Circuit Court for Baltimore City
Case No. 122223007

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0890

September Term, 2023

VERNON SMITH

v.

STATE OF MARYLAND

Shaw,
Albright,
Eyler, D.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Shaw, J.

Filed: May 10, 2024

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

At the conclusion of a jury trial in the Circuit Court for Baltimore City, Appellant Vernon Smith was convicted of second-degree assault, witness retaliation, conspiracy witness retaliation, and second-degree conspiracy assault. He was sentenced to eighteen years all but eight years suspended, followed by three years of supervised probation. Appellant timely appealed. He presents two questions for our review:

1. Did the trial court err by admitting State's Exhibit 4 into evidence under the Prior Inconsistent Statement exception to the hearsay rule where the witness said he did not remember and there was no finding of feigned memory loss?

2. If the evidence was properly admitted for impeachment purposes only, and where the only other evidence of criminal agency is [Appellant's] admission to a "physical altercation" with an unidentified person at an unidentified time, was the evidence sufficient to sustain convictions for second-degree assault, witness retaliation, conspiracy witness retaliation, and conspiracy second-degree assault?

For the following reasons, we affirm the judgment of the circuit court.

BACKGROUND

A jury trial commenced on May 31, 2023, in the Circuit Court for Baltimore City on charges against Appellant related to incidents that occurred on June 17, 2022, and July 12, 2022. The State's first witness was Baltimore City Officer Leandrew Baillum. Officer Baillum testified that, on June 17, he responded to a call from Mr. Winston Melendez. At the time, Officer Baillum was wearing a body-worn camera and took a recorded statement from Mr. Melendez. Mr. Melendez informed Officer Baillum that he was sitting on the steps outside of his residence located in the 1800 block of St. Paul Street in Baltimore City, and he was attacked by two individuals who stole his wallet which contained his I.D. and $800. Officer Baillum testified that he observed a cut on the right side of Mr. Melendez's

lip. A still photograph taken from Officer Baillum's body-camera footage was admitted into evidence that depicted Mr. Melendez at the location where the incident occurred. Officer Baillum testified that he was unable to locate or identify any suspects.

On July 12, Officer Baillum responded to a call in reference to the June 17 incident, stating that the suspects were in the area. He arrived at Mr. Melendez's residence and took a statement from him, which was recorded on his body worn camera. Mr. Melendez reported that when he was returning home from the store that day, he saw three individuals: a man on a bike, a darker man with dread locks and one other man. The individuals resembled the men who robbed him. Mr. Melendez stated that the man who was riding the bike hit him in the face and informed him that he had a gun and that he should not be speaking to the police.

Officer Baillum, Mr. Melendez and a third individual then drove around the area to search for the person who was involved in the June 17 assault. Officer Baillum testified that Mr. Melendez identified an individual while they were in his police car and he then drove Mr. Melendez back to his residence. Officer Baillum later approached the man identified by Mr. Melendez and asked for his I.D. The individual was Appellant Vernon Smith. Officer Baillum was wearing his body-worn camera when he spoke to Appellant and the video recording of his interaction was entered into evidence. Officer Baillum testified that he explained to Appellant that he was being stopped in reference to a fight that had previously occurred. In the video, Appellant stated, "[m]an, I ain't hurt nobody, then they's calling the police -- (indiscernible) calling the police on somebody, for real.

These folk these days." Officer Baillum testified that Appellant was subsequently arrested in connection with the June 17 and July 12 incidents.

On cross-examination, Officer Baillum confirmed that there were multiple people in the area on July 12 and that he did not get a clothing description from Mr. Melendez. Officer Baillum also testified that he never recovered Mr. Melendez's I.D. On redirect examination, Officer Baillum clarified that Mr. Melendez pointed out Appellant when he was driving in the car with him on July 12, and that Mr. Melendez's identification was the reason why he stopped Appellant that day. The State played a portion of the body camera footage that was admitted into evidence as State's Exhibit Five, where Mr. Melendez stated, "[t]hat's them right there," when he was riding in Officer Baillum's police car.

The State then called Detective Timothy Bardzik. Detective Bardzik testified that he participated in the investigation into the June 17 incident. He interviewed Appellant when he was arrested which was videotaped and during the interview, Appellant stated, "I should've filed charges on that motherf [*****] . . . for sexual harassment." Appellant stated that Mr. Melendez "kept playing with me for, like, sex, and kept playing me, and I'm not gay. You hear me?" He stated, "[h]e's doing that because he's trying to – he mad. He's a b[****], and he played with me, and I ain't play that day. (indiscernible), but I did not take no money from him. I wouldn't." Appellant stated that Mr. Melendez had touched him a few times and that Mr. Melendez lived on St. Paul Street. On cross-examination, defense counsel played a portion of the video where Appellant stated that he was intoxicated and only had an eighth-grade education.

The State's next witness was Mr. Melendez. Mr. Melendez recalled that he made a call to the police on June 17, regarding an attack. He testified that he did not recall who attacked him, how many people were there, and did not recall speaking with Officer Baillum. He stated, "it happened a long time ago." He testified that he remembered calling the police on July 12, in reference to the June 17th incident and that a police officer came out after he placed the call. He stated that he did not remember what he said to the officer. The State showed Mr. Melendez, Officer Baillum's body-worn camera footage – State's Exhibit Four, to refresh his recollection about why he called the police on July 12, and Mr. Melendez stated that he still did not remember that day after viewing the video. The State moved to admit State's Exhibit Four into evidence and the court admitted it over defense counsel's objection. In the video, Mr. Melendez stated to Officer Baillum, "[s]o I got jumped. I got robbed. I got all that, and then I just went to the store, and they just threatened me and hit me in the face." He further stated, "[b]ut every single time I come outside, they be threatening and threatening and threatening me." He stated, "I can't even go to the store, and they told me, they was like, you know, 'stay in your lane,' and all that stuff, and hit me in my face. . . They was like, 'You know you shouldn't talk to the cops' and all that other stuff, but now I'm scared for my life. Like I'm just scared." The State then asked Mr. Melendez to walk through what happened on July 12. Mr. Melendez testified:

> Okay. I went to the store. As I was coming back, there was somebody on a bike, but I don't even remember how he looked. There was a darker one with dreads. That's it, and one more person, but I don't even remember how he looks, but the other person that was on the bike, he's the one that came up to me and said whatever he said and then hit me.

Mr. Melendez testified that he did not remember the men, and that the incident happened a year ago. Additionally, he stated that he did not remember pointing anyone out, but that he remembered being shown a photo array. He further stated that he did not recall what the intentions of the three men were who approached him on July 12, and that he did not recall what led him to be attacked on June 17. He testified that he is gay and that he did not recall making any sexual advances on anyone that day.

On cross-examination, Mr. Melendez stated that he was not drinking or using marijuana on June 17 because he had chemotherapy. He stated that his neighbor called 911 on June 17 and when asked if he made a call to 911 that day, he stated, "I think – I don't remember, ma'am." Defense counsel played the 911 call to refresh his recollection, and Mr. Melendez acknowledged that it was him on the call. He stated that he did not recall giving a clothing description of the men, did not recall what the men looked like, did not recall what they were wearing, did not recall any features about the men, did not recall whether he told the officers how short or tall the men were, and he did not recall if there were a lot of people outside that day. On redirect examination, the State played more of the video where Mr. Melendez identified the three men: "one of them has glasses on with the hat to the back. He's tall and skinny. That's the main one, but then there's another one that's dark-skinned. He has a hat to the back too. There's three of them."

After Mr. Melendez's testimony, the State rested its case and Appellant moved for acquittal on all counts.[1] Regarding the robbery charge, Appellant argued that the only identification in the case was the testimony from Officer Baillum that he drove around with Mr. Melendez and Mr. Melendez identified Appellant. Appellant argued that it was not clear whether Mr. Melendez identified Appellant as the individual there on June 17 or July 12. Regarding the robbery conspiracy charge, Appellant argued that there was no testimony regarding a meeting of the minds to commit robbery and that there was no identification that connected him to the robbery. Regarding the second-degree assault and second-degree conspiracy assault charges, he argued that there was no identification that he was the individual who committed the assault on that day and there was no evidence that there was a plan between two people to commit that assault. Finally, Appellant argued that regarding the witness retaliation charge, Mr. Melendez did not testify that he was threatened and that he only stated it in the video exhibit. The court denied Appellant's motion on the charges of robbery, conspiracy robbery, second-degree assault, second-degree conspiracy assault, theft, conspiracy theft, and witness retaliation and the court dismissed the hate crime charge. Appellant rested his case and renewed his Motion for Judgment of Acquittal on the same grounds. His motion was denied.

[1] Appellant was charged with the following in connection to the June 17 incident: robbery, conspiracy robbery, second-degree assault, second-degree conspiracy assault, theft, conspiracy theft and hate crimes. Appellant was charged with the following in connection to the July 12 incident: witness retaliation, conspiracy witness retaliation, witness retaliation (felony), conspiracy witness retaliation (felony) and second-degree conspiracy assault. We only discuss Appellant's arguments in support of his Motion for Acquittal for the charges he was convicted of for the purposes of brevity.

On June 1, 2023, the jury found Appellant guilty of second-degree assault, witness retaliation, conspiracy witness retaliation, and second-degree conspiracy assault. He was sentenced to eighteen years all but eight years suspended, followed by three years of supervised probation. Appellant timely appealed.

DISCUSSION

I. The circuit court did not err in admitting Mr. Melendez's prior statement into evidence.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Hearsay is inadmissible at trial unless it falls within an exception to a hearsay rule excluding such evidence or is "permitted by applicable constitutional provisions or statutes." Md. Rule 5-802. "Unlike other evidence, a trial court has no discretion to admit hearsay in the absence of a provision providing for its admissibility. Hearsay is thus an issue of law, not fact. Whether evidence is hearsay is reviewed *de novo*, without deference to the trial court." *Young v. State*, 234 Md. App. 720, 733 (2017) (internal citations and quotations omitted).

Md. Rule 5-802.1 provides that certain statements "previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule." Md. Rule 5-802.1(a), provides: "A statement that is inconsistent with the declarant's testimony [may be admitted], if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and was signed by the declarant;

or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement[.]"

There are two situations in which Md. Rule 5-802.1(a) is applicable. The first is positive contradictions, where the witness's prior statement is materially inconsistent with his or her testimony. *Wise v. State*, 243 Md. App. 257, 271-72 (2019). The second is the "classic evidentiary problem of the turncoat witness" that the Supreme Court of Maryland addressed in *Nance v. State*. 331 Md. 549, 552 (1993). In *Nance*, the Court determined that a trial court may admit a witness's prior out of court testimony as substantive evidence when the witness displays a selective loss of memory. *Id.* at 572. The Court noted that when a witness's claim of lack of memory amounts to deliberate evasion, inconsistency can be implied. *Id.* at 564.

This Court later elaborated on the *Nance* holding in *Corbett v. State*, 130 Md. App. 408 (2000). The *Corbett* Court explained that a court can admit a witness's prior statement when the witness feigns forgetfulness at trial "because by claiming that he [or she] does not remember an event that he [or she] does remember, the witness is denying, albeit indirectly, that the event occurred," and "inconsistency may be implied from a witness's failure to testify about a matter entirely when under the circumstances he [or she] reasonably would be expected to do so." *Id.* at 425. The *Corbett* Court also held that the decision whether a witness's lack of memory is feigned or actual is a "demeanor-based credibility finding that is within the sound discretion of the trial court to make." *Id.* at 426.

In *McClain v. State,* the Maryland Supreme Court discussed Md. Rule 5-802.1 and held that unlike some other Rules, findings do not need to be made explicitly on the record. 425 Md. 238, 252 (2012). The Court added that "'in case of doubt the courts should lean toward receiving such statements to aid in evaluating the testimony,'" and that absent an explicit ruling, appellate courts apply a presumption that the trial court knew the law and applied it properly. *Id.* at 248–250 (citations omitted).

Here, Appellant argues that the trial court erred by admitting video evidence of Mr. Melendez's prior statement under Maryland Rule 5-802.1(a), without making any finding that Mr. Melendez was feigning his claim of memory loss. Conversely, the State argues that Mr. Melendez's prior statement was properly admitted.

At the beginning of the trial, the State alerted the court, "Your Honor, I just wanted to bring your attention before we started, I have reason to believe that the State's victim in this case may be – may be a hostile witness or refuse to testify when he's called over. I just wanted Your honor to be – to have a head's up." The Court stated "[o]kay." During Mr. Melendez's direct examination, he failed to recall much of what happened on June 17. He testified that he did not remember anything, he did not recall speaking with Officer Baillum, he did not recall who he was attacked by and he did not recall how many people were present in the area on June 17.

The State attempted to admit State's Exhibit Two, Officer Baillum's body-worn video footage from June 17, after Mr. Melendez testified that he did not recall what he said to Officer Baillum that day. Defense counsel objected to the admission of the exhibit and

the State argued that Mr. Melendez's statement was a prior inconsistent statement, admissible under Md. Rule 5-802.1(a). Defense counsel argued that Mr. Melendez's statement was not inconsistent because his testimony was that he did not remember making the statement to Officer Baillum and that he was not feigning memory loss. The Court overruled defense counsel's objection and initially admitted statement under Md. Rule 5-802.1(a). The exhibit, however, was ultimately withdrawn from evidence.

The court asked Mr. Melendez whether he recalled any events from the June 17 incident and Mr. Melendez stated that he did not.

[The court]: Excuse me. Overruled. Let him answer -- what is your answer?

[Mr. Melendez]: I can't recall it. It happened a year ago. I can't –

[The court]: It happened a year ago?

[Mr. Melendez]: Yes.

[The court]: And you say you don't recall? What is it that you don't recall?

[Mr. Melendez]: I don't remember the -- the people that did that, that day.

[The court]: Oh. You don't. remember –

[Mr. Melendez]: When it happened, it happened. That's all I remember.

[The court]: Okay.

[Mr. Melendez]: I have other cases that I've been going through, so it gets -- I really don't remember.

[The court]: Okay. All right. Let's move on.

Shortly thereafter, the State asked Mr. Melendez whether he recalled the July 12 incident. Mr. Melendez stated that he did not recall, and the State marked Exhibit Four–

Officer Baillum's body-worn camera from July 12, for identification purposes and to refresh Mr. Melendez's recollection. After Mr. Melendez viewed the video and failed to recall the July 12 incident, the State moved to admit State's Exhibit Four. Defense counsel objected. The court stated, "I'm going to admit it" and noted defense counsel's continuing objection. After failing to recall what happened when he was in Officer Baillum's vehicle on July 12, and failing to recall if he had identified anyone that night, Mr. Melendez stated:

> [Mr. Melendez]: Can I say something. Judge?
>
> [The court]: Wait a minute. [W]hat -- you have a question?
>
> [Mr. Melendez]: Yeah. I didn't want to testify, so I don't know why I'm up here. Like, I just –
>
> [The court]: The State called you as a witness.
>
> [Mr. Melendez]: But I didn't want to testify.
>
> [The court]: Well, you may -- you may not want to but you have to.

From this record, we hold that the court implicitly found that Mr. Melendez's memory loss was feigned. Following Mr. Melendez's initial testimony, the court admitted footage from the officer's body worn camera that included Mr. Melendez's statement describing the attack, but the exhibit was then withdrawn. The court's comments and questions to Mr. Melendez, included the following: "It happened a year ago?" – "And you say you don't recall? What is it that you don't recall?" – "Oh. You don't. [R]emember," demonstrate the court's skepticism of whether Mr. Melendez's memory was feigned. Later, when Mr. Melendez again failed to recall the events from the July incident, the court admitted the video footage over defense counsel's objection. As we see it, the court had

several opportunities to assess the credibility of Mr. Melendez's testimony and the court ultimately made a demeanor-based credibility decision that his testimony was feigned. We hold, that, consistent with the presumption that the court knew and properly applied the law, Mr. Melendez's prior statement was properly admitted as a prior inconsistent statement under Md. Rule 5-802.1(a). As stated, the court was not required to make an *explicit* finding on the record to satisfy the Rule's requirements. *McClain*, 425 Md. at 252.

We note, that in addition, there is no dispute that Mr. Melendez's prior statement met the recording requirement under Md. Rule 5-802.1(a) because the statement was recorded by Officer Baillum's body-worn camera. It was "recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement[.]" Md. Rule 5-802.1(a)(3).

II. Appellant's sufficiency argument was not properly preserved for appeal.

"A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment of acquittal shall be necessary." Md. Rule 4-324(a).

"Ordinarily, an appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). The primary purpose of Md. Rule 8-131(a) is "to ensure fairness for all parties in a case and to promote the orderly administration of law." *State v. Bell*, 334 Md. 178, 189

(1994). To properly preserve an issue, a party must make "a timely and clearly stated objection made to the trial court so that the court has an opportunity to consider the issue and to correct the error." *Jordan v. State*, 246 Md. App. 561, 587 (2020).

Appellant argues that if Mr. Melendez's prior statement was properly admitted for impeachment purposes only, the remaining evidence available for substantive consideration was insufficient to sustain his convictions. The State argues that the iteration of Appellant's legal sufficiency argument was never raised below in support of its Motion for Judgment of Acquittal and is thus waived. The State contends that the jury instruction that was offered after the court ruled on a Motion for Judgment of Acquittal cannot alter the propriety of the court's ruling or the basis upon which the evidence was admitted. Lastly, the State argues, assuming arguendo, that the jury instruction altered the admission of Mr. Melendez's statement, the remaining evidence was sufficient to sustain Appellant's convictions. We agree with the State that the issue was not properly preserved for review.

The court admitted Mr. Melendez's statement to Officer Baillum on July 12, under Md. Rule 5-802.1(a), which permits an inconsistent out-of-court statement "to be offered as substantive evidence." *Nance*, 331 Md. at 569. At end of the trial, the court instructed the jury, after which defense counsel requested an additional instruction. At a bench conference, the parties discussed what instruction should be used for Mr. Melendez's prior statement and whether it was to be admitted as substantive evidence or impeachment evidence. After much discussion, defense counsel stated, "so your – your honor, the State

just agreed to just read the – the impeachment one that I gave you." The court stated "[t]hat's fine," and read the following instruction to the jury:

> [The court]: All right. One more instruction. You've heard testimony that Mr. Melendez made a statement before Trial. Testimony concerning that statement was permitted only to help you decide whether to believe the testimony that he gave during the trial. It is for you to decide whether to believe the trial testimony of Mr. Melendez in whole or in part, and you may not use the earlier statement for any purpose other than to assist you in making that decision.

In support of the Motion for Judgment of Acquittal, Appellant did not argue that Mr. Melendez's statement was admitted only for impeachment and that the evidence was legally insufficient to convict him of the various crimes as required under Md. Rule 4-324(a). Instead, Appellant improperly requested an instruction about Mr. Melendez's statement that did not reflect the court's ruling, and for reasons that are not clear, the State agreed to it, which led to it being given. None of that affects the ruling on the Motion for Judgment of Acquittal, which happened before the instructions were given and was based on the evidence admitted. Therefore, we find that the issue was not properly preserved for our review.

Assuming arguendo, that Appellant had properly preserved his sufficiency argument, we find the evidence was sufficient to sustain Appellant's convictions for second-degree assault, witness retaliation, conspiracy witness retaliation, and second-degree conspiracy assault. "The standard for 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." *Pinkney v. State*, 151 Md. App. 311, 326 (2003). "Weighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder." *State v. Stanley*, 351 Md. 733, 750 (1998). We do not re-weigh the evidence, but "we do determine whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Pinkney*, 151 Md. App. at 326.

First, we address the evidence for the second-degree assault conviction in connection to the June 17 incident. At trial, Mr. Melendez testified that he was attacked on June 17, and that he did not consent to the assault. Officer Baillum testified that he observed a cut on Mr. Melendez's lip when he arrived at the scene. On July 12, Mr. Melendez identified Appellant as the perpetrator from June 17 and Officer Baillum confirmed Appellant's identity.[2] Finally, Appellant in his interview with Officer Bardzik detailed his resentment towards Mr. Melendez because he had made sexual advances on Appellant. He stated that Mr. Melendez "touched [him]" multiple times in different situations and that he should have filed charges against him for sexual harassment. On this record, the evidence was sufficient to support Appellant's second-degree assault conviction.

Next, we address the evidence for the witness retaliation, conspiracy witness retaliation and conspiracy second-degree assault convictions in connection to the July 12

[2] *Eades v. State*, 75 Md. App. 411, 427 (1988) ("A victim's identification of the accused as the perpetrator of the crime is ample evidence to sustain his conviction.").

incident. At trial, Mr. Melendez testified that he had called the police on July 12 and that a police officer came out that day. Officer Baillum testified that the call was in reference to "the incident that occurred before and possible suspects in the area." Mr. Melendez further testified to the following regarding what occurred on July 12: "Okay. I went to the store. As I was coming back, there was somebody on a bike, but I don't even remember how he looked. There was a darker one with dreads. That's it, and one more person, but I don't even remember how he looks, but the other person that was on the bike, he's the one that came up to me and said whatever he said and then hit me." Finally, Appellant stated in his interview with the police: "I even confronted [Mr. Melendez] about it before I got booked." Viewing the evidence in the light most favorable to the State, the evidence presented at trial was sufficient to support Appellant's convictions for witness retaliation, conspiracy witness retaliation and conspiracy second-degree assault.

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