UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1214

September Term, 2014

MATTHEW EDMUND MIKOWSKI

v.

STATE OF MARYLAND

Meredith,
Friedman,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: August 1, 2016

This case is an unspeakable tragedy—for the victim, but also for the defendant, and for the community that they shared. As so often happens, however, this Opinion does not and cannot address itself to the human tragedy much less make sense of it. This Opinion turns instead on arcane points of criminal procedure. The principal question concerns the bill of particulars, a device by which the State gives a defendant notice of the nature of the charges against him. Appellant Matthew Mikowski attempts to transform the bill of particulars from a notice into a limitation, and confine the State to proving an artificially cramped version of his crimes. We will not permit the transformation.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2013, Mikowski and four of his friends met at Mikowski's house to take the psychedelic drug LSD. Mikowski was almost 18 years old at the time and a junior in high school. His four friends, Samuel Cross, Brian Delaney, Hunter Haddaway, and Harold Weeks, were recent high school graduates.

The group met at Mikowski's house late in the evening, built a bonfire in the backyard, and each took two hits of what they thought was LSD. The drug, however, turned out to be 25C NBOMe, a designer psychedelic drug. One of the group, Samuel Cross, experienced what everyone described as a bad trip. He became disoriented, forgot where he was, mumbled incoherently, and turned violent, hitting Harold Weeks in the face. As Cross began to get louder, Mikowski told him to be quiet. When Cross failed to quiet down, and in fact grew louder, Mikowski became upset. Cross became interested in the fire. Weeks tried to move him away. When Cross again moved towards the fire, Mikowski put

Cross in a standing full nelson and dragged him away.[1] Nervous, Weeks suggested calling the paramedics, but Mikowski refused, saying that he did not want to wake up his mother. When Cross stumbled near the fire again, Mikowski put him in a chokehold—Weeks told police that the chokehold lasted 40 seconds[2]—and the two wrestled on the ground. After Mikowski released Cross, Cross remained on the ground, but, according to testimony, seemed unharmed. Although there was further talk of calling 911, Mikowski overruled the suggestion. They also discussed driving Cross to the hospital themselves, but the boys couldn't work out the details because Mikowski wouldn't let them take his mother's car and their own cars were parked too far down the road. Weeks, Delaney, and Haddaway eventually left and when Mikowski went back to check on Cross, he discovered that Cross was dead.

The State charged Mikowski as an adult with second degree murder, reckless endangerment, second degree assault, and distribution of a controlled dangerous substance. Mikowski filed a pre-trial motion to transfer jurisdiction to the juvenile court ("reverse waiver"). The trial court denied the motion, finding that four of the five statutory factors weighed against transfer to the juvenile system.

[1] The full nelson was alternatively described as a bear hug with Mikowski's arms around Cross's biceps.

[2] Weeks was the only other person present at the time the chokehold began. Haddaway and Delaney had gone on a walk and returned, according to testimony, only after Mikowski had Cross in the chokehold but before he released Cross. Thus, Weeks was the only person in the group who testified regarding how long the chokehold lasted.

Pursuant to Maryland Rule 4-241(a), Mikowski requested a bill of particulars. The State responded, pursuant to Rule 4-241(b), with a written bill of particulars in which it stated that each of the charged crimes (except the drug distribution charge) was committed "by strangulation" (as opposed to Mikowski's providing the drugs, refusing to call for help, or physically restraining Cross). Pursuant to Rule 4-241(c), Mikowski took exception to the bill of particulars claiming that it was insufficient.[3] At a pre-trial hearing, however, the parties apparently resolved their disagreement as to the sufficiency of the bill of particulars. In announcing their agreement, Mikowski's attorney stated that the State had agreed that "the specific act of strangulation [that was] alleged here relates to … an approximate 40 second hold that [Weeks] contends [Mikowski] had on Sam Cross's neck. It's one event." Their agreement, however, was never memorialized in a written amendment to the bill of particulars and, as a result, only exists in the transcript of the hearing. Mikowski's theory in this appeal is that this statement, *by his own counsel*, constitutes an oral amendment to the State's bill of particulars and functions, not just as notice, but as a limitation on the State.

During the trial, Mikowski made a motion for judgment of acquittal at the end of the State's case and again after the defense rested, each time predicated on the defense's view that the State had failed to prove the bill of particulars. The trial court denied both

[3] Following Mikowski's exception, the trial court issued a written memorandum opinion in which it determined that the State's bill of particulars was insufficient and ordered the state to respond with the specific acts alleged. That determination by the trial court is not challenged on appeal.

motions. Mikowski also requested a jury instruction based on the bill of particulars. The trial court declined to instruct as requested. The jury found Mikowski guilty of involuntary manslaughter, reckless endangerment, and second degree assault. He was acquitted of second degree murder, making him eligible to request reverse waiver to the juvenile court for sentencing. CP § 4-202.2(a)(1) (allowing a court to transfer jurisdiction of a case to juvenile court for sentencing if the charge that excluded jurisdiction did not result in a finding of guilty). Mikowski filed a motion for reverse waiver to the juvenile court for disposition.[4] The trial court denied his request, finding that all five statutory factors now weighed against transfer to the juvenile system (as opposed to four out of five at the pre-trial motion). Mikowski was then sentenced as an adult to a term of imprisonment of ten years, all suspended but two years, followed by five years of supervised probation.

ANALYSIS

I. Bill of Particulars

Mikowski's principal argument concerns the bill of particulars. Specifically, because Mikowski's counsel reported that the State thought that Mikowski put Cross in a "40 second chokehold," Mikowski argues that this statement functions as a limitation on the State. Thus, he argues, first, that he was entitled to a judgment of acquittal because the State's evidence did not support that this "40 second chokehold" was the mechanism of

[4] In the criminal system, the procedure is called sentencing. In the juvenile system, it is called a disposition. *In re Appeal Misc. No. 32 From the Circuit Court for Montgomery Cnty.*, 29 Md. App. 701, 703-4 (1976).

Cross's injury. Second, Mikowski argues that he was entitled to a jury instruction admonishing the jury not to consider any mechanism of injury except the "40 second chokehold" mentioned in the bill of particulars. The State disagrees, arguing that Mikowski construes the bill of particulars too narrowly and claims that it never wavered from its theory of the case: that Mikowski strangled Cross. We explain, first, the nature of a bill of particulars and why the bill of particulars in this case, although it is a limitation on the State, cannot be used as such a severe limitation on the State's proof. We then turn to how this analysis applies in the context of Mikowski's motion for judgment and request for jury instructions.

As an initial matter, we aren't really sure what bill of particulars we should be analyzing in this case. As noted above, Mikowski made a demand, the State responded, and Mikowski took exception. The parties resolved the dispute but never memorialized the resolution. Thus all we have is a transcript of the hearing in which Mikowski's counsel reports his understanding of the State's position. While we are skeptical, for purposes of this analysis, we will assume without deciding that this can constitute an oral amendment to a bill of particulars and evaluate Mikowski's claim accordingly.

A bill of particulars is a "formal, detailed statement of the claims or charges brought by a plaintiff or a prosecutor, usually filed in response to the defendant's request for a more specific complaint." *Dzikowski v. State*, 436 Md. 430, 446 (2013) (citing with approval Black's Law Dictionary 189 (9th ed. 2009)). The legislature has relaxed the common law form of indictment for murder and manslaughter by adopting a statutory short form. CR

§ 2-208 (murder or manslaughter); § 3-206 (reckless endangerment). When the State uses the short form indictment, however, a defendant can still obtain information from the State regarding "the manner or means of committing the offense" through a bill of particulars. Md. Rule 4-241; *see also* Byron L. Warnken, Maryland Criminal Procedure, 16-739 (2013) (explaining that a short form indictment eliminates the need to set forth the crime with specificity and that a bill of particulars must be requested within 15 days of entry of counsel or first appearance of counsel).

The functions of a bill of particulars are narrow. "Its functions are to give the defendant notice of the essential facts supporting the crimes alleged in the indictment or information, and also to avoid prejudicial surprise to the defense at trial." *Dzikowski*, 436 Md. at 446 (quoting 1 Charles Alan Wright et al., Fed. Prac. & Proc. Crim. § 130 (4th ed., April 2012 Update)). The purpose of a bill of particulars is not to force the State "to elect a theory upon which it intends to proceed" but rather "to guard against the taking of an accused by surprise." *Id.* at 447 (internal citation omitted). The bill of particulars "allows the defendant to prepare a defense properly, including the process of securing witnesses," because it is a means of "ascertaining the exact factual situation upon which a defendant was charged." *Id*. (internal citation and quotation omitted). Thus, the bill of particulars is not a limit on the legal scope of the case, but rather on the factual scope by apprising the defendant of the "particular conduct to which [the] accusation relates and refers." *Id.*

In *Dzikowski*, the State failed to issue a proper bill of particulars. *Dzikowski*, 436 Md. at 454. Instead of specifying which conduct constituted the basis for reckless

endangerment, because "there were multiple, possibly distinct, acts by more than one party that could support the charge," the State simply referred the defendant to the trial discovery produced. *Id.* at 452-53. The Court of Appeals found that the failure to issue a proper bill of particulars, and the circuit court's denial of the defendant's exceptions, was not harmless error. *Id*. at 454-55. The error was not harmless because "all parties began the trial assuming that the more serious act of leaving an impaired, and possibly unconscious, man lying in the road, served as the factual focal point of all of the charges against the petitioner." *Id*. at 456. Midway through the trial, however, the State changed its factual theory, and argued that it was the defendant's "timed push" of the victim toward an oncoming car that constituted reckless endangerment. *Id.* The Court of Appeals held that "[h]ad the State notified the petitioner that the basis for the reckless endangerment charge was the 'timed push,' and not the knockdown punch that, objectively, more directly related to the victim's death, … the petitioner may have adopted a different strategy at trial or otherwise altered his preparations." *Id.* Therefore, although *Dzikowski* was decided on the State's failure to provide a proper bill of particulars, its analysis of harmless error is instructive in that it demonstrates the purpose of the bill of particulars. It is precisely the switch and surprise, and resulting prejudice, encountered in *Dzikowski* that a bill of particulars is meant to prevent.

Thus, we know that the bill of particulars must disclose the State's factual, rather than legal, theory of the case. And we know it must provide greater specificity about that factual theory than is shown in the short form indictment. And we know that it prevents

the State from being able to switch its factual theory and surprise the defendant during trial. But we also think that minor errors in a bill of particulars—small discrepancies between the facts alleged in the bill of particulars and those proven at trial—are not fatal to the State's case. The difficulty lies, of course, in drawing that line: when do small discrepancies become a prejudicial surprise because they move into the realm of a separate factual theory?

Unfortunately, there is no easy-to-draw line that we can provide. Several factors here, however, help assure us that the trial court did not abuse its discretion in determining that the differences between the facts alleged in the bill of particulars and those proven at trial were on the small discrepancies side of that line rather than the prejudicial surprise side. First, the bill of particulars was sufficient to allow the defense to understand that strangulation, not the drugs and not the failure to render aid, was the factual theory under which the State was proceeding. Second, in that theory, the precise duration of the chokehold—was it 40 seconds or was it a minute?—was an ancillary detail, not vital to the theory. Third, we are not unmindful and it is not unimportant, that the defense demanded greater specificity in the bill of particulars than that to which they were entitled, with the hope of obtaining a discrepancy and exploiting it on appeal.

Viewed through this lens, Mikowski's current arguments are not supportable. First, he argues that the trial court erred by denying his motion for judgment of acquittal because, according to him, the State failed to prove what it plead in the bill of particulars—a 40 second chokehold. "The standard of review of the denial of a motion for judgment of

acquittal 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.'" *Briggs v. State*, 348 Md. 470, 475 (1998) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The trial court properly reviewed the evidence presented, not just the bill of particulars. The evidence at trial supported a finding that Mikowski strangled Cross. We hold, therefore, that the trial court properly denied the motion for judgment of acquittal.

In the same vein, Mikowski argues that the bill of particulars should have been converted into a particularized jury instruction confining the jury to finding the facts alleged in the bill of particulars. Thus, Mikowski requested the trial court instruct the jury that:

> [T]he specific conduct in this count with which the Defendant has been charged in each count is a singular act of placing his arm across the front of the neck of Sam Cross for a period of 40 seconds or less as testified to by Harold Griffin Weeks. The Defendant is not charged with any other act…or omission with respect to the allegation that Defendant caused the death of Samuel Ives Cross and you may not base your verdict as to this count on any other act, failure to act[,] or omission.

Mikowski requested that the trial court instruct the jury that Mikowski was charged *only* with placing his arm across Cross's neck for 40 seconds and that the jury could base its verdict only on that act.

"A Maryland appellate court reviews a trial court's refusal or giving of a jury instruction under the abuse of discretion standard." *Stabb v. State*, 423 Md. 454, 465

(2011). Our review of jury instruction claims is guided by the consideration of three factors: "(1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given." *Id*. Here, because the second factor is dispositive, we need not address the other two factors.

The requested jury instruction did not reflect the facts of the case. If the State had attempted to perpetrate a switch and surprise, and argue, for example, that Mikowski had committed the charged crimes by providing drugs to Cross, then the bill of particulars would have prevented the switch and the requested jury instruction might have been applicable. The State, however, never wavered from the theory that it was Mikowski's strangling Cross that caused Cross' death. Because the requested jury instruction was not applicable to the facts of this case, we conclude that the trial court did not abuse its discretion by refusing to give it.

II. Reverse Waiver

Mikowski's second argument is that the trial court considered improper factors in refusing to transfer jurisdiction over his sentencing to juvenile court.[5] In effect, Mikowski

[5] Mikowski requested transfer to the juvenile court both pre-trial and pre-sentencing. The trial court denied both requests. While his brief to this Court focuses on the pre-sentencing denial, Mikowski makes a blanket claim that the trial judge erroneously considered non-statutory factors at the pre-trial reverse waiver hearing as well. He further argues that we should apply his pre-sentencing analysis to the trial court's pre-trial reverse waiver denial. Mikowski, however, provides no analysis of the trial court's pre-trial decision or what in it he claims was error. We will, therefore, confine our (continued…)

argues that the five factors listed in Section 4-202.2(b) of the Courts & Judicial Proceedings ("CJP") Article are exclusive and any non-statutory considerations are prohibited.

When considering a pre-sentencing motion to transfer jurisdiction to the juvenile court for disposition, the circuit court must review five factors:

> (1) the age of the child;
>
> (2) the mental and physical condition of the child;
>
> (3) the amenability of the child to treatment in an institution, facility, or program available to delinquent children;
>
> (4) the nature of the child's acts as proven in the trial or admitted to in a plea; and
>
> (5) the public safety.

CJP § 4-202.2(b). Mikowski concedes that the trial court considered each of the five statutory factors. His complaint is, instead, that the court also considered four additional non-statutory factors, in addition to the five statutory factors: the availability of secure treatment facilities in the juvenile system; the sufficiency of treatment options through the juvenile system; the length of time Mikowski would be in the juvenile system; and deterrence of other youth in the county. Mikowski argues that the trial court should not have taken these non-statutory factors into consideration at all.

analysis to whether the trial court erred by considering non-statutory factors in its denial of the pre-sentencing reverse waiver request. *See Ruffin Hotel Corp. of Maryland v. Gasper*, 418 Md. 594, 618 (2011) (reaffirming "the proposition that appellate courts cannot be expected to search" for support for a party's position).

Mikowski bases this theory on his reading of our decision in *Whaley v. State*, in which we rejected the trial court's consideration of a non-statutory factor in a pre-trial reverse waiver hearing. 186 Md. App. 429 (2009). To understand why *Whaley* does not control our decision here, however, requires some background. There are three situations in which there may be transfer of jurisdiction between the adult criminal justice system and the juvenile system: (1) a pre-trial juvenile court to criminal court (a "waiver"), CJP § 3-8A-06; (2) a pre-trial criminal court to juvenile court (a "pre-trial reverse waiver"), Criminal Procedure Article ("CP") § 4-202; and (3) a pre-sentence criminal court to juvenile court (a "pre-sentencing reverse waiver"), CJP § 4-202.2. The statutory factors to be considered for waiver and pre-trial reverse waiver are virtually the same. *Gaines v. State*, 201 Md. App. 1, 11 (2011). For both of these pre-trial transfer requests, the court must consider:

> (1) age of the child;
>
> (2) mental and physical condition of the child;
>
> (3) the child's amenability to treatment in any institution, facility, or program available to delinquents;
>
> (4) or the nature of the alleged crime; and
>
> (5) the public safety.

CP 4-202(d). In addition, the waiver statute also requires the juvenile court to consider the child's alleged participation in the offense and carries a presumption that the child committed the act. *Gaines*, 201 Md. App. at 11 (citing CJP § 3-8A-06(d)(2), (e)(4)). Thus, each of the three situations has its own method for considering guilt: in a waiver request,

the child's participation in the crime is considered and there is a presumption of guilt; in a pre-trial reverse waiver request there is no consideration of the child's guilt; and in a pre-sentencing reverse waiver request, the child has already been convicted of a crime.

In *Whaley*, the circuit court was determining whether to grant a pre-trial reverse waiver request. 186 Md. App. at 438-39. The trial judge believed that consideration of a non-statutory factor—the defendant's guilt—was mandatory. *Id*. at 448. We held that the trial court erred, not because the trial court considered the defendant's guilt, but because it considered consideration of the defendant's guilt mandatory. *Id*.; *see also Gaines*, 201 Md. App. at 15 (noting that this Court reversed the trial court in *Whaley* because the trial court "presumed the child's guilt in a reverse waiver hearing."). Because the trial court's consideration of the defendant's guilt during the pre-trial reverse waiver hearing skewed the analysis of the statutory factors and ran contrary to the purpose of transferring jurisdiction to the juvenile court when "in the interest of the child," we found error. *Whaley*, 186 Md. App. at 447 (noting that a defendant assumed "guilty of a serious offense will frequently be deemed to be a threat to public safety and not amenable to treatment," which "seems to run contrary to the authorization to transfer jurisdiction to the juvenile court when it is 'in the interest of the child.'").

But Mikowski reads too much into *Whaley* if he believes that it constitutes a total ban on the consideration of non-statutory factors. *Whaley* itself, at least by implication, actually endorsed the consideration of certain non-statutory factors. For example, in that case we noted that consideration of DJS's views on a proposed reverse waiver (despite not

being statute statutory factor) are important and often determinative. *Whaley*, 186 Md. App. at 449 (stating that without a favorable DJS report, "a reverse waiver request faces almost certain denial."). The implicit endorsement of the trial court's consideration of non-statutory factors continued in *Gaines*, where we said, at least in dicta, that even if the court had weighed the juvenile's level of participation in the crime, a non-statutory factor, it would not have erred in doing so. *Gaines*, 201 Md. App. at 14. Our rationale, in *Gaines*, was that it is impossible to completely divorce the statutory factors from their background:

> It is difficult, if not impossible, to consider 'the nature of the alleged crime,' which the court must do, without considering the actions taken by the alleged perpetrators to commit that crime. Thus, we do not interpret that factor in the reverse waiver statute as being completely divorced from consideration of the actions taken by the alleged perpetrators.

Id. We went on to reason that such a rigid interpretation of the statutory factors would not serve the interests of the public, the juvenile, or our system of justice:

> It would be absurd to conclude that, in considering the nature of the offense, a juvenile court, in a waiver hearing, could consider the accused's level of participation in determining that he should be tried as an adult, but that a circuit court, in a reverse waiver hearing, cannot take into account the accused's level of participation in deciding that he should be transferred to juvenile court. Indeed, if appellant's strained interpretation of the 'nature of the alleged crime' factor were to prevail, it would lead to unpalatable results. For example, in a case where a fourteen-year-old child has been induced by those older than he into acting as a lookout in an armed robbery that results in a felony murder, the court would be unable to consider his minor and limited role in the crime in deciding whether to grant a reverse waiver. That is a result that would serve neither the interests of the public, the juvenile, nor our system of justice. We do not believe the General Assembly intended such a rigid,

> inflexible interpretation of 'the nature of the alleged crime' and thus reject appellant's interpretation, since we 'avoid construing a statute in a way which would lead to absurd results.'

Id. at 14 (internal quotation and citation omitted). As we said in *Gaines*, the circuit court may "consider *all relevant* information presented to it." *Id*. at 18 (emphasis added).

We think that the rule to be distilled from *Whaley* and *Gaines* is that a trial judge's consideration of non-statutory factors is not prohibited so long as the non-statutory factors that it considers (1) won't skew consideration of the statutory factors and (2) are consistent with the purposes of the juvenile justice system generally, as set forth in CJP §3-8A-02(a)(1) (stating that the Juvenile Justice System is designed to balance "public safety and the protection of the community" with "accountability of the child" and "competency and character development to assist children in becoming responsible and productive members of society.").

Here, we are persuaded that the trial court's considerations of non-statutory factors did not skew consideration of the statutory factors and were consistent with the purpose of the juvenile system generally, and were not, therefore, error. The availability of secure treatment facilities and the sufficiency of treatment options are part of balancing "public safety" with the "accountability of the child" and the options for assisting in "character development." CJP § 3-8A-02(a)(1)(i)-(iii). In addition, those considerations are relevant to whether the juvenile system would be able to assist Mikowski "in becoming a responsible and productive member of society." CJP § 3-8A-02(a)(1)(iii). The term for

which Mikowski would remain in the juvenile system is relevant to whether, in the juvenile system, there would be "accountability of the child." CJP § 3-8A-02(a)(1)(ii). Finally, deterrence of other youth can be relevant to "public safety and protection of the community." CJP § 3-8A-02(a)(1)(i).

We conclude, therefore, that the circuit court properly considered appropriate factors for pre-sentencing transfer to the juvenile system and did not abuse its discretion by denying the request to transfer jurisdiction. We affirm.

JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.