UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1752

September Term, 2015

PHILLIP MASON

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Friedman,

JJ.

Opinion by Arthur, J.

Filed: September 26, 2016

On June 18, 2015, a Baltimore City jury convicted Phillip Mason of second-degree murder, use of a firearm in the commission of a crime of violence, first-degree assault, unlawfully transporting, carrying, or wearing a handgun, and illegal possession of a regulated firearm. The court imposed a sentence of 30 years' imprisonment for second-degree murder; a consecutive term of 20 years' imprisonment, the first five to be served without the possibility of parole, for the use of a firearm in the commission of a crime of violence; and a consecutive term of five years' imprisonment for illegal possession of a regulated firearm. The court merged the remaining convictions. Mason filed this timely appeal.

For the reasons that follow, we shall affirm the judgments of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

During the early evening of April 18, 2014, gunshots were heard in the vicinity of West Lanvale and Spedden Streets in Baltimore City. A victim, Trevar Gilliam, was found unresponsive, lying in the street with a gunshot wound to his neck. He was transported to University of Maryland's Shock Trauma Unit, where he was pronounced dead.

Police were not immediately able to identify any suspects in the shooting. On May 25, 2014, however, a detainee, Donyae Belle, identified Phillip Mason from a photo array as the person whom he saw shoot the victim. On Mason's picture in the array, Belle wrote that, "He was there on the scene on Spedden St[.] and was the person doing the shooting." Belle signed his name to that document. In addition, he gave a recorded statement in which he inculpated Mason in the shooting.

On September 15, 2014, the State charged Mason with first-degree murder, second-degree murder, first-degree assault, use of a firearm in the commission of a crime of violence, unlawfully wearing, carrying, or transporting a firearm, and illegal possession of a firearm. Mason's arraignment occurred on October 9, 2014. Absent good cause, Mason's trial was required to begin within 180 days, or by approximately April 7, 2015. Md. Code (2001, 2008 Repl. Vol.), § 6-103(a)(2) of the Criminal Procedure Article ("CP"); Md. Rule 4-271(a)(1).

On December 17, 2014, the court granted the State's motion for a postponement and ordered the parties to appear for trial on March 16, 2015.

From the transcript of the proceedings on March 16, 2015, it appears that the State made advance requests to postpone the trial date on February 23, 2015, and on March 10, 2015. The basis for the requests was that the assigned prosecutor was to be out of the country on March 16, 2015. The court denied the first request for reasons not disclosed by the record; the court was unable to act on the second request because Mason had not been transported to the courthouse. Consequently, the State reiterated its request for a postponement on March 16, 2015.

The record reflects that Mason did not affirmatively oppose the request, and Judge Emmanuel Brown granted it, expressly finding good cause for a postponement. *See* Md. Rule 4-271(a)(1) ("[o]n motion of a party, or on the court's initiative, and for good cause shown, the county administrative judge or that judge's designee may grant a change of a circuit court trial date"). Judge Brown set a new trial date of May 20, 2015. The new trial date was more than 180 days after Mason's arraignment.

Upon Mason's motion, the court later postponed the May 20, 2015, trial date as well, because of his attorney's scheduling conflicts.

At a motions hearing on June 9, 2015, Mason asked the court to dismiss the charges against him under *State v. Hicks*, 285 Md. 310 (1979), because more than 180 days had passed since his arraignment. The court denied the motion, reiterating that it had found good cause to postpone the trial on March 16, 2015, because of the prosecutor's unavailability.

During the trial, Donyae Belle, the witness who had identified Mason from a photo array, claimed to have no memory of the shooting or of his statements to the police. After finding that Belle was feigning memory loss, the court permitted the State to introduce his prior recorded statement under Md. Rule 5-802.1(a).[1]

The jury convicted Mason of second-degree murder, first-degree assault, and related firearms offenses. He took this timely appeal. We affirm.

QUESTIONS PRESENTED

Mason poses three lengthy and argumentative questions, which we have restated as follows:

1. Did the trial court act within its discretion in finding that the prosecutor's unavailability constitute good cause to postpone the trial date past the statutory 180-day mark?

2. Did the trial court act within its discretion in admitting Belle's recorded statement as a prior inconsistent statement under Rule 5-802.1(a)?

3. Was there sufficient evidence to sustain Mason's convictions?

[1] A second witness had also identified Mason in a photo array, but he refused to testify, or even to take an oath to testify, at trial. The circuit court held him in contempt.

DISCUSSION

I. Good Cause to Postpone the Trial

Mason argues that the trial court erred in denying his motion to dismiss the charges against him because, he says, the State violated Rule 4-271(a) by failing to bring him to trial within 180 days of his arraignment on October 9, 2014. Mason's argument turns on the premise that Judge Brown abused his discretion in granting the State's request for a postponement on March 16, 2015.

Pursuant to CP § 6-103(a) and Md. Rule 4-271(a), "the trial in a circuit court criminal prosecution must begin no later than 180 days after the earlier of (1) the entry of the appearance of the defendant's counsel or (2) the first appearance of the defendant before the circuit court." *State v. Huntley*, 411 Md. 288, 290 (2009). In applying the predecessor of Rule 4-271(a), the Court of Appeals held that dismissal is the appropriate sanction for noncompliance. *State v. Hicks*, 285 Md. 310, 318 (1979).

"[F]or good cause shown," however, "the county administrative judge or that judge's designee may grant a change of a circuit court trial date," Md. Rule 4-271(a), including a change that extends the trial date beyond the 180-day deadline. *See*, *e.g.*, *Tapscott v. State*, 106 Md. App. 109, 122 (1995), *aff'd*, 343 Md. 650 (1996). A finding of good cause carries a presumption of validity. *Id.*; *State v. Green*, 54 Md. App. 260, 266 (1983), *aff'd*, 299 Md. 72 (1984).

In an appellate challenge to the existence of good cause, "the test is whether the defendant has met the burden of establishing that the administrative judge's decision to

postpone the trial date, and the length of delay until the new trial date, represent a clear abuse of discretion." *State v. Harris*, 299 Md. 63, 67 (1984). "A court's discretionary ruling will generally not be deemed an abuse of discretion unless it is 'well removed from any center mark imagined by the reviewing court' or is 'beyond the fringe of what [the reviewing court] deems minimally acceptable.'" *Jones v. State*, 175 Md. App. 58, 81 (2007) (quoting *Gray v. State*, 388 Md. 366, 383 (2005)).

Under *Hicks*, the "critical postponement" of a case is the one that pushes the trial beyond the 180-day deadline. *See*, *e.g.*, *State v. Harris*, 299 Md. at 67. Here, the critical postponement occurred on March 16, 2015, when Judge Brown extended the trial date until May 20, 2015, beyond the 180-day deadline of April 7, 2015.

In the circumstances of this case, we see no abuse of discretion in the finding that the State had good cause to postpone the trial on March 16, 2015. The prosecutor was unavailable because he was out of the country. The record contains nothing to suggest that the prosecutor had scheduled his trip in defiance of the court's requirement that he be in trial on March 16, 2015. Nor does the record contain anything to suggest that any of his colleagues could substitute for him in prosecuting this serious felony trial. In fact, it appears that Mason did not even actively oppose the request for a postponement. Mason cannot fault Judge Brown for failing to consider arguments that he did not make.

Arguing that a failure to exercise discretion may itself amount to an abuse of discretion, Mason complains that the circuit court simply rubber-stamped the State's request. He complains, at some length, that the circuit court has eviscerated Rule 4-271(a) by routinely acquiescing in similar requests. We lack the ability to assess that

argument, not least because we have no way to know how often the circuit court exercises its discretion to *deny* the State's requests for postponement, as those cases do not come before us. We can only review the facts of this case, where the State made what appears to have been a facially legitimate request for a postponement, the defendant appears to have done nothing to challenge the request or the basis for it, and the court granted it. On this record, we see nothing besides a conscientious exercise of discretion.[2]

II. Admitting the Prior Inconsistent Statement

"This case presents the classic evidentiary problem of the turncoat witness," who offers testimony that is inconsistent with an earlier statement. *Nance v. State*, 331 Md. 549, 552 (1993). Mason claims that the trial court abused its discretion in admitting Donyae Belle's recorded statement as substantive evidence. We disagree.

Rule 5-802.1(a) states that if a witness testifies and is subject to cross-examination, the general rule against hearsay does not exclude "[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

[2] In his opening brief, Mason argued that the postponement was invalid because it had not been granted by the administrative judge or his designee. While Mason is correct that the administrative judge did not grant the postponement, he did nothing to rule out the possibility that Judge Brown was a proper designee. In fact, in an appendix to its brief, the State attached a copy of an order confirming that the administrative judge had made Judge Brown his designee and had given him the authority to preside over postponement requests on the date of the critical postponement in this case. We have granted the State's motion to correct the record to include a copy of that order.

making of the statement[.]" This rule represents the codification of *Nance*, in which the Court of Appeals held "that a witness's prior testimony is admissible as substantive evidence when the prior testimony is *inconsistent* with the witness's in-court testimony, and the witness is subject to cross-examination concerning the statement at the trial where the statement is admitted." *Tyler v. State*, 342 Md. 766, 775 (1996) (emphasis in original) (citing *Nance*, 331 Md. at 570-71).

In *Nance*, three witnesses provided signed statements to the police concerning the identification of the men who were charged with a homicide. *See Nance*, 331 Md. at 553-56. Two of the witnesses repeated the substance of their statements before the grand jury. *Id.* at 555. Before trial, however, one witness gave an additional statement in which he expressed fear of retaliation if he testified (*id.*), while another witness said that one of the assailants expected him to kill one of the other witnesses for cooperating. *Id.* at 556. During trial, the witnesses each recanted their earlier statements. *See id.* at 556-58. "[T]here was evidence from which the jury could infer that the witnesses had made truthful identifications out of court, only to become disingenuous at trial." *Id.* at 563. Although the prior, out-of-court statements were hearsay (*id.* at 559), the Court of Appeals affirmed the decision to admit them as substantive evidence under a modern, common-law exception to the hearsay rule, as long as the recanting declarants were present for cross-examination. *Id.* at 565-69.

Nance, however, does not provide sufficient guidance for the case at hand. Unlike the turncoat witnesses in *Nance*, Belle did not formally recant or disavow his earlier

statements. Rather, he claimed that he had no recollection of giving a statement to the police.

"[W]hen a witness truthfully testifies that he [or she] does not remember an event, that testimony is not 'inconsistent' with [a] prior written statement about the event, within the meaning of Rule 5-802.1(a)." *Corbett v. State*, 130 Md. App. 408, 425 (2000). On the other hand, "[a] witness who professes not to remember an event in an effort to avoid testifying about it in fact remembers it." *Id.* Such a witness "is able to testify about the event, but is unwilling to do so." *Id.* When a witness falsely claims not to remember an event in order to avoid testifying about it, "inconsistency may be implied in that testimony because by claiming that he [or she] does not remember an event that he [or she] does remember, the witness is denying, albeit indirectly, that the event occurred." *Id.* Hence, if a court finds that a witness is feigning memory loss in order to avoid testifying at trial, the court may admit the witness's prior statement as substantive evidence under Rule 5-802.1(a) on the theory that it is inconsistent with the trial testimony. *See id*. at 426-27. The decision about "whether a witness's lack of memory is feigned or actual is a demeanor-based credibility finding that is within the sound discretion of the trial court to make." *Id.* at 426.

In this case, the trial judge took testimony from Belle, outside the presence of the jury, about his professed failure of recollection. In that testimony, Belle, who had initially failed to appear in response to a subpoena and who came to court only after the trial judge had issued a body attachment, indicated that he had expressed concern about his safety and that the State had put him up in a hotel room, but otherwise claimed near-

total amnesia. On a few occasions, however, when Belle did not claim a lack of recollection, his trial testimony contradicted his pretrial statement. At trial, for example, Belle claimed that he did not know the victim, which contradicted his statement that he had known the victim for six years. Similarly, at trial Belle testified that he did not hear any gunshots, which contradicted his statement that Mason shot the victim (as well as his other trial testimony that he remembered nothing about the shooting).

After hearing from Belle, the trial judge watched Belle's recorded statement. Only after watching the recording and seeing Belle testify did the trial judge make the demeanor-based credibility finding that Belle was feigning a lack of recollection. Mason has offered no basis to conclude that the trial judge abused his discretion in any way in making that determination. For that reason, we affirm the decision to admit Belle's prior inconsistent statements as substantive evidence under Rule 5-802.1(a).[3]

III. Sufficiency of the Evidence

Finally, Mason contends that the evidence presented at trial was legally insufficient to sustain his convictions. Mason, however, offers no coherent rationale for his contention, because his argument abruptly ends, in mid-sentence, halfway through the

[3] On cross-examination, after the court had admitted Belle's prior statement and allowed the jury to watch and listen to the recording of his interview with the police detectives, Belle expressly disavowed some of his statements to the police. Specifically, he stated that he "didn't see any shooting," that he "never saw" a shooting "with [his] own two eyes," that "what [he] was saying on the screen is not true." Although the court did not and could not rely on that testimony as a basis to admit Belle's prior statements, his repudiation of his recorded statement supports the court's conclusion that he had feigned his loss of memory.

first paragraph, at the bottom of page 34 of his brief. "[I]f a point germane to the appeal is not adequately raised in a party's brief, the court may, and ordinarily should, decline to address it." *DiPino v. Davis*, 354 Md. 18, 56, (1999); *see Klauenberg v. State*, 355 Md. 528, 552 (1999); *Moosavi v. State*, 355 Md. 651, 660-61 (1999); *Rutherford v. State*, 160 Md. App. 311, 328 (2004); *see also* Md. Rule 8-504(a)(6) (requiring that a brief contain "[a]rgument in support of the party's position on each issue").[4]

Nonetheless, even if we were to address the issue, we would find the evidence to be sufficient to support the convictions.

In evaluating the sufficiency of the evidence, it is not our function or duty "'to undertake a review of the record that would amount to, in essence, a retrial of the case.'" *Hobby v. State*, 436 Md. 526, 538 (2014) (quoting *Derr v. State*, 434 Md. 88, 129 (2013)). Rather, we review the evidence in the light most favorable to the State, giving due regard to the jury's findings of fact, its resolution of conflicting evidence, and its opportunity to observe and assess the credibility of witnesses. *Titus v. State*, 423 Md. 548, 557 (2011) (citations omitted). Our "concern is not whether the verdict is in accord with what appears to be the weight of the evidence, 'but rather is only with whether the verdicts were supported with sufficient evidence – that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offense charged beyond a

[4] Mason attempts to develop his argument in a reply brief. Having failed to raise that argument in an intelligible fashion in his initial brief, however, Mason may not raise it in a reply brief. *See McIntyre v. State*, 168 Md. App. 504, 528 (2006); *Campbell v. Lake Hallowell Homeowners Ass'n*, 157 Md. App. 504, 535 (2004).

reasonable doubt.'" *Donati v. State*, 215 Md. App. 686, 718 (2014) (quoting *State v. Albrecht*, 336 Md. 475, 479 (1994)). "Making this determination 'does not require [the appellate] court to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.'" *State v. Manion*, 442 Md. 419, 431 (2015) (quoting *Dawson v. State*, 329 Md. 275, 281 (1993)) (further quotation marks omitted). The appellate court's role is limited to determining "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Smith v. State*, 415 Md. 174, 184 (2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Maryland courts have long held that "[t]he positive identification of a single eyewitness, if believed by the trier of facts, is sufficient to sustain a conviction." *Watson v. State*, 6 Md. App. 134, 139 (1969). In his pretrial statements in this case, Belle identified Mason as the person who shot the victim. The trial court properly admitted Belle's pretrial statements as substantive evidence under Rule 5-802.1(a) when Belle feigned a lack of recollection at trial. Because those statements, if believed, were sufficient to support the convictions, we reject Mason's challenge to the sufficiency of the evidence.

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