Circuit Court for Baltimore City
Case No. 122102002

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 117

September Term, 2023

HARRY COKLEY

v.

STATE OF MARYLAND

Graeff,
Friedman,
Beachley,

JJ.

Opinion by Graeff, J.

Filed: November 6, 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 persuasive value only if the citation conforms to Md. Rule 1-104(a)(2)(B).

A jury in the Circuit Court for Baltimore City convicted Harry Cokley, appellant, of second-degree murder, use of a handgun in the commission of a crime of violence, and possession of a regulated firearm after having been convicted of a crime of violence. The court sentenced appellant to 40 years of imprisonment on the conviction for second-degree murder, 20 years, consecutive, on the conviction for use of a handgun in the commission of a crime of violence, and 15 years, consecutive, on the conviction for possession of a regulated firearm, resulting in an aggregate sentence of 75 years in prison.

On appeal, appellant presents the following question for this Court's review:

> Did the circuit court err by not allowing appellant to adequately impeach the State's key witness during cross-examination?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On February 28, 2022, Morris Hood was shot three times in the apartment he shared with Sharnisha Holmes. A four-day jury trial began on January 4, 2023.

Officer Nevin Nolte testified that he responded to a call regarding a shooting. He and his partner, Officer Brittany Garcia, found Mr. Hood bleeding upstairs. Officer Nolte secured the crime scene and transported Ms. Holmes to Baltimore City police headquarters.

Crime lab technician Randolph Turner testified that he photographed items at the crime scene and collected several items that Ms. Holmes identified as belonging to appellant. He also photographed three cartridge cases, one projectile, and one live cartridge from the main bedroom. The cartridge cases were processed for fingerprints, and the live cartridge was processed for suspected DNA and fingerprints.

Holly Porter, a DNA Analyst for the Baltimore Police Department, testified regarding the results of the DNA analysis. The swab taken from a pair of blue underwear, which Ms. Holmes identified as belonging to appellant, contained a mixture of DNA from at least three individuals, including appellant. Appellant also matched the profile of the major DNA contributor to the swab taken from the white tank top.

Daniel Lamont, a firearms examiner for Baltimore Police Department, testified that he analyzed three cartridge cases and three bullets.[1] All three bullets were fired from the same firearm.

Ms. Holmes testified that she lived with her boyfriend, Mr. Hood, and her two children on South Monastery Avenue. Throughout the months prior to the incident, she and Mr. Hood were "going through things" and would "usually break up and get back together, break up and get back together."

On February 27, 2022, Ms. Holmes and Mr. Hood had a fight, and they each called the police. They had been fighting for a couple of months, and their fights occasionally became physically abusive. That day, she and Mr. Hood were not together, and it was her "understanding that the relationship was ended."

That evening, Ms. Holmes invited appellant to her house, and he showed up with his friend, Charles Burgess, at approximately 11:30 p.m. Ms. Holmes testified that she

[1] Mr. Lamont explained that a "cartridge case" is "a component of a live cartridge." He stated that, "what most people consider, call a 'bullet' usually is a live cartridge. It's unfired ammunition. That's made up of four components. It's your bullet, your gunpowder, your primer, and then the cartridge case holds all of that together."

was "really, really drunk," but she "wasn't as drunk to the point where [she] didn't know what was going on."

Mr. Hood came home while Ms. Holmes and appellant were beginning to "have sex" on the couch in her living room.[2] Mr. Hood "began to fuss, and him and [appellant] got into it." Appellant apologized and said that he did not know that Ms. Holmes had a boyfriend. Mr. Hood then turned around, said that he would be back, and left the house.

Ms. Holmes then went downstairs to use her bathroom. When she walked back upstairs, she saw Mr. Hood come back in the house with something in his hand. Ms. Holmes ran up the steps and saw appellant in her room. She and appellant began to have sex again, with the bedroom door cracked open.

Ms. Holmes then heard footsteps coming up the steps. Appellant "zipped [his] pants on," and Ms. Holmes heard Mr. Hood walking toward her bedroom saying that he was "going to kill [her]." She then saw Mr. Hood standing in the doorway of her bedroom. Ms. Holmes and appellant "stood up," with appellant standing behind her and his friend.[3]

Appellant told Mr. Hood: "You don't want to do this. Don't do this." Appellant and Mr. Hood "were arguing back and forth with each other, and [appellant] just kept telling him . . . 'This is not what you want.'" Ms. Holmes saw Mr. Hood carrying

[2] Ms. Holmes said that Mr. Burgess was in the basement at that time.

[3] Ms. Holmes gave conflicting statements regarding Mr. Burgess' location. She originally stated that appellant and Mr. Burgess were in her bedroom when the shooting occurred. Ms. Holmes later testified several times that Mr. Burgess was not in the bedroom when the shooting occurred, but rather, he was in the basement. She stated that Mr. Burgess came upstairs after he heard the shots.

something that was "sticking out of his pants, but he wasn't like, pointing it or anything." She stated at various times that she was not sure what was in Mr. Hood's pants, it was a gun, and it could have been a cellphone.

Appellant then retrieved a gun from his "satchel-looking bag."[4] He lifted up the gun and fired three shots. Mr. Hood fell down. Appellant stood over Mr. Hood "like he was going to do something else," and Ms. Holmes pushed him away and asked why he did that. Appellant and Mr. Burgess left the house, and Ms. Holmes called the police.

Ms. Holmes testified that she told detectives "everything that happened" that night and told them the truth, but she was "out of it," and "it wasn't just like a regular drinking feeling for [her]." She "wasn't blacked out," though, or "drunk to the point where [she] didn't know what was going on." Ms. Holmes did not recall some of the things she told the police during her interview, and she attributed this to her intoxication. Ms. Holmes identified the photo array that detectives showed her at police headquarters. She identified the photo of appellant as the person who shot Mr. Hood.

Ms. Holmes testified that she did not think that appellant was defending her from Mr. Hood. She did not recall if she told the police that. She did tell the police that she thought Mr. Hood had a gun, but she "wasn't sure." She did not recall multiple people shooting in the house.

[4] On re-direct examination, Ms. Holmes testified that she did not know if appellant retrieved a gun from his bag, but he "reached up from the bag and pulled it up and began to fire."

Dr. Melissa Brassell, an Assistant Medical Examiner, performed an autopsy on Mr. Hood. He had two gunshot wounds to his chest and a "through-and-through" gunshot wound to his left wrist. Dr. Brassell recovered two bullets from Mr. Hood's chest wounds. There was no evidence of "close-range firing in this case" because there was no "stippling," or "gunpowder."[5] Dr. Brassell concluded that Mr. Hood's cause of death was multiple gunshot wounds, and his manner of death was homicide.

Detective Tate testified that he responded to the scene at approximately 1:50 a.m. on February 28, 2022. The primary crime scene was on the second floor going into the main bedroom, however, part of the crime scene was also located in the living room.

After briefly interviewing Ms. Holmes at police headquarters, Detective Tate returned to Ms. Holmes' residence with two other detectives to execute a search and seizure warrant. Upon completing the search of the residence, he returned to police headquarters with Detective Forsythe to continue interviewing Ms. Holmes for approximately eight or nine hours.[6] From this interview, he understood that Mr. Hood and appellant had a verbal argument, which led to Mr. Hood leaving the house. When Mr. Hood returned to the house, he went upstairs and "grabbed Ms. Holmes in the neck area." Appellant and Mr. Hood then engaged in a "physical altercation" in the bedroom, which led to appellant retrieving a handgun from a blue bag and shooting Mr. Hood multiple times.

[5] Dr. Brassell explained that "stippling[s]" are "small . . . , pinpoint abrasions around the entrance wound defect . . . caused by gunpowder particles that are emitted from the barrel of the gun along with the bullet, striking the skin surface."

[6] Ms. Holmes testified she was at the police station for "like 12 hours, maybe."

Detective Tate testified that Ms. Holmes was "elusive" in her initial responses. Ms. Holmes eventually "came around" after speaking with Detective Forsythe. Detective Tate agreed that once Detective Forsythe became a little more forceful with Ms. Holmes, her demeanor changed.

At the end of the State's case, appellant testified on his own behalf. He stated that, on February 27, 2022, at 10:40 p.m., Ms. Holmes called him and asked him to come over to her house for a wine party. At approximately 11:00 p.m., appellant arrived at Ms. Holmes' house with his friend, Mr. Burgess. He saw approximately 12 people inside.

Appellant did not go upstairs, and he primarily stayed in the living room. Appellant and Ms. Holmes started "getting intimate" on top of couch cushions that Ms. Holmes had placed on the floor in the living room. Appellant then heard gunshots, and he got up, put his pants on, and "tried to run out the door." Ms. Holmes prevented him from leaving by grabbing him and holding his arm, begging him to take her with him. Appellant eventually freed himself and ran out of the house. The other people in the house "were running in different directions, . . . trying to get out of the house." Appellant denied shooting Mr. Hood.

Additional facts will be included, as warranted, in the discussion that follows.

DISCUSSION

I.

Appellant contends that "the trial court erred by not allowing [him] to adequately impeach the State's key witness during cross-examination." Specifically, appellant argues that the court erred in preventing him from admitting portions of Defendant's Exhibit 8, Ms. Holmes' recorded interview with Detective Forsythe. Appellant argues that the evidence was admissible under Maryland Rule 5-616(b)(1), as a prior inconsistent statement, and under Maryland Rule 5-616(b)(2), as evidence contradicting Ms. Holmes' testimony. He asserts that the court violated his right to confrontation in violation of the Sixth Amendment to the United State Constitution and Article 21 of the Maryland Declaration of Rights.

The State contends that appellant's claim is not preserved for this Court's review because he did not raise below the arguments that he makes on appeal, and he did not make a proffer of the substance and relevance of the evidence he sought to admit. It further argues that the court properly ruled that the recorded interview was inadmissible hearsay. Finally, the State asserts that, even if the court erred in excluding Ms. Holmes' recorded interview, "any error was harmless beyond a reasonable doubt."

A.

Proceedings Below

On cross-examination, defense counsel elicited Ms. Holmes' testimony that she told the police that Mr. Hood came into the room, she and appellant stood up, appellant and Mr. Hood began to argue, and appellant shot Mr. Hood. Defense counsel sought to introduce into evidence a portion of Ms. Holmes' recorded interview with the police, stating that he wanted to play portions at 5:38:26 to 5:45. The court sustained the State's objection.

The following colloquy then occurred:

> The Court: So, the objection is hearsay.
>
> [COUNSEL FOR APPELLANT]: It's her interview. It's her statement.
>
> The Court: Doesn't make it not hearsay. It's an out-of-court statement offered for the truth unless it's different than as she testified.
>
> [COUNSEL FOR APPELLANT]: Well, I mean, I asked her to recall what she said to the police and it's different from what she said to the police.
>
> The Court: Is it different than her testimony in court?
>
> [COUNSEL FOR APPELLANT]: Well, she testified to a whole—yes.
>
> The Court: Is it inconsistent? Is it a prior inconsistent statement; and if so, then I'll hear from [the State], but—
>
> [COUNSEL FOR APPELLANT]: What it is, Your Honor, it is more the statement—well, it's she acquiesces or agrees to the statement as suggested by Detective Forsythe and Detective Tate. That's what it is. So what I am getting at—where I'm trying to go with this is—and I may not be able to go there and I understand that—is the first mention of the final version, which I started reading off to her, happens in this particular statement and Detective Forsythe says, "You know, family and people are going to be mad at you. I understand if he put his hands on you," et cetera, et cetera, that, you know, "Hopefully he was defending you," and all that. That's the first mention in

> any of the statements of what became the final aspect of the police report. And so, actually, the question is, you know, this is suggestive and that she was adopting—she ultimately adopted or ratified what he told her to say.
>
> The Court: I think you can ask her that, "Didn't the detective"—I'm sorry. Go ahead. Do you want to respond?
>
> [THE STATE]: Yeah, Your Honor, that was (unintelligible at 2:13:37). I think that it would be appropriate to ask her and then (unintelligible at 2:13:41) refresh her recollection, but at this juncture, I don't think (unintelligible at 2:13:44) the statement itself.
>
> The Court: Yeah, the statement, though, substantively, is not admissible unless it's inconsistent with the trial testimony. Now, if you're going to suggest that somebody suggested to her what the truth was before she agreed to it, you can ask her that question, and if she says, "Yes, that's true," then you still don't get it in.

The court added that if Ms. Holmes said no, they would address it further. It stated that, "[a]t this point, the objection is sustained."

Defense counsel then asked Ms. Holmes if Detective Forsythe stated that she understood that Ms. Holmes and Mr. Hood sometimes got involved in a physical altercation, and he "put his hands on [her]." Ms. Holmes initially said no, but when asked if she was sure, she stated that she did not recall. Defense counsel then played a portion of the recorded interview for Ms. Holmes to listen to with headphones, to see if it refreshed her recollection.

Counsel did not indicate for the record what portion of the tape he played, and because it was played solely for the witness via headphones, the record does not reflect what portion of the recording was played. Counsel then asked Ms. Holmes if it was "true that Detective Forsythe was the first person who suggested to you that this might have been

some sort of self-defense." Ms. Holmes stated that she did not "recall her saying that." Counsel then asked Ms. Holmes whether Detective Forsythe suggested to her "a scenario that [appellant] was defending [her] from Mr. Hood?" Ms. Holmes stated that she did not recall. Defense counsel stated: "I mean, it's on there. I mean, you don't recall listening to that at all?" Ms. Holmes responded: "What I listened to, it didn't say anything about nobody defending no one." The court then sustained the State's objection to appellant's renewed request to admit Defendant's Exhibit 8.[7] Defense counsel did not proffer the grounds for his objection.

B.

Preservation

We address first the State's preservation argument. It asserts that appellant's arguments on appeal are not preserved for review because he argued below only that Ms.

[7] Appellant states in his brief that the relevant exchange was shown on the time stamp from 5:47:48 to 5:49:07, and he summarizes the relevant portion as follows:

> At time stamp 5:47:28 [of Exhibit 8], Detective Forsythe told Ms. Holmes: "Now my thing is, if [appellant] was defending you, I don't have a problem with that." At 5:48:05, the detective said, "I know [Mr. Hood] always putting his hands on you, so if [appellant] was, caught himself defending you because of the situation, then that's fine." At 5:49:07, Detective Forsythe told Ms. Holmes in a loud tone: "You're not going to just have a problem out of us, you're going to have a problem out of his family because when they find out the whole situation, you don't think they're going to come looking for you? You don't think that's going to happen? It's going to be on like popcorn for you, and you know it."

The record is not clear regarding what portion of the exhibit was provided to the witness. Prior to playing the recording, however, counsel stated that he wanted to play five minutes of the recording, from 5:38:26 to 5:45.

Holmes adopted the detective's statement about what happened, and he never argued that the recording was admissible under Rule 5-616 or the Confrontation Clause.

"[A]n appellate court ordinarily will not consider any point or question 'unless it plainly appears by the record to have been raised in or decided by the trial court.'" *Robinson v. State*, 404 Md. 208, 216 (2008) (quoting Md. Rule 8-131(a)). The Supreme Court of Maryland has explained that the primary purpose of this rule is two-fold:

> (a) to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings, and (b) to prevent the trial of cases in a piecemeal fashion, thus accelerating the termination of litigation.

Fitzgerald v. State, 384 Md. 484, 505 (2004) (quoting *Cnty. Council v. Offen*, 334 Md. 499, 509 (1994)). *Accord Martin-Dorm v. State*, 259 Md. App. 676, 704 (2023).

The Supreme Court of Maryland has further explained that Md. Rule 5-103(a)(2)

> requires that, to preserve a claim that a trial court erroneously excluded evidence, the party must be prejudiced by the ruling and "the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered."

Devincentz v. State, 460 Md. 518, 535 (2018) (emphasis omitted) (quoting Md. Rule 5-103(a)(2)). *Accord Merzbacher v. State*, 346 Md. 391, 416 (1997) (appellant's objection to the exclusion of evidence is not preserved where appellant fails to proffer "the contents and relevancy of the excluded evidence" and this failure will not be "excused" if counsel's questions could have been answered "in any number of ways").

The record reflects that counsel argued below only that the recorded statement was admissible as an inconsistent statement. That is the only issue that is preserved for this Court's review. We will not consider any additional arguments on appeal.

C.

Analysis

Initially, the circuit court properly ruled that the recording of the interview was hearsay. 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." *Devincentz*, 460 Md. at 553 (quoting Md. Rule 5-801(c)). The recording consisted solely of out-of-court statements, and therefore, they were not admissible for the truth of the matter asserted.

Appellant contends on appeal that the recording was admissible, not for the truth of the matter asserted, but to impeach Ms. Holmes by contradicting her trial testimony that she had no recollection that the police suggested to her that appellant shot Mr. Hood in self-defense. Appellant asserts that the jury needed this evidence to "properly assess" Ms. Holmes' credibility.

The State argues that the court did not abuse its discretion in excluding the recorded interview. It asserts that appellant failed to lay the proper foundation to admit it as impeachment evidence, and the evidence did not constitute a prior inconsistent statement.

"An appellate court typically reviews a trial court's ruling on the admission of evidence for abuse of discretion." *State v. Galicia*, 479 Md. 341, 389 (2022) (citing *Portillo*

Funes v. State, 469 Md. 438, 478 (2020)), *cert. denied*, 143 S. Ct. 491 (2022). "A trial court abuses its discretion when 'no reasonable person would take the view adopted by the trial court,' or when the ruling is 'clearly against the logic and effect of facts and inferences before the court.'" *Prince v. State*, 255 Md. App. 640, 652 (2022) (quoting *King v. State*, 407 Md. 682, 697 (2009)), *cert. denied*, 482 Md. 746 (2023).

Maryland Rule 5-616(a) permits the credibility of a witness to be attacked by questions directed at, among other things, "[p]roving under Rule 5-613 that the witness has made statements that are inconsistent with the witness's present testimony." Rule 5-613(a) provides:

> (a) **Examining Witness Concerning Prior Statement –** A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.

With respect to the admission of extrinsic impeaching evidence, Rule 5-613(b) provides that,

> [u]nless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit to having made the statement and (2) unless the statement concerns a non-collateral matter.

In *Thomas v. State*, 213 Md. App. 388, 406 (2013), *cert. denied*, 437 Md. 640 (2014), this Court explained

> Maryland Rule 5–616 permits extrinsic evidence of prior inconsistent statements to be used for the purpose of impeachment, in accordance with Maryland Rule 5–613(b). Under Rule 5–613(b), for extrinsic evidence of a witness's prior inconsistent oral statement to be admissible for impeachment, the following foundation must be laid: 1) the contents of the statement and the circumstances under which it was made, including the person to whom it was made, must have been disclosed to the witness during his trial testimony; 2) the witness must have been given the opportunity to explain or deny the statement; 3) the witness must have failed to admit having made the statement; and 4) the statement must concern a noncollateral matter. Before the requirements of Rule 5–613(b) come into play, however, the prior statement of the witness must be established as inconsistent with his trial testimony.

(quoting *Hardison*, 118 Md. App. at 237-38).

Here, appellant failed to meet the foundation requirements to admit the proffered portion of the recorded interview, for two reasons. First, the statement appellant wanted to offer was that of the police officer. It was not a prior inconsistent statement by Ms. Holmes. "[W]itnesses are not impeached by prior inconsistent statements of other witnesses, but by their own prior inconsistent statements." *Sweetney v. State*, 423 Md. 610, 625 (2011) (quoting *United States v. Wilson*, 720 F. Supp. 2d 51, 66 (D. D.C. 2010)).

Second, the record does not show that the portion of the recording that appellant references in his brief was disclosed to Ms. Holmes at trial. As indicated, counsel indicated below that he wanted to introduce the recorded interview at 5:38:26 through 5:45. Presumably this was the portion played to the witness. Appellant argues on appeal, however, that the relevant portion of the interview began at 5:47:28, two minutes later.

There is nothing in the record to show that the relevant portion of the interview was disclosed to Ms. Holmes because counsel did not specify on the record what portion he

played for Ms. Holmes. It is the appellant's burden to produce a sufficient record. *Black v. State*, 426 Md. 328, 337 (2012) ("[T]he appellant or petitioner has the burden of producing a 'sufficient factual record for the appellate court to determine whether error was committed.'") (quoting *Mora v. State*, 355 Md. 639, 650 (1999)). Because the record does not support a finding that appellant made a proper foundation to admit the recording under the Rule, appellant has failed to show any error by the circuit court.

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