

Supreme Court of Kentucky

2025-SC-0115-MR

TYLER AUSTIN JORDAN

APPELLANT

V. ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
NO. 21-CR-01207

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION OF THE COURT BY JUSTICE BISIG

AFFIRMING

This matter involves a jury trial in Fayette County in which Tyler Austin Jordan (“Jordan”) was convicted of one count of first-degree arson and five counts of first-degree wanton endangerment. Jordan received a total sentence of twenty-five years’ imprisonment and appeals to this Court as a matter of right. Ky. Const. § 110(2)(B). The primary issue on appeal is the admission of Jordan’s statement from a recorded phone conversation via a detective’s testimony and whether it was properly disclosed by the Commonwealth. While this Court ultimately finds there was a discovery violation regarding the call, it did not rise to the level to reverse the considered decision of a jury of twelve citizens after a multi-day trial. In the context of an alleged discovery violation, the Court is mindful that a mistrial is an extreme remedy and should only be

used when there appears in the record manifest necessity. *Cardine v. Commonwealth*, 283 S.W.3d 641, 647 (Ky. 2009) (citing *Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky. 2004)). Here, the trial court engaged in just such an analysis and found ample evidence supporting the jury's decision. The trial court determined no substantial probability that the outcome of the trial would be different if the evidence were disclosed. The appellant therefore failed to show that the trial court abused its broad discretion in making this decision, and we accordingly affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Jordan lived at an apartment complex in Lexington, Kentucky. The Pine Brook Apartments consisted of four-plex units adjoined to other four-plex units which were all divided by brick fire walls that protruded above an attic space. There was a breezeway contained in the middle of the apartment units with wooden stairs leading to the entrances on the second floor. In September of 2021, Jordan lived in the bottom right apartment of the four-plex while Mr. Jeremy Richart and his girlfriend, Rachelle Lawson, lived diagonally above Jordan in the top-left apartment. In addition, A.R., Jeremy's minor child, lived with Jeremy and Rachelle part-time in the apartment. On September 2, 2021, A.R. was staying in the apartment along with Jeremy's aunt, Sherri Richart, and her friend, Monique Blackston. The guests were staying in the apartment in Lexington to participate in the Bluegrass Classic Dog Show Cluster that was taking place at the Kentucky Horse Park. Sherri and Monique were in a guest bedroom along with their dogs in a crate, while

A.R. slept in the living room with three additional dogs. The other residents of this particular four-plex directly above and next to Jordan were away the night of the fire.

Later that evening, A.R. was awakened by one of the dogs barking, and she saw smoke and flames around the door to the outside and alerted the others staying in the apartment. Jeremy opened the exterior door to discover a wall of flames on the other side. A.R. called 911, and the occupants of the apartment rushed to the balcony on the other side. Eventually, A.R. jumped from the balcony and landed on a concrete pad below, inside a fenced-in patio. She broke an ankle and fractured her tibia on impact. Next, Jeremy lowered Rachelle, Monique, and two of the dogs down to A.R. Sherri crawled back into the apartment to get two dogs from the crate in the living room. Jeremy jumped off the balcony. Sherri lowered the dogs and then jumped herself. Sherri was severely injured and couldn't stand after her exit. There was burning debris all around. Sherri suffered second-degree and third-degree burns.

Importantly, the Lexington Fire Department responded within four minutes of A.R.'s 911 call. Police Officer Drew Chism followed a firetruck from a local engine company into the apartment complex, with a third firetruck following closely behind him. At the time both the police and fire departments arrived on the scene, Jordan was standing on a patch of grass near the apartments. He was barefoot, wearing pajamas, and was close enough to the asphalt to be in the way of the firetrucks responding. Officer Chism assisted

the victims in moving away from the burning building. He helped A.R. to stand and passed her to Jeremy. The firefighters learned that Sherri continued to be trapped on the patio, and they shielded her from falling embers and spraying water. Officer Chism picked up a chainsaw and used it to cut out a section from the patio wall in order to extract Sherri.

While paramedics examined A.R. for injuries, she saw Jordan watching the fire and smiling. Jeremy also stated that he observed Jordan watching the fire while laughing and smiling (or smirking). Jordan continued to stand by the apartment's tennis courts and was smiling when Officer Chism approached him for questioning. Officer Chism's body camera recorded the encounter with Jordan. He continued to be barefoot in his pajama pants and hoodie sweatshirt. During the encounter, Jordan was focused on the fire and uncooperative. He did not answer basic questions or identify himself. He can be seen repeatedly turning Officer Chism's questions back on him. Jordan stared at the fire continuously. Jordan told Officer Chism that he liked fires. When Officer Chism asked Jordan if he had called 911 in response to the fire, Jordan responded, "Why would I?"

Captain James Greer of the Lexington Fire Department's Fire Investigation Bureau next came over to speak to Jordan. Jordan also refused to cooperate with Captain Greer. Greer informed Jordan that his behavior was suspicious because he was laughing at the situation. Jordan again refused to provide his name or place of residence, and in fact walked away from Captain Greer and Officer Chism.

Both officers eventually caught back up to Jordan. He continued to ignore questions about his name and place of residence and watched the fire. He was defiant in keeping his hands in his pockets. He refused the directive to remove them as well, and the officers struggled and wrestled with Jordan until he was taken to the ground and detained. Other firefighters on the scene disclosed that Jordan stood in the way of the firetruck as it arrived on scene and actually prevented them from accessing some of their equipment by standing very close to the truck. Based upon this information, Officer Chism told Jordan he was being charged with obstructing governmental operations and explained that if he continued to refuse to provide identifying information, he would be taken to jail.

After detaining Jordan, the officers around him continued to attempt to get his identifying information. Jordan complained that Officer Chism had assaulted him and that he wanted to press charges. Officer Chism explained that he would still need to give his name in order to do so. Upon transporting Jordan to a patrol car, it was found he was carrying a mobile phone, a pocket knife, and a lighter in his pocket. Ultimately, the officers were able to identify Jordan after a bystander gave them information about Jordan's car and where it was parked in the apartment complex.

The Lexington Fire Investigation Bureau came on scene and investigated the origin and cause of the fire. Battalion Chief Chris Burke determined the fire was not accidental and had three points of origin: 1) the front door of Jordan's living room; 2) the base of Jordan's sofa; and 3) the bottom of the

staircase in the common breezeway. In addition, in the unburnt portions of Jordan's apartment, Chief Burke discovered a handwritten note on the top of the dresser which read: "God can not save you, he's way up in the sky, I'm right here leaning over your body[.] So when I say you die, you die." The note was accompanied by a sketch of a human figure standing on a cloud with text that read "have a safe trip." Chief Burke was unable to interview Jordan at the jail as he remained unresponsive. Chief Burke also obtained and listened to a recorded phone call Jordan made from the jail to an unidentified woman in which he admitted to being inside the apartment asleep when the fire started. This testimony is the crux of the dispute here.

Jordan was indicted in Fayette County on charges of first-degree arson and first-degree wanton endangerment. Following his jury trial, he was found guilty of the offenses and sentenced to a total of twenty-five years' imprisonment in accordance with the jury's recommendation. The current appeal followed. At trial, the jury learned that the occupants of the other apartment were injured by the fire or escaping from it. A.R. suffered a split tibia and part of her ankle was shattered. Monique's forehead and arm were cut, and she was treated for smoke inhalation. Jeremy suffered minimal injuries. Sherri suffered second- and third-degree burns, a compound fracture of her left femur, and a crushed right ankle. Jordan did not testify at trial and called no witnesses.

During cross-examination, Chief Burke testified that at the time of the fire he did not know whether Jordan was present in his apartment. However,

upon further cross-examination, Chief Burke responded that he did know and had listened to a phone call in which Jordan places himself in the apartment at the time of the fire. Jordan objected to this testimony, arguing the Commonwealth failed to disclose the phone call statement in discovery.

The trial court paused the trial to conduct a hearing outside the presence of the jury. Chief Burke disclosed that the phone call at issue was provided to the Commonwealth on a CD. The trial court listened to the arguments, further testimony from Chief Burke, and reviewed the pertinent portion of the phone call. After its review, the trial court denied the motion for an admonishment to the jury to disregard the testimony, stating:

it is not fair to the defense to say, “disregard what you heard the witness say,” because that precludes [defense counsel] from saying “we were not in the apartment.” Ok, now clearly, there is substantial evidence that he [was] outside the apartment along with others. So, in terms of him saying, “well I was not even there,” meaning on the premises, that’s not even an argument. He’s there.

And so, if I say an admonition, “don’t mention it, disregard it,” I mean to you [counsel], don’t mention again and disregard it to the jury, I just think it makes it a farce of what everybody knows, I am very hesitant, I am more in the category of me making the decision . . . that it is potentially harmless error because you have him already at the premises. And this is one step further, him being in the apartment and leaving to escape being injured by the fire. And if we act like that didn’t exist, I just think it is a farce.

The trial court further explained:

You [defense counsel] need to be giving some thought as to what your closing argument would be. So, and there is similar evidence, I mean, your position can still be there’s no evidence that he set the fire, and that’s why I am going with harmless error in terms of him being put in the apartment.

The trial court then permitted the parties an opportunity to negotiate an agreement regarding the charges. When they were unable to come to a resolution, Jordan next requested a mistrial, which the trial court denied, stating:

I have been giving some great thought as to whether or not I would grant that motion. I am exceptionally unhappy with the way this has progressed. I am not sure exactly how it happened. . . . But I do believe it could . . . potentially be viewed by the higher court, if he is in fact convicted, as harmless, and so therefore, I am going to overrule your motion for a mistrial.

Jordan continued his argument to which the court responded:

I am still sticking with, I don't believe an admonishment is going to be sufficient because it precludes the defense from, I just don't think you could potentially say "we weren't there" and yet we have the defendant's statement saying "I was there and I had to get out because of the fire" and so it is going to be up to you all to decide how you want to proceed, so I have made my ruling.

After the above dialogue, the trial court denied Jordan's motion for a mistrial.

ANALYSIS

I. The Court finds a discovery violation occurred in this case.

The record reflects that the Commonwealth was unable to establish with any level of certainty that they turned the CD with the phone call at issue over to Jordan. Chief Burke disclosed that the phone call was provided to the Commonwealth on a CD. The prosecuting attorney had various levels of certainty that she had turned these over to Jordan's lawyer. The Commonwealth denied any discovery violations, arguing it had provided the defense with a thumb drive containing everything Chief Burke had provided.

The Commonwealth further argued that they were not planning to use the recording as evidence at trial. Despite this, the Commonwealth was unable to produce copies of the flash drive or other media. While “the Commonwealth cannot claim ignorance in order to avoid an RCr 7.24(1) violation,” this Court’s refusal to excuse an unintentional discovery violation does not relieve a defendant from the burden of demonstrating sufficient resulting prejudice to justify reversal. *Trigg v. Commonwealth*, 460 S.W.3d 322, 326 (Ky. 2015).

Defense counsel properly objected at the time of the testimony, and the trial court held a separate hearing and considered the arguments and circumstances of the call. Jordan argues the information contained in the call and resulting testimony at trial impacted a portion of counsel’s trial strategy. In support, counsel argued in opening statements that no one could say whether Jordan was in the apartment at the time the fire started. Jordan further explains that this information about his location at the time the fire began is not otherwise present in the trial testimony, absent the introduction of the call. We do not allow surprise testimony in trial. The pretrial discovery process exists to ensure evidence is disclosed so that defendants can strategize regarding the presentation of proof. Rule of Criminal Procedure (“RCr”) 7.24(1)(a) outlines the scope of discovery in criminal proceedings and requires, upon written request by the defense, that the attorney for the Commonwealth enclose the substance of any oral incriminating statement to have been made by the defendant. Inadvertence is not controlling. Because of the

Commonwealth's inability to concretely establish they turned over the call, the Court holds there was a discovery violation.

II. The violation was harmless error given the totality of evidence and the lack of substantial possibility the outcome would be different.

The mere existence of a violation does not end the inquiry. A discovery violation that occurs during a jury trial should be thoroughly evaluated as to whether there is a reasonable probability that the result would have been different if the evidence was disclosed. *Stieritz v. Commonwealth*, 671 S.W.3d 353, 368 (Ky. 2023). The granting of a mistrial is an extreme remedy and should only be used when the record establishes manifest necessity. *Cardine*, 283 S.W.3d at 647. A trial court possesses "broad remedial powers" to address discovery violations. *Akers v. Commonwealth*, 172 S.W.3d 414, 417 (Ky. 2005). A discovery violation is only prejudicial error when the violation is a surprise attack on defense counsel's "entire defense strategy." *Stieritz*, 671 S.W.3d at 368.

From the information outlined herein, the violation was unintentional and concerned a factual situation about which there was a large amount of circumstantial evidence introduced at trial. As noted by the trial judge in her ruling, ample evidence at trial supported that Jordan was on scene at the apartments at the time of the fire. In fact, overwhelming evidence showed he was by the concrete pad and the tennis courts, watching and smiling, as the fire burned. Close in time to the incident, witnesses at the apartments observed that Jordan was standing in the way of the fire truck upon its arrival on scene. The trucks arrived within 4 minutes of the call. Multiple witnesses

testified to his presence at the scene to the jury. Both A.R. and Jeremy testified that they saw Jordan barefoot and in his pajamas, watching the fire. Officer Chism observed him in the immediate area of the fire. James Greer from the Lexington Fire Investigation Bureau saw Jordan there observing the fire. Jordan's physical reaction to the fire was a key factor in drawing attention to him as a possible suspect. Finally, the jury would be able to observe Jordan's attire and presence at the scene in officer body camera footage. In sum, there was much information that would place Jordan already at the scene of the fire the evening it happened.

Notwithstanding this analysis, the Court is also mindful that the root reason for RCr 7.24(1)(a) is not to inform the defendant that he made the statement at issue, but rather to inform defense counsel in order to plan a strategy around information obtained by the prosecutor in mounting a defense. *Grant v. Commonwealth*, 244 S.W.3d 39, 43 (Ky. 2008) (footnote omitted). The law further states that the Commonwealth should not be permitted to mount "a surprise attack on an unsuspecting defense counsel's entire defense strategy" through the withholding of discovery by "oversight[] or otherwise[.]" *Trigg*, 460 S.W.3d at 327 (quoting *Chestnut v. Commonwealth*, 250 S.W.3d 288, 296 (Ky. 2008)). Without fair notice as required under RCr 7.24(1)(a), the defendant may find himself confronted with a claim that he made incriminating remarks and be forced to cobble together a response. *Id.* at 328.

These strategy concerns are mitigated by the facts in this case. First, defendant Jordan did not testify. Therefore, the statement from the call did not

contradict any testimony given at trial. Jordan's defense can be characterized as one of "reasonable doubt" that there was sufficient evidence that Jordan started the fire. As previously stated, the witness testimony placed Jordan in the vicinity of the fire at the time it occurred. The investigation regarding the origins of the blaze by Chief Burke established the fire began in Jordan's living room at the base of his sofa, and at the bottom of the staircase leading to the breezeway. The jury viewed the foreboding note left in his apartment. Jordan being barefoot and in his pajamas outside the precise location of the fire within four minutes as the fire truck arrived is certainly circumstantial evidence of his presence at the time of the fire. Without any mention of the phone call, the argument that he was not at the scene is already seriously undermined by other evidence. This one statement in testimony cannot be found to have undermined the defense's entire strategy of the case. Considering this information, we find the trial court acted well within its discretion to determine the additional information in the phone call would not have substantially changed the outcome of the trial.

We pause to address two cases Appellant argues are controlling. In both cases, trial verdicts were reversed based upon surprise evidence not provided in discovery. In *Grant*, the Commonwealth introduced a recorded phone call in which the defendant acknowledged he delivered drugs to a property in direct contradiction to defendant's testimony on the witness stand. 244 S.W.3d at 42. In *Chestnut*, the defendant gave an alibi that he was at a Waffle House and away from the scene of a burglary, and police presented an undisclosed

statement of his that he was immediately outside the homes at the time of the burglary. 250 S.W.3d at 295. The distinction in both precedents is the surprise evidence was in direct contradiction to the accused's own testimony at trial. This is clearly more significant from a credibility and ultimate outcome analysis than the vague nature of the phone call at issue here. Nothing in this evidence is of a similar nature to *Grant* and *Chestnut*. Arguably, the evidence indicating Jordan was asleep at the time the fire started could be seen to benefit his position in the case. His assertion that he awoke to a fire could lead a juror to conclude he was not responsible for the fire.

In addition to the discovery violation argument, Jordan briefly argues for the first time that the failure to turn over the statement was a violation of the Fourteenth Amendment to the United States Constitution and *Brady v. Maryland*, 373 U.S. 83 (1963). He posits that the statement could be viewed as favorable to his case by establishing he did not intentionally start a fire because he was asleep. This issue was not preserved at trial as he then argued a discovery violation under RCr 7.24. Furthermore, the trial court did not have the opportunity to engage in an analysis as to whether the statement was favorable or impeaching because the court did not have this issue presented. In *Mills v. Commonwealth*, 718 S.W.3d 577, 585 (Ky. 2025), we articulated the proper test trial courts should apply for tardy mid-trial disclosures of evidence. In the instance of an alleged *Brady* violation, the trial court should examine whether the evidence is favorable to the defense. *Id.* Here, we are talking about a self-serving statement of the defendant himself. Thus, the instinctive

response is there is no shocking revelation that occurred at trial when the witness referenced Jordan's own statement he was in his apartment when the fire started. The customary remedy would be a continuation with an opportunity to analyze the new information. *Id.* at 586. At the appellate level, courts apply the "retrospective" test which focuses on the reasonable probability of a different outcome. *Id.* at 587. For the reasons previously stated, the Court finds no such probability in this case.

In sum, as previously stated, "[t]he power to grant a mistrial ought to be used sparingly and only with the utmost caution, under urgent circumstances, and for very plain and obvious causes." *Roberts v. Commonwealth*, 599 S.W.3d 841, 853 (Ky. 2020) (quoting *Commonwealth v. Padgett*, 563 S.W.3d 639, 646 (Ky. 2018)). The record here reflects the trial court weighed its options fully and considered the appropriate standard. We acknowledge the jury's question about the phone call clearly indicates that the jury paid attention to the information. The jury's specific query does not change the analysis. Primarily because of the other evidence presented, but also the jury question could easily have been as a result of the trial court breaking to entertain argument on the issue and the jury wondering whether that information must be disregarded. Having previously determined the additional information in the call was harmless error, the trial court denied Appellant's request to answer the jury's question in the negative.

The decision about whether this evidence warranted a mistrial was clearly within the trial court's discretion. *Hammond v. Commonwealth*, 504

S.W.3d 44, 51 (Ky. 2016). This discretion should be exercised to declare a mistrial only if there is an urgent and manifest necessity considering the totality of the circumstances in the case. *Id.* We are reminded the well-settled test for an abuse of discretion is whether the decision of the trial court is “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Roberts*, 599 S.W.3d at 852 (quoting *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)). Here, the trial court clearly made findings that the mistake that occurred in the disclosure process made it “exceptionally unhappy,” but solidly found that any review by a higher court would find any error harmless. The judge also reasonably determined that giving an admonishment placed undue emphasis on the information.

It is clear from the record that the trial court considered various remedies including admonishment or mistrial, and while considering all the possibilities, finally determined it was harmless error. RCr 7.24(11) specifically allows a trial court to impose sanctions as may be just for discovery violations. Our law gives the trial court broad discretion in addressing any discovery violations and determining the appropriate course of action. *Wilson v. Commonwealth*, 381 S.W.3d 180, 191 (Ky. 2012).

In conclusion, there was ample evidence of guilt presented in this case to support the jury’s verdict. The trial court acted within its broad discretion to address discovery violations. For these reasons, we affirm.

All sitting. Lambert, C.J.; Conley, Goodwine, and Keller, JJ., concur. Nickell, J., dissents by separate opinion which Thompson, J., joins.

NICKELL, J., DISSENTING: Because I am convinced our precedents governing the Commonwealth's failure to timely disclose a defendant's incriminating statement compel reversal for a new trial in the present matter, I respectfully dissent.

Upon a defendant's written request, RCr 7.24(1)(a) mandates that

the Commonwealth *shall disclose* the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness, and to permit the defendant to inspect and copy or photograph any relevant (a) written or recorded statements or confessions made by the defendant, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody, or control of the Commonwealth[.]

(Emphasis added). "The reason for the rule is not to inform the accused that he made the statement, but rather to inform the defense, in order to plan its defense strategy, whether the *prosecutor* has knowledge of statements of a defendant that it may introduce or use to impeach." *Grant v. Commonwealth*, 244 S.W.3d 39, 43 (Ky. 2008) (footnote omitted). In other words, "RCr 7.24 does not require that the defense rely only on its own information as to the existence of witness statements, but places the burden on other parties to disclose what is in their possession." *Id.*

The Commonwealth's failure to timely disclose a defendant's incriminating statement results in two forms of apparent prejudice to the defense. *Trigg v. Commonwealth*, 460 S.W.3d 322, 327 (Ky. 2015). First, the prosecution should not be permitted to mount "a surprise attack on an unsuspecting defense counsel's entire defense strategy" through the

withholding of discovery by “oversight[] or otherwise[.]” *Id.* (quoting *Chestnut v. Commonwealth*, 250 S.W.3d 288, 296 (Ky. 2008)). Second, “[w]ithout the fair notice required under RCr 7.24(1), the accused individual who is suddenly confronted with the claim that he made incriminating remarks must cobble together a make-shift response or allow the testimony to go unchallenged.” *Id.* at 328. In either circumstance, the discovery violation unfairly impedes the defendant’s “ability to prepare and present a proper defense and to effectively challenge the accuracy of the testimony through cross-examination.” *Id.*

Although a trial court possesses “broad remedial powers” to address discovery violations, *Akers v. Commonwealth*, 172 S.W.3d 414, 417 (Ky. 2005), we have consistently

held that “a discovery violation serves as sufficient justification for setting aside a conviction when there is a reasonable probability that if the evidence were disclosed the result would have been different.” *Chestnut*[], 250 S.W.3d] at 297. Additionally, **we have held that when an undisclosed statement makes it doubtful that defense counsel would have proceeded in the same manner at trial, then reversal is required.** *Id.* at 298; *Akers*[], 172 S.W.3d [at] 417-18 []). Furthermore, “absent the protections of RCr 7.24(1), there is nothing to curb the errant prosecutor who may strategically violate the rule in an attempt to surprise a defendant with an undisclosed statement.” *Chestnut* at 298.

Trigg, 460 S.W.3d at 328 (emphasis added).

In the present appeal, Jordan’s reasonable doubt defense explicitly focused on the insufficiency of the evidence to place him at the location of the fire at the time it started. For example, at the outset of Jordan’s opening statement, he told the jury:

Based on . . . questions we have asked you before and issues that have been raised, I guess you probably weren't surprised the Commonwealth chose to talk about dogs and people trapped in an apartment. What they didn't say is, they intend or expect there to be proof as to what caused the fire. *We do not expect there to be a single witness who will say that they know whether or not Tyler Jordan was in the apartment or on the landing or anywhere at the time the fire started. No witness is going to place him there at the time the fire started.*

(Emphasis added). Jordan continued to emphasize this point throughout his cross-examination of the Commonwealth's witnesses, and the jury specifically questioned the trial court about its ability to use this evidence. I have no doubt defense counsel would have proceeded in a different manner at trial had he been properly apprised of the prosecution's knowledge of Jordan's statement. Thus, the Commonwealth's failure to comply with RCr 7.24(1) compels reversal under *Trigg*, 460 S.W.3d at 328; *Chestnut*, 250 S.W.3d at 298; *Grant*, 244 S.W.3d at 43.

The majority disregards the discovery violation as harmless based on: (1) the strength of the overall evidence of guilt; (2) distinguishing *Grant* and *Chestnut*. Neither of these propositions withstand scrutiny.

First, by focusing on the strength of the Commonwealth's evidence against Jordan, the majority sidesteps the appropriate inquiry under our precedents, which simply asks whether "defense counsel would have proceeded in the same manner at trial" but for the non-disclosure of the defendant's incriminating statement. *Trigg*, 460 S.W.3d at 328. This mode of analysis is essentially a restatement of "[t]he traditional appellate standard for determining prejudice for discovery violations [which] involves a two-pronged analysis: (1)

did the nondisclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant's case." 22A C.J.S. *Criminal Procedure & Rights of Accused* § 460 (2026). The harm of a discovery violation, as opposed to the erroneous admission of known and properly disclosed evidence, is the element of unfair surprise and the attendant prejudicial impact on defense counsel's ability to effectively prepare and present a defense. Wayne R. LaFave, et al., 5 *Crim. Proc.* § 20.6(b) (4th ed. 2025); 22A C.J.S. *Criminal Procedure & Rights of Accused* § 460 ("[W]hen undisclosed evidence is used against [a criminal defendant], basic unfairness results which constitutes reversible error."). Thus, the prejudicial impact of the discovery violation as it relates to the ultimate issue of guilt or innocence is not the dispositive issue. LaFave, 5 *Crim. Proc.* § 20.6(b); 22A C.J.S. *Criminal Procedure & Rights of Accused* § 460.

Second, the majority points to the fact that the undisclosed statements in *Grant* and *Chestnut* contradicted the defendants' testimony at trial while Jordan did not testify in the present appeal.¹ The majority also characterizes Jordan's statement as "[a]rguably" beneficial to his case at trial. Based on my reading of the applicable law, I cannot agree with the majority that our precedents in *Grant* and *Chestnut* are meaningfully distinguishable from the instant matter.

¹ Notably, we applied the reasoning of *Grant* and *Chestnut* in *Trigg* despite the defendant's decision not to testify. *Trigg*, 460 S.W.3d at 328.

In *Grant*, this Court made clear that the harm of a discovery violation results from the unavailability of “[s]uch information [that] is vital to a *professional decision* with respect to [the] defense.” 244 S.W.3d at 43 (emphasis added). While “an informed decision as to proper strategy” necessarily includes the decision to testify, *id.*, the scope of a defendant’s strategy also encompasses the defense’s ability to fairly and adequately present its version of the facts through the examination of witnesses and the argument of counsel. See *Washington v. Texas*, 388 U.S. 14, 20 (1967). In my view, Jordan’s decision not to testify does nothing to mitigate the prejudicial impact of the discovery violation, which refuted his counsel’s framing of the defense theory to the jury and the manner by which the Commonwealth’s witnesses were questioned on the subject of Jordan’s whereabouts at the time the fire started.

In addition, I cannot conclude the impact of Jordan’s undisclosed statement was anything but inculpatory despite his claim to have been asleep at the time the fire started in his apartment. An inculpatory statement not only includes those declarations “that would in themselves support a conviction under a . . . criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a . . . crime.” *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Here, Jordan’s statement was clearly inculpatory as it placed him directly at the origin of the fire at the time it had started, rather than the mere vicinity as he had previously claimed. Indeed, just as “the jury may well have felt hostility

toward a defendant they perceived as having . . . lied to them from the witness stand[,]" *Grant*, 244 S.W.3d at 43-44, I am likewise convinced the jury here may have equally felt hostility toward a defendant like Jordan whose *lawyer* they perceived as having lied to them from the courtroom lectern.

Our precedents mandate reversal when “nondisclosure rendered defense counsel unable to make a well-informed decision about the most appropriate defense strategy, and there is a reasonable probability that defense counsel would not have pursued the same theory had he been apprised of [the defendant’s] alleged statement. *Trigg*, 460 S.W.3d at 328. Because Jordan was “suddenly confronted with the claim that he made incriminating remarks” and his counsel was unfairly left with the option to “cobble together a make-shift response or allow the testimony to go unchallenged[,]" *id.* at 327, I cannot conclude the discovery violation was harmless in this matter. Therefore, I respectfully dissent and would remand for a new trial.

Thompson, J, joins.

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