

Circuit Court for Montgomery County
Case No. C-15-CR-21-000111

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0921

September Term, 2022

NICHOLAS GREG SMITH

v.

STATE OF MARYLAND

Arthur,
Shaw,
Sharer, J. Frederick,
(Senior Judge, Specially Assigned)
JJ.

Opinion by Shaw, J.

Filed: December 4, 2023

*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. However, unreported opinions issued on or after July 1, 2023, may be cited for persuasive value, but only if no reported authority adequately addresses the issue before the court. Md. Rule 1-104.

Appellant, Nicholas Greg Smith, was convicted by a jury of first-degree assault and second-degree assault in the Circuit Court for Montgomery County. He was sentenced to twenty-five years' incarceration for the first-degree assault conviction, and ten-years' incarceration for the second-degree assault conviction to be served consecutively with all but ten years suspended. Appellant filed this timely appeal raising three questions:

1. Whether photographs of injuries alleged only to have resulted from uncharged conduct may be introduced as evidence at trial where all evidence of the uncharged incident was excluded?
2. Whether text messages demonstrating that the alleged victim and the defendant were not physically together or in conflict on the days of the alleged assault should have been admitted as prior inconsistent statements, following a charge of fabrication, where the alleged victim testified to the same?
3. Whether certain jail calls should have been admitted under the prior inconsistent statement hearsay exception, where the statements made in the calls were entirely consistent with the declarant's testimony at trial?

For reasons discussed below, we affirm.

BACKGROUND

On October 21, 2021, Kimberly Holly reported to a Montgomery County Police Officer that she had been involved in a domestic violence incident. Ms. Holly was directed to follow the officer in her car to the Family Justice Center located in Rockville where she was interviewed. Ms. Holly told the officer that she has been involved in an altercation with Appellant at her home on October 19, 2021, around 1:00 PM. She stated that Appellant punched her in the stomach and made threats, after she told him she "didn't want

him around.” Ms. Holly was pregnant at the time and, according to her, Appellant stated, “if he don’t need to be around then the babies aren’t and he wished they died.” When asked by the officer if there were any marks, Ms. Holly showed the officer bruises on her stomach and stated that “just the one [mark] on [her] stomach [was] from when [Appellant] punched [her],” and that “the other mark [was] from [gallbladder] surgery.” She went on to explain that Appellant squeezed her neck for “probably 10 seconds” and before releasing his grip and said, “I hope you die.” Neither Ms. Holly nor the officer identified any bruising on her neck. The officer did, however, photograph the bruises on the side of Ms. Holly’s stomach and the scratches on her arm. Ms. Holly stated that the scratches were the result of a prior altercation with Appellant on October 10, 2021. The interview was captured by the police officer on his body worn camera. On October 27, 2021, Appellant was arrested and charged with first-degree assault, second-degree assault, and reckless endangerment.

Appellant subsequently filed a motion in *limine*, requesting that any mention of the October 10, 2021 incident between Appellant and Ms. Holly and an “exposure” incident be excluded. He argued that the two incidents constituted inadmissible “bad acts” evidence. At a motions hearing, the State indicated that it did not intend to offer any evidence relating to either incident. The court then ruled that the motion was “moot because there's an agreement from the State that they won't be offering it as other crimes evidence.” The court also noted that it would instruct Ms. Holly, prior to testifying, not to mention “anything about either the October 10th incident or the nature of the statement concerning the child.”

The State called Ms. Holly to testify as its first witness. She recanted her report to police, stating that “nothing ever happened.” She testified that when she spoke with the officer at the Family Justice Center on October 21, 2021, she was “medicated” and “hallucinated” the assault. When presented with a transcript of her statements to the officer, Ms. Holly testified that the transcript was “not correct” and that she “[didn’t] remember saying that.” When asked if it would refresh her recollection to see her statement where she asserted that Appellant strangled her, Ms. Holly said “no.” When asked if she had “any recollection of [the] encounter with the detective,” she stated she “[did not] remember much of what [they] talked about.” Ms. Holly continually denied that Appellant assaulted her and claimed the medicine made her “[think] he did something.” Subsequently, the State asked her whether she and Appellant “had conversations about this medication mix-up,” to which she responded “Yes.” The State then asked Ms. Holly whether she and Appellant had a “conversation about whether [she] [was] making all of this up,” and she responded, “Yes.” However, she denied that Appellant told her to testify in a particular way, stating “[Appellant] didn’t coerce me into saying anything. It’s literally the medication.”

On cross-examination, defense counsel attempted to admit text messages between Appellant and Ms. Holly as prior consistent statements to rebut the charge of fabrication implied by the State, and as Ms. Holly’s then existing mental state or impression. The State objected.

The State’s second witness was Detective Robert Anzenberger, from the Montgomery County Police Department. Detective Anzenberger conducted the interview of Ms. Holly at the Family Justice Center, photographed her injuries, completed a Domestic

Violence Report and listened to jail calls between Appellant and Ms. Holly. A transcript of the recorded interview between Ms. Holly and Detective Anzenberger was admitted into evidence. Detective Anzenberger testified that he took photographs of the markings on Ms. Holly's body that she described as being caused by Appellant and he identified photographs that showed "a reddish, purplish bruise" on Ms. Holly's stomach and marks on her arm. The photographs were offered by the State as evidence. Defense counsel objected to their admission, arguing three of the pictures depicted "the alleged injuries from the 10/10 incident" that were excluded during the motions in *limine* hearing and were not relevant. The court overruled defense counsel's objection, stating "[a]ll [the State] had done was lay a foundation properly for the admission of evidence." The court then admitted the photographs.

Detective Anzenberger also testified that he listened to jail calls between Appellant and Ms. Holly and prepared recordings of the conversations. During a break, the State, defense counsel, and the court, reviewed five recorded clips to determine their admissibility. The State argued the clips were being offered as substantive evidence of Ms. Holly's "prior inconsistent statements" because she could be heard on the calls saying that "she's going to tell everybody that she was on her medication, she was hallucinating, and that she was [] incorrectly remembering what it was she's saying, and she's going to say that she made the initial statement to the police up." Defense counsel contended that Ms. Holly's statements during the jail calls were not inconsistent, and that she did not affirmatively state that she was going to make anything up. After listening to each clip, the

court ruled that Ms. Holly's statements were "inconsistent with her testimony in court" and that the recordings would be admitted into evidence.

Over defense counsel's objection, Detective Anzenberger testified that based on his experience as a detective "there were no [] indications to [him] that [he had] seen through previous experiences with individuals with [] mental health distress," that Ms. Holly was experiencing similar mental health issues.

The State's third witness was Officer Jamal Tolliver, from the Montgomery County Police Department. Officer Tolliver was the responding officer and made the initial contact with Ms. Holly in the parking lot of a shopping center in Montgomery County. He led her to the Family Justice Center to conduct her initial interview and his body-worn camera recording was admitted into evidence. In the recording, Ms. Holly can be heard detailing the assault. Officer Tolliver testified that he completed the front portion of the Domestic Violence report based on information she provided to him, identifying Appellant as Ms. Holly's assailant, and diagramming the places on Ms. Holly's body where she claimed Appellant hit her. Over defense counsel's hearsay objection, the report was admitted into evidence.

At the conclusion of the State's case-in-chief, Appellant moved for judgment of acquittal on all three counts. The court denied his motion as to first- and second-degree assault but reserved on the reckless endangerment charge.

During the presentation of Appellant's case, he sought the admission of medical records that included a list of medications that Ms. Holly was prescribed at the time of the assault, as well as a document stating she was diagnosed with a bipolar disorder. The court

admitted the evidence with redactions. Prior to resting his case, Appellant asked the court if he could have “an opportunity to call [Ms. Holly] and ask her to drive to court and testify” so the text messages between Appellant and her could be admitted into evidence. The court denied his request, reasoning that he “had ample [opportunity] to subpoena her, contact her, do anything.” Appellant rested his case and moved for judgment of acquittal on all counts. The court granted Appellant’s motion as to the reckless endangerment charge. Following deliberations, the jury found Appellant guilty of first-degree assault and second-degree assault. Appellant filed a timely notice of appeal.

STANDARD OF REVIEW

“[W]hether a particular item of evidence should be admitted or excluded ‘is committed to the considerable and sound discretion of the trial court [...].’” *State v. Simms*, 420 Md. 705, 724 (2011) (internal citations omitted). “Maryland Rule 5-402, however, makes it clear that the trial court does not have discretion to admit irrelevant evidence . . .” *Id.* at 724-25. “The determination of whether evidence is relevant is a matter of law, to be reviewed *de novo* by an appellate court.” *Fuentes v. State*, 454 Md. 296, 325 (2017). “An ‘[a]buse of discretion exists where no reasonable person would take the view adopted by the trial court, or when the court acts without reference to guiding rules or principles.’” *State v. Heath*, 464 Md. 445, 458 (2019) (quoting *State v. Robertson*, 462 Md. 342, 364 (2019)).

DISCUSSION

- I. **The court’s error in admitting the photographs of Ms. Holly’s arm was harmless.**

Appellant argues the trial court erred in admitting photographs showing markings on Ms. Holly's arm. Appellant contends the photographs were irrelevant, unfairly prejudicial, and "an impermissible use of prior alleged wrongs." He asserts, prior to trial, he sought the exclusion of all evidence relating to an uncharged incident on October 10th, which included photographs of Ms. Holly's arm. The State agreed it would not introduce the evidence and the court declared the motion moot. The court, later, admitted the photographs over his objection.

The State argues Appellant's motion in *limine* did not refer to any specific physical evidence that he sought to exclude. Although the State concedes that it agreed not to introduce evidence related to the October 10th incident, there was no agreement about the physical evidence that would be excluded. The State contends the photographs were introduced as pictures that "depicted [Ms.] Holly's body at the time" she was interviewed by the detective, which was on October 21, 2021.

The State further argues that Appellant's relevancy objection is not preserved because he failed to make continuous objections. According to the State, while Appellant objected to the initial introduction of the photos, he failed to object to the "domestic violence form," which referenced the arm injuries, and he did not object to the State's closing argument. The State cites to *Berry v. State*, 155 Md. App. 144 (2004) to support its argument.

Maryland Rule 4-323(a) provides, in pertinent part, that "an objection to the admission of evidence shall be made at the time the evidence is offered or soon thereafter as the grounds for the objection become apparent. Otherwise, the objection is waived. The

grounds for the objection need not be stated unless the court, at the request of the party or on its own initiative, so directs.”

In *Berry v. State*, an opinion authored by this Court, the appellants argued that the trial court erred in admitting testimonial evidence of a handgun over their objection. 155 Md. App. 144, 171 (2004). The appellants, however, did not object when testimony about the handgun was elicited on more than one occasion. *Id.* The appellants did not object to testimony given by one of the detectives and when another witness testified that he saw the detective recover a handgun from a vehicle. *Id.* We held that, as a result, the issue was not properly preserved for appellate review, stating that “[t]he failure to object as soon as the handgun evidence was admitted, and on each and every occasion at which the evidence was elicited, constitutes a waiver of the grounds for objection.” *Id.* at 172 (citing Md. Rule 4-323(a); *Fowlkes v. State*, 117 Md. App. 573, 588 (1997)).

In the present case, the State introduced photographs of Ms. Holly’s arm injury and Appellant immediately objected to the admission on relevancy grounds. Appellant then attempted to draw the trial court’s attention to its prior ruling, but the court interrupted him and overruled his objection. Appellant did not later object to the admission of the Domestic Violence Report or the State’s closing argument.

We note, first, that Appellant’s failure to object to references made during closing argument is not dispositive as the photographs and Domestic Violence report had already been admitted into evidence. We also note that the record reflects that the State had agreed not to introduce the evidence and yet acted contrary to its agreement. The State’s argument that there was no agreement regarding the physical evidence lacks merit in light of the

prosecutor's statement to the court that, "[t]he State has no intention of introducing any evidence as it relates to the October 10th assault." It is also clear, that, in opposition to its prior ruling, the Court held that the evidence was admissible, over Appellant's objection.

Under Rule 4-232 (a), Appellant was, nevertheless, required to make his objections "known to the court at the time the evidence is offered or soon thereafter as the grounds for the objection become apparent." Because he failed to do so, the issues of relevancy, unfair prejudice, and prior bad acts are not properly preserved for appellate review.

Assuming arguendo, the issue is preserved, we next examine whether the court erred in admitting photographs of Ms. Holly's arm injuries. Appellant contends the injuries observed in the photographs were not caused by the assaults Appellant was charged with and the State did not present an "iota of evidence" suggesting that the injuries had anything to do with those assaults. Appellant argues the evidence was highly prejudicial given the State's inability to draw a connection between the two incidents.

The State argues the photographs were relevant because they depicted "the state of Ms. Holly's body on October 21, 2021," and because the photographs could have been admitted as impeachment evidence, undermining Ms. Holly's claim that she hallucinated the assaults. Additionally, the State argues that its intention in admitting the photographs was not to admit evidence of prior bad acts and that the photographs were not the crux of the State's case. Lastly, the State argues that "even if there was an ambiguity as to when those injuries occurred, that ambiguity would only have impacted the second-degree assault charge," leaving the first-degree assault conviction in place.

Our opinion in *Sweeney v. State*, 242 Md. App. 160, 167 (2019) is instructive. There,

the appellant was convicted of second-degree theft and burglary. *Sweeney*, 242 Md. App. at 167. On appeal, he argued that the trial court erred in admitting a series of close-up photographs that depicted a number of tools characterized as “burglar tools” that were attributed to him. *Id.* at 181. The appellant contended that because the State “did not establish any connection between the tools and the [appellant’s] burglary,” the tools were not relevant and therefore inadmissible. *Id.* Furthermore, the appellant argued, even if the picture of the “burglary tools” was relevant, its admission was unfairly prejudicial. *Id.* This Court held that the trial court erred in admitting photographs of burglary tools that the State did not connect to the crime being prosecuted. *Id.* at 182. We reversed and remanded *Sweeney*, finding, that the evidence was irrelevant and impermissibly suggestive. *Id.* at 184, 187.

Here, the trial court’s decision to admit the photographs of Ms. Holly’s arm injuries from an unrelated and uncharged event was error. While courts have broad discretion in the conduct of trials, “[e]vidence which in any manner shows or tends to show that the accused has committed another crime wholly independent of that for which he is on trial, even though it be a crime of the same type, is irrelevant and inadmissible.” *Sweeney*, 242 Md. App. at 184 (quoting *Ross v. State*, 276 Md. 664, 669 (1976)).

Our determination, however, that the trial court erred does not end our inquiry. We next examine whether the court’s error was harmless. As articulated by the Supreme Court of Maryland in *Dorsey v. State*, 276 Md. 638 (1976), and reaffirmed in *Gross v. State*, 481 Md. 233, 253-54 (2022), an error is harmless, if “a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt

that the error in no way influenced the verdict....” *Gross*, 481 Md. at 259 (quoting *Dorsey*, 276 Md. at 659).

In the present case, we hold that the injuries depicted were minor, their evidentiary value was limited and there was no testimony presented about them. There was also an abundance of evidence before the jury for its consideration regarding whether Appellant assaulted Ms. Holly. That evidence included, but was not limited to, photographs of bruises on Ms. Holly’s body, a recorded interview with Detective Anzenberger, and a domestic violence report form that identified Appellant as the assailant, contained diagrams of the injuries, and had details about the assault. Based on our review of the record, we hold the error did not, in anyway, influence the verdict. As a result, the admission of the photographs was harmless.

II. The court did not err in denying the admission of text messages between Appellant and Ms. Holly.

Appellant contends the court erred in failing to admit text messages from October 19th and 20th between himself and Ms. Holly. He asserts the messages were “prior consistent statements that show that they weren’t arguing” and rebut the State’s charge that Ms. Holly “fabricated her testimony at trial.” Appellant argues the messages were “contemporaneous with the alleged assault and predate Holly’s report to police and any conversations [Appellant] and [Holly] had while [Appellant] was incarcerated.” Alternatively, he contends the text messages were relevant non-hearsay evidence.

In response, the State argues the messages were not “consistent statements.” Second, even if Ms. Holly’s statements could have been admitted as prior consistent

statements, Appellant’s statements in the text thread would not have been admissible. Finally, the State asserts that Appellant’s arguments regarding admissibility as relevant non-hearsay are not preserved for appellate review.

We agree with the State that Appellant’s non-hearsay argument was not preserved. At trial, in seeking the admission of the text messages, Appellant made no argument that the messages were not hearsay. Rather, Appellant asserted that an exception to the hearsay rule regarding prior consistent statements was applicable. Here, for the first time on appeal, Appellant argues the statements could have been admitted on this alternative ground. Because Appellant failed to argue this below, he did not give the trial court the opportunity to examine and rule on this issue. We, therefore, decline to address its merits on appeal. *See Lopez-Villa v. State*, 478 Md. 1, 19-20 (2022) (articulating that “courts should ‘rarely exercise’ their discretion to review unpreserved issues under Md. Rule 8-131(a), ‘as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court’” to ensure the trial court has the opportunity to administer justice fairly.) (quoting *Chaney v. State*, 397 Md. 460, 468 (2007)).

The text messages Appellant sought to have admitted as hearsay exceptions are:

[Tues, Oct 19, 8:38 AM]

[APPELLANT]: Good morning (smiley face emoji)

[HOLLY]: Gm

[APPELLANT]: Call when u can

[HOLLY]: K

[Tues, Oct 19, 1:35 PM]

[APPELLANT]: I love u in I miss u

[HOLLY]: Love and miss you too

[APPELLANT]: (loved Victim's previous message)

[APPELLANT]: U still out

[HOLLY]: Yeah

[APPELLANT]: Ok

[Tues, Oct 19, 5:25 PM]

[APPELLANT]: I love you (heart kissing face emoji)

[APPELLANT]: (heart eye emoji)

[Wed, Oct 20, 8:14 AM]

[APPELLANT]: I love you (red heart emoji) (heart kissing face emoji)

[HOLLY]: Love you too

[Wed, Oct 20, 11:15 AM]

[APPELLANT]: wyd baby

[Wed, Oct 20, 2:39 PM]

[APPELLANT]: I'm in a bad mood today I'll come over another day

[APPELLANT]: I'm going with dan for rest of week

In Maryland, generally, hearsay statements are not admissible unless the statements fall within defined exceptions. Md. Rule 5-802.1 provides an exception for consistent statements and requires the trial court to examine two aspects. First, the statement must be

consistent with a declarant's testimony and, second, it must be offered to rebut a charge of fabrication, improper influence or motive. The Rule states, in pertinent part:

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:

(b) a statement that is *consistent* with the declarant's testimony, if the statement is offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive[.]

(emphasis added).

The Supreme Court of Maryland in *Thomas v. State*, 429 Md. 85, 101 (2012) explained that Md. Rule 5-802.1(b) "retains the common law 'pre motive' requirement, meaning, as a prerequisite to the admissibility of a prior consistent statement, the statement "must predate the alleged motive to fabricate." The Court opined that Md. Rule 5-802.1(b) permits the admission of prior consistent statements "which would *logically* rebut the impeachment undertaken, whether by an implied or express charge of fabrication or of bias or improper motive.'" *Thomas*, 429 Md. at 103 (emphasis added). In *Acker v. State*, 219 Md. App. 210, 225 (2014), this Court discussed the "finite scope of Rule 5-802.1(b)" and stated that the Rule "is not an avenue for the admission of a witness's consistent out-of-court statement unless the statement is introduced to rebut an impeachment based upon a specific event which is the source of the witness's motivation to fabricate." *Acker*, 219 Md. App at 226.

In the present case, Appellant argues, and the State does not challenge, that the messages predated the motive to fabricate. The text messages were sent on October 19,

2021, and October 20, 2021, and Ms. Holly contacted police to report the incident on October 21, 2021. As a result, this Court holds that the pre motive requirement has been met.

The second issue concerning the admissibility of the text messages under Md. Rule 5-802.1(b) is a “consistency” requirement, i.e., whether Ms. Holly’s statements in the text messages were consistent with her testimony. On direct examination, the State questioned Ms. Holly as to what occurred between her and Appellant on October 20th that led her to report that he had assaulted her. Ms. Holly testified as follows:

[STATE]: Okay. I'm going to direct your attention to October 19th and 20th of last year, 2021. Did anything happen with you and Mr. Smith?

[HOLLY]: No.

[STATE]: Okay. And on October 21st of 2021, did you call the police?

[HOLLY]: Yeah, I called the police, but I don't know what day it was.

[. . .]

[STATE]: On October 19th, 2021, did you and the defendant get into a verbal argument?

[HOLLY]: No.

[STATE]: And on October 19th, 2021, did the defendant strike you?

[HOLLY]: No.

[. . .]

[STATE]: Ms. Holly, I'm sorry, I may be going back for a second, but at any point in October, the end of October, did the defendant assault you?

[HOLLY]: No.

[STATE]: Okay. At any point, did he put his hands on you?

[HOLLY] No.

[STATE]: At any point, did he punch you?

[HOLLY]: No.

[STATE]: At any point, did he cause any marks on your body?

[HOLLY]: No.

[STATE]: Ms. Holly, you indicated to the police that you were assaulted, correct?

[HOLLY]: Yes.

[STATE]: Okay. And you told both the detective and the patrol officer that the defendant punched in the stomach, correct?

[HOLLY]: I believe that's what I told them.

[STATE]: Okay. And you actually showed the detective where on your body there was bruise from being punched in the stomach, correct?

[HOLLY]: Oh, the surgery thing?

[STATE]: Answer my question.

[HOLLY]: It was the surgery scar.

[. . .]

[STATE]: You told Detective Anzenberger that the bruise on your stomach was from being punched by the defendant, correct?

[HOLLY]: While under that medication, yes.

Following this exchange, the State questioned Ms. Holly about phone conversations with Appellant where, as the State argues, Appellant coerced Ms. Holly's testimony.

[STATE]: Okay. And -- Court's indulgence. Have you ever had a conversation with the defendant about making up what you said happened here today?

[DEFENSE]: Objection.

[COURT]: Overruled. You may answer.

[HOLLY]: Yes.

[. . .]

[STATE]: So my question was, you and the defendant have a conversation about whether you were making all of this up.

[HOLLY]: Yes.

[...]

[STATE]: Who says it's not real?

[HOLLY]: Nicholas.

As we see it, the text messages do not directly or indirectly, address whether an assault occurred or whether the two were with each other when the incident occurred. Rather, the statements focus on Ms. Holly's expression of her feelings and affection. Ms. Holly's articulation of love does not rebut the State's argument that Ms. Holly's testimony was fabricated and that Appellant coerced her trial testimony. The issue of whether Appellant and Ms. Holly were in love was simply not an issue in the case. We decline to conclude that a "[l]ove you too" text is synonymous with, or demonstrates that, Ms. Holly was truthful when she stated that Appellant did not assault her after she provided a detailed account of an assault to the police. We conclude the messages do not satisfy the "consistency" requirement under Md. Rule 5-802.1(b).

Further, even if there is an implied consistency between the messages and Ms. Holly's testimony, the purpose for which Appellant offered the text messages is not in

accord with Md. Rule 5-802.1(b). Md. Rule 5-802.1(b), unlike Md. Rule 5-616(c)(2), does not provide a means by which prior statements may be admitted to rehabilitate a witness because, “prior consistent statements used for rehabilitation of a witness whose credibility is attacked are *relevant not for their truth* since they are repetitions of the witness’s trial testimony.” *Mohan v. State*, 257 Md. App. 65, 94 (2023) (quoting *Thomas v. State*, 429 Md. 85, 108 (2012) (emphasis added)). “Prior consistent statement[s] may not be admitted to counter all forms of impeachment or to bolster the witness merely because [he or] she has been discredited.” *Thomas v. State*, 429 Md. 85, 101 (2012) (quoting *Holmes v. State*, 350 Md. 412, 420 (1998)). The focus, under Md. Rule 5-802.1(b), is on discrediting the charged *motive* to fabricate raised by the opposing side, and not on discrediting a prior inconsistent statement to rehabilitate a witness. Further, Appellant made no argument that the statements were admissible under Md. Rule 5-616.

We hold that the court did not err in denying the admission of the text messages.

III. The court did not err in admitting jail call recordings between Appellant and Ms. Holly.

Appellant next contends the court erred in admitting Appellant’s jail calls with Ms. Holly as prior inconsistent statements. Citing Md. Rule 5-802.1(a), Appellant argues that “the statements were not clearly inconsistent with [Ms. Holly’s] testimony at trial.”

The State’s rebuttal is three-fold. First, the State argues the calls were inconsistent because Ms. Holly, on direct examination, denied that Appellant assaulted her. During a call on November 15, 2021, however, she stated that the truth was “on paper” and at that time, “the only ‘paper’ statements were the statement of charges and the domestic violence

form, which both implicated Appellant.” Second, the State argues despite Ms. Holly testifying that Appellant did not coerce her, the jail calls establish that she wanted Appellant’s approval of her testimony. Finally, the State contends the jail calls establish an inconsistency regarding whether she was on medication. At trial, she stated that her medication caused her to believe that she had been assaulted, but during the jail calls, she claimed she was “off” her medication.

Md. Rule 5-802.1(a) provides that a statement that is inconsistent with a 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[.]” *Wise v. State*, 471 Md. 431, 446 (2020).

Here, following an assertion by the State that Ms. Holly fabricated her testimony because of improper influence from Appellant, the State offered three jail calls into evidence as inconsistent statements. We note, first, that Ms. Holly’s testimony regarding this issue was under oath, and the statements made by her during the calls were recorded in substantially verbatim fashion by electronic means contemporaneously with making the statement.

Appellant cites to this Court’s opinions, *Marlin v. State*, 192 Md. App. 134, 146 (2010) and *Adams v. State*, 165 Md. App. 352 (2005), regarding what may be considered an inconsistent statement pursuant to Md. Rule 5-802.1. Appellant argues the “sort of statements that Maryland courts have found to qualify as prior inconsistent statements are

unambiguous contradictions of the declarant’s trial testimony.” We do not agree with Appellant’s characterization. While *Marlin* (a case where the witness identified the appellant to the police but later testified that he did not identify the appellant to the police) and *Adams* (a case where the witness provided a statement where he identified the shooter but later testified that he could not identify who the shooter was) were cases where the witnesses’ contradictions were unequivocal, those two cases, and cases like it, do not limit what may be properly considered as an inconsistent statement.

In *Wise v. State*, 471 Md. 431, 453 (2020), the appellant argued that a positive contradiction is a “refutation, recantation, or express change to key parts of a witness’s observations.” (citing *Stewart v. State*, 342 Md. 230, 235 (1996)). The appellant contended that because the witness “never recanted, withdrew, or expressly changed his testimony,” “the State [could not] admit the previous written statement.” *Id.* at 440. In the witness’ previous statement he described how he “hear[d] gunshots and [saw] the murder suspect flee from his house.” However, at trial, the witness testified that he heard “gunshots from a bar down the street,” and that he “didn’t even know anybody got shot until somebody had told [him] out there on the front [of the house].” *Id.* at 457. The appellant believed that in order for the two statements to be considered “inconsistent” under Md. Rule 5-802.1(a), the witness “would have needed to testify that [the appellant] did not commit the assault and shooting.” *Id.*

In rejecting appellant’s argument, the Supreme Court of Maryland ruled that the witness’ prior statement was an inconsistent statement admissible under Md. Rule 5-802.1(a) because both the materiality and positive contradiction requirements were met.

Id. at 457-58. The identity of the shooter was a material issue in the case and the State's ability to positively identify the appellant as the shooter depended on the witness' testimony. Whether the witness was at a bar or at home (in the area where the shooting took place), was material to whether he did in fact have an interaction with the shooter moments before and immediately after the shooting as the witness previously stated. *Id.* at 457. The Court found that the trial testimony was a positive contradiction because the witness' testimony "subverted his previous statement to police because it narrated a sequence of events in which he never saw, nor could have seen [the appellant] involved in [the victim's] murder. *Id.*

Five jail call clips were admitted into evidence. The State played three of the jail calls for the jury. They went as follows:

[November 15, 2021]:

[APPELLANT]: Right, right now, like, the only thing I would even (unintelligible) is just the truth, like –

[HOLLY]: Okay.

[APPELLANT]: Just the truth.

[HOLLY]: Yeah, it's on paper.

[November 15, 2021]:¹

[HOLLY]: I thought you told me that?

[APPELLANT]: Okay, Kim. It don't even matter, okay? I'm probably going to leave out of here, and by the time I do get out of here, you'll be well off. So –

¹ The jail call between Appellant and Ms. Holly on November 15, 2021, was divided into two separate recordings in State's Exhibit 1A.

[HOLLY]: I said I will help you with this.

[APPELLANT]: At this point, the only thing that's going to help me is the truth, okay? The truth.

[HOLLY]: So you want me to go and say, oh, I made everything up, is that what you want me to do down there, because you want me to say I made everything up, you was innocent, I wasn't medicated, is what you want me to say. That's, that's, that's what you want me to say, right?

[APPELLANT] : Kim, I don't want you to say anything, okay? I'm going to deal with this, okay?

[HOLLY]: Nicholas, stop playing these games with me.

[APPELLANT]: I'm not playing no games, okay? I'm not playing –

[HOLLY]: They want you to sit here and said you want me to say that none of this ever happened and that I wasn't medicated, you're going to go out and say this, this didn't happen.

[APPELLANT]: Forget it.

[HOLLY] That I was off my medication and I lost my damn mind, right?

[APPELLANT]: Kim, just forget it. Like, you don't –

[HOLLY]: Is that what you want me to say?

[APPELLANT]: No, I don't even -- look, there's no hope for me, okay? There's no hope. Don't worry about it.

[HOLLY]: Fine, I'll say that. I'll tell them I was off my medication.

[December 12, 2021]:

[APPELLANT]: All that s[***] that's in that f[*****] report, like--

[HOLLY]: Mm-hm, what about it?

[APPELLANT]: Say what?

[HOLLY]: What about it?

[APPELLANT]: How you can just –

[Recorded Voice:] One minute remaining.

[APPELLANT]: You can just, like, feel comfortable with saying, like, I did all that, so.

[HOLLY]: Yeah, I'm comfortable with telling the truth.

In our view, each jail call admitted at trial established an inconsistency between Ms. Holly's trial testimony and her statements to police prior to trial. On the witness stand, Ms. Holly stated that "nothing ever happened," that Appellant did not coerce her testimony, and that "[i]t's literally the medication" that made her hallucinate the assault. However, in the jail calls, Ms. Holly made statements to the contrary and during the calls, she repeatedly asked Appellant "what you want me to say?"

We hold, like the trial court, the jail calls were prior inconsistent statements pursuant to Md. Rule 5-802.1(a). As in *Wise*, the statements met the materiality and positive contradiction requirements. They were material as to whether Appellant committed the assault, and they were positive contradictions as they "subverted" Ms. Holly's previous statement that she had been assaulted by Appellant. The court did not err in admitting the recordings.

**JUDGMENTS OF THE CIRCUIT
COURT FOR MONTGOMERY
COUNTY AFFIRMED.**