Circuit Court for Montgomery County
Criminal Case No. 131790

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2080

September Term, 2017

DARNELL WHITFIELD

v.

STATE OF MARYLAND

Reed,
Fader,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: November 15, 2018

A Montgomery County jury convicted appellant Darnell Whitfield ("Whitfield") of second-degree assault and disorderly conduct. Whitfield argues that the trial court improperly admitted certain body camera footage of a police interview with the victim, and that the error cannot be considered harmless. Whitfield also contends that there was insufficient evidence to support the disorderly conduct conviction. We agree that the trial court erred in admitting the body camera footage, and that the error was not harmless. As such, we reverse both convictions and remand for further proceedings should the State decide to retry Whitfield.

BACKGROUND & PROCEDURAL HISTORY

On March 28, 2017, Breana Bryant ("Bryant"), age 25, walked to a public park in Rockville with two female 13-year-old friends, P.M. and T.Z., and two small children (Bryant's one-and-a-half-year-old daughter and three-year-old niece). The park was a five-minute walk from the apartment complex where Bryant and P.M. both lived. Whitfield, whose mother also lived at the apartment complex, followed the group to the park. Though the girls and Bryant's various accounts differed as to what precisely occurred at the park, it is uncontested that after engaging the group in conversation, Whitfield hit P.M. in the face. Following the incident, Bryant and the girls returned to the apartment complex and Bryant called 911. The police came, interviewed P.M., and photographed a quarter-inch cut on her face. Whitfield was later charged with second-degree assault, disorderly conduct, and disorderly intoxication.

At trial, Bryant and both 13-year-old girls testified. Their testimony differed in specific details, but the overall picture was that at the park, Whitfield was drinking what smelled like alcohol out of a red cup, engaged the group in unwanted conversation, and ultimately hit P.M. in the face with a 12-to-18-inch stick. In the call to 911 that the State entered into evidence without objection, Bryant added that Whitfield punched P.M. in the face. Officer Dennis Owen of the Montgomery County Police Department, who had responded to the 911 call, also testified, and a photograph taken by Officer Owen that showed injuries to P.M.'s face was introduced without objection.

Whitfield chose not to testify. Though not contesting that Whitfield hit P.M. in the face, defense counsel focused on inconsistencies among the various accounts about the sequence of events that led to P.M. being hit, as well as the exact manner of physical contact. The jury heard evidence that Whitfield immediately apologized after hitting P.M., and that he said he did not mean to do so.[1] The central thrust of Whitfield's argument was that the physical contact was an accident arising from a play-fight.

As will be discussed further below, the State also introduced body camera footage of part of the interview that Officer Owen conducted with P.M. at the apartment complex after he responded to the 911 call. During the interview, P.M. stated that Whitfield first

[1] For instance, when calling 911, Bryant told the dispatcher: "And he was trying to like play fight her but she wasn't in the mood for it. And he hit her with his fist. And he punched her." On direct examination, Bryant testified that after hearing what sounded like a fist, she turned around and "[Whitfield] was still near [P.M.] talking about I'm sorry. I didn't mean to hit you or whatever." On cross-examination, Bryant reaffirmed that Whitfield said, "I was just playing" and that he apologized.

punched her in the face with a closed fist before hitting her with a stick. Whitfield objected to the audio from the body camera footage as inadmissible hearsay. After initially stating that it would exclude the footage—which the State had offered substantively—as inadmissible hearsay,[2] the trial court revisited the issue and later admitted the footage when the State raised the theory that Rule 5-803(b)(8)(D) categorically permits admitting any first-level hearsay contained within police body camera footage.[3]

Following a full day of deliberations that lasted as long as the trial itself, the jury convicted Whitfield of assault and disorderly conduct, but acquitted him of disorderly intoxication. The court sentenced Whitfield to ten years, all but six months suspended, for assault, and a consecutive suspended sentence of 60 days for disorderly conduct, with three years of supervised probation. Whitfield timely appealed.

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[2] The State first attempted to introduce the footage as a present sense impression, which the trial court quickly rejected. The State did not then attempt to admit the footage under any other hearsay exception until its later argument concerning Rule 5-803(b)(8)(D). Although it described the footage to the trial judge as showing P.M. "still under the same physical and emotional and psychological feeling that she had as the result of the assault," at no point did the State ask the trial court to consider admitting the footage as an excited utterance, nor has the State raised the issue on appeal.

[3] Rule 5-803(b)(8)(D) provides:

> Subject to Rule 5-805, an electronic recording of a matter made by a body camera worn by a law enforcement person or by another type of recording device employed by a law enforcement agency may be admitted when offered against an accused if (i) it is properly authenticated, (ii) it was made contemporaneously with the matter recorded, and (iii) circumstances do not indicate a lack of trustworthiness.

DISCUSSION

Whitfield argues that the body camera footage was impermissible hearsay, and that the error in admitting it at trial was not harmless. Whitfield further contends that the evidence was insufficient to convict him of disorderly conduct. Because we cannot conclude beyond a reasonable doubt that the error in admitting the body camera footage did not affect the jury's verdict by bolstering P.M.'s (and Bryant's) credibility, we reverse both convictions.

I. The Body Camera Footage Was Impermissible Hearsay.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 5-801. Unless falling within an exception provided by rule, statute, or constitutional provisions, hearsay is inadmissible. Rule 5-802. Whether a hearsay exception is applicable is a legal determination, given that "hearsay is never admissible on the basis of [a] trial judge's exercise of discretion." *Thomas v. State*, 429 Md. 85, 98 (2012).

The State concedes in its brief that contrary to the theory espoused at trial, "Rule 5-803(b)(8)(D) does not authorize the introduction of any and all oral statements recorded by an officer's body camera simply by virtue of having been recorded by a body camera." Thus, the State agrees with Whitfield that the statements captured by the police body camera must fit within another hearsay exception to have warranted introduction at trial.

The State now claims that the body camera footage could have been admitted under the hearsay exception for prior consistent statements. *See* Rule 5-802.1(b) (Permitting "[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"). Whitfield contests that this point was not raised at trial and is therefore waived. We may consider the issue for the first time on appeal. *See Unger v. State*, 427 Md. 383, 406 (2012) ("[A]n appellee is entitled to assert any ground adequately shown by the record for upholding the trial court's decision, even if the ground was not raised in the trial court, and that, if legally correct, the trial court's decision will be affirmed on such alternative ground"); *see also Yaffe v. Scarlett Place Residential Condo., Inc.*, 205 Md. App. 429, 440 (2012) (quoting *Robeson v. State*, 285 Md. 498, 502 (1979) ("[A]n appellate court can affirm when 'the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties.'"). Nevertheless, we are not persuaded that the footage could have been introduced as a prior consistent statement.

As mentioned, Rule 5-802.1(b) permits introducing a prior consistent statement for the truth of the matter asserted when it "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."[4] The declarant's testimony does not

[4] Rule 5-616(c)(2) allows admitting a prior consistent statement to rehabilitate a witness whose credibility has been attacked. However, statements admitted under Rule 5-616(c)(2) "are relevant not for their truth . . . [but rather] [t]hey are relevant because the circumstances under which they are made rebut an attack on the witness's credibility." *Thomas*, 429 Md. at 98 (quoting *Holmes v. State*, 350 Md. 412, 427 (1998)). In *Thomas*, the Court of Appeals determined that the statements in question could not be admitted

necessarily have to precede the charge of fabrication or improper motivation: the rule "contemplates" situations where a charge could be levelled before the declarant's testimony is given. *Ford v. State*, ___ Md. ___, 2018 WL 5304298, No. 11, Sept. Term, 2018, at * 15 n. 2 (Oct. 26, 2018). Accordingly, the fact that here the body camera footage was introduced prior to P.M.'s testimony does not, on its own, render Rule 5-802.1(b) inapplicable; for instance, "remarks made by counsel during opening statement . . . [that] set forth an express or implied charge of fabrication or improper influence or motive" could "arguably . . . trigger" the rule. *Id*.

The State suggests various examples of Whitfield allegedly "charging" fabrication or improper motive, including defense counsel's generic claim during opening statement that Whitfield "has been falsely accused of something he didn't do." Even if we were to agree that Whitfield did, in fact, make an implied charge of fabrication or improper motive, there is no suggestion from this record of when any such improper motive arose.[5] "[A]s a

under Rule 5-616(c)(2) when the State offered them to bolster testimony as both consistent *and true*. *Id*. at 109-110. Here, the State attempted to introduce the body camera footage for the truth of the matters asserted. Therefore, the statements would not be admissible under Rule 5-616(c).

[5] Although any impetus to exaggerate the details of the incident would presumably have arisen before the 911 call and P.M.'s recorded interview with the police, this Court has held that "reporting a crime, [in and of] itself" should not be categorically viewed as establishing the point in time when an improper motivation has developed for the purposes of Rule 5-802.1(b). *Acker v. State*, 219 Md. App. 210, 230 (2014). On the other hand, nothing on this record suggests that P.M. developed an improper motivation *after* she recorded the police interview. *See Thomas*, 429 Md. at 107 ("Even if we were to adopt the view that investigation and arrest do not automatically produce the motive to fabricate and

prerequisite to admissibility, a prior statement must predate the alleged motive to fabricate." *Thomas*, 429 Md. at 101. Thus, the body camera footage was not admissible for its substantive truth under Rule 5-802.1(b).

II. Admitting the Body Camera Footage Was Not Harmless Error.

Having determined that the body camera footage was inadmissible hearsay, we must determine whether the error was harmless. To do so, we "apply the test set forth" by *Dorsey v. State*:

> [W]hen an appellant, in a criminal case, establishes error, unless 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, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

Devincentz v. State, 460 Md. 518, 560 (2018) (quoting *Dorsey*, 276 Md. 638, 659 (1976)). When "error is established, the burden falls upon the State . . . to exclude this possibility beyond a reasonable doubt." *Devincentz*, 460 Md. at 560 (quoting *Dionas v. State*, 436 Md. 97, 108 (2013)). Ultimately, because the footage had the likely effect of bolstering

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that the trial court must make the express determination as to when and if the alleged motive to fabricate commenced; on the basis of the record before us, the trial judge made no such determination in this case. Thus, on the record before us, there was no basis demonstrated to admit [the] prior consistent statements.") None of the State's examples of Whitfield allegedly "charging" fabrication or improper motive—the allegation that P.M. changed her story between the time of the police interview and August 2017; the fact that no one called the police until P.M.'s angry brother got involved; or the idea that P.M. exaggerated the story as an excuse to stay home from school—demonstrate that an improper motive developed after P.M. gave the recorded interview.

the credibility of the State's main witnesses, we cannot conclude beyond a reasonable doubt that the error in no way affected the jury's verdict.

On the one hand, the body camera footage could arguably be construed as providing cumulative factual evidence. *See Yates v. State*, 429 Md. 112, 120 (2012) ("[W]e will not find reversible error on appeal when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury without objection through the prior testimony of other witnesses") (Citation and emphasis removed).[6] In addition to the statements from the body camera footage, the jury heard separate testimony that Whitfield hit P.M. with a stick, and the claim that Whitfield punched P.M. was entered without objection through the audio of Bryant's call to 911.[7]

[6] In *Yates*, the petitioner argued that erroneously admitted statements were not cumulative because they were "of a 'different quality' than other admitted evidence," and that "it is not merely the content but also the manner in which that content is delivered that matters to whether the evidence is cumulative." 429 Md. at 122. The Court of Appeals was not persuaded, determining that "[t]hese statements, although using different words, reach the same conclusion: that Petitioner fired a gun shortly after chasing [a certain individual] out of the house." *Id*. at 123. However, we note that in *Yates* the petitioner was convicted of second-degree felony murder, meaning the jury only needed to find that the petitioner had killed someone during the commission of a felony, and not that the petitioner had intended to kill someone. Here, in contrast, to convict Whitfield of second-degree assault the jury had to decide whether Whitfield's actions were intentional, reckless, or accidental. If the effect of the erroneously admitted statements was to bolster P.M. or Bryant's credibility, thereby making the jury less likely to believe that P.M.'s injuries were accidental, we cannot conclude that "the admission of the hearsay evidence did not ultimately affect the jury's verdict given the cumulative nature of the similar statements offered at trial." *Id*. at 124.

[7] We note that in the interview captured by the body camera footage, P.M. stated that Whitfield first punched her before hitting her with the stick. In the call to 911, Bryant stated that Whitfield first "kind of [threw the stick] at her and it hit her in the face and *then* he punched her." (Emphasis added.)

However, even though evidence may be "cumulative" because there is sufficient independent evidence to support a conviction, *Dove v. State*, 415 Md. 727, 743-44 (2010), "[a]n 'otherwise sufficient' test [] is a misapplication of the harmless error test." *Dionas*, 436 Md. at 117. "[T]he proper inquiry upon applying the harmless error test is not a consideration of the State's evidence apart from [a particular witness's] testimony, but whether the trial court's error was unimportant in relation to everything else the jury considered in reaching its verdict." *Dionas*, 436 Md. at 118 (Footnote omitted).

To convict Whitfield of second-degree assault, the question for the jury was not simply whether Whitfield had hit P.M, but whether the physical contact was intentional or reckless, or accidental. Defense counsel conceded that Whitfield hit P.M; defense counsel's argument was that the physical contact was an accidental result of play-fighting. In this vein, the jury had heard from Bryant's 911 call and Bryant's testimony that: (1) Whitfield had been play-fighting; (2) Whitfield quickly apologized to P.M. for hitting her; and (3) Whitfield said he did not mean to hit P.M. Accordingly, our harmless error analysis depends upon whether the body camera footage may have influenced the verdict by making the jury less likely to deem the incident an accident. We believe the footage could have had this effect, given that the footage deviated—in both substance and tone—from other evidence, while simultaneously bolstering P.M.'s credibility.

The admitted portion of the body camera footage captured P.M. telling Officer Owen that Whitfield "punched" her with a "closed fist" before hitting her with a stick. When testifying, however, P.M. did not say anything about Whitfield punching her with a

closed fist; she was not even asked if she was punched. The closest P.M.'s testimony came to her claim in the body camera footage was that "a part of his hand" hit the "side of her cheek":

[THE STATE]: Q. And what did he do with the stick?

A. He just swung it towards the side of my cheek.

Q. Which side?

A. This one.

Q. Is that your right side?

A. Yes.

Q. What exactly hit the right side of your cheek?

A. The stick.

Q. Did any other?

A. And like a part of his hand.

Additionally, during the portion of the police interview admitted through the body camera footage, Officer Owen twice asked P.M., without response, whether Whitfield had "sucker punched" her. Even if inadvertent, the idea of a "sucker punch" imbued the evidence with a new degree of severity concerning Whitfield's alleged actions, especially given that the only other evidence that Whitfield had punched P.M. came from: (1) the audio of Bryant's 911 call, and (2) Bryant's testimony that she heard—but did not see—a fist hit P.M. The notion of a "sucker punch" added a discernable difference in degree and may have made the jury less likely to consider the incident an accident.

The body camera footage could also have made the jury less likely to deem the incident an accident if it bolstered P.M.'s (or Bryant's) credibility. "[W]here credibility is an issue and, thus, the jury's assessment of who is telling the truth is critical, an error affecting the jury's ability to assess a witness'[s] credibility is not harmless error." *Devincentz*, 460 Md. at 561 (quoting *Dionas*, 436 Md. at 110); *see also Newman v. State*, 65 Md. App. 85, 98 (1985) (the fact that prior consistent statements were cumulative was "not dispositive" when the prior consistent statements bolstered the victim's testimony and "the issue [wa]s essentially one of credibility").

By showing P.M. become emotional as the interview progressed, the body camera footage almost certainly bolstered P.M.'s credibility. At least, the State thought so. In its closing rebuttal argument, the State argued to the jurors that they could believe P.M.'s testimony because her demeanor while testifying "was the exact same reaction that [she] had when she was asked about the exact same incident" during the interview captured on the body camera**.** The State further added that the body camera footage showed P.M. to be traumatized by the incident and that as "the sole judges of that credibility . . . that is not something that is faked." Most notably, when the State first argued for the body camera footage to be introduced, during a bench conference in the courtroom that occurred just prior to the trial's introductory proceedings and jury selection, the State told the trial judge and defense counsel that the footage was "the best evidence in this case [] as opposed to having someone testify to it." Pursuant to the *Dorsey* test, we cannot conclude beyond a reasonable doubt that admitting the State's self-professed best evidence in no way

influenced the verdict when it may have bolstered the credibility of the State's two main witnesses.[8]

Finally, we note that "the jury's behavior during deliberations [is] a relevant factor in the harmless error analysis." *Dionas*, 436 Md. at 111. A jury note suggesting "concern regarding an element of the crime" can be relevant, and the "length of jury deliberations provide[s] context, albeit not necessarily conclusive, for the evaluation and understanding of the jury's findings, and thus, perspective." *Id*. at 111-12. Here, one of the notes the jury submitted during deliberations asked: "How does the law define a reckless act and not accidental?" This question prompted the court to realize it had neglected to read aloud the definition of "reckless act" when earlier instructing the jury; the court then provided a written definition at that point. Moreover, the jury deliberations lasted a full day—as long as the trial itself. These factors suggest that the jury considered the case to be close, reinforcing our inability to conclude beyond a reasonable doubt that the error in no way influenced the verdict.

[8] The footage did not just potentially bolster P.M.'s credibility. By introducing P.M.'s statement that she had been punched, the footage may also have bolstered Bryant, given that the footage reinforced Bryant's claims that Whitfield punched P.M. As stated above, apart from the body camera footage, the only other evidence that Whitfield punched P.M. came from Bryant.

III. There Was Sufficient Evidence to Convict Whitfield of Disorderly Conduct.

Whitfield contends that there was insufficient evidence to support a disorderly conduct conviction because "his behavior was not disorderly and the public peace was not disturbed."[9] Whitfield, in effect, argues that he should not have been convicted of disorderly conduct when his behavior did not disturb anyone other than the five people in the park who were already associated with the alleged assault.

In reviewing for sufficiency of the evidence, we ask "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." *Grimm v. State*, 447 Md. 482, 494-95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)). We do not "re-weigh" the evidence. *Spencer v. State*, 422 Md. 422, 434 (2011). Deferring "to any possible reasonable inferences [that] the trier of fact could have drawn from the . . . evidence," *Grimm*, 447 Md. at 495 (quoting *Jones v. State*, 440 Md. 450, 455 (2014)), appellate courts "need not decide . . . whether we would have drawn different inferences from the evidence." *Grimm*, 447 Md. at 495 (quoting *State v. Mayers*, 417 Md. 449, 466 (2010)).

The Criminal Law Article provides: "[a] person may not willfully act in a disorderly manner that disturbs the public peace." Md. Code. Ann., Crim. Law. § 10-201(c)(2). In

[9] Although we reverse Whitfield's convictions on other grounds, we address his sufficiency of the evidence claim for the purposes of double jeopardy, for if "the evidence was insufficient to sustain a conviction, then double jeopardy prohibits the retrial of the defendant for the crime at issue." *Breeden v. State*, 95 Md. App. 481, 511 (1993).

Spry v. State, 396 Md. 682, 691-92 (2007), the Court of Appeals reiterated "what constitutes a breach of the peace" for the purposes of disorderly conduct offenses:

> [I]n *Wanzer v. State*, this Court interpreted what constitutes a breach of the peace, noting that it signifies disorderly, dangerous conduct, 'an affray, actual violence, or conduct tending to or provocative of violence by others.' In *Drews v. State*, we noted that, while disorderly conduct offenses are presently codified in Section 10–201 of the Criminal Law Article, '[t]he gist of the crime of disorderly conduct ... as it was in the cases of common law predecessor crimes, is the doing or saying, or both, of that which offends, disturbs, incites, or tends to incite, a number of people gathered in the same area.'

(Internal citations and footnote omitted). The Court thereby equated "disorderly conduct" with a "breach of the peace," and explained that the gist of the crime of disorderly conduct includes the doing or saying of that which offends or disturbs a number of people gathered in the same area. As discussed in greater detail above, here the jury heard from three eyewitnesses that Whitfield hit P.M. in the face, and the State produced photographic evidence showing injuries to the face of the victim—injuries sustained while in a group of five in a public park.[10] Additionally, the jury heard testimony from the group that Whitfield engaged with them in certain conversation that left them uncomfortable enough that they asked him to leave them alone. Viewing this evidence in the light most favorable to the State, the jury could reasonably believe that that Whitfield willfully "d[id] or sa[id] . . . that which offends [or] disturbs . . . a number of people gathered in the same area" for the purposes of the statute.

[10] A "public park" is specifically enumerated as a "public place" for the purposes of the statute. Md. Code. Ann., Crim. Law. § 10-201(a)(3)(ii)(5).

In sum, we reverse Whitfield's convictions for second-degree assault and disorderly conduct because the improper admission of body camera footage was not harmless error. Should the State decide to retry Whitfield, there was sufficient evidence to support a disorderly conduct conviction.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY MONTGOMERY COUNTY.