UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0246

September Term, 2014

KOBINA EBO ABRUQUAH

v.

STATE OF MARYLAND

Kehoe,
Reed,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: December 20, 2016

After a four day jury trial in the Circuit Court for Prince George's County, Kobina Ebo Abruquah was convicted of first-degree murder and use of a handgun in the commission of a crime of violence. Appellant appeals his convictions and presents four issues, which we have reworded and reordered for purposes of analysis.

> 1. Did the trial court err in admitting the prior written statement of a jailhouse informant?
>
> 2. Did the trial court err in admitting testimony of a police officer as to the victim's fear of appellant?
>
> 3. Did the trial court abuse its discretion when it excluded appellant's firearms and toolmarks experts from testifying?
>
> 4. Did the trial court err in limiting defense counsel's examination of several witnesses?

We conclude that the trial court erred in admitting the prior consistent statement of the jailhouse informant. Because we are not certain beyond a reasonable doubt that the controverted evidence did not affect the jury's verdict, we must reverse the convictions and remand this case for a new trial or other proceedings.

Our disposition of the first issue moots appellant's remaining contentions. We will briefly discuss appellant's contentions regarding testimony as to the victim's state of mind because the same issue may arise again if appellant is retried.

Background

On August 8, 2012, Prince George's County police, in the course of a welfare check at appellant's residence, discovered the decomposing body of Ivan Aguirre-Herrera, one of appellant's housemates. After an investigation, appellant was arrested and charged

with Mr. Aguirre-Herrera's murder and related charges.[1] The evidence presented at trial can be summarized as follows.

Appellant, Aguirre-Herrera, and two other individuals shared a house in 2012. Appellant's relationship with Aguirre-Herrera was acrimonious and each sought and obtained a peace order against the other prior to August 3, 2012. On that date, the members of the Prince George's County Police Department responded to three separate calls for complaining of disturbances at the property.

Officer Michael Clarke responded to the first call around 9:00 p.m. Officer Clarke testified that Aguirre-Herrera made the call to police, and he was the only one in the house when Officer Clarke arrived. Aguirre-Herrera told Officer Clarke that "he had an argument with his roommate and he was in fear for his life." Officer Clarke advised Aguirre-Herrera to apply for protection or to press criminal charges at the commissioner's office.

At 10:32 p.m., police responded to a second call from the house, and found both Aguirre-Herrera and appellant at the residence. Officer Chad Melby testified that both appellant and Aguirre-Herrera were "agitated" and "upset." After advising both men of their "options," the police left.

Just before midnight, Corporals Michael Gainey and Belinda Nichols responded for the third and last call from the house. When the police arrived, only appellant was

[1] Appellant was charged with Murder in the First Degree, Murder in the Second Degree, and Use of a Firearm in the Commission of a Crime of Violence.

present. Corporal Gainey testified that appellant told police that he and his roommate were having a "verbal dispute." According to Corporal Gainey, appellant had a "nonchalant attitude[.]"

Corporal Nichols' characterization of appellant was different. She testified that, when she and Corporal Gainey arrived at the scene, appellant was "very loud, rude, screaming, yelling[,]" and "demanding that [police] arrest someone that was not on the scene at the time." When she tried to explain that police could not arrest someone who was not there, appellant approached her several times, and his voice "kept going louder and louder."

After the officers had been at the house for about ten minutes, Mr. Aguirre-Herrera pulled up in his car. Both officers told appellant to stay at the top of the steps while they spoke with Aguirre-Herrera, but appellant did not comply. Appellant came down the steps to where the officers were speaking to Aguirre-Herrera and began to shout "lock him up, lock him up. I want him arrested. He call[ed] me a monkey[.]" Despite being told multiple times to go back to the top of the steps, appellant refused to comply.

Both officers testified that Aguirre-Herrera appeared "quiet" and "scared." He had paperwork from the commissioner in his hand. Corporal Nichols testified that when Aguirre-Herrera walked over to her, she asked him why he did not complete the paperwork, and that he said he did not understand it. When asked how Aguirre-Herrera was behaving in the presence of appellant, Corporal Nichols said: "He huddled up against my body. . . . I felt he was afraid. He was very soft-spoken." She continued:

> I told them both, I was like someone is going to get hurt. Someone needs to leave. And I asked [Aguirre Herrera], did you call your landlord? He said I

> tried to call him several times. I said someone needs to leave. Someone is going to get hurt. Because [appellant] was very, very aggressive towards him and he just huddled up under me.

The officers left shortly after midnight.

There was a Wendy's restaurant directly across the street from appellant's house. The manager testified that he heard three gunshots through the open drive-through window between 11:30 p.m. and 12:30 a.m. on the night in question. He believed the shots came from the area near appellant's house.

Aguirre-Herrera's telephone records showed that he called his landlord and the police several times on August 3, 2012, and that the last outgoing phone call made from his phone was placed at 10:10 p.m. After that, all incoming phone calls, including many from his employer, went to voice mail.

Aguirre-Herrera's brother testified that he became concerned about his brother's well-being. On August 8, he called the police. Corporal Maurice Rich responded and knocked on the door of the victim's house. He saw that one of the windows had "at least a thousand flies and insects all over it[,]" and smelled an odor coming from that window. Based on these facts, he decided that a forced entry was appropriate.

Corporal Rich testified that when the door to the house was forced open, "the odor of decay and flesh was very overwhelming." Police officers discovered Aguirre-Herrera's remains in the room where the flies were covering the window.

The police found two firearms, a Taurus .38 special and a Glock pistol, hidden in a vent in the basement ceiling of the house. DNA taken from the .38 was consistent with

appellant's DNA at 15 out of 15 loci. The likelihood of choosing an unrelated person in the African-American population with the same DNA profile is 1 in 5.42 quadrillion.

Scott McVeigh testified as an expert in firearms and tool mark identification. He concluded "to a reasonable degree of scientific certainty" that the bullets recovered from the victim's body were fired by the Taurus .38 found in the ceiling vent. The police arrested appellant and he was confined in the Prince George's County Detention Center.

Cecil Muhammad was housed in Prince George's County detention center with appellant for three days after appellant's arrest. Muhammad testified that appellant told him that he killed his housemate on the third of August. We will discuss Muhammad's testimony in detail in Part I of this opinion.

Appellant testified in his own defense. He admitted owning the Taurus .38 handgun, but denied killing the victim. Appellant said that the night in question, he left the house two to four minutes after the police left. He drove to the McDonald's in Langley Park, sat in his car for 15 to 20 minutes, then went inside to order food. He introduced surveillance video footage from the McDonald's which he stated shows him in line for food at 1:03 a.m. Afterwards, appellant said, he went to the post office to check his box, then returned home. When he got there, he heard noises coming from the victim's room, which he ignored. Appellant said he went to his room, watched television, and went to sleep.

Over the next five days, appellant said, he lived in the house, but did not "notice anything strange" and did not know that Aguirre-Herrera had been murdered. He found

out Aguirre-Herrera was dead on Wednesday, August 8th, when he returned home and saw police outside his home. He went to police headquarters for questioning, during which time he was told that Aguirre-Herrera had been killed.

Analysis

I. The Prosecution's Efforts to Rehabilitate Muhammad

In August 2012, Cecil Muhammad was incarcerated in the Prince George's County Detention Center for failing to appear for a court date for a charge of driving while intoxicated. After his arrest for murder and related charges, appellant shared a cell with Muhammad for three days.

The State called Muhammad as a witness in its case in chief. He testified that, during the three days that they were housed together, appellant confessed to him that he had shot Mr. Aguirre-Herrera. During his testimony, Muhammad explained in great detail the conversations he had with appellant. On direct examination, Muhammad stated that appellant "just felt comfortable enough to open up to [him] . . . about his life and about things that transpired." When asked what appellant told him, Muhammad began by explaining:

> Basically the guy, Ivan Herrera, was a pain in the ass . . . . People coming in during times in the night and what have you. So that was like a big issue that he didn't like. So he was very upset about that. He told me Ivan came on to one of the house roommates and the roommates [sic] basically said, I don't go like that. So he basically told me, Man, that the guy was a homosexual. An undercover homosexual. . . . So I think his antics, based on what Kobina was telling me, was basically he was trying to really run – deter him so much, to make him get out of there so his type of people could move in the house.

Muhammad also stated that people coming in and out of the house "teed [appellant] off" because they had a relationship. He described the relationship over the period of months:

> [It was] like an ongoing tug of war. It got to the point where they really wasn't getting along because of all the activity that was going on in the house. And they got into a big argument about that to the point where Ivan went and got a peace order on him. And that once he found out he got a peace order, then that's when Kobina went and got a peace order on Ivan.

Muhammad's direct testimony continued:

> [Prosecutor]: He told you he went and got a peace order once Ivan got one on him?
>
> [Muhammad]: Exactly.
>
> [Prosecutor]: What else did he tell you?
>
> [Muhammad]: From that point, from my recollection, is they got into a heated argument over this; to the point where he just snapped.
>
> [Prosecutor]: Did he tell you when he snapped?
>
> [Muhammad]: I don't recall the day . . . but he snapped. That's when he did it.
>
> [Prosecutor]: Did he — what did he tell you when he lost it?
>
> [Muhammad]: He shot him.
>
> . . . .
>
> [Prosecutor]: Did he tell you how that happened?
>
> [Muhammad]: No. He didn't tell me how that happened. He didn't get into the specifics.
>
> [Prosecutor]: Did he tell you what gun he used??
>
> [Muhammad]: A .38.
>
> [Prosecutor]: Did he own any other gun he told you of?
>
> [Muhammad]: Yes. He told me that he had a 9mm that he kept in his basement in the ceiling.
>
> [Prosecutor]: Is that where he said he kept the .38 as well?
>
> [Muhammad]: Yes, sir.

Muhammad testified that he attempted to contact a Lieutenant Orr in the Detention Center about appellant's statement to him but was unsuccessful in reaching him.

Muhammad related that he was currently serving a sentence for unauthorized use of a motor vehicle and two counts of assault, his sentence being "eight years, suspend all but five." Muhammad also testified that he had been granted parole less than one month earlier but that he was "not getting anything" for testifying against appellant.

On cross-examination, defense counsel sought to impeach Muhammad's testimony. She elicited the following from him:

(1) Appellant met Muhammad for the first time in the Detention Center.

(2) Muhammad was in the Detention Center because he failed to appear for trial for a charge of driving while impaired.

(3) If convicted of a felony, Muhammad faced a parole violation proceeding in the District of Columbia which could have resulted in imposition of a sentence of 40 years.

(4) In September 2012, after his release from detention resulting from the DUI charge, but before he contacted law enforcement authorities about his knowledge of the Aguirre-Herrera murder, Muhammad was charged with theft of property valued between $10,000 and $100,000, unauthorized removal of property, malicious destruction of property over $500, possession of burglary tools, being a rogue and vagabond, two counts of second degree assault on law enforcement officers, resisting arrest, fleeing and eluding by failing to stop a vehicle, fleeing and eluding on foot, driving without a license,

reckless driving, driving at an excessive speed, failure to avoid collision with another vehicle, and theft of an automobile.

(5) Muhammad made contact with the police about appellant's statement after he was arrested on these charges. (He also testified that, before being arrested in September, he had tried approaching the police about his conversation with appellant by "[making] calls." Furthermore, he tried to call the prosecutor's office but "they just took their time."

(6) Muhammad admitted that, in the guilty plea proceeding disposing of the September criminal charges set out in the previous paragraph, his lawyer alluded Muhammad's "coming forward in a murder investigation. This murder investigation."

On redirect, the State sought to introduce two written statements made by Muhammad in order to repair his credibility after defense counsel's cross-examination. The first, in the order of presentation to the court by the State, was written by Muhammad in November 2012 (the "November Statement"). He gave this written statement regarding appellant's confession to the police sixty days after his September 2012 arrest.

The second statement (the "August Notes") apparently consisted of two or more handwritten notes made by Muhammad while he was still in the Detention Center. Apparently, the August Notes were undated but Muhammad testified that he wrote them on August 15th or 16th, shortly after speaking with appellant. Both documents were initially admitted over defense counsel's objection as prior consistent statements of the witness pursuant to Md. Rule 5-802.1(b). The court then recessed for lunch.

After the recess, the trial court revisited the admissibility of Muhammad's written statements and requested additional argument from counsel regarding the time at which Muhammad's motive to fabricate arose, as well as the time at which the statements were written. Ultimately, the court concluded that the pending charges arising out of Muhammad's September arrest constituted a motive for him to fabricate the November Statement but that Muhammad had no motive to fabricate when he made the August Notes. Accordingly, he ruled that the November Statement would not be submitted to the jury but that the August Notes would be. This brings us to the parties' appellate contentions.

Appellant asserts the trial court erred in admitting the August Notes. In support of his contention, appellant argues that Muhammad had multiple motives to fabricate at the times the August Notes were written. Specifically, appellant asserts that Muhammad's arrest for driving while intoxicated and charge for failure to appear were sufficient to give rise to a motive to fabricate, and the fact that Muhammad faced a parole revocation proceeding in the District of Columbia enhanced that motive. Appellant argues that Muhammad's failure to notify law enforcement of appellant's jailhouse statements shows that Muhammad was seeking "currency" to use to his advantage in the event of future arrests. Appellant thus contends that Muhammad's motivation to lie arose, at the earliest, when he was placed in the detention center, and, at the latest, when he was placed in the cell with appellant.

Md. Rule 5-802.1(b) excludes prior consistent statements from the general prohibition against hearsay statements. Pursuant to the rule, when a witness testifies at a trial or hearing, and is subject to cross-examination, counsel is permitted to introduce, as substantive evidence, "[a] [previous] statement that is consistent with the declarant's testimony, if the testimony is offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive[.]" Md. Rule 5-802.1(b).

As the Court has explained, "under Md. Rule 5–802.1(b) a prior consistent statement 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, 102 (2012) (quotation marks and citations omitted). Instead, the rule is "intended to permit the admission of those 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." *Id*. at 103 (citation omitted). For this reason, it is the law in Maryland that a prior statement is admissible under Rule 5-802.1(b) only if the statement was made before the declarant had a motive to fabricate his or her story. *Holmes v. State*, 350 Md. 412, 424 (1998); *see also Thomas,* 429 Md. at 101-02*; Acker v. State*, 219 Md. App. 210, 222, *cert. denied*, 441 Md. 62 (2014); *Hajireen v. State*, 203 Md. App. 537, 554, *cert. denied*, 429 Md. 306 (2012).

As the *Thomas* Court explained:

> If the prior consistent statements were made at a time prior to the existence of any fact which would motivate bias, interest, or corruption on the part of the witness then the prior consistent statements are admissible to rebut the alleged bias or interest. Conversely, statements made when the declarant

> had an alleged motive to falsify are not relevant to rebut a charge of fabrication.

Id. at 104-05 (internal citations omitted). A witness facing criminal charges may be motivated to fabricate in order to curry favor with police officers or prosecutors. Therefore, "when the witness is obviously under investigation or has been arrested when the [prior] statements were made, [those statements] are generally inadmissible because the motive to fabricate has already arisen." *Id.* at 103.

In other words, *Thomas* instructs that the prior statement is "generally inadmissible" if the statement was made after the declarant was arrested. Appellant argues that, because Muhammad made his notes after he was arrested, the August Notes were inadmissible.

As an initial matter, the State raises a preservation argument. The State points out, correctly, that appellant's trial counsel did not articulate a "motive to fabricate" objection to the August Notes when the prosecutor initially moved their introduction into evidence. However, as we have related, the court reconsidered the question of the admissibility of Muhammad's statements after returning from its recess. During that colloquy, defense counsel argued that Muhammad's intent was to collect jailhouse stories to use to his benefit at some future time, and that the notes he wrote following his conversation with appellant were part of his quest to obtain incriminating information. The record also reveals that defense counsel argued that Muhammad's incarceration, which could have provided a basis for a parole violation, gave Muhammad a motive to fabricate. We conclude that defense counsel's arguments on reconsideration were sufficient to preserve this issue for appellate review.

Moving to the merits of appellant's contention, we conclude that the trial court erred when it admitted the August Notes into evidence. In *Thomas*, the Court held that statements made by a witness who is "obviously under investigation" or is under arrest "are generally inadmissible [as prior consistent statements] because the motive to fabricate has already arisen." *Id*. at 103 (internal quotation marks omitted). The *Thomas* Court concluded, in the case before it, that the witness's statement was inadmissible on the basis that he had a motive to fabricate "the moment he knew he was under investigation and/or stopped by the police on suspicion of participating in a drug transaction." *Id*. at 107.

In light of *Thomas's* holding that, in general, the motive to fabricate arises upon investigation or arrest, and statements made thereafter are not admissible to rebut allegations that the witness's in-court testimony is fabricated, we must conclude that the August Notes should not have been admitted pursuant to Md. Rule 5-802.1(b).[2] Despite Muhammad's testimony on this issue to the contrary, it is clear that, even in August, when his only pending Maryland charge was for a DUI, Muhammad faced a significant problem in the District of Columbia because he was on parole in that jurisdiction and was facing a forty year prison sentence if his parole were terminated. This constituted a substantial motivation to fabricate and that motivation was not rendered irrelevant by Muhammad's subsequent charges.

[2] As *Thomas* notes, Md. Rule 5-616(c) permits the introduction of prior consistent statements not as substantive evidence but only to rehabilitate a witness's credibility. 429 Md. at 97. However, the colloquy between counsel and the trial court made it clear that the prosecutor sought to introduce the August Notes as substantive evidence.

Trial error is not a basis for reversal if the error was harmless. For us to conclude that the admission of the August Notes was harmless, we would have to conclude beyond a reasonable doubt that "the error in no way influenced the verdict[.]" *Robinson v. State,* 436 Md. 560, 563 (2014). It is difficult to conceive how we could conclude that the error was harmless in light of the significance of Muhammad's testimony to the State's case. But, in any event, we are unable to undertake a harmless error analysis in this case because the August Notes were not included in the record transmitted to this Court by the circuit court clerk's office. When this deficiency became clear, we requested appellant's appellate counsel and the Office of the Attorney General to supplement the record with those documents, or at least photocopies of them. Counsel were unable to do so.

II. Mr. Aguirre-Herrera's Testimony that He Was in Fear for His Life

We will now address an additional evidentiary issue because it is likely that it will arise again if the case is retried. As we have related, the State introduced the testimony of Prince George's County police officers who responded to three calls at appellant's house on the night of Aguirre-Herrera's murder. Officer Michael Clarke responded to the first call for a disturbance between roommates. Officer Clarke testified that he spoke to Aguirre-Herrera when he arrived at the house, and that Aguirre-Herrera informed him that he had called the police because "he had an argument with his roommate and he was in fear for his life."

Officer Clarke's testimony as to Aguirre-Herrera's reason for his call was admitted over defense counsel's objection. When the State initially inquired as to Aguirre-

Herrera's explanation for his call, defense counsel objected and the court asked the prosecutor for his proffer. The following colloquy took place:

> [PROSECUTOR]: He was going to indicate he was in fear for his life by the defendant and he would be returning to the house. He was in fear of danger, so he was meeting with him, speaking with him.
>
> [DEFENSE COUNSEL]: It's hearsay. I don't see it as being a present sense impression. It's basically a thing that apparently the decedent said to get the officer over there. There's no indication there was a present sense impression. That's where you were describing something not going on, and not editorializing, I fear for my life. I don't recognize it falls into any present –
>
> THE COURT: I think you can have a present sense impression with respect to your current mental state. As long as you stick to that portion of it, I will allow it.

Appellant contends that the trial court erred in allowing Officer Clarke to testify to the victim's statement that "he had an argument with his roommate and he was in fear for his life." Appellant asserts that the statement was inadmissible hearsay, and the trial court "conflated" the present sense impression and state of mind exceptions to the general rule against the admission of hearsay evidence. Appellant argues that the statement was neither admissible as a present sense impression, nor under the state of mind exception. In response, the State asserts that Officer Clarke's testimony was admissible under either exception.

Maryland Rule 8-503 provides

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (b) Other Exceptions.

> (1) *Present Sense Impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
>
> . . . .
>
> (3) *Then Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action[.]

A present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Md. Rule 5-803(b)(1). As explained by Judge Murphy, "[w]hen a declarant, without any motivation to falsify, describes an event he is observing at that very moment, his 'present sense impression' is admissible at trial." JOSEPH F. MURPHY, JR., MARYLAND EVIDENCE HANDBOOK § 803[B] (4th ed. 2010).

Even if Aguirre-Herrera's description of his feeling of fear constitutes a present sense impression of an "event or condition," or a description of his "then existing state of mind," his statement would be admissible only if it is relevant. Relevancy is often fact-dependent. We wish to draw the court's attention to *Copeland v. State*, 196 Md. App. 309 (2010), and *Banks v. State,* 92 Md. App. 422 (1991), two opinions in which this Court analyzed the relevancy of evidence as to the victim's state of mind in differing factual contexts.

THE JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY ARE REVERSED AND THIS CASE IS REMANDED TO IT FOR FURTHER PROCEEDINGS. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.