UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1998

September Term, 2014

PATRICK J. WALTERS

v.

STATE OF MARYLAND

Hotten,
Nazarian,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: July 24, 2015

Patrick Walters, appellant, was convicted in the Circuit Court for Baltimore City of second degree assault and carrying a dangerous weapon openly with the intent to injure. Appellant presents the following question for our review:

> "Did the trial court err in admitting Edgar Hoover's prior statement into evidence?"

We shall hold that appellant waived his objection to the admissibility of the statement and affirm.

I.

Appellant was indicted in the Circuit Court for Baltimore City with attempted armed robbery, attempted robbery, first and second degree assault, carrying a dangerous weapon openly with intent to injure and carrying a concealed dangerous weapon with intent to injure. The jury convicted appellant of second degree assault and carrying a dangerous weapon openly with intent to injure. The court sentenced appellant to a term of incarceration of eight years for second degree assault and three years concurrent for carrying a dangerous weapon openly with the intent to injure.

The following facts were adduced at trial. Michael Taylor testified that, on October 12, 2012, he was storing items in his parked van when he noticed appellant, whom he had known for three to four years, on the other side. Mr. Taylor locked the van, but noticed a light turn on inside indicating that someone had attempted to open another of the van's doors. Mr. Taylor asked, "who is that?" and appellant walked around to his side of the

van and said, "it was me." Mr. Taylor began to chat with appellant. He told appellant that he was about to leave for a bike ride with his two friends. Mr. Taylor testified that during their conversation appellant suddenly became violent, narrating as follows:

> "THE STATE: Okay. Can you — can you tell the ladies and gentlemen what happened?
>
> [MR. TAYLOR]: At that point Patrick walked behind me said, what are you doing? I said, we're going bike riding. And he came up and he mumbled something about, you're doing good for yourself. I, you know, and he went to give me a hug, and at that point he put a knife here through my liver. And I tried to push him away, and I collapsed, because it went into my liver, the knife or whatever.
>
> And as I turned, he was reaching for my pockets and he was hollering, bitch, and he stabbed me again in the back of my shoulder. And that's when I seen the blood going over me and I knew I was in trouble and I hollered help. And Eddie [Hoover] had came over with a bike and intervened and stopped him from assaulting me anymore."

A key witnesses at trial was Edgar Hoover, one of the friends with whom Mr. Taylor had been planning to take a bike ride. On October 13, the day after the attack, Mr. Hoover gave a statement to police describing the evening's events in detail. At that time, Mr. Hoover told the officers that he was not under the influence of any drugs or alcohol. In the pertinent portion of his statement, Mr. Hoover narrated as follows:

> "Okay. Me and — me and my friend Mike were getting ready to go for bike rides. My buddy — my buddy Mike [Taylor] was putting something in his car. A friend of ours, Patrick [Walters], which we both know, we've both known for years, came over and was talking to Mike. They were standing at the car talking. I was standing there holding, I had Mike's bike and my bike.

> And Mike and him were catty corner from me just talking on the corner, a friendly talk.
>
> They went to hug each other, they was friends; that's when Pat stabbed him. I didn't even see him stab him, I didn't know it; but when they separated, Pat came over to the corner where I was, Mike went in the street, right there in the center of the street, and he said, he stabbed me. I said, what? I said, Pat, what are you doing, man? I said, we're all friends here. What the hell are you doing stabbing him?
>
> He didn't tell me why he stabbed him. He said, I got him. And he walked — he walked westbound Eastern Avenue. Mike went down the street. I called my buddy's house that we were in front to come get the bicycles. My friend Brittany and Jimmy were walking down the street. Mike went down towards them holding himself.
>
> I said, actually I'll call my buddy Vic. One of them said, come out here and get Mike's bike. I rode down on my bike to see what was going on, on the southbound corner of Ann Street and Fleet, but Brittany and Jimmy were already taking care of him. That's when the other gentleman already called 911, and then (inaudible).
>
> I went to see what Mike, make sure Mike was okay. I was telling him, keep pressure on the — on the arteries. And trying to figure out where he was. He was disoriented and trying to figure out what was going on. And then I then proceeded to call his mother, let his mother know what happened. I told her that — that amongst friends, we, that we knew each other and I would call her back when it was all over and let her know what was going on.
>
> But yeah, that's and that's basically what happened. That another gentleman was on the corner, and he's the one that called 911 and then got the ambulance and the police here at the time, which that's all that happened."

At trial, Mr. Hoover's testimony differed significantly from the statement that he gave police on the day after the attack. Mr. Hoover insisted repeatedly that he did not see anything happen and that he was unable to recall the evening in detail, testifying as follows:

> "THE STATE: Do you recall what happened on the night of October 12th of 2012 when Michael Taylor was stabbed?
>
> MR. HOOVER: I — I could not see nothing happen, ma'am. I did not see nothing happen. I don't know what happened.
>
> THE STATE: Okay. What—
>
> MR. HOOVER: I just know —
>
> THE STATE: What did you see?
>
> MR. HOOVER: I — I just know Mike came past me and — and Pat came up by him and Mike yelled something and I talked, I stopped and talked to him. I — I don't know what happened. And then he went the other way, and I went down to see what was going on. That's all I know."

The State attempted to refresh Mr. Hoover's recollection of the incident by providing him with a copy of the transcript of his October 13 interview. Mr. Hoover insisted that he could not remember the incident and stated further that he was intoxicated on the night of the stabbing and when he gave his statement to police. He testified as follows:

> "THE STATE: Sir, having read that document, does it refresh your recollection about exactly what you saw?
>
> MR. HOOVER: I — I didn't see, like I said, I didn't see anything happen. . . .
>
> * * *
>
> THE STATE: — do you recall giving a statement to the police on the 13th of —
>
> MR. HOOVER: I remember —
>
> THE STATE: — 2012?

> MR. HOOVER: giving a statement, ma'am, but I — I don't remember what all I said in the statement.
>
> THE STATE: Okay. I —
>
> MR. HOOVER: I mean, I was under the influence myself, ma'am. I — I don't remember exactly what happened. I — I can't recollect.
>
> THE STATE: Okay.
>
> MR. HOOVER: I was doing alcohol back then, too. I had the same problem. That's why I don't drink no more, ma'am."

After repeatedly trying to gain Mr. Hoover's cooperation, the State sought to introduce the statement that Mr. Hoover gave police on the day after Mr. Taylor was stabbed. The State alleged that Mr. Hoover's memory loss was feigned and that his testimony was inconsistent with his prior statement, arguing as follows:

> "THE STATE: Your Honor, I'm citing Maryland, I'm citing Maryland Rule 5-802.1, and it's the State's position —
>
> THE COURT: Go ahead.
>
> THE STATE: It's the State's position that this witness is now feigning memory loss. He has acknowledged that he —
>
> THE COURT: Keep your voice down.
>
> THE STATE: He has acknowledged that he remembers seeing the Defendant earlier in the day. I would proffer that his taped statement says that he saw the Defendant with a knife, which he is able to describe in the statement. I've now asked him whether or not the Defendant had a knife, he said he doesn't recall.
>
> I tried to refresh his recollection with his taped statement, which describes specifically what he saw. And I will proffer that what his taped statement says is that he saw the victim and

> the Defendant hug, after which, the Defendant stabbed the victim. It's the State's position that he's feigning memory loss and his prior taped statement should come in for, as substantive evidence.
>
> DEFENSE COUNSEL: Your Honor, *I would agree that he's, there are some issues about what he's, what he can remember and not remember*; however, I would preface it with he's also indicated to the court that he lied to the police officers on that date saying that he wasn't under the influence. So it is possible that he was under the influence when he gave the statement. And he may clearly have memory issues because of what he — what he said was not true right out of the box, because he was, which of course I can ask him about.
>
> *I would ask that we try to keep it to the parts, not the whole statement, just the part that is substantive, not A to Z.*
>
> * * *
>
> THE COURT: Okay. (Inaudible) I do believe that based on has been — what it's based on has been presented, that this does come squarely within 5-802.1, the hearsay exception. He's acknowledged that this is his statement. As [defense counsel] has said, that he said he may have been under the influence at that time, but he had said that he was not, but he — and now he's indicating that he doesn't remember anything. So this is his statement.
>
> And I do believe it comes in, but I would agree with [defense counsel] that there may be some things that can and should be redacted. So the preliminary ruling is the statement comes in, subject to any redactions."

After the court decided to admit the statement, the State and defense counsel met and agreed on which portions of the statement would be played for the jury and which portions would be redacted. The portion of the statement to be admitted included all of the quoted text.

When court resumed in the afternoon, the State recalled Mr. Hoover and attempted to play the recording. At a bench conference, the Court asked defense counsel if counsel had seen the written portion of the redaction, and defense counsel responded that she had. Trial resumed, and the State attempted to play the redacted recording but experienced technical difficulties. The State proposed to play the unredacted version of the recording but to stop it before the redactions began. The following colloquy ensued:

> "THE COURT: All right. So what you're telling me — let me see this. What you're telling me, both of you, so we're clear, is that up to a point where it says, I, there was no argument, there was no dispute; that's fine. All right. So that's what you have then is the opportunity, the ability, it seems, to play that to the Jury. That goes into evidence because they hear it. And somehow you're going to have to just —
>
> DEFENSE COUNSEL: Well I wouldn't —
>
> THE COURT: — cut it there. That —
>
> DEFENSE COUNSEL: Well, I wouldn't send it back if we can't —
>
> THE COURT: Well, no, that's — that's — that's what I'm saying. There's going to have to be some way, because there's not a tape anymore, you're just going to have to figure some way out; or it will just be in evidence through them hearing it. And they can bring — we can bring them back out here if they ask to hear it again.
>
> DEFENSE COUNSEL: Right.
>
> THE COURT: Because we've done that in the past. And that's — that's the best I — I can see you doing, because I don't know how you're going to deal with your technical issues.

THE STATE: Uh-huh.

THE COURT: So that's what you've got.

THE STATE: All right.

THE COURT: *Any objection, Defense?*

DEFENSE COUNSEL*: No.*"

After the State was unable to play the unredacted recording, the circuit court ordered the State to continue with its examination of Mr. Hoover. The State examined Mr. Hoover, and defense counsel cross-examined him. On redirect, however, the State informed the circuit court that it had solved the technical problem and requested as follows:

> "THE STATE: I now have the unredacted portion of the statement.
>
> THE COURT: The unredacted?
>
> THE STATE: Yes.
>
> THE COURT: Okay.
>
> THE STATE: Going. It's my decision that I should be able to play it now. He's testified that he was drunk during his statement. I think the statement will speak otherwise if played to the Jury.
>
> DEFENSE COUNSEL: *I'm just objecting because it's, we're past that.*
>
> THE COURT: Let's see, he — you asked him questions about when he was with the officers. All right. So just so we're clear, in cross you did ask him whether he'd been taking drugs and that he lied to the officers. Okay. Based on cross, I'll allow her to put the statement in. So okay. Over your —

DEFENSE COUNSEL: Just note —

THE COURT: — objection

DEFENSE COUNSEL: Note my objection.

THE COURT: Absolutely."

The State played Mr. Hoover's statement as noted, and the jury convicted appellant. This timely appeal followed.

II.

Appellant argues that the trial court erred in admitting "the whole of" Mr. Hoover's statement into evidence when only a "handful of lines" were inconsistent with his out-of-court testimony, and the doctrine of verbal completeness does not save the inadmissible portions of the statement.

The State offers four responses. First, the State argues that we should not consider appellant's claims because he does not identify any specific portions of Mr. Hoover's statements that he claims were admitted improperly. Second, the State contends that appellant waived his argument. Third, the State alleges that the portions of Mr. Hoover's out-of-court statement that were played for the jury were inconsistent with his trial testimony. Finally, the State asks us to find that the error in admitting the statement, if any, was harmless.

III.

We hold that appellant waived his objection to the State's failure to redact any allegedly inadmissible portions of his statement. Appellant waived this objection when he collaborated with the State to determine which portions of the statement would be redacted. In this appeal, appellant does not argue that the statement as a whole was inadmissible. Rather, he argues that certain unspecified portions of the statement should have been redacted because they were not inconsistent with Mr. Hoover's in court testimony and were therefore inadmissible hearsay.

Appellant and the State worked together to determine which parts of Mr. Hoover's statement would be admitted. When the State first attempted to play the tape, the prosecutor noted that she had "redacted parts of the statement" and requested a break so that she could speak to defense counsel about which portions of the statement were relevant. After some discussion, the Court recessed for lunch and asked counsel to "work it out." When the parties returned, defense counsel affirmed, "I've seen the written portion of the redaction[,]" and did not object to the State's presenting the unredacted portions of the statement. It is clear that defense counsel actively participated in selecting the portions of the statement to be played for the jury.

During the State's attempts to play the recording, appellant objected several times, but each time he listed a specific ground for his objection other than that which he raises on

appeal — that the portion of the recording played for the jury included material that was not inconsistent with his in-court testimony.[1]

Because appellant did not merely fail to assert his rights, but affirmatively waived them, we will not review for plain error. *Joyner v. State*, 208 Md. App. 500, 512 (2012).

IV.

Even assuming *arguendo* that appellant's objection was preserved, we would hold that the statements were admitted properly. The circuit court's determination of whether evidence is hearsay and, if so, whether it is admissible under an exception is a legal conclusion, which we review *de novo*. *Bernadyn v. State*, 390 Md. 1, 8 (2005). We review any factual findings necessary to the circuit court's determination for clear error. *Gordon v. State*, 431 Md. 527, 538 (2013).

Maryland Rule 5-802.1 excepts certain prior statements by witnesses from the rule excluding hearsay and provides as follows:

> "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:

[1]Before the State attempted to play the unredacted recording, appellant objected to the entire recording being sent back to the jury, but when the Court asked her whether she objected given that the recording would not be sent back with the jury, defense counsel answered "no." When the State played the recording later in Mr. Hoover's testimony, defense counsel stated a specific ground for her objection, arguing that "we're past that."

> (a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to 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 . . . ."

In Maryland, as well as in many Federal appellate courts, inconsistency may be implied from testimony of memory loss if the memory loss is feigned, rather than actual. *Corbett v. State*, 130 Md. App. 408, 421-22, 425 (2000). Whether a witness's purported lack of memory is feigned is a demeanor-based credibility finding that is within the discretion of the trial court. *Id.* at 426. It would have been within the trial court's discretion to admit Mr. Hoover's statement based on its finding that his memory loss was feigned alone. Mr. Hoover went further, however. Several of Mr. Hoover's statements at trial directly contradicted his statement to police. At trial, Mr. Hoover stated that he had been intoxicated when he made the statement, while in his earlier statement he stated that he was not under the influence of drugs or alcohol. In his statement to police, Mr. Hoover recounted a detailed narrative surrounding the stabbing, while at trial he claimed repeatedly that he "could not see nothing happen" and "did not see nothing happen." The portions of the statement that were played for the jury were inconsistent with Mr. Hoover's in court testimony and therefore admissible under Rule 5-802.1.

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