of an alibi. I mean even if you had filed the alibi, I mean you clearly had the address. . . . What the State needs is a name and an address. . . . [Y]ou had plenty of time to give notice in this case. You knew the witness' address. You knew

[3] At the hearing on the motion, defense counsel limited his argument solely to the trial court's exclusion of Devon Jones' testimony and did not make any argument regarding the testimony of the other two witnesses.

> his name. . . . You had plenty of time to file it. The Court believes that it ruled correctly and therefore, your motion for new trial is denied.

The court sentenced Appellant to life in prison for the felony murder conviction, a consecutive twenty-year term for armed robbery, and a number of concurrent prison terms. This timely appeal followed. Additional facts will be provided in the discussion as needed.

DISCUSSION

I.

Exclusion of Witnesses

Appellant first argues that the trial court erred in failing to permit three witnesses—Mr. Devon Jones, Mr. Mays, and Mr. Watkins—to testify at trial. Appellant maintains that the trial court could not have exercised its discretion properly because it "did not engage in analysis of the proper factors to make an appropriate ruling."

The State responds that by receiving a second trial, Appellant was not relieved of his duty to comply with Maryland Rule 4-236, which requires a defendant to provide notice of alibi witnesses. Because Appellant failed to provide notice, the trial court's ruling was justified. It is of no consequence that the court did not examine factors on the record because trial judges are presumed to know the law and do not need to "spell out" their rulings, the State contends. Additionally, with respect to Mr. Mays and Mr. Watkins, the State suggests that Appellant did not properly preserve this issue for our review because defense counsel did not proffer those witnesses as alibi witnesses at trial; instead, defense counsel asserted to the trial court that she planned to call those two only as impeachment witnesses.

We review whether a discovery violation occurred *de novo*. *State v. Graves*, 447 Md. 230, 240 (2016) (citation omitted). Then, as the Court of Appeals explained in *Cole v. State*, 378 Md. 42 (2003), the remedy for a discovery violation is, "in the first instance, within the sound discretion of the trial judge. The exercise of that discretion includes evaluating whether a discovery violation has caused prejudice. Generally, unless we find that the lower court abused its discretion, we will not reverse." *Id.* at 55-56 (citations and quotation marks omitted). An abuse of discretion occurs when the trial court acts in "an arbitrary or capricious manner" or goes "beyond the letter or reason of the law." *Johnson v. State*, 228 Md. App. 391, 433 (2016) (citations and quotations marks omitted).

A. Failure to Disclose Alibi Witnesses

Under Maryland Rule 4-263(e)(1), a defendant must provide the State with the name and address of each non-impeachment witness who the defendant intends to call at trial. *Id.* If the State has established the time, place, and date of the charged offense, a defendant must also provide the State with the name and address of any alibi witnesses. Md. Rule 4-263(e)(4). "Unless the court orders otherwise: . . . the defense shall make disclosure pursuant to section (e) of this Rule no later than 30 days before the first scheduled trial date." Md. Rule 4-263(h). "If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may . . . prohibit the party from introducing in evidence the matter not disclosed[.]" Md. Rule 4-263(n).

A defendant's failure to comply with Rule 4-263 does not, however, require automatic disqualification of the witness' testimony. *Id.* "In exercising its discretion

regarding sanctions for discovery violations, a trial court should consider: (1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances." *Thomas v. State,* 397 Md. 557, 570-71 (2007) (citing *Taliaferro v. State,* 295 Md. 376, 390 (1983)). The Court of Appeals in *Taliaferro* also listed as relevant criteria "whether the disclosure violation was technical or substantial, the timing of the ultimate disclosure," and "the overall desirability of a continuance." 295 Md. at 390-91.

Preliminarily, we note that neither *Taliaferro* nor its progeny require a trial court to evaluate, on the record, a list of rigid, exhaustive factors, but simply identify "relevant factors which recur in [alibi disclosure] opinions." *Taliaferro*, 295 Md. at 391; *see also Silver v. State,* 420 Md. 415, 435 (2011) ("Our precedents do not require a trial court to engage in a prolonged and formal analysis of prejudice whenever a discovery error is alleged. Instead, a court is required to hear the arguments of the parties and determine the correct remedy[.]"). The Court noted that "[f]requently these factors overlap[]" and "do not lend themselves to compartmental analysis." *Id.* So on appeal, we consider whether the court's sanction was an abuse of discretion in light of the considerations that the Court of Appeals has highlighted as relevant to an analysis of a discovery violation under Rule 4-263(e)(1).

1. Devon Jones

With respect to Devon Jones, we hold that the defense's failure to disclose Devon Jones as an alibi witness before the 2015 trial was a discovery violation and that the trial court properly exercised its discretion to exclude his alibi testimony.

The defense having named Devon Jones a potential alibi witness during the first trial in 2013 is irrelevant; Appellant's convictions were reversed by this Court and a new trial commenced. At that point, both the State and the defendant were obligated to meet relevant procedural requirements, such as identifying important witnesses, regardless of whether the same witnesses had been identified in the previous trial. *See e.g. Harrod v. State,* 423 Md. 24, 35 (2011) ("[I]t is not a leap of faith to acknowledge that the grant of a mistrial in a criminal case does create a 'tabula rasa' and requires the litigants to observe pretrial procedures once again."); *Cottman v. State,* 395 Md. 729, 743 (2006) ("We have said that '[i]t is generally recognized that the effect of granting a new trial is to leave the cause in the same condition as if no previous trial had been held.'") (internal citations omitted); *Hammersla v. State,* 184 Md. App. 295, 313 (2009) ("The reversal of Appellant's conviction, with the order for a new trial, 'wiped the slate clean,' and the case began anew procedurally.").

In fact, that Appellant named Devon Jones as a potential witness prior to the first trial makes his untimely disclosure prior to the second trial all the more egregious. *See* Md. Rule 4-263(c)(1) ("The State's Attorney *and defense* shall exercise due diligence to identify all of the material and information that must be disclosed under this Rule." (emphasis added)). As the trial court noted, Appellant had ample time prior to the second

trial to disclose Devon Jones as a potential witness, but, for whatever reason, he failed to do so. Although Appellant claims that defense counsel attempted to subpoena Devon Jones and that "an error had been made by a secretary," we note that Maryland Rule 4-263(e) does not require a subpoena. Rather, the Rule merely requires that a defendant provide the State with the name and address of the potential alibi witness. All of this information was available to Appellant well before thirty days prior to trial. *See* Md. Rule 4-263(c)(2) ("The obligations of the State's Attorney and the defense extend to material and information that must be disclosed under this Rule and that are in the possession or control of the attorney[.]").

Having determined that the defense's failure to disclose Devon Jones as an alibi witness was a discovery violation, we now turn to the sanction imposed by the trial court for that violation. In its colloquy concerning the defense's untimely disclosure of Devon Jones, the court inquired into whether the State had an opportunity to interview Devon Jones before trial and expressed its concern that the last-minute disclosure would prejudice the State because the State would have already prepared its case "without any knowledge from the defense that Mr. Jones would be presented as an alibi witness." The trial court decided that the State was not required to rely on what the defense may have disclosed to prior counsel at a trial that was held two years earlier. The court reasoned that parties "don't always try the same case twice[,]" and that the State was "preparing now for the retrial[,]" but "[t]here's been no notice to her from the defense that Devon Jones is going to be an alibi witness. So she wouldn't have prepared her case with that in mind." It is clear from this that the trial court considered the non-disclosure to be substantive and the

prejudice to the State to be severe. *See Taliaferro*, 295 Md. at 391. The other factors do not aid Appellant. The reason for the untimely disclosure was that defense counsel errantly disclosed the wrong name and did not recognize or correct the problem for five months. And, as we will discuss in regard to Appellant's motion for a new trial on this same point, the court found a continuance to be undesirable because it would have caused a substantial delay to the prejudice of Appellant and several of the State's witnesses may have become unavailable. Accordingly, we conclude that the trial court's exclusion of Devon Jones as an alibi witness was not an abuse of discretion under the principles articulated in *Taliaferro*.

2. Mays & Watkins

The State moved to exclude the testimony of Devon Jones, Mr. Mays, and Mr. Watkins, and during the October 21 courtroom colloquy set out above, defense counsel proffered Mr. May and Mr. Watkins as impeachment witnesses. At that point, the court decided that they would be permitted to testify because the rules did not require the defense to disclose impeachment witnesses. It was then only because the State expressed its concern that the two men would attempt to bolster Devon Jones' account of Appellant's alibi, the court offered the following clarification: "If they are impeachment witnesses, then I will allow them to testify. . . . But [i]f they are going to start talking about anything that Devon Jones did because I don't see how even that would come into the case because that's going to be hearsay, so you guide yourself accordingly." Defense counsel accepted this decision, and proceedings concluded for the day.

The next morning, however, when defense counsel indicated her objection "regarding the defense witnesses," the court reiterated that the State's motion was "only

granted as to Mr. Jones." Although defense counsel did, at this point, refer to Mr. Mays and Mr. Watkins as "essentially alibi witnesses," because "they acted as book ends around Mr. Devon Jones' testimony." Defense counsel objected only "to the court's decision regarding Mr. Devon Jones." Defense counsel complained that, given the court's ruling with regard to Devon Jones, the defense would have no other witnesses.

Maryland Rule 5-103(a)(2) states the following:

> Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling, *and* . . . [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer on the record or was apparent from the context within the evidence was offered.

See also Mack v. State, 300 Md. 583, 603 (1984) ("[T]he question of whether the exclusion of evidence is erroneous and constitutes prejudicial error is not properly preserved for appellate review unless there has been a formal proffer of what the contents and relevance of the excluded testimony would have been[.]" (citations omitted)), *overruled on other grounds by Price v. State*, 405 Md. 10, 27-29 (2008).

On October 21, 2015, when asked explicitly by the trial court, defense counsel stated that these two witnesses would be called only for impeachment purposes. The court ruled accordingly, permitting these two men to testify. The next day, when defense counsel mentioned during a colloquy that they, too, were "essentially alibi witnesses," the context of the argument demonstrates that defense counsel still failed to make this point clear to the court. Immediately following that suggestion, defense counsel noted that she was objecting *only* to the exclusion of Devon Jones as an alibi witness and complained that without Devon Jones, she would be unable to call another witness. Viewing the defense's

objection in the context of the prior day's ruling, it seems clear to us that the failure of defense counsel to call Mr. Mr. Mays and Mr. Watkins as witnesses was not the result of error by the circuit court.

Alternatively, perhaps defense counsel failed to call Mr. Mays and Mr. Watkins as witnesses because they were, in fact, alibi witnesses. In that case, we would still find no reversible error. As we discussed with respect to Devon Jones, Maryland Rule 4-263(e)(4) requires the defense to disclose to the State any alibi witnesses it may have. We just held that the defense's failure to disclose Devon Jones as an alibi witness prior to the eve of trial was grounds for his exclusion as an alibi witness. The same rationale applies to Mr. Mays and Mr. Watkins. In fact, unlike Devon Jones, Appellant does not allege that the State should have been aware of Mr. Mays and Mr. Watkins from an alibi disclosure in 2013. Thus, the defense's failure to disclose the other two alibi witnesses was even more untimely and inexcusable than was the failure to disclose Mr. Jones. *See Taliaferro*, 295 Md. at 391. Furthermore, it is not at all clear from the record what these witnesses would have testified to and whether they would have offered relevant and admissible testimony. The record discloses that the defense did not proffer the relevance of Mr. Watkins and Mr. May's alibi testimony independent of that of Devon Jones, and the court did not make an explicit ruling as to those witnesses, other than, that they were permitted to testify as impeachment witnesses.

In sum, the record does not reveal exactly why defense counsel did not call Mr. Mays and Mr. Watkins as defense witnesses. Whatever the reason, however, we can conclude safely that it was not due to a reversible error by the circuit court.

B. Motion for a New Trial

Appellant argues, in the alternative, that the trial court erred in denying his motion for a new trial based on its exclusion of Devon Jones. According to Appellant, the trial court failed to give proper weight to facts that "were developed in additional detail after trial," mainly a text message from defense counsel to the prosecutor on October 19, 2015, "we previously subpoenaed Devon Jones. I just got in touch with him today and found a new number for him. I assume you know about him." Appellant concedes, however, as defense counsel did during the hearing on Appellant's motion for a new trial, that there was no subpoena for Devon Jones in the case file because the subpoena erroneously named "Devon Levon" as the witness. Further, Appellant maintains that he "disagrees" with the trial court's decision and that the court "misapplied" the appropriate factors because "the primary witness, Devon Jones, was known to the prosecution and because Appellant's defense was prejudiced."

The State responds that Appellant fails to articulate why he "disagrees" with the trial court's ruling or how the court misapplied the relevant factors. The State also points out that defense counsel's October 19 text message to the prosecutor was "quite obviously" in defense counsel's possession on October 21 when the trial court made its initial ruling on Appellant's failure to give the State notice of his intent to call Devon Jones as an alibi witness. In any event, the State continues, the trial court concluded rightly that the October 19 text message did not alter the analysis of whether Appellant provided sufficient notice.

On an appeal of a trial court's denial of a motion for new trial, we review for abuse of discretion. *Merritt v. State*, 367 Md. 17, 28 (2001). We perceive no such abuse here.

First, as we have discussed already, the fact that Appellant's prior attorney may have disclosed Devon Jones on the eve of Appellant's first trial in 2013 does not satisfy Maryland Rule 4-263(e)(4) with respect to Appellant's second trial in 2015.

Further, the State is right to point out that the October 19 text message was within defense counsel's possession as she argued the State's motion to exclude Devon Jones as an alibi witness on October 21. Despite Appellant's framing on appeal, this was not newly discovered evidence. Further, the text message was still untimely (trial was scheduled to begin Monday, October 19) and does not even indicate that the defense planned to call Devon Jones as an alibi witness. To the extent that the defense, in its text message, "assume[d]" the prosecutor "knew about [Devon Jones]," she seems to have been mistaken. As the State explained prior to trial, the defense's initial disclosure was for Devon Levon, who the State then had its investigator run a background check on and try to locate. Given the untimeliness of the October 19 text message, the State would have had no opportunity to run a similar investigation on Devon Jones, as was the court's concern prior to trial. The text message does not change that.

We also find no merit to Appellant's argument that the circuit court failed to consider the *Taliaferro* factors at the post-trial hearing. The court stated expressly, "I do think that my ruling reflects all of the factors that I would have had to consider." It then discussed when the defense ultimately made its disclosure (on the eve of trial), that the violation was "definitely a substantial violation[,]" that "the State was prejudiced by [the defense's] late notice[,]" and that postponement was not desirable because it would have prejudiced Appellant because it would have caused a substantial delay in trial and State's

witnesses may have become unavailable. Accordingly, we conclude that the trial court did not abuse its discretion in denying Appellant's motion for a new trial.

II.

Sufficiency of the Evidence

Appellant contends the circuit court erred in denying his motion for judgment of acquittal because the evidence was insufficient to sustain his convictions. In support of this broad contention, he offers three distinct arguments. First, that Mr. Taylor, the State's sole eyewitness, "gave conflicting testimony" in his identification of Appellant as the shooter because he failed to name Appellant as the shooter when he was first interviewed by a police officer at the hospital. He concedes, however, that "the testimony of a single eyewitness, if believed, is sufficient to convict," and that "questions of credibility are for the fact-finder to resolve." Second, Appellant maintains that the State failed to establish that the victims' property was taken by force given that the police found money and two cell phones at the crime scene. Finally, Appellant argues that the evidence was legally insufficient to establish "the intent element" of the attempted murder of Mr. Taylor, despite conceding that "intent to kill may be inferred from the use of a weapon against a vital part of a victim's body."

The State responds that Mr. Taylor's testimony provided a sufficient basis from which a reasonable trier of fact could have concluded that Appellant was the shooter. His testimony was bolstered by the testimony of others that Mr. Taylor knew Appellant prior to the shooting, and by Appellant's admission to Det. Reichenburg that he was present in the back seat of Mr. Taylor's Buick on the night of the shooting. Next, the State argues

that its evidence sustains Appellant's robbery conviction. The State avers that conceded in Appellant's argument that police recovered "*[m]ost* of the property" from the car is the fact that there was some property not recovered, which is all the robbery conviction required. Finally, the State suggests that Appellant's argument that there was no evidence of his intent to kill Mr. Taylor "is easily dismissed" given that Appellant shot Mr. Taylor in the cheek, a particularly vulnerable part of the body.

"The test of appellate review of evidentiary sufficiency is whether, 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Donati v. State*, 215 Md. App. 686, 718 (2014) (internal citations omitted). "The test is 'not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.'" *Painter v. State*, 157 Md. App. 1, 11 (2004) (internal citations omitted; emphasis in original). "We 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [we] would have chosen a different reasonable inference.'" *Donati*, 215 Md. App. at 718 (internal citations omitted). "Further, we do not 'distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Id.*

As to circumstantial evidence, "[i]t is not necessary that the circumstantial evidence exclude every possibility of the defendant's innocence, or produce an absolute certainty in the minds of the jurors." *Hebron v. State*, 331 Md. 219, 227 (1993) (internal citations and quotation marks omitted). "Many an inculpatory inference is permitted notwithstanding

the fact that an exculpatory inference was just as likely and would also have been permitted." *Cerrato-Molina v. State*, 223 Md. App. 329, 350 (2015), *cert denied* 445 Md. 5 (2015). In short, although circumstantial evidence "must afford the basis for an inference of guilt beyond a reasonable doubt, it is not necessary that each circumstance, standing alone, be sufficient to establish guilt, but the circumstances are to be considered collectively." *Hebron*, 331 Md. at 227 (internal citations omitted).

A. Mr. Taylor's Identification of Appellant

Appellant's contention that Mr. Taylor did not identify Appellant initially at the hospital, and therefore provided "conflicting testimony," is an exaggeration of the record. Mr. Taylor testified that Appellant, while in the back seat of the Buick, brandished a firearm and demanded his money and that when Mr. Taylor tried to flee, Appellant shot him in the head. The police's search of the car later revealed a bullet casing, two cell phones, and five one-dollar bills, all of which were located in the rear seating area, consistent with Mr. Taylor's testimony. Det. Reichenburg's testimony that Appellant admitted to being in the back seat of the car only further supports Mr. Taylor's version of events. Because the defense offered no witnesses of its own, Mr. Taylor's testimony was the only description of the shooting that the jury had to consider.

Contrary to Appellant's argument on appeal, Mr. Taylor's failure to identify Appellant as shooter to the first officer with whom Mr. Taylor spoke, was not enough to make his identification so unreliable that a reasonable juror could not conclude that Appellant was the shooter. Although Mr. Taylor did not name Appellant as the shooter on the night of after the shooting, he testified that this is because he was in shock from being

shot in the head and more concerned with the safety and whereabouts of his friend, Mr. Alexander. Then, only one day later, when interviewed by Det. Reichenburg, Mr. Taylor identified his shooter as a man named Antomar. The police used the name Antomar to search for suspects and compile a photo array. When shown that photo array, Mr. Taylor identified Appellant and circled his photo "almost immediately," writing, "Antomar shot me and Corey" on the photo array form. Mr. Taylor also testified that he was familiar with Appellant prior to the incident from his participation in a mentor program to which Appellant belonged. At no time did Mr. Taylor waver in his testimony identifying Appellant as the shooter. Accordingly, we conclude that Mr. Taylor's testimony provided a sufficient basis for a reasonable jury to conclude that Appellant was the shooter.

B. Robbery

Next, Appellant argues that there was insufficient evidence to support a conviction for robbery because the police recovered money and cell phones (items the victims allegedly surrendered at gunpoint) from the backseat of Mr. Taylor's Buick.

Mr. Taylor testified that Appellant, while brandishing the gun, told him and Mr. Alexander to give Appellant "everything" out of their "pockets." Mr. Taylor then testified that he and Mr. Alexander threw several items into the backseat, including approximately $46 in cash. Later, when the Buick was searched by police, about $5 in cash was recovered from the backseat. No evidence was presented suggesting that either Mr. Taylor or Mr. Alexander regained possession of their property.

We disposed of this same argument on Appellant's appeal from his first trial. In that trial, just as in his second, "the State introduced evidence showing that Messrs. Taylor

and Alexander threw money and/or items into the back seat in excess of that recovered[.]" *Jones*, 217 Md. App. at 702. There, we concluded that "it follows logically that a rational juror could have found that the alleged robber took [the missing] property." *Id.* As we did before, we conclude that in this case that the State was able to demonstrate the first element of robbery with a dangerous weapon—taking property from the victims. *Id.* at 703 Given that the evidentiary support for the remaining elements of the crime are unchallenged, we hold that a rational trier of fact could have found beyond a reasonable doubt that Appellant committed the crime of robbery with a dangerous weapon.

C. Intent to Attempt Murder

Appellant's final argument on appeal is curious, at best. Appellant argues that the "intent element" of attempted murder was not satisfied but concedes that the jury may infer an intent to kill from his use of a weapon against a vital part of Mr. Taylor's body. At trial, defense counsel argued similarly, "[T]here is no evidence that the one shot to Mr. Taylor's face was in any way an attempt to murder and kill him." When the trial court responded simply, "Shot in the head[,]" defense counsel pivoted back to her prior argument that Mr. Taylor's testimony was the only evidence that Appellant was actually the shooter.

As we've explained already, Mr. Taylor's testimony provided a sufficient basis from which a jury could have determined that Appellant was the shooter. That leaves Appellant's argument that that "one shot to Mr. Taylor's face" could, but does not necessarily, imply his intent to kill him. In short, we conclude that a single shot to a victim's head or face as he attempted to flee an armed robbery provided enough evidence from which a reasonable jury could have concluded that Appellant was attempting to

murder Mr. Taylor. The State also presented the jury with Mr. Taylor's photo array, on which he wrote, "I was shot in the face. He wanted to kill me." The fact that Mr. Alexander was also fatally shot in the head from the backseat of the same car because he was not fortunate enough to flee in time, is a circumstance that certainly supports Mr. Taylor's assertion that Appellant wanted to kill him too.

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