Circuit Court for Prince George's County
Case No. CT-17-0309B

UNREPORTED*

IN THE APPELLATE COURT

OF

MARYLAND**

No. 0005

September Term, 2022

DEION VINCENT FURR

v.

STATE OF MARYLAND

Reed,
Albright,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Albright, J.

Filed: March 29, 2023

* This is an unreported opinion. It may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

In September 2017, in the Circuit Court for Prince George's County, a jury found Appellant, Deion Furr, guilty of armed robbery, robbery, theft, and conspiracy. The victim of these crimes was Elijah Smith. For armed robbery and conspiracy,[1] Mr. Furr was sentenced to 20 years' incarceration with all but four years suspended (on each count), the sentences to run concurrently. Approximately four years later, and as partial relief for Mr. Furr's post-conviction petition,[2] the State consented to Mr. Furr's filing this belated direct appeal. Mr. Furr presents one question for our review, which we have reworded as follows:[3]

> Whether the circuit court erred when it declined to admit Mr. Smith's prior handwritten statement?

For the reasons below, we answer this question "no," and affirm Mr. Furr's convictions.

BACKGROUND

On the evening of February 4, 2017, Cpl. Andre Lyles was patrolling the 400 block of Suffolk Road in Prince George's County in his police cruiser. As he approached Central Avenue, he observed four men in the street. He then heard someone shout, "They

[1] At sentencing, the circuit court merged robbery and theft into armed robbery.

[2] Mr. Furr's remaining post-conviction claims are stayed pending the outcome of this direct appeal.

[3] As originally phrased, Mr. Furr's question was as follows:

> Whether the trial court erred when it denied Appellant's motion to admit Defense Exhibit 4 into evidence[.]

just robbed me!" Three of the men, including Mr. Furr, ran toward Cpl. Lyles' vehicle. Cpl. Lyles stopped, exited his vehicle, and ordered the men to the ground. As Cpl. Lyles approached, he found a firearm approximately three feet from one suspect's right hand. The fourth individual, victim Elijah Smith, then attempted to retrieve his property. During a show up at the scene, Mr. Smith identified Mr. Furr as one of the three individuals who robbed him.

Later that evening, at the police station, Mr. Smith handwrote and signed a statement. The statement was on a form that included space for, among other things, the witness's narrative and descriptive information about each suspect, including what each suspect looked like, what they wore, and what they said (if anything). The form also included photographs showing examples of masks and other kinds of face coverings to select if applicable.

At the ensuing jury trial in September, 2017, the State called Cpl. Lyles, who identified Mr. Furr as one of the individuals he detained; Det. Baimba Sesay, who confirmed that Mr. Smith identified Mr. Furr during the show up; Det. Patrick McAveety, who recovered the gun from the scene; and Mr. Smith.[4] On direct examination, Mr. Smith testified that three men approached him with a gun, demanded his things, and took off with his cell phone and wallet. Mr. Smith also identified the gun that was used.

[4] Mr. Furr also called Det. Sesay. He did not call any other witnesses.

Mr. Furr cross-examined Mr. Smith, asking him about some of the details in his handwritten statement. Mr. Smith acknowledged the handwritten statement was his, but maintained that Mr. Furr was the suspect who "had the weapon." At the conclusion of the cross-examination, Mr. Furr moved to admit the handwritten statement. The trial court declined this request, finding that Mr. Smith had neither denied making, nor recanted, the handwritten statement.

> [THE COURT]: [I]'m not persuaded that under the facts that we are presented with in this case that that statement comes in. I think that when you read the Nance case[5] and you look at those facts, I don't think the facts in this case are consistent with what happened in the Nance case, number one. I think that certainly the statement was used appropriately to impeach to the extent that the jury found that you did that successfully, but I think there are probably some things in that statement that would not otherwise be admissible.
>
> But the witness clearly—well, he either doesn't want to be part of giving the statement or didn't want to be part of being here yesterday, but I don't think that that amounts to a recant, I don't think.

It is this ruling that Mr. Furr challenges here.

MR. FURR'S CONTENTIONS

Mr. Furr contends that the trial court erred when it declined to admit Mr. Smith's handwritten statement because it was inconsistent with his trial testimony and, therefore, admissible under Md. Rule 5-802.1(a). Specifically, Mr. Furr posits four inconsistencies that render Mr. Smith's handwritten statement admissible: (1) Mr. Smith testified that only one gun was used in the robbery but wrote "that two of the perpetrators held

[5] *Nance v. State*, 331 Md. 549 (1993).

handguns[;]" (2) Mr. Smith testified that more than one assailant had a mask but wrote about one mask only; (3) Mr. Smith testified that the man with the "bush" hair was merely present but wrote that the suspect with the bush had a gun; and (4) while Mr. Smith testified that he did not remember what the perpetrators were wearing, he provided a detailed description of their clothing in his handwritten statement.

Mr. Furr adds that the trial court's error in declining to admit Mr. Smith's handwritten statement was not harmless as his cross-examination of Mr. Smith, extensive as it was, could not have accounted for every possible discrepancy between Mr. Smith's testimony and his handwritten statement. Therefore, according to Mr. Furr, there exists a reasonable possibility that the outcome might have been different had the circuit court allowed the jury to examine the statement.

DISCUSSION

As an appellate court, we "analyze[] without deference the trial court's ruling on the admissibility of evidence under a hearsay exception." *Wise v. State*, 243 Md. App. 257, 267 (2019), *aff'd*, 471 Md. 431 (2020). We review the circuit court's factual findings supporting its hearsay ruling with "significant deference and will not disturb the findings 'absent clear error.'" *Id.* (quoting *Gordon v. State*, 431 Md. 527, 538 (2013)). Where a litigant wishes to introduce an extrinsic (and allegedly) prior inconsistent statement to impeach, we review *de novo* the trial court's decision on whether the foundational requirements for admission have been met. *Brooks v. State*, 439 Md. 698, 708-09 (2014).

Turning to the inconsistencies Mr. Furr posits, we observe that not every inconsistency between trial testimony and a prior statement warrants admission of the prior statement as substantive evidence. To be admitted under Md. Rule 5-802.1(a), the prior statement must be "inconsistent" in the sense that the prior statement "positively contradict[s]" the witness's trial testimony on a "material issue at trial[,]" *Wise*, 471 Md. at 457, and the inconsistency between the two is such that the witness's testimony is "impossible to square factually with a prior statement" and not merely "inconsisten[t] as to peripheral or immaterial matters[,]" *Wise v. State*, 243 Md. App. at 272.[6] Thus, prior statements have been admitted under Rule 5-802.1(a) when they positively contradicted trial testimony on a material issue such as identity, agency, or opportunity—*i.e.*, whether the defendant was the individual who perpetrated the crime, or whether the defendant could have done so. *See, e.g.*, *McClain v. State*, 425 Md. 238, 248-250 (2012) (where victim was shot *outside* a bar, and witness testified that defendant was *inside* bar at time of shooting, witness's prior statement placing defendant *outside* bar at time of shooting was admissible); *Stewart v. State*, 342 Md. 230, 233-36 (1996) (witness's prior statements identifying the defendant as the assailant were admissible where the witness recanted the prior identifications at trial); *Sheppard v. State*, 102 Md. App. 571, 574-75

[6] The prior statement must also meet one of three additional requirements: it must be "(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 [] signed by the declarant; or (3) [contemporaneously] recorded in substantially verbatim fashion by stenographic or electronic means[.]" Md. Rule 5-802.1(a). Here, Mr. Smith's prior statement was reduced to writing and signed.

(1994) (two witnesses' prior statements, in which one was only forty-five percent sure that the defendant was the assailant and the other disputed that defendant was the assailant, were both admissible where those witnesses identified the defendant at trial).[7]

The inconsistencies posited by Mr. Furr do not directly relate to whether he was one of the three suspected robbers: Mr. Smith's prior statement and trial testimony were consistent on that point. Instead, Mr. Furr's four posited inconsistencies concern other matters, including the gun (or guns) used during the robbery, and descriptions of the

[7] Although Mr. Furr asserts on appeal that Mr. Smith's prior statement is inconsistent with his trial testimony within the meaning of Rule 5-802.1(a), he acknowledges that he cross-examined Mr. Smith "extensively" about that statement because the statement went to issues of "credibility[.]" Thus, the State responds that Mr. Furr attempted to use the prior statement to impeach Mr. Smith, rather than for its substance. *See Johnson v. State*, 228 Md. App. 391, 437 (2016) (quoting 6 Lynn McLain, *Maryland Evidence: State and Federal* § 607:1 (3d ed. 2013)) (noting that one method of impeachment is to "show[] that the witness, though possibly well-intentioned, has given inaccurate testimony due to faulty perception, memory, or ability to communicate"). This interpretation is bolstered somewhat by the nature of several of the alleged inconsistencies. For instance, although the identity of the robber who stood by (and did not touch Mr. Smith) might bear upon culpability, the hairstyles of the assailants, their clothing (and Mr. Smith's memory of that clothing), and which assailant held the gun during the robbery and at what time, are not primarily relevant for their substance *per se*. Instead, they are more relevant to assessing the credibility of Mr. Smith's testimony and the weight to give it. Mr. Furr, nevertheless, focuses his arguments on admitting the prior statement as substantive evidence. On appeal, he does not assert that the statement should have been admitted as extrinsic impeaching evidence, nor does it appear that those separate requirements were met at trial. *See* Md. Rule 5-613; Md. Rule 5-616(b)(1) (providing for admission of extrinsic impeaching evidence if the requirements of Rule 5-613(b) are satisfied); *Pinkney v. State*, 151 Md. App. 311, 323 (2003) ("Rule 5-802.1 . . . governs the admission of extrinsic evidence of a prior inconsistent statement when it is offered as substantive evidence, rather than for impeachment purposes . . . . The rule does not contain the same foundational requirements as Rule 5-613[.]"). For purposes of this appeal, we limit our analysis to the arguments that Mr. Furr makes and consider only whether the prior statement should have been admitted as substantive evidence under Md. Rule 5-802.1(a).

suspects and their actions, including which suspect was which and their hairstyles and clothing.

First, as to whether the suspects had one or two guns, we see no real contradiction, let alone a material or positive contradiction, between Mr. Smith's trial testimony and prior statement. At trial, Mr. Smith surmised that two of the suspects may have "switched" the gun between them. And, in his prior statement, he wrote that one suspect told another to "give me the gun[.]" Indeed, during cross examination, Mr. Smith consistently maintained that only one gun was used in the robbery:

> [COUNSEL FOR MR. FURR]: Now, . . . what you said, the person . . . held a, right, a gun in hand, black handgun, correct?
>
> [MR. SMITH]: Yeah.
>
> * * *
>
> [COUNSEL FOR MR. FURR]: Now, as relates to the third person you described, you said he's 5' 7"; one is 6' 5"?
>
> [MR. SMITH]: That's an estimate. I can't. That's, you know, what I said.
>
> [COUNSEL FOR MR. FURR]: Said he also had a handgun held, right hand, did you not, right there in your own handwriting?
>
> [MR. SMITH]: It was only one. It was on one gun used, but could have been an opportunity. He might had it. He might have gave to him, he might have had it.
>
> [COUNSEL FOR MR. FURR]: Then please tell the jury why you told the jury he held the handgun in his right hand and the other guy held his black handgun in his right hand, why would you write that?

> [MR. SMITH]: It was only one weapon, it wouldn't be two weapons used.
>
> [COUNSEL FOR MR. FURR]: So why would you, in the statement, would you say that both people had possessed handguns in the robbery?
>
> [MR. SMITH]: Not during the same time as the robbery, sir.
>
> [COUNSEL FOR MR. FURR]: When, after the robbery?
>
> [MR. SMITH]: Not after. One had it at one point in the robbery, then another might have had it at the same in the robbery. It wasn't two separate guns.
>
> [COUNSEL FOR MR. FURR]: So they switched off handguns during the robbery?
>
> [MR. SMITH]: Possibly, yes.

To be sure, in his prior statement, when describing the weapon and what hand each suspect held it in, Mr. Smith described two of the suspects as each holding a black handgun in his right hand. But this description doesn't mean there were two separate guns. As Mr. Smith wrote in that same statement, one suspect told the other to give him "the gun[.]" Thus, Mr. Smith's prior description simply encompassed two different moments during the robbery. This matches Mr. Smith's testimonial surmise that, at some point during the robbery, the suspects "switched" the gun between them. Accordingly, Mr. Furr's first contention fails.

Second, as to how many suspects wore masks, we see no material contradiction between Mr. Smith's trial testimony ("the guys" "had masks" and "one or two out of the three had masks") and his handwritten statement (describing one robber as wearing a

mask). During cross-examination, Mr. Smith testified as follows:

> [COUNSEL FOR MR. FURR]: Now you said they were wearing masks, correct?
>
> [MR. SMITH]: One or two out of the three had masks.
>
> [COUNSEL FOR MR. FURR]: Which one had the mask? You said was the tall, [] guy, the guy with the bush?
>
> [MR. SMITH]: I think he had the mask (pointing at defendant.)
>
> [COUNSEL FOR MR. FURR]: He had the mask?
>
> [MR. SMITH]: Yeah.

In contrast, in his handwritten statement, Mr. Smith wrote that one suspect had a mask, and he endorsed a photo of a ninja ski/full ski mask to describe the mask he saw.

Again, however, Mr. Smith's trial testimony is not inconsistent with his prior statement. His degree of certainty decreased because he testified that "one or two" suspects had masks, instead of a single suspect as indicated in his prior statement. But, "one or two" is not inconsistent with one—it is just less certain. Moreover, even if we were to disregard the "one or" portion of Mr. Smith's trial testimony and find an inconsistency, the variance between two masks and one is not the kind of contradiction that renders a prior statement admissible. It is just one detail, and it is not a detail that goes to the identification of the defendant as one of the suspected robbers: both Mr. Smith's prior statement and his trial testimony were consistent that Mr. Furr was one of the three. At most then, the variance speaks only to issues of Mr. Smith's perception and memory. *See Wise v. State*, 243 at 271 (rejecting an approach that would permit "the

slightest contradiction between a prior statement and trial testimony" to support substantive admissibility under Rule 5-802.1(a)). Accordingly, Mr. Furr's second contention fails.

Third, as to which of the suspects wore his hair in a bush, we cannot conclude that Mr. Smith's handwritten statement materially contradicted his trial testimony. To be sure, Mr. Smith testified inconsistently about who had the bush, at first identifying Mr. Furr as the suspect with the weapon and ascribing the bush to him, but later testifying that the suspect with the bush was "there just watching" and "didn't touch [him]":

> [COUNSEL FOR MR. FURR]: Can you recall what they looked like as far as facial features?
>
> [MR. SMTH]: I believe this brother, I believe it was him that had the weapon. (pointing at the defendant.)
>
> * * *
>
> [COUNSEL FOR MR. FURR]: Didn't you say that was the one with the bush?
>
> [MR. SMITH]: That was the one with the bush (pointing at the defendant)
>
> * * *
>
> [COUNSEL FOR MR. FURR]: Who had the bush?
>
> [MR. SMITH]: It was the third individual that didn't do nothing, he was just standing around.
>
> * * *
>
> [COUNSEL FOR MR. FURR]: Now, you stated that the one with the bush was there just watching, correct?

> [MR. SMITH]: Yeah, he didn't, he didn't touch me or do, you know what I mean.
>
> [COUNSEL FOR MR. FURR]: And the one with the bush, you said, didn't pose a threat earlier, correct?
>
> [MR. SMITH]: Yeah.
>
> [COUNSEL FOR MR. FURR]: And you told the State you couldn't tell whether he was just scared or he was just there or nothing, you didn't know what it was?
>
> [MR. SMITH]: Yeah.

But this inconsistency in Mr. Smith's trial testimony about who had the bush does not mean that his prior statement was "impossible to square" with the trial testimony. Just as Mr. Smith first testified, his handwritten statement matched the suspect with the gun to the suspect who had the bush. Although his second description later at the trial—the suspect with the bush just watched and didn't touch him—varied somewhat, that does not render the handwritten statement admissible. Again, it is one detail, and it is not a detail that speaks directly to whether Mr. Furr was one of the three men involved in the robbery. At most, the detail bears only upon *which* of the three men Mr. Furr was (as well as issues of Mr. Smith's perception and memory). As above, Mr. Furr's third contention fails.

Fourth, Mr. Furr's final contention—that, at trial, Mr. Smith testified that he did not remember what the suspects were wearing, but he provided a detailed description of their clothing in his handwritten statement—is one we do not address. Of course, we recognize that claimed lapses of memory may provide a separate basis for substantive

admissibility of prior inconsistent statements because "[w]hen a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied." *See Nance v. State*, 331 Md. at 564 n.5. But, courts have also held there must be "a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful" before admission is proper. *See, e.g.*, *Johnson*, 842 P.2d 1, 18-19 (Cal. 1992). In his brief, Mr. Furr asserted that the lapse in memory was a "point of discrepancy[,]" but he provided no substantial argument about that lapse. Likewise, he did not assert that there was a reasonable basis to conclude that Mr. Smith's lapse of memory was evasive or untruthful, rather than the result of the simple passage of time between his prior statement (made shortly after the robbery) and the trial (which occurred six months later). Nor did Mr. Furr explain why the lapse went to a material issue at trial or argue that the materiality requirement is inapplicable in the context of a claimed lapse of memory. Without substantial argument as to how this branch of the law on prior inconsistent statements supports Mr. Furr's argument, we will not speculate. Md. Rule 8-504(a)(6) & (c).

Moreover, even if we were to somehow conclude that the trial court erred in declining to admit Mr. Smith's handwritten statement, the error was harmless beyond a reasonable doubt. An error is harmless if, on independent review of the record, we are satisfied beyond a reasonable doubt "that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict." *Dorsey v. State*, 276 Md. 638, 659

(1976) (footnote omitted). Given the use Mr. Furr made of Mr. Smith's handwritten statement at trial, we are satisfied that the trial court's exclusion of the statement, even if erroneous, did not contribute to the guilty verdicts here. We explain.

To the extent Mr. Furr wanted Mr. Smith's handwritten statement before the jury for substantive purposes, *i.e.* to argue that Mr. Furr was the third suspect who "just [stood] around watching" (and that this suspect was not culpable), the evidence of a third suspect who "stood around" was already before the jury. Mr. Smith testified as to this suspect and what he did (or did not do). Thus, if Mr. Smith's handwritten statement suggested that the third suspect was not culpable, the statement was cumulative of Mr. Smith's trial testimony, and we see no harmful error in excluding the handwritten statement. *See Shivers v. State*, 256 Md. App. 639, 654-55 (2023) (holding that excluding evidence of two prior statements was harmless where the information contained within the statements was already in evidence from other sources); *United States v. Warren*, 42 F.3d 647, 656 (D.C. Cir. 1994) (holding that an error that excludes a statement is harmless where its contents are "cumulative of other evidence heard by the jury."). Ultimately, we do not see much more (and Mr. Furr does not identify *any* more) that Mr. Furr could have made of the handwritten statement had it been admitted.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.