

Circuit Court for Baltimore County
Case No. K-16-3106

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 538

September Term, 2017

EZRA REUVEN GOLDMAN

v.

STATE OF MARYLAND

Woodward, C.J.,
Eyler, Deborah S.,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 7, 2018

*This is an unreported opinion, and 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.

Following a jury trial in the Circuit Court for Baltimore County, Ezra Reuven Goldman, appellant, was convicted of three counts of robbery with a dangerous weapon, three counts of robbery, three counts of first-degree assault, two counts of use of a firearm during a crime of violence, and one count of possession of a regulated firearm by a prohibited person. Goldman raises two issues on appeal: (1) whether the trial court erred in admitting Dwayne Woods's videotaped statements that identified him as the perpetrator of the robberies because, he claims, those statements constituted inadmissible hearsay, and (2) whether the commitment record must be corrected to accurately reflect the sentences imposed by the trial court for both counts of use of a firearm during a crime of violence. For the reasons that follow, we affirm the judgments but remand the case to the circuit court for the purpose of correcting Goldman's commitment record.

At trial, the State presented evidence that a Citgo gas station on Reistertown Road was robbed at gunpoint on three separate occasions over a one month period. The police did not develop a suspect until they arrested Dwayne Woods for driving on a revoked license several months after the robberies. Following his arrest, Woods offered to provide information about the robberies in exchange for his release. Woods was taken to police headquarters and, in a videotaped interview, he told Detective Dave Shipley that he knew Goldman and that Goldman told him that he committed the robberies. Woods also identified Goldman in a photograph shown to him by Detective Shipley. During a subsequent search of Goldman's residence, police recovered several unique articles of clothing that were similar to those worn by the perpetrator of robberies.

When the State called Woods as a witness at trial, he stated that he did not remember making any statements to Detective Shipley and attributed his memory loss to having fallen off a ladder several months after his arrest. He also indicated that his memory was “probably” affected by the fact that he had been taking Oxycodone approximately five times a day since the fall. The trial court ultimately found that Woods was “feigning memory loss” and admitted his videotaped statements as prior inconsistent statements pursuant to Maryland Rule 5-802.1(a)(3).

On appeal, Goldman asserts that the trial court abused its discretion in finding that Woods was feigning memory loss and, therefore, that his videotaped statement should not have been admitted. However, this claim is not preserved for appeal. The day after Woods’s videotaped statements were admitted into evidence, Detective Shipley testified, without objection, about those same statements. Consequently, Goldman waived any prior objection he may have had regarding the admission of those statements. *See DeLeon v. State*, 407 Md. 16, 31 (2012) (“Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection.” (citation omitted)).

Moreover, even if the issue was preserved, it lacks merit. Maryland Rule 5-802.1(a)(3) provides that a statement previously made by a witness who testifies at trial and is subject to cross-examination is not excluded by the hearsay rule if the “statement is inconsistent with the declarants testimony” and was “recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement[.]” This Court has recognized that a witness gives inconsistent testimony when he “is able to testify about the event” but feigns memory loss because he “is unwilling to

do so.” *Corbett v. State*, 130 Md. App. 408, 425-27 (2000). “[T]he 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.

Here, Woods initially testified that he remembered being arrested and taken to the police station, but that he did not remember making any statements to Detective Shipley about Goldman the same night. Upon further questioning, he changed his testimony and stated that he had no memory of being arrested at all. Moreover, he admitted that he had talked to Detective Shipley in the hallway prior to testifying and told him that “snitches get stitches.” In light of that testimony, and given that the trial court was in the unique position to observe Woods’s demeanor, we cannot say that the court abused its discretion in finding that Woods was feigning memory loss. Consequently, his prior videotaped statements were “inconsistent” with his trial testimony and admissible under Rule 5-802.1.

Goldman also contends, and the State agrees, that his commitment record must be corrected to reflect the sentence imposed by the trial court. At the sentencing hearing, the court stated that Goldman’s sentences for both counts of use of a firearm during a crime of violence (Counts 12 and 20) were to “run concurrent.” The court gave no indication that those sentences were only to run concurrent with certain counts. However, the commitment record states that the “jail sentence in [Count 12] is Concurrent with the jail sentence imposed in Count(s) 9 (nine)” and that the “jail sentence in [Count 20] is Concurrent with the jail sentence impose in Count(s) 17 (seventeen).” Because we perceive no evidence of error in the transcript, the transcript prevails over the commitment record in this case. *See Douglas v. State*, 130 Md. App. 666, 673 (2000). Consequently,

the commitment record must be amended to reflect that Goldman’s sentences on Counts 12 and 20 are to run concurrently with all other sentences, not just the sentences imposed on Counts 9 and 17.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. CASE REMANDED FOR THE SOLE PURPOSE OF CORRECTING THE COMMITMENT RECORD TO REFLECT THE CORRECT SENTENCE. COSTS TO BE PAID BY APPELLANT.