Circuit Court for Washington County
Case No. C-21-CR-22-000018

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0073

September Term, 2023

GAGE JOHN COLES

v.

STATE OF MARYLAND

Nazarian,
Zic,
Robinson,
(Specially Assigned),

JJ.

Opinion by Zic, J.

Filed: September 18, 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).

Appellant Gage Coles was convicted in the Circuit Court for Washington County of voluntary manslaughter, assault charges, and related firearm offenses for discharging a firearm into a group of approximately ten adults as the group started toward Mr. Coles and his two friends, all three of which were minors at the time.

During trial, two out-of-court statements were admitted as exceptions to the hearsay rule pursuant to Maryland Rule 5-802.1. Mr. Coles now argues that these statements were erroneously admitted. Mr. Coles also requested jury instructions for both self-defense and defense of others, but the jury was instructed only on self-defense. Mr. Coles now appeals the circuit court's decision not to instruct on defense of others.

QUESTIONS PRESENTED

Mr. Coles presents two questions for our review, which we have recast and rephrased as follows:[1]

1. Whether the circuit court erred in admitting two recorded out-of-court statements in violation of Maryland Rule 5-802.1.

2. Whether the circuit court erred in declining to instruct the jury on the law of defense of others.

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[1] Mr. Coles phrased the questions as follows:

1. Whether the trial court erred when it admitted over objection two recorded out of court statements by two testifying witnesses in violation of Maryland Rule 5-802.1[.]

2. Whether the trial court erred in declining [Mr. Coles'] request that the jury be instructed on the law of defense of others[.]

For the following reasons, we partially answer the first question in the negative and we do not reach the remainder because the issue was not preserved for appellate review. We also do not reach the second question because the issue was not preserved for appellate review.

BACKGROUND

On October 23, 2021, Mr. Coles and his two friends, Malachi Leech and Zabein Jenkins, went on a walk and encountered a group of between eight to ten people wearing ski masks. The nature of the interaction is contested in this case, and is detailed below in this opinion, but during the encounter, it is undisputed that Mr. Coles discharged a firearm into the group, killing one person and wounding another.

During the trial, two recorded interviews of testifying witnesses were admitted. The two testifying witnesses, Mr. Leech and Mr. Jenkins, were interviewed by law enforcement during the investigative period prior to trial. The entirety of these out-of-court recorded interviews were admitted into evidence over Mr. Coles' hearsay objection.

During the trial, Mr. Coles requested that the jury be instructed on both self-defense and defense of others. The court held that defense of others was not implicated by the evidence in trial, and accordingly, the court instructed the jury on imperfect and perfect self-defense.

The jury convicted Mr. Coles of voluntary manslaughter, assault charges, and related firearm offenses. He was sentenced to an aggregate executed sentence of 25 years, five years of which is to be served without the possibility of parole.

Mr. Coles filed a timely appeal, contesting the jury instructions and the recorded out-of-court interviews of Mr. Leech and Mr. Jenkins.

DISCUSSION

I. MR. COLES' CLAIM FOR REDACTION UNDER MARYLAND RULE 5-802.1 WAS NOT PRESERVED FOR APPELLATE REVIEW. MR. COLES' CLAIM THAT CONSISTENT EVIDENCE WAS WRONGLY ADMITTED UNDER THE SAME RULE IS PRESERVED BUT CONSTITUTES HARMLESS ERROR.

Hearsay is not admissible evidence during trial. Md. Rule 5-802. There are several exceptions to the rule against hearsay relating to prior statements by witnesses. Md. Rule 5-802.1. The exception at issue here is admittance of a testifying witness's prior inconsistent statement. The relevant portion of the rule states:

> The following 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:
>
> > (a) A statement that is inconsistent with the declarant's testimony, 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[.]

Md. Rule 5-802.1(a). Maryland jurisprudence makes clear that "a prior inconsistent statement must present a material contradiction[,]" so that the admitted evidence is "legally significant or dispositive [of] facts." *Wise v. State*, 471 Md. 431, 452-53, 454 (2020).

During Mr. Coles' trial, two recorded interviews were admitted into evidence under Maryland Rule 5-802.1(a) over his hearsay objection. Mr. Coles now argues that Mr. Jenkins' interview should have been redacted because the entirety of his statement was not inconsistent with his trial testimony, as required under the rule. This issue is not preserved for appellate review because Mr. Coles did not request redaction at the circuit court. Mr. Coles also argues that Mr. Leech's interview should not have been admitted to any extent because the recorded interview was not inconsistent with his trial testimony. This issue is preserved, but it constitutes harmless error.

A. Standard of Review

When we review questions "'of whether particular evidence is hearsay or whether it is admissible under a hearsay exception[,]'" we owe the circuit court "'no deference,'" however, "'the factual findings underpinning this legal conclusion necessitate a more deferential standard of review.'" *Smith v. State*, 259 Md. App. 622, 666-67 (2023) (quoting *Gordon v. State*, 431 Md. 527, 538 (2013)). Accordingly, when we review "'a trial court's ruling on whether evidence falls under an exception to the rule against hearsay,'" we review the factual findings for clear error and the circuit court's application of law to fact without deference. *Smith v. State*, 259 Md. App. at 667 (quoting *Hailes v. State*, 442 Md. 488, 499 (2015)).

B. Mr. Coles' Claim That Mr. Jenkins' Interview Should Have Been Redacted Is Not Preserved.

i. The Parties' Contentions

Mr. Coles argues that Mr. Jenkin's recorded interview should not have been admitted in its entirety and argues that the circuit court should have redacted the consistent portions of the interview. Mr. Coles admits that while some statements Mr. Jenkins made during the recorded interview were inconsistent and within the reach of Rule 5-802.1, other portions of Mr. Jenkins statement were not inconsistent.[2] Accordingly, Mr. Coles argues that only the inconsistent portions of the interview should have been admitted, not the entire interview. Mr. Coles does not present an argument on the issue of preservation.

The State contends that Mr. Coles' argument is not preserved for two reasons.[3] The State argues that Mr. Coles' request for redaction is not preserved because Mr. Coles did not request redaction in the circuit court. The State cites to Maryland caselaw to argue that the individual seeking redaction of objectionable portions must first request the redaction in the circuit court. The State also argues that Mr. Coles made a specific objection to Mr. Jenkins' interview. The State argues that because Mr. Coles made a specific objection, only that specific reason is preserved on appeal. The State argues that

[2] Mr. Coles presented substantive arguments regarding Mr. Jenkins' recorded interview, but we do not reach the issue because it is not preserved for appellate review.

[3] The State also makes a substantive argument that the circuit court properly admitted the statements of both witnesses. This portion of the State's argument is summarized during our analysis of Mr. Leech's interview.

because Mr. Coles made a specific objection of "hearsay" in the circuit court, Mr. Coles' argument on appeal is not preserved because Mr. Coles' objection during the trial "did not include a claim that the interview did not contain prior inconsistent statements, or that it was otherwise inadmissible under Rule 5.802.1."

ii. Discussion

In order for Mr. Coles to make the argument on appeal that Mr. Jenkins' interview should have been redacted in the circuit court, Mr. Coles must have preserved the issue for appellate review by requesting redaction of the interview in the circuit court. *See Colkley v. State*, 251 Md. App. 243, 282-83 (2021) ("[I]t was Appellant's obligation to request redaction of specific portions of the recording . . . general objections will not suffice."); *Belton v. State*, 152 Md. App. 623, 634 (2003) ("[I]t is the obligation of the party seeking redaction to raise the issue to the judge."); *Williams v. State*, 117 Md. App. 55, 68 (1997) ("[A]ppellant never asked the trial court to redact the portions of the statement appellant believed to be prior consistent statements. Accordingly, even if error, it was not preserved.").

This general rule was recently reaffirmed in *State v. Smith*, ___ Md. ___, No. 0030, Sept. Term 2023, 2024 WL 3770718 (filed Aug. 13, 2024). The Supreme Court of Maryland, however, recognized only a singular exception where defense counsel is not required to request redaction for hearsay statements against penal interest under Rule 5-804(b)(3), which involves a hearsay exception pursuant to a declaration against penal interest. *State v. Smith*, No. 0030, slip op. at 34, 40-41, 2024 WL 3770718, at *16, 18-19. This hearsay exception is not at issue here.

Accordingly, because Mr. Coles failed to seek redaction of Mr. Jenkins' interview in the circuit court, the issue is not preserved for appeal. We therefore do not reach the State's alternative argument for preservation, and we do not reach the substantive arguments regarding Mr. Jenkins' interview.

C. Mr. Coles' Claim That Mr. Leech's Interview Is Not Inconsistent With His Testimony During Trial Is Preserved.

Regarding Mr. Leech's interview, Mr. Coles does not argue redaction, but instead argues the interview was entirely consistent with Mr. Leech's testimony during the trial. Because Mr. Leech's interview is hearsay and, according to Mr. Coles, does not fall under an exception to the rule against hearsay, the interview should not have been admitted. Mr. Coles did not file a reply brief to respond to the State's preservation argument.

Just as in its argument with regard to Mr. Jenkins' interview, the State argues that Mr. Coles made a "specific objection" by stating the grounds of "hearsay" when he objected to the interviews. The State argues this specific objection does not preserve Mr. Coles' argument on appeal that the recorded interview is hearsay and is not encompassed by a hearsay exception because, during the trial, "[d]efense counsel did not address the prosecutor's argument that it was admissible" as an exception to the rule against hearsay "under Rule 5-802.1." The State characterizes Mr. Coles' objection of "hearsay" as "merely stat[ing] the obvious[,]" because while the recorded interviews are hearsay, both are allowed in to evidence under a hearsay exception, and Mr. Coles, the State argues, should have said as much during his specific objection.

On appeal, Mr. Coles argues that Mr. Leech's interview is hearsay. In the circuit court, Mr. Coles objected to Mr. Leech's interview as hearsay. Mr. Coles is making the same argument in the circuit court as he is in on appeal. Accordingly, his objection is preserved for appellate review.

D. The Circuit Court Erred By Not Making A Predicate Finding Regarding The Alleged Inconsistency Of Mr. Leech's Interview But The Error Was Harmless.

i. Parties' Contentions

Mr. Coles argues that Mr. Leech's interview should not have been admitted because it is hearsay that does not fall under any exception. He argues that Mr. Leech's interview is not inconsistent with his trial testimony, and accordingly, does not meet the requirements of Rule 5-802.1. Mr. Coles concedes that an explicit finding of inconsistency is not required; however, he cites to *McClain v. State*, 425 Md. 238 (2012), arguing that in *McClain* there was "an implicit finding of inconsistency" on the record because the circuit court during "a bench conference prior to the admission of the statement into evidence . . . inquired about the inconsistency between the witness's trial testimony and recorded out of court statement." Mr. Coles contends that "[h]ere, there was no inquiry by the trial court regarding [Mr.] Leech['s] statement nor was there [] an offer of inconsistency by the State." Mr. Coles then quotes Mr. Leech's testimony during trial comparing it to Mr. Leech's recorded interview to argue that they are consistent.

The State argues that the circuit court does not need to make an explicit or implicit finding of inconsistency, and therefore, the circuit court properly admitted the statements. The State cites to *McClain* and argues that circuit courts "should err on the side of

admission." The only substantive argument the State makes regarding the alleged consistency of Mr. Leech's recorded interview to his trial testimony is that "[i]t is not surprising that the trial court treated [Mr.] Leech's prior statement as raising the same issues as [Mr.] Jenkins' prior statement, because defense counsel did so as well. That is, defense counsel said he had the 'same' objection."

ii. Circuit Court Error

Circuit courts must make a preliminary finding as to whether the alleged inconsistency qualifies the statement as a prior inconsistent statement under Rule 5-802.1 and, therefore, is admissible; however, circuit courts are not required to explicitly state this finding on the record. *McClain*, 425 Md. at 251-52. Circuit courts are charged with determining the "[p]reliminary questions concerning . . . the admissibility of evidence[.]" Md. Rule 5-104(a). Accordingly, the court must "'mak[e] a finding on th[e] preliminary, predicate issue'" of whether a witness's statement may come into evidence as a prior inconsistent statement, but the circuit court is not "require[d]" to make "such a finding . . . on the record." *McClain*, 425 Md. at 251-52 (quoting *Corbett v. State*, 130 Md. App. 408, 427 (2000)).

In *McClain*, the Supreme Court of Maryland held that unlike a previous case, where this Court held that the circuit court erred by not making a finding of inconsistency before admission of the hearsay evidence, in *McClain* "the facts of th[e] case demonstrate[d] that the trial court made a finding, albeit implicitly, on the admissibility of [the] statement as a prior inconsistent statement." 425 Md. at 252 (discussing *Corbett*, 130 Md. App.). In *McClain*, the circuit court conducted a bench conference before the

evidence was admitted, and the court "inquired whether [the witness] testified 'inconsistently or incorrectly' when compared with [the] prior statement." 425 Md. at 252. The Court in *McClain* stated:

> The court's comments certainly indicate, even if not expressly, that the court admitted the statement as a prior inconsistent statement under [Rule 5-802.1]. We presume, moreover, that the court recognized its obligations to satisfy itself of the existence of the two prerequisites for admission of the statement under that Rule. *See Davis* [*v. State*], 344 Md. [331,] 339 [(1996)] (stating that the trial court's determination of inconsistency in witness statements was implied, when supported by the record, because 'judges are presumed to know and, properly to have applied, the law').

Id.

Of note, while the circuit court must make a preliminary finding of inconsistency, the trial court does not have a *sua sponte* duty to parse through each portion of the statement to ensure that each and every portion is inconsistent. *State v. Smith*, No. 0030, slip op. at 33-35, 40, 2024 WL 3770718, at *15-16, 18 ("The trial court's parsing requirement to determine the admissibility of hearsay statements that comprise an extended narrative or interview based upon the declaration of penal interest exception *is unique* to this type of hearsay evidence." (emphasis in original)).

"When determining whether inconsistency exists between testimony and prior statements, 'in case of doubt the courts should lean toward receiving such statements to aid in evaluating the testimony.'" *McClain*, 425 Md. at 250 (citations omitted). Here, however, the State did not point to any inconsistency during admission of Mr. Leech's testimony, and there was no discussion of a single instance of inconsistency from the

court. During the previous admission of Mr. Jenkins' recorded interview, Mr. Coles objected to the admittance as hearsay, and the court initiated a bench conference. The State asserted that Mr. Jenkins made various inconsistent statements in the recorded interview compared to his trial testimony that were material to the case. The State pointed to specific portions of Mr. Jenkins' statement that it alleged were inconsistent. There was not a similar bench conference or assertion of inconsistency with regard to Mr. Leech's recorded interview.

Mr. Coles' brief presents multiple pages of argument including citations to the record and quotations of the testimony, demonstrating that Mr. Leech's testimony during trial was consistent with his recorded interview. The State presents no argument and no citation to the record to support that Mr. Leech's testimony during trial was inconsistent with his recorded interview. It is not the function of this Court to compose legal arguments in support of the State's challenge to Mr. Coles. *See Rollins v. Cap. Plaza Assocs., L.P.*, 181 Md. App. 188, 201-03 (2008) (dismissing appeal where appellant failed to provide sufficient reference to pages in the record extract supporting the facts asserted, noting that this Court "cannot be expected to delve through the record to unearth factual support favorable to the appellant" (cleaned up)); *Reynolds v. Reynolds*, 216 Md. App. 205, 225-26 (2014) ("We therefore shall not comb through the 2,904 pages of extract in this case—much less the record itself—in order to find factual support for appellant's alleged point of error.").

We conclude that the circuit court did not make a predicate finding of inconsistency.

As we said in *Corbett*,

> The federal cases hold that trial courts have considerable discretion in determining whether a witness's testimony truly is inconsistent with his prior testimony. . . . In this case, we are not taking issue with the court's exercise of discretion. Rather, we are confronted with an absence of any finding on the issue. The admissibility of [the] prior inconsistent statement depended upon a preliminary finding by the court that [the prior statement was inconsistent with the trial testimony]. The court erred in permitting [the prior] statement to come into evidence as a prior inconsistent statement without first making a finding on that preliminary, predicate issue. Md. Rule 5-104.

130 Md. App. at 426-27 (citations omitted). From our understanding of Mr. Leech's testimony at trial and his recorded interview, as presented by the briefs, we do not find support for the argument that the circuit court even made an implicit finding of inconsistency, as described in *McClain*.

iii. The Error Was Harmless

Even though the circuit court did not make a preliminary finding of inconsistency and this Court has not been directed to an instance of inconsistency, the recorded interview did not provide information that was not already admitted. *See Yates v. State*, 429 Md. 112, 124 (2012) ("We agree with the [Appellate Court of Maryland] that the admission of the hearsay evidence did not ultimately affect the jury's verdict given the cumulative nature of the similar statements offered at trial."); *Grandison v. State*, 341 Md. 175, 219 (1995) ("[W]e will not find reversible error on appeal when objectionable testimony is admitted if the essential contents of that objectionable testimony have

already been established and presented to the jury *without objection* through the prior testimony of other witnesses." (emphasis in original)).

We therefore hold that the error was harmless.

II. THE ISSUE OF ERROR IN THE JURY INSTRUCTIONS WAS NOT PRESERVED FOR APPEAL.

A. Standard of Review

We review a circuit court's decision to deny a proposed jury instruction for abuse of discretion. *Collins v. National R.R. Passenger Corp.*, 417 Md. 217, 228-29 (2010) (internal citations omitted). Abuse of discretion occurs if there is "'a clear showing of . . . discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Id.* at 229 (internal citations omitted). The Supreme Court of Maryland further explained that:

> A trial judge exercises discretion by assessing whether the evidence produced at trial warrants a particular instruction on legal principles applicable to that evidence and to the theories of the parties. Therefore, the onus is on the trial judge to discern and ensure that the jury instructions encompass the substantive law applicable to the case. While we defer to the trial judge's ruling, an improper exercise of discretion may cause prejudice to a party and result in reversible error.

Id. at 228-29 (internal citations omitted).

B. The Parties' Contentions

Mr. Coles does not address whether his argument that the evidence was sufficient to generate an instruction on the defense of others is preserved for appellate review. He substantively argues that the jury instruction for defense of others was proper because it was a correct statement of law, was applicable to his case, it was not covered by other

jury instructions, and defense counsel properly requested the instruction. He contends that the recorded interview of Mr. Jenkins generated enough evidence to meet the standard to warrant the relevant jury instruction.

The State argues that Mr. Coles' jury instruction claim is not preserved because Mr. Coles' counsel did not properly object after the jury instructions were delivered. The State substantively argues that if preserved, the circuit court did not err in denying the requested instruction because the evidence did not show that Mr. Coles was attempting to defend others in use of force. Alternatively, the State argues that if there was error, it was harmless due to the absence of evidentiary support, rendering the claim inconsequential, thereby demonstrating that the trial outcome would not have been altered.

C. Discussion

Pursuant to Rule 4-325(f), a party cannot claim that a jury instruction was erroneous "unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." "The purpose of the rule is to give the trial court an opportunity to correct its charge to the jury if it believes a correction is necessary in light of the objection." *Taylor v. State*, 473 Md. 205, 227 (2021). But an appellate court has discretion to recognize a "plain error in the instructions." Md. Rule 4-325(f) ("An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object."). Mr. Coles did not argue that there was a "plain error" made in the instructions.

Here, Mr. Coles objected to the circuit court denying his request for instructing the jury on defense of others. The circuit court "not[ed]" the objections and stated that defense counsel "can certainly renew them." Mr. Coles' counsel affirmed by saying, "Renew them, yeah." When the court instructed the jury, however, Mr. Coles did not object again, failing to renew his previous objection. After the court read the jury instructions to the jury, the court even indicated to defense counsel that it was time to renew any objections by stating, "Okay, [defense counsel], I'll hear your objections." Mr. Coles' counsel, however, stated, "No objections, your Honor."

Our Supreme Court has explained that to "preserv[e] an alleged jury instruction error: '[T]here must be an objection to the instruction; the objection must appear on the record; the objection must be accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the record and the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless.'" *Watts v. State*, 457 Md. 419, 426 (2018) (quoting *Gore v. State*, 309 Md. 203, 209 (1987)). The only recognized exception to not renewing after delivery of jury instructions is if it would be "'futile or useless.'" *Id.* (quoting *Gore*, 309 Md. at 209). Here, there is no indication of either because the court offered for Mr. Coles' counsel to renew objections to the jury instructions, and after the jury instructions were delivered, the circuit court specifically asked Mr. Coles' counsel to again state his objections. In addition to not renewing the objection, Mr. Coles' "counsel affirmatively advised the court that there was no objection to the instruction[s.]" *Booth v. State*, 327 Md. 142, 180 (1992) (holding that it constituted a waiver of error when defense counsel,

prior to the delivery of jury instructions, not only failed to object but "affirmatively" stated that there was no objection). Unlike *Booth* where defense counsel did not object at all, here, Mr. Coles' defense counsel did object prior to the delivery of jury instructions. Maryland jurisprudence, however, is clear that renewal must take place after delivery of the jury instructions, unless it would be futile or useless.

Accordingly, we hold that if there was error with the jury instructions, the claim is not preserved for appellate review. We decline to recognize any plain error in the instructions as this argument was not raised by Mr. Coles.

CONCLUSION

We hold that Mr. Coles' argument for redaction under Maryland Rule 5-802.1 was not preserved for appellate review. Mr. Coles' argument that consistent evidence was wrongly admitted under Maryland Rule 5-802.1 was preserved but any error was harmless. Mr. Coles' argument regarding the circuit court's denial of the jury instruction for defense of others was not preserved for appeal.

JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

The correction notice(s) for this opinion(s) can be found here:

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