UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0407

September Term, 2015

OLAKUNLE GABRIEL SOLOMON

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: April 19, 2016

A jury in the Circuit Court for Baltimore County convicted Olakunle Gabriel Solomon ("Solomon") of robbery. Solomon was sentenced to a term of fifteen years imprisonment, with all but eight years suspended in favor of five years supervised probation. In this appeal, Solomon presents three questions for our review:

1. Did the trial court err in allowing Melissa Trujillo to testify regarding her level of certainty as to her identification of appellant?

2. Did the trial court err in allowing the State to impeach its own witness and/or in admitting into evidence Sam Solomon's prior statement?

3. Did the trial court err in allowing other impermissible hearsay into evidence?

We shall answer all of those questions in the negative and affirm Solomon's conviction.

I.

EVIDENCE INTRODUCED BY THE STATE

On December 23, 2013, Melissa Trujillo was a student at Franklin High School in Reisterstown, Maryland. She testified that on that date, as she was walking home from Planet Fitness, she was approached by a fellow student, whom she immediately recognized. That fellow student was Samuel Solomon ("Sam") who is appellant's younger brother. Sam was accompanied by another person whom Ms. Trujillo identified in court as appellant. When appellant and Sam approached her, Trujillo believed that appellant had a gun in his pocket. Based on that belief, she put her bag down and Sam went through that bag while appellant took her cell phone from her pocket. After her phone was taken, appellant told

Ms. Trujillo to walk in the opposite direction. She did so. Shortly thereafter she reported the robbery to the Baltimore County Police.

Baltimore County Police Detective Kenneth Lynch responded to the scene of the December 23, 2013 robbery and immediately notified Detective Steven Davalli. Police officers subsequently went to Franklin High School where they arrested Sam. Sam was transported to a police station where, on January 2, 2014, he gave a written statement to Detective Davalli. In that written statement, Sam said that he and appellant were walking home when they saw "a girl." According to Sam's written statement, appellant stopped the girl by pulling out a BB gun and telling the girl to give him her phone. After the victim gave appellant her phone, Sam and his brother ran home. In his written statement, Sam also said that appellant later told him that the phone was "useless" and that he was going to throw it away.

Sam cooperated with the police by telling Detective Lynch where Ms. Trujillo's cell phone could be located. Based on that information, the phone was found at Sam's residence, which was approximately one mile from the scene of the robbery.

As will be described in more detail, *supra*, at trial, Sam was a classic "turn coat" witness. When the prosecutor asked him about the robbery, Sam stated "I don't remember. . . . [I]t was almost a year and a half ago and I just told you I had a concussion[.]" When he

was shown the written statement taken from him by Detective Davalli, Sam claimed that he had never signed that statement nor had he even seen it previously.

II.

A. First Question Presented

During re-direct examination of Ms. Trujillo, the following exchange occurred:

> [PROSECUTOR]: How sure are you that the [d]efendant was the other person involved?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled as to that one.
>
> [Ms. Trujillo]: I'm a hundred percent sure.
>
> [PROSECUTOR]: And why are you sure?
>
> [WITNESS]: It is very – it was a very traumatic event to me. I may not remember every detail, single detail. Sorry. The face is very – I'm sorry. The face is very vivid to me. And I don't think I could forget. So yes, I am a hundred percent sure.

(Emphasis added.)

Appellant argues that the trial judge committed reversible error in allowing the witness to say that she was "a hundred percent sure" that appellant was one of the robbers. The State argues, preliminarily, that this issue has been waived for purposes of appellate review because: 1) although appellant's counsel objected the first time the question was asked, no objection or motion to strike was made once the witness reiterated her statement

that she was "a hundred percent sure." We agree that the issue has been waived. See *Jones v. State*, 310 Md. 569, 589 (1987) (objection to evidence is waived if, at another point during the trial, the same evidence came in without objection). *See also* Md. Rule 4-323(a) which provides, in relevant part, "[an] objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived."

But even if the objection had not been waived, appellant would not benefit because the trial judge did not err in allowing the witness to testify that she was "a hundred percent sure." *See Mines v. State*, 208 Md. App. 280, 302 (2012). In *Mines*, a witness called by the State testified that appellant had attempted to rob him. The witness was then asked if he told the police "the degree of sureness" he had about his identification of the person who attempted to rob him. *Id*. The witness responded that he told the police that he was "a hundred percent sure." Appellant's trial counsel did not object to the question nor did counsel ask that the answer be stricken. Nevertheless, on appeal, appellant asked us to exercise our discretion to grant him plain error review concerning the issue of whether the trial judge erred when he allowed the jury to consider the victim's "hundred percent sure" testimony. We held that the trial court, in allowing the answer, was guilty of no error, much less plain error. *Id*. We explained:

> A witness's degree of certainty is a proper consideration when evaluating his likelihood of misidentification. *See e.g.*, *Neil v. Biggers*, 409 U.S. 188, 200,

> 93 S.Ct. 375 . . . (1972)(stating that factors to be considered in evaluating the likelihood of misidentification include "the level of certainty demonstrated by the witness at the confrontation"); *Jones v. State*, 395 Md. 97, 110 n. 8, 909 A.2d 650 (2006)(same); *James v. State*, 191 Md.App. 233, 253, 991 A.2d 122 (2010)(same); *Turner v. State*, 184 Md. App. 175, 182, 964 A.2d 695 (2009)(same).

Id.[1]

B. <u>Second Question Presented</u>

Appellant contends that the trial judge erred in allowing the State to introduce Sam's written statement into evidence because, contrary to the trial judge's findings, Sam's out-of-court statements were not inconsistent with Sam's trial testimony.

As previously mentioned, Detective Davalli testified that he took a written statement from appellant's brother, Sam, in which the latter said that appellant participated in the armed robbery of the victim. That written statement was introduced by the State as

[1]Appellant cites no case from any jurisdiction that has held that a trial judge erred in allowing a witness to testify as to his or her degree of certainty regarding identification. Instead, appellant relies, *inter alia*, on *Brodes v. State*, 614 S.E.2d 766-71 (Ga. 2005), a case where the Georgia Supreme Court held that it was no longer permissible, in Georgia, for a judge to instruct a jury that it could consider the witness's certainty in his/her identification as a factor to be used in deciding the reliability of that identification. In the case at hand, the trial judge, without objection, told the jurors that, among other things, the jury could consider "the witness's certainty or lack of certainty" when evaluating that person's identification of the defendant. The trial judge's instruction was in exact compliance with Maryland Criminal Pattern Jury Instruction (2d ed. 2012), MPJI-CR 3-3. Appellant also placed reliance on *United States v. Brownlee*, 454 F.3d 131(3rd. Cir. 2006), a case that did not decide the issue here presented. Instead, *Brownlee* concerned the issue of whether the trial court erred when it did not allow defendant to call an expert to testify as to the unreliability of eyewitness testimony.

substantive evidence of appellant's guilt. When introducing the written statement, the State relied on an exception to the hearsay rule set forth in Md. Rule 5-802.1(a) which reads:

> 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:
>
> (a) A statement that is inconsistent with the declarant's testimony, 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.

(Emphasis added.)

As already mentioned, Sam testified that he had no memory of the robbery at issue. According to Sam, his loss of memory was caused by two concussions he suffered while wrestling in high school in the early part of February 2015, which was shortly before the trial. Nevertheless, Sam made no claim of memory loss when he flatly denied that he signed the statement that Detective Davalli said he gave on January 2, 2014.

In *Corbett v. State*, 130 Md. App. 408, 425 (2012) we said:

> A witness who professes not to remember an event in an effort to avoid testifying about it in fact remembers it. He is able to testify about the event, but is unwilling to do so. Logic dictates that inconsistency may be implied in that testimony because by claiming that he does not remember an event that he does remember, the witness is denying, albeit indirectly, that the event occurred.

On the other hand, "when a witness truthfully testifies that he does not remember an event, that testimony is not 'inconsistent' with his prior written statement about the event, within the meaning of Rule 5-802.1(a)." *Id*. "[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*.

In the case at hand, the trial judge, after considering testimony from Sam, taken out of the presence of the jurors, made a finding that Sam's claim that he could not remember the incident was feigned. The trial judge explained:

> Having had the opportunity to observe this witness on the stand for probably upwards of an hour with a recess in between, I find . . . that these concussion symptoms that he is alleging are entirely feigned. There is absolutely no basis in fact for this feigning of not being able to remember. Having observed him on the stand when it is a question he would like to answer, he perks up and answers the question. And when it is areas that he prefer not to answer, he puts his head in his hands and starts talking about his head injury. So that is the finding I'm making at this time in the proceeding.

Appellant's sole basis for arguing that Maryland Rule 5-802.1(a) was inapplicable is because (purportedly) the judge had no reason to find that Sam's loss of memory was feigned. The only ground for that argument is that the State failed to contradict Sam's testimony that he had suffered two concussions in February 2015.

It is true that the State did not contradict Sam's statement that he suffered two concussions during the month of February 2015. In that regard, Sam testified, outside the presence of the jury, that he saw a doctor for the concussions but was never hospitalized as

a result of them. But, the mere fact that someone has had one or more recent concussions does not necessarily mean that it is probably, or even likely, that the concussion would lead to loss of memory of an event that took place more than a year previously. Moreover, appellant's argument ignores the trial judge's reasons for concluding that Sam was feigning a loss of memory about appellant's felonious behavior, i.e., that Sam's purported memory loss was too convenient to be real. Under these circumstances, we cannot say that the trial judge's demeanor-based factual findings that Sam was feigning a loss of memory constituted an abuse of discretion. Therefore, we hold that the trial judge did not err in allowing the State to introduce into evidence Sam's prior written statement pursuant to Md. Rule 5-802.1(a).

Separate and apart from the issue of whether the trial judge erred in allowing Sam's written statement to be introduced, appellant claims that the trial judge erred in allowing the State to use the written statement to impeach Sam's trial testimony. In support of that argument, appellant relies on Md. Rule 5-613, which reads:

> (a) **Examining witness concerning prior statement**. A party examining a witness about a prior written . . . statement made by the witness need not show it to the witness or disclose its contents at that time, provided that before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties . . . and (2) the witness is given an opportunity to explain or deny it.
>
> (b) **Extrinsic evidence of prior inconsistent statement of witness.** Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until

> the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter.

If a party meets the condition of Rule 5-613(a), that party may introduce extrinsic evidence of the prior inconsistent statement, provided the witness denies having made the statement and the statement concerns a non-collateral matter. Md. Rule 5-613(b). Such impeachment may occur even if the State is the one calling the witness. Md. Rule 5-607. If, however, in an attempt to introduce a prior inconsistent statement, the State calls a witness it knows will contribute nothing to its case or if the State questions an otherwise helpful witness about an independent area of inquiry solely for the sake of impeachment, then the prior inconsistent statement may not be introduced. *Bradley v. State*, 333 Md. 593, 604 (1994).

Appellant argues that the trial court erred in admitting Sam's written statement for impeachment purposes, because it was "patently evident at the outset of trial proceedings that Sam . . . was reluctant to testify against [a]ppellant." According to appellant, the State called Sam to the stand "likely fully anticipating his refusal to cooperate and using that in order to have his prior statement admitted as substantive evidence." Therefore, appellant asserts, the State should have been barred from impeaching Sam based on his prior written statement.

The aforegoing appellate argument has been waived because at trial, when the court asked appellant's counsel for the basis for his objection, counsel gave a reason different from the one he now advances. *See Brecker v. State*, 304 Md. 36, 39-40 (1985) ("[O]ur cases have consistently stated that when an objector sets forth the specific grounds for his objection, . . . the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified.")

Prior to the point where Sam's statement was introduced as substantive evidence, which was after Detective Davalli testified as to how the confession was obtained from Sam, the following colloquy took place at the bench:

> THE COURT: . . . The State intends to use [the statement] to impeach [Sam] on the witness stand with it. That is what they are offering. That is what they intended to use it for at this point. They are not offering the statement at this time.
>
> [DEFENSE]: For 5-802.1.
>
> THE COURT: Right. Not offering it at this point. Indicated they may be doing it later through a detective.
>
> [DEFENSE]: I see. Court's indulgence one moment. I don't know if the State is then asking that the actual statement be read to the jury as a prior inconsistent statement. If that is the case, I'm objecting to that.
>
> THE COURT: They are asking that they be allowed to impeach the witness with what they maintain to be a prior inconsistent statement based on the things that he said

from the witness stand in this in-camera examination on him.

[DEFENSE]: Court's indulgence. I guess the problem I have with it, Your Honor, is that the witness has not acknowledged that this is his statement.

THE COURT: That is exactly what the State intends to ask him about. He is denying it is his statement and they are saying that is inconsistent with the statement itself.

[DEFENSE]: I think - and I guess my comment would be, Your Honor, that is not what the inconsistency is. The inconsistency is supposed to be under Rule 5-613 that the witness has given testimony and the contents of his prior statement are inconsistent with the testimony that he has given. Not that the witness is denying that that is his statement and therefore that is the inconsistency. I think that -

THE COURT: They are not moving the statement in at this time so I am going to hear your argument on it when they get to the point that they are trying to admit the statement but I will allow them to cross-examine him on this over your objection.

[DEFENSE]: Thank you.

THE COURT: Anything else before we bring the jury in?

[PROSECUTOR]: No, Your Honor.

Aside from the fact that the argument appellant now raises is different from the one raised below, the argument is also waived for a second reason: because, although many questions were asked of Sam concerning the differences between his testimony, and the

written statement he gave to Detective Davalli, defense counsel did not object to any of those questions even though the trial court did not give counsel a continuing objection.[2] *See* Md. Rule 4-323(a) (an objection is waived unless made at the time the evidence is offered or as soon thereafter as the grounds for the objection became apparent). Finally, even if the argument appellant now makes had not been waived and even if the statements of Sam should not have been used to impeach the witness, any error in this regard was harmless, beyond a reasonable doubt, because, as explained, *supra*, the statement was properly admitted as substantive evidence pursuant to Md. Rule 5-802.1(a).[3]

C. Third Issue Presented

Appellant contends that the trial judge erred in allowing Detective Davalli's "impermissible hearsay" concerning what Sam said when he identified appellant as the person who stole the victim's cell phone. At trial, Sam's oral statement was introduced by the State in reliance upon Md. Rule 5.802.1(c), which provides:

[2]A continuing objection was requested by defense counsel but the request was denied.

[3]Nothing in this opinion should be construed as suggesting that if defense counsel at trial had objected for the reason appellant now advances, that the argument would have had merit. To the contrary, we agree with the State's arguments set forth in its brief that it was proper to impeach Sam with his prior inconsistent statement even if the State was not surprised by Sam's trial conduct. *See Bradley v. State*, 333 Md. at 606-07. This impeachment was permissible because the subject of all the impeachment question all concerned matters necessary to prove the State's case. *Id*.

> 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: . . .
>
> (c) A statement that is one of identification of a person made after perceiving the person[.]

In support of his argument that Detective Davalli's testimony was "impermissible hearsay" appellant simply relies on his prior assertion that he raised in support of the argument that Sam's written statement should not have been admitted, i.e., that the trial judge erred in finding that Sam's memory loss was feigned. That argument is without merit for the reasons already stated.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.