Circuit Court for Baltimore City
Case Nos. 122125025 & 122125026

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

CONSOLIDATED

STATE OF MARYLAND
v.
DAVIN VICE
No. 293
September Term, 2023

STATE OF MARYLAND
v.
WORD THAXTON-BEY
No. 297
September Term, 2023

Beachley,
Albright,
Robinson, Dennis M., Jr.
(Specially Assigned),

JJ.

Opinion by Robinson, J.

Filed: October 15, 2024

* This is an unreported opinion. It may not be cited as precedent within the rule of stare decisis. It may be cited as persuasive authority only if the citation conforms to Md. Rule 1-104(a)(2)(B).

This is a consolidated appeal by the State of Maryland from final judgments granting motions to dismiss indictments against Davin Vice and Word Thaxton-Bey. On the third day of trial, the State presented testimony regarding two sets of photo arrays that resulted in the victim, Elliot Betrand, Sr., identifying Vice and Thaxton-Bey as the individuals involved in him being stabbed. Vice and Thaxton-Bey moved to dismiss the indictments against them based on the revelation that the initial photo array was lost and that there was a second set of photo arrays for the identification process. The circuit court granted Vice's and Thaxton-Bey's motions to dismiss based on what it perceived to be a "tainted" photo-array identification process. The State filed a timely appeal.

According to the State, the circuit court committed reversible error by abusing its discretion when it dismissed all charges against Vice and Thaxton-Bey. Vice and Thaxton-Bey argue that the circuit court properly exercised its discretion when it dismissed the indictments. For the reasons explained below, we agree with the State, reverse the judgment of the circuit court, and remand this case to the circuit court for a new trial.[1]

BACKGROUND

During the morning hours of March 19, 2022, Betrand was walking from his home to a worksite when a red car pulled up beside him. Betrand recognized Thaxton-Bey, who

[1] On September 3, 2024, Vice and Thaxton-Bey filed a "Motion to Strike the Appendix to Appellant's Reply Brief." Pursuant to this Court's order entered on September 5, 2024, the Court deferred a ruling on the motion until oral argument on September 6, 2024. At the outset of oral argument, the Court granted the motion.

was in the passenger seat. At the intersection of North Rosedale and Grayson Street, Vice "jumped out with a knife" and "started swinging." Betrand "took off up the street," with Vice close behind him, and "got hit in the back of the head" with the knife. When Betrand arrived at the 1700 block of North Rosedale, he collapsed on the ground. Vice caught up with Betrand and stabbed him in the back. During the stabbing, Vice stated, "I kill you about my father."

On May 5, 2022, a grand jury sitting in the Circuit Court for Baltimore City indicted Vice on charges of attempted murder in the first degree, conspiracy to commit murder, attempted murder in the second degree, first-degree assault, conspiracy to commit assault, second-degree assault, conspiracy to commit second-degree assault, and openly wearing and carrying a dangerous weapon related to the stabbing of Betrand. On the same date, the grand jury also indicted Thaxton-Bey on charges of conspiracy to commit murder, conspiracy to commit first-degree assault, and conspiracy to commit second-degree assault for his participation in the stabbing.

At trial, Betrand testified that he knew Thaxton-Bey for several years from their work as home improvement contractors, including working together on two jobs. Before the encounter, Betrand and Thaxton-Bey had been working at the same residence, in which Thaxton-Bey had installed a bathroom. According to Betrand, the owner of the residence was dissatisfied with Thaxton-Bey's work, asked Betrand "how much [he] would charge him to take it out," and stated that he wanted Betrand, not Thaxton-Bey, to complete the remainder of the work at the residence. Betrand testified that "[n]ews about

the bathroom situation had gotten around," and that Thaxton-Bey began attempting to start arguments with Betrand. Betrand also testified that he believed he gave law enforcement officials Thaxton-Bey's name at the hospital, and that while he did not know Vice personally, he thought that Thaxton-Bey was Vice's father.[2] Betrand explained that he had seen Vice before because he was a customer at a liquor store where Betrand worked. He had also seen Vice walking with Thaxton-Bey, but "didn't really pay it no mind . . . until this happened." Betrand learned of Vice's name by locating a photo of him on Thaxton-Bey's Facebook page and "told the police" about Vice's involvement in the stabbing.

Detective Maurice Grant administered the first set of photo arrays with Betrand on March 28, 2022, and confirmed that Betrand was able to identify Vice and Thaxton-Bey as the perpetrators. On cross-examination, Detective Grant stated that he did not keep copies of the first set of photo arrays and had given them to the primary detective, Detective Nicholas Kuhn. Detective Kuhn, who was assigned to the Southwest District Detective Unit and specializing in aggravated assaults, also testified. When Detective Kuhn spoke to Betrand, Betrand provided Vice's and Thaxton-Bey's names. Based on this information, Detective Kuhn found an address for Thaxton-Bey and identified a relationship between Vice and Thaxton-Bey.

[2] Although the State's brief refers to Thaxton-Bey as Vice's father, the record does not reflect testimony or other evidence to support the assertion that Thaxton-Bey is Vice's father. As Vice points out in this brief, in a motion for bail review, Vice's counsel informed the circuit court that Thaxton-Bey and Vice are not related.

Detective Kuhn explained that, as the primary detective, he created photo arrays, placing six photos of individuals with similar age, race, height and weight to the suspects. Detective Kuhn testified that Betrand was shown photo arrays twice and identified Vice and Thaxton-Bey. According to Detective Kuhn, he placed photos of Vice and Thaxton-Bey in the arrays "[b]ecause those were the suspects that had developed" based "in part because of information . . . provided by the victim" and "in part based on other investigatory tools." Detective Kuhn also testified that the first set of photo arrays was lost. He then spoke to his supervisor, who "guided [the detective] how to create a second one and have that reshown." Vice's counsel objected and requested to approach the bench. Counsel explained: "Your Honor, I'm very concerned about the second photo array because I -- they put all new people and pictures. That means all of the array is tainted. All of the second array is tainted." Vice's counsel expressed concern that if different people were utilized, only Vice would be seen twice. Counsel for Vice then stated that she would "withdraw the objection for now," and the circuit court interjected that, if five different people were in the arrays, "then that would sound like that's a very good objection."

After the bench conference concluded, Detective Kuhn testified that he created a second set of photo arrays. Another detective not otherwise involved in the investigation administered the second set of photo arrays to Betrand, and Betrand once again identified Vice and Thaxton-Bey. Based on this identification, the detective obtained arrest warrants.

The circuit court directed the parties to the bench and stated:

> [T]he issue you raise with regard to double identifications for different arrays does trouble me somewhat. I am going to send the jury out and I'm going to ask the officer as to the composition of the second array because that could have profound effect on how we proceed.

After the jury left the courtroom, the trial judge questioned Detective Kuhn:

> THE COURT: Detective Kuhn, you were the one who assembled the photographs that were used in what we'll refer to as the first photo array that was shown to the victim. Is that correct?
>
> [DETECTIVE KUHN:] Yes, Your Honor.
>
> THE COURT: And you assembled the photographs for the second photograph -- photo array after speaking with Ms. Banks. Is that correct?
>
> [DETECTIVE KUHN:] Yes, Your Honor.
>
> THE COURT: In the second photo array, were the five additional individuals in addition to the photos of the defendants, were they the same photos as used in the first array?
>
> [DETECTIVE KUHN:] No, Your Honor.

The circuit court then instructed Detective Kuhn to leave the courtroom and asked counsel to approach the bench.

Vice's counsel moved for dismissal and for a mistrial:

> [VICE'S COUNSEL]: I would move for the case to be dismissed. I would move for a mistrial.
>
> THE COURT: Based on?

> [VICE'S COUNSEL]: Based on the fact that I believe that the photo array is tainted and it should have never been admitted and there's been a lot of questions about –
>
> THE COURT: And it was unduly suggest[ive]?
>
> [VICE'S COUNSEL]: It was unduly suggest[ive] and there was a lot of questions to the victim about it, there was questions to the detective about it. I would think that in that the procedure was unduly suggest[ive]. A photo array should have been excluded. Unfortunately, I didn't realize about the second photo array until Sergeant Strong (phonetic).
>
> THE COURT: What you don't know, you can't use. You're not clairvoyant, neither am I, neither is [the prosecutor]. Or you, [Thaxton-Bey's counsel], I didn't mean to -- I don't mean to exclude you, but you're sort of – you're there in right field. All right.

Thaxton-Bey joined Vice's motion to dismiss:

> [VICE'S COUNSEL]: Your Honor, I, I do think it should. I think that this process has become tainted. I don't think it will be cured in an additional trial. I think that I would move to have the case dismissed.
>
> [THAXTON-BEY'S COUNSEL]: And I will second that, Your Honor. Not to mention that whoever the State brings up for the (indiscernible) witness did see two separate photo arrays with five different other suspects.

The prosecutor argued that Betrand "knew them both," was "familiar with them both," and contrasted this from a "case in which these are stranger on stranger." The trial judge countered that Betrand "picked the same people that he picked out from a previous photo array less than a month, if I understand it, before." The prosecutor explained that Betrand "picked [Vice and Thaxton-Bey] out because they were in fact the people that

assaulted him," that he had "been clear by name," and that Betrand, in fact, "gave the police the names" of his perpetrators.

The circuit court granted each defendant's motion and dismissed the case, explaining:

> But the difficulty is the jury has heard all of this testimony, including a great deal of information about what I will style for the very first time in my judicial career a tainted identification process. And I don't know how that bell gets un-rung.
>
> I mean, there are ways had everybody been aware of what we now know before the trial that you could have addressed these things. Possibly not even bringing up the first ID. But it's too – we're too far down the road now to fix it. So, I am going to grant the motion of each defendant to dismiss this case.

The State then requested a mistrial "to try this case again without the photo array." The circuit court responded:

> I don't think that it is appropriate, and I have been reversed once for granting a mistrial for manifest necessity because of a mistake made by the State in presenting evidence in a case, and I was reversed for granting a mistrial. I don't see a difference between this situation.
>
> In fact, this is a more difficult situation to address because it could have been, not that you would have had any reason to, but it could have been addressed before trial had anyone truly known the answer to the question that I asked the officer. And I don't know how that gets fixed. But even -- it truly can't be fixed with this jury.
>
> So, I don't know how then I permit another jury to address the same thing because of the error not by you, possibly by Ms. Banks, in not assuring that the same photographs were used. But that might now have cured it either. But it has

> certainly left a much closer question because they're two different photo, photo arrays with the exception of the pictures of two specific individuals who were identified. I am going to dismiss the case. I don't believe I have any choice.

While the circuit court recognized that, had the "defective photo identification" been addressed by the circuit court before trial, it might have been "handled in a different way," it found that it was "left with the position that it cannot grant a mistrial as requested by the State for manifest necessity" and dismissed the indictments against Vice and Thaxton-Bey. This appeal followed.

DISCUSSION

The State presents one question on appeal that we rephrase: Did the circuit court abuse its discretion by dismissing the indictments against Vice and Thaxton-Bey?[3] This Court reviews a trial court's decision on a motion to dismiss an indictment for an abuse of discretion. *Kimble v. State*, 242 Md. App. 73, 78 (2019). That discretion is not without its limits. A trial court must exercise its discretion "in accordance with correct legal standards." *State v. Hart*, 449 Md. 246, 264 (2016) (citation omitted). The State argues that the "[circuit] court abused its discretion in two respects":

> First, the court did not have authority to dismiss the charges due to the admission of testimony concerning the photo array. The proper remedy for an unduly suggestive and unreliable photo identification procedure is suppression of the illegally

[3] The State presented the question for review as: "Did the circuit court commit reversible error by dismissing all charges based on the confirmatory photographic identifications of Vice and Thaxton-Bey as the perpetrators?" The question for review, as presented by the State, focuses primarily on the constitutionality of the photo array process and whether suppression was the appropriate remedy. As we see it, the issue on appeal is whether the circuit court abused its discretion when it dismissed the indictments against Vice and Thaxton-Bey for what amounted to a discovery violation.

> obtained evidence. Second, the court abused its discretion in concluding that the identifications of Vice and Thaxton-Bey were tainted in the first instance. Instead, the victim's familiarity with Vice and Thaxton-Bey assuaged any constitutional due process concerns. Because dismissal was predicated on this erroneous conclusion, the court should not have been considering a remedy but should have simply overruled the defendants' objection. This Court should reverse the judgments of the circuit court and remand for a new trial.

These appeals essentially involve a discovery issue, specifically the State's failure to disclose that there was an earlier photo array with different fillers in the arrays. Maryland Rule 4-263 governs discovery in criminal cases in the circuit courts. Rule 4-263(d) requires the State's Attorney, "[w]ithout the necessity of a request," to provide the defense with "[a]ll relevant material or information regarding . . . pretrial identification of the defendant by a State's witness . . . ." Rule 4-263(c)(1) also requires the State's Attorney to "exercise due diligence to identify all of the material and information that must be disclosed under this Rule." Rule 4-263(c)(2) specifies that the State's Attorney's obligations "extend to material and information" in the "possession or control" of any "person who either reports regularly to the attorney's office or has reported to the attorney's office in regard to the particular case[,]" a category of persons that obviously includes the police detective investigating the case. One purpose of these rules is to assist the defendant in preparing a defense and to protect the defendant from surprise. *Williams v. State*, 364 Md. 160, 174 (2001).

As the circuit court recognized, "there are ways had everybody been aware of [the issues related to the photo arrays] before the trial that [counsel] could have addressed

these things." Rule 4-263(n) addresses the sanctions that a circuit court may impose when, as here, it finds that a discovery violation has occurred and provides in pertinent part:

> 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 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.

On its face, Rule 4-263(n) does not require a court to impose any particular sanction in the case of a discovery violation. Instead, the rule leaves the choice of a sanction, if any, to the sound discretion of the circuit court. *See Thomas v. State,* 397 Md. 557, 570 (2007). "The abuse of discretion standard requires a trial judge to use his or her discretion soundly and the record must reflect the exercise of that discretion. Abuse occurs when a trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law." *Garg v. Garg,* 393 Md. 225, 238 (2006) (*quoting Jenkins v. State,* 375 Md. 284, 295–96 (2003)). When the trial court exhibits a "failure to consider the proper legal standard in reaching a decision," such an action constitutes an abuse of discretion. *Neustadter v. Holy Cross Hosp. of Silver Spring,* 418 Md. 231, 242 (2011) (quoting *Aventis Pasteur, Inc. v. Skevofilax,* 396 Md. 405, 433 (2007).

"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 feas[i]bility of curing any prejudice with a continuance; and (4) any other relevant circumstances." *Thomas,* 397 Md. at 570-71 (footnote omitted); *Raynor v. State*, 201 Md. App. 209, 228 (2011). "[I]n fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules" (*id.* at 571), which "'is to give a defendant the necessary time to prepare a full and adequate defense.'" *Raynor*, 201 Md. App. at 228 (2011) (quoting *Ross v. State*, 78 Md. App. 275, 286 (1989)), *aff'd*, 440 Md. 71 (2014). "'[T]he sanction of dismissal should be used sparingly, if at all[.]'" *Thompson v. State*, 395 Md. 240, 261 (2006) (citations omitted).

As for the first *Thomas* factor, "the reasons why the disclosure was not made," there is no dispute that the State failed to disclose to defense counsel information regarding the multiple photo arrays, including the "lost" photo array. On the other hand, the circuit court did not make any finding that the failure to disclose was intentional on the part of the State. Indeed, the circuit court, at least implicitly, assumed that the prosecutor representing the State at trial was not aware of the potential issues regarding the photo arrays:

> You're not clairvoyant, neither am I, neither is [the prosecutor]. Or you, [Thaxton-Bey's counsel], I didn't mean to -- I don't mean to exclude you, but you're sort of – you're there in right field. All right.

The second factor, "the existence and amount of any prejudice to the opposing party," and the third factor, "the feasibility of curing any prejudice with a continuance," are interrelated, and we shall examine them together. As for the former, the Supreme

Court of Maryland has said that, when a criminal discovery rule is violated, "a defendant is prejudiced only when he is unduly surprised and lacks adequate opportunity to prepare a defense, or when the violation substantially influences the jury," and that "the prejudice that is contemplated is the harm resulting from the nondisclosure." *Thomas*, 397 Md. at 574. The record before us does not reflect that the circuit court sufficiently addressed and considered "the existence and amount of any prejudice to the opposing party," and "the feasibility of curing any prejudice with a continuance." Although the record does reflect some discussion regarding the prospect of granting a mistrial, the circuit court's consideration of the potential of curing the discovery violation by granting a mistrial appears to have been limited to an unidentified prior case that resulted in a reversal:

> I have been reversed once for granting a mistrial for manifest necessity because of a mistake made by the State in presenting evidence in a case, and I was reversed for granting a mistrial. I don't see a difference between this situation.

The circuit court's description of this other unidentified case does not provide an adequate basis for this Court to assess whether the circuit court sufficiently evaluated whether granting a mistrial was a less drastic sanction for the State's failure to disclose information related to the photo arrays. Although the circuit court stated, "And I don't know how that bell gets un-rung" and "[W]e're too far down the road now to fix it," the record before us also does not reflect that the circuit court sufficiently addressed whether a curative instruction would be an appropriate remedy under the circumstances, especially against the backdrop of the well-settled recognition that "when curative

instructions are given, it is generally presumed that the jury can and will follow them." *Simmons v. State*, 436 Md. 202, 222 (2013).

As to the fourth *Thomas* factor, "any other relevant circumstances," the circuit court did not specifically identify any other relevant circumstances that it considered in concluding that dismissal was the appropriate remedy for the State's failure to produce information regarding the "lost" photo array.

Vice's counsel initially stated, "I would move for the case to be dismissed. I would move for a mistrial." Vice's position then seemed to evolve into a motion to dismiss the charges when Vice's counsel said, "I think that I would move to have the case dismissed," which Thaxton-Bey joined when his counsel stated, "And I will second that, Your Honor." We note that when, as in this case, defense counsel does not request other potentially appropriate and less-drastic sanctions for a discovery violation, the trial court is not required to grant an excessive sanction. Indeed, the Supreme Court of Maryland has explained:

> Although the purpose of discovery is to prevent a defendant from being surprised and to give a defendant sufficient time to prepare a defense, defense counsel frequently forego requesting the limited remedy that would serve those purposes because those purposes are not really what the defense hopes to achieve. The defense, opportunistically, would rather exploit the State's error and gamble for a greater windfall. As Chief Judge Gilbert explained . . . in *Moore v. State*, 84 Md. App. 165, 176 (1990), however, the 'double or nothing' gamble almost always yields 'nothing.'

Thomas v. State, 397 Md. at 575 (quoting *Jones v. State*, 132 Md. App. 657, 678 (2000)).

When, as here, "the trial court exhibits a clear failure to consider the proper legal

standard" in exercising its discretion, it abuses that discretion. *Kusi v. State*, 438 Md. 362, 385 (2014) (citations and quotations omitted). We hold that the circuit court, although vested with the authority to impose the sanction it did for the State's discovery violation, abused its discretion by failing to consider the proper legal standard, specifically the *Thomas* factors. To be clear, we express no opinion regarding the constitutionality of the photo array process that law enforcement personnel utilized as part of their investigation. We likewise express no opinion regarding how the circuit court should rule on any motion to suppress the photo arrays. Nor do we express any opinion on the sufficiency of the remaining evidence in the event the circuit court suppresses one or both photo arrays. To allow for maximum remedial flexibility on remand, we also offer no opinion regarding what, if any, less-drastic sanction the circuit court should consider imposing for any discovery violation. We vacate the judgments of the circuit court dismissing the indictments against Vice and Thaxton-Bey and remand the cases to the circuit court for a new trial. This result does not violate double-jeopardy principles.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which applies to the States through the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784, 796 (1969), states that ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. While Maryland does not have a double jeopardy clause in its constitution, "it is well established that Maryland common law double jeopardy principles also protect an accused against twice being put in jeopardy for the same offense." *Simmons*, 436 Md. at

213 (cleaned up). "This protection against being twice put into jeopardy prohibits three distinct abuses: 1) the second prosecution for the same offense after acquittal; 2) the second prosecution for the same offense after conviction for that offense; and 3) the imposition of multiple punishments for the same offense." *Taylor v. State*, 381 Md. 602, 610 (2004) (citing *State v. Jones,* 340 Md. 235, 242 (1995)).

`In a jury trial, jeopardy attaches when the jury has been empaneled and sworn. *Hubbard v. State*, 395 Md. 73, 90 (2006) (citing *Illinois v. Somerville*, 410 U.S. 458, 467 (1973)). Once jeopardy has attached, the Double Jeopardy Clause "unequivocally bars the retrial of a defendant after a final judgment of acquittal." *Id.* at 89 (citing *Arizona v. Washington*, 434 U.S. 497 (1978)). However, retrial may be permitted "when a criminal proceeding is concluded after jeopardy attaches but without resolving the merits of the case." *Id.* The Supreme Court of the United States further explained this principle in *Arizona v. Washington*:

> Unlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused. Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. Yet in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must

> demonstrate "manifest necessity" for any mistrial declared over the objection of the defendant.

434 U.S. 497, 505 1978). The Supreme Court of Maryland has also explained:

> It is also well established that, if a defendant seeks to have a prosecution terminated without any submission to a judge or jury as to the defendant's guilt or innocence of the charges and the court grants that motion, further prosecution is not barred. The critical question is 'whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'

Kendall v. State, 429 Md. 476 (2012) (quoting *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 571 (1977)).

In this case, Vice and Thaxton-Bey both sought to have the prosecution terminated without submission to the jury as to their guilt or innocence of the charges, and the circuit court granted their respective motions to dismiss the indictments against them. The resolution of these cases was not a resolution of some or all of the factual elements of the crimes charged. It was based on what amounts to a discovery violation. Double-jeopardy principles do not preclude granting new trials for Vice and Thaxton-Bey. Granting new trials is also consistent with double-jeopardy protections because a new trial would not result in a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction for that offense, or the imposition of multiple punishments for the same offense.

For these reasons, we reverse the circuit court's dismissal of the indictments against Vice and Thaxton-Bey and remand these cases to the circuit court for a new trial.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASES REMANDED FOR A NEW TRIAL. COSTS TO BE PAID BY APPELLEES.