Circuit Court for Prince George's County
Case No. CT08-0308X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2165

September Term, 2018

KENNETH BILLOW JENKINS, III

v.

STATE OF MARYLAND

Graeff,
Leahy,
Beachley,

JJ.

Opinion by Leahy, J.

Filed: April 8, 2020

Appellant, Kenneth Billow Jenkins, III, was convicted in October 2008, by a jury in the Circuit Court for Prince George's County of first-degree felony murder, attempted second-degree murder, and related offenses,[1] for shooting Von Kelley and his girlfriend, Julia Fils-Aime, during a drug deal that went bad. Fils-Aime died from her wounds, but Kelley survived his injuries and testified in the underlying trial, identifying Jenkins as the shooter. In December 2008, the court sentenced Jenkins to a total term of imprisonment for life plus twenty years.

In July 2015, Jenkins filed a Petition for Writ of Actual Innocence (the "Petition") pursuant to Maryland Code (2001, 2019 Repl. Vol.), Criminal Procedure Article ("CP"), § 8-301 and Md. Rule 4-332, in which he requested a new trial "based upon newly discovered evidence that undermines the integrity of . . . the convictions." The court denied the Petition, and Jenkins now appeals from that denial. For the reasons explained herein, we shall affirm the judgment of the circuit court.

Facts and Proceedings

At trial, the State called Von Kelley,[2] who testified that

> sometime during the month prior to August 1, 2007, [he] met [Jenkins] on a public bus; the pair began talking about how each enjoyed smoking marijuana on occasion. When Kelley told [Jenkins] he could obtain marijuana, [Jenkins] took his cell phone number.

[1] Jenkins was also convicted of robbery, robbery with a deadly weapon, second-degree assault, and two counts of the use of a handgun in the commission of a felony or crime of violence. He was acquitted of first-degree premeditated murder, second-degree murder, attempted first-degree premeditated murder, and first-degree assault.

[2] Elsewhere in the record, Kelley is identified as "Kelly" or "Vaughan Kelly." To avoid confusion, we shall refer to this individual as "Kelley."

> On August 1, 2007, Kelley received three phone calls from [Jenkins], who inquired whether Kelley could help him obtain marijuana. Kelley affirmed that he could sell [Jenkins] half ounces of marijuana for $50 each, so the two arranged to meet in Chillum Park in Hyattsville to effectuate a sale.
>
> Kelley's girlfriend, Julia Fils-Aime, decided to accompany Kelley to the park. At approximately 8:45 p.m., [Kelley] and Fils-Aime arrived at the park, where they met with [Jenkins] and another man Kelley did not know.
>
> Kelley gave [Jenkins] a half ounce of marijuana, and [Jenkins] handed Kelley some money. Realizing that it did not total the agreed-upon $50, Kelley turned around to confront [Jenkins], only to find [Jenkins] pointing a gun at him and Fils-Aime. [Jenkins] told Kelley to "run it," which, to him, meant "give up all your stuff." Kelley and Fils-Aime immediately began to empty their pockets, but before they could give anything to [Jenkins, he] shot Kelley in the arm and said, "I'll kill your bitch," after which he shot Fils-Aime. He then shot Kelley a second time, this time in the abdomen.
>
> Kelley and Fils-Aime were able to run from the men, although Fils-Aime collapsed several yards from the scene of the shooting. Kelley continued to run until he reached a road, where he flagged down cars.

Jenkins v. State, No. 2484, September Term 2008, slip op. at 2-3 (filed August 3, 2010) (footnote omitted), *cert. denied*, 417 Md. 126 (2010).

Kelley testified that on October 4, 2007, Detective Hollowell met with him and "showed [him a] set of pictures." Kelley "picked out" a photo of Jenkins and identified him as the shooter. When asked how long Kelley thought that it took him "to look at these photos before making a selection," Kelley replied: "Not long. I mean, because I recognized him." When asked whether there was "any doubt in [his] mind that it was . . . Jenkins who shot [him] and Julia on August 1, 2007," Kelley replied: "No, there's no doubt in my mind."

The State also called Prince George's County Police Officer Larry Johnson, who testified that while he was "en route to another call, [he] noticed the injured Kelley and

radioed for an ambulance." *Jenkins*, slip op. at 3. Kelley told the officer that Kelley "and his girlfriend were walking through a park and, as they were walking through a trail in the park, both of them were approached by two black males, one having shoulder-length dreads and, basically, they were robbed." Officer Johnson subsequently "called for backup, and the police set up a perimeter around the park." *Id.*

The State also produced evidence that

> [a]s Officer Michael Ebaugh canvassed the area in his cruiser, he saw two men fitting the description of the robbers. As Ebaugh approached them, the pair took off running, each in a different direction. One of the two men got away, but Ebaugh chased and eventually apprehended the other man, later identified as Dernaldo McGee. [Fils-Aime ultimately succumbed to her injuries.]
>
> Following a check of McGee's cell phone records, which showed that someone had called Kelley from that phone in the half hour before the shootings, McGee was arrested and charged with the shootings of Kelley and Fils-Aime. While Kelley was in the hospital recovering from his injuries—which included the loss of one kidney—Detective Thomas Hollowell visited and showed him a photo array that included a photo of Dernaldo McGee, who, at that time, was the main suspect in the shootings.

Id. Kelley told the police that "he met [Jenkins] on a bus, that they discussed their enjoyment of smoking marijuana on occasion, and that he and [Jenkins] had smoked marijuana together the afternoon they met." *Id.* at 20.

The State further produced evidence that

> [a] review of Kelley's cell phone records and investigation of the owners of the cell phones that had dialed Kelley's phone on the night of the shootings, coupled with Kelley's statement that he recognized the shooter from his previous interaction with him on the bus, led police to develop [Jenkins] as a suspect. After Kelley was released from the hospital, Hollowell showed Kelley a second photo array, from which Kelley quickly picked [Jenkins] as the man who had shot him and Fils-Aime on August 1, 2007.

Id. at 3-4. At trial, Detective Hollowell was asked how long Kelley looked at the photo array. The detective replied: "It wasn't very long." Detective Hollowell further testified that, when Kelley selected a photo, he "said 'this one,' and [the detective] had him just write exactly what he said, initial it and date it."

On appeal, Jenkins argued, among other contentions, "that the trial court erred in excluding evidence that showed Dernaldo McGee had been charged and arrested in the shootings of Kelley and Fils-Aime and that a handgun and ammunition of the same type used in the shootings were found in McGee's home." *Id.* at 5. Rejecting the contention, we stated, in pertinent part, that we were "not persuaded that [Jenkins] was prejudiced by the exclusion of the evidence" because, "[g]iven Kelley's trial testimony—the credibility of which the jury was free to weigh—that he knew it was [Jenkins] on the phone when he called to set up the meeting in the park and that there was 'no doubt in [his] mind' that it was [Jenkins] who shot him and Fils-Aime, the issue of whether McGee had initially been arrested and charged in the crime would not have exculpated" Jenkins. *Id.* at 9-10.

In 2015, Jenkins filed the Petition, in which he contended that, in 2011, he submitted to the Prince George's County Police Department (the "Department") a request, pursuant to the Maryland Public Information Act ("MPIA"), for the Department's "file." In 2014, the Department submitted to Jenkins, among other documents, notes taken by Detective Hollowell during three separate meetings with Kelley. The first set of notes, dated August 1, 2007, reads, in pertinent part:

> Description of incident
> - male & female are in the woods hanging out
> - Two blk males approach announce robbery

- Struggle ensues
- male & female shot

The second set of notes, dated August 3, 2007, reads, in pertinent part:

- Julia come to his house 12-3 to help wash clothes.
- They were heading out to a store (illegible) maybe for him to buy her something.

* * *

Unsure if the suspect(s) new [sic] him
light skin guy may have seen him on the bus.

* * *

States person who called him on the phone they met to blaze a "L" <weed>

He met the person a week or so ago on metro <[W]est [H]yattsville>

Exchange of phone numbers first time they met

Called @ his home
come out and blaze "L"
shooter says "BLUNT".

The third set of notes was taken by Detective Hollowell during the October 4, 2007 meeting with Kelley, during which the detective showed Kelley the second photo array. The notes read, in pertinent part:

Kelley was told that I had two sets of photos to look at.

I asked if he could recognize any one in the photos as being the person he met @ the train station

* * *

[T]he first series of photos Kelley looked at for at least 20 (twenty) seconds. States he did not see anyone in that group.

> [T]he next series of photos Kelley studied for a longer period
> - He was asked if he recognized anyone.
> - I asked if he saw the person who looks like the person.
> - He looked @ two photos & pointed to photo one.
> - He said this guy resembles the guy.
> - I asked him to write his comment above the photo & sign & date it.
>
> A written statement was obtained in it he states the person he saw resembles or/is the person he met @ the metro/ and in the park. He also indicates it is the same person who shot he & Julia.

Jenkins contended that these notes, combined with other documents disclosed in response to the MPIA request, "reveal[] that Kelley was a reluctant and untruthful witness who had a motive to incorrectly identify [Jenkins] as the man that shot him."

The State subsequently filed an Opposition to the Petition. The State "agree[d] that there were certain portions of Detective Hollowell's file, including handwritten notes, that were not produced in discovery to the defense." Nevertheless, the State "disagree[d] with [Jenkins] about the meaning and relevance of those documents," and contended "that there is not a substantial or significant possibility that the outcome of trial would have been different."

In May 2017, the court held a hearing on the Petition. At the hearing, Jenkins submitted, among other exhibits, the aforementioned notes, and called his former trial counsel to testify. Following the hearing, the court denied the Petition in a written order, which stated the following:

> This matter came before this Court on August 2, 2017 as a *Petition for Issuance of a Writ of Actual Innocence*. In Petitioner's motion, filed by [counsel], Petitioner presented the argument, not limited to, the allegation that multiple pieces of newly discovered evidence were sufficiently material to demonstrate a substantial or significant possibility that the result of the proceeding may have been different.

> *Patterson v. State*, 229 [Md.] App. 630, 146 A.3d 496 (2016) interprets Maryland [Rule] 4-332, and states a Court may deny a *Petition for Issuance of a Writ[] of Actual Innocence* if errors do not overcome other compelling evidence against the Defendant[]. Furthermore, this Court does not believe that the relief sought by the Petitioner can be done through a *Petition for Issuance of a Writ of Actual Innocence*.
>
> Therefore, having reviewed Petitioner's motion and all supporting documents, this Court finds that it is not in the interests to grant Petitioner's Issuance of a Writ[] of Actual Innocence and the allegations contained in Petitioner's Motion are without merit.

(Emphasis in original). The circuit court, therefore, denied Jenkins's Petition.

STANDARD OF REVIEW

"Generally, the standard of review when appellate courts consider the legal sufficiency of a petition for writ of actual innocence is *de novo*." *Smallwood v. State*, 451 Md. 290, 308 (2017). Where a hearing was held on the petition, however, we review the circuit court's decision only for abuse of discretion. *French v. State*, No. 2386, September Term 2018, slip op. at 7 (filed October 31, 2019). "Under that standard, this Court will not disturb the circuit court's ruling, unless it is well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *Patterson v. State*, 229 Md. App. 630, 639 (2016) (citation and internal quotation marks omitted). "A trial court must, however, 'exercise its discretion in accordance with correct legal standards.'" *Smith v. State*, 233 Md. App. 372, 411 (2017) (citation omitted).

DISCUSSION

Jenkins contends that the circuit court erred in denying his Petition, because had Detective Hollowell's notes from his August 3 and October 4, 2007 meetings with Kelley been disclosed, there is "a substantial or significant possibility that the outcome of [his] trial would have been different." He advances two reasons for this allegation of error. First, Jenkins asserts that Kelley's August 3 statement to the detective "was highly inconsistent with [Kelley's] trial testimony." Second, Jenkins claims that the notes from the October 4 meeting reflect that Kelley "struggled to identify" him in the photo array, because Kelley "studied the array for over 20 seconds" before selecting Jenkins's photo, and stated only that the photo "'resembled' the robber."

The State concedes that Detective Hollowell's notes were not produced to the defense before trial or in time for Jenkins to move for a new trial. The State argues, however, that the court did not abuse its discretion in denying the Petition for two reasons. First, Detective Hollowell's notes were cumulative of other evidence available to Jenkins and used in Jenkins's defense at trial. Second, the State argues that "Jenkins failed to prove that the evidence may well have produced a different result."

Persons convicted of certain crimes may petition for a writ of actual innocence based on newly discovered evidence under CP § 8-301. This Court has explained that, in order to prevail on such a petition, the petitioner must satisfy three requirements. *Smith*, 233 Md. App. at 411. The "petitioner must produce newly discovered evidence that: (1) speaks to the petitioner's actual innocence; (2) could not have been discovered in time to move for a new trial under Md. Rule 4-331; and (3) creates a substantial or significant possibility that the result may have been different." *Id.* (internal quotation marks and footnote omitted).

Furthermore, the petitioner bears the burden of proof as to each requirement. *Patterson*, 229 Md. App. at 638. The statute also requires that the circuit court state its reasons for granting or denying a petition on the record. CP § 8-301(f)(3).

As a threshold matter, we accept Jenkins's assertion, and the State's concession, that Jenkins could not have discovered Detective Hollowell's notes in time to move for a new trial under Rule 4-331. Thus, we proceed to examine whether the circuit court abused its discretion in determining that Jenkins failed to meet the other requirements necessary to prevail on his Petition.

Actual Innocence

This Court explained in *Yonga v. State*, that "actual innocence" within the context of this statute "means factual innocence, not mere legal insufficiency." 221 Md. App. 45, 57 (2015), *aff'd*, 446 Md. 183 (2016) (citing *Bousley v. United States*, 523 U.S. 614, 623 (1998)). "What the petition must show is newly discovered evidence that the petitioner is actually innocent." *Id.* at 62. While a substantial or significant possibility that the result might have been different is an element of the claim, it "is simply the weight or level of persuasion that the newly discovered evidence of actual innocence must possess in order to justify the issuance of the writ." *Id.* "The required level of persuasion for newly discovered evidence to make a decisive difference is by no means the same as the thing that the newly discovered evidence is offered to prove[.]" *Id.* at 63-64.

In *Smith v. State*, we explained that the General Assembly has noted several types of new evidence that speak to a petitioner's actual innocence. 233 Md. App. at 412. These include:

> (1) a confession by another individual to having committed the crime; (2) acknowledgement by an eyewitness or other evidence indicating he was mistaken; (3) acknowledgment by an eyewitness or other evidence indicating that the witness intentionally lied; or (4) evidence casting serious doubt on the reliability of scientific evidence used against the defendant.

Id. at 412-13 (citation omitted). This list, however, is not exhaustive, and a petitioner is not required to definitively prove his or her innocence to warrant relief under the statute. *Id.* at 413. "That the newly discovered evidence does not definitively exonerate appellant, or may be countered by other evidence, goes to the weight of the evidence[.]" *Id.* In evaluating the first prong, "we look to whether the newly discovered evidence 'speaks to,' or could support, a claim that the petitioner did not commit the crime for which he or she was convicted." *Id.*

In the case before us, the evidence that Jenkins proffered as newly discovered was mainly cumulative of other evidence that was introduced at trial. The jury heard evidence that showed that Kelley's version of the events leading up to the robbery, as initially relayed to Officer Johnson, had changed by the time of his August 3 conversation with Detective Hollowell. Kelley testified at trial that he had initially met Jenkins on a bus and arranged to meet him in a park to sell marijuana to him. Officer Johnson, however, testified that, when he first encountered Kelley, Kelley claimed that he and Fils-Aime were just walking through the park when they were approached and robbed by two men. In light of Officer Johnson's testimony, Detective Hollowell's notes, to the extent that they reflect a change in Kelley's story, were cumulative of other evidence presented at trial. Thus, Jenkins had the opportunity to, and in fact did, highlight at trial that Kelley initially declined to disclose

that the purpose for his meeting with Jenkins was to sell marijuana. Jenkins argued the issue of Kelley's credibility to the jury, and yet, the jury still credited Kelley's testimony.

The evidence regarding the language that Kelley used to identify Jenkins was also cumulative of evidence that was made available to Jenkins before trial. Kelley's written statement, taken the same day as the October 4, 2007 notes, indicates that he was shown a photo array and that he confirmed that the photo of Jenkins "resemble[d] or [wa]s" the person who shot him and Fils-Aime. This is substantially the same information reflected in Detective Hollowell's October 4 notes.

The only additional information contained in the October 4 notes was Hollowell's description of the amount of time that Kelley took to study each photo array quantified as longer than 20 seconds. Jenkins argues that the newly discovered evidence demonstrates that "[Kelley] took longer than he claimed to make that identification," and "the linchpin of the State's case—may not have been reliable." But Jenkins did not demonstrate that 20 seconds is a long time to consider a photo array. Nor could Jenkins show that 20 seconds was longer than, or contradicted, Kelley's trial testimony that it took him, "Not long. I mean, because I recognized him." Accordingly, the new evidence did not "speak[] to" or support a claim that Jenkins did not commit the crimes for which he was convicted. *See Smith*, 233 Md. App. at 413. Whether 20 seconds is considered a long time to review a photo array, or whether that period of time conflicted with Kelley's trial testimony, are factual inquiries squarely within the discretion of the trial court. We certainly cannot say that the trial court abused its discretion because it was not convinced by Jenkins's argument that "the linchpin of the State's case—may not have been reliable."

Substantial Possibility of a Different Result

In order to determine if there is a substantial or significant possibility that the result of a trial would have been different, courts utilize the "before and after" test:

> We first look at the evidence of guilt before the jury at the trial that led to the conviction. We then look at the newly discovered evidence. The acid test is to ask whether, if that jury had had the benefit of the newly discovered evidence as well as the evidence that was before them, would there be "a substantial or significant possibility that the result would have been different?"

Yonga, 221 Md. App. at 69. "[T]he substantial or significant possibility standard falls between 'probable,' which is less demanding than 'beyond a reasonable doubt,' and 'might' which is less stringent than probable." *Smith*, 233 Md. App. at 430-31 (citation omitted). The Court of Appeals has also declared that the distinction "between 'impeaching' evidence, i.e., evidence that a witness lied about the merits of the case, and so-called 'merely impeaching' evidence, i.e., false testimony concerning the witness's credibility[,]" is too rigid in this context. *McGhie v. State*, 449 Md. 494, 512 (2016) (citation omitted).

Maryland decisional law on this prong shows that while a hearing judge should carefully weigh the effect of the new evidence, the decision is ultimately discretionary. For example, in *McGhie v. State*, the Court of Appeals concluded that evidence that a ballistics expert lied about his qualifications created the possibility that one or more members of the jury would have discredited his testimony entirely. 449 Md. at 512. Still, the Court held that the circuit court did not abuse its discretion in determining that this evidence would

not have overcome the substantial body of other evidence introduced against the petitioner at trial. *Id.* at 514.

In the case before us, the circuit court explained in its order that, under *Patterson v. State*, 229 Md. App. 630 (2016), it could deny a Petition for Issuance of a Writ of Actual Innocence if "errors do not overcome other compelling evidence against the" defendant. The court noted that "Petitioner's [M]otion" presented the argument that "multiple pieces of newly discovered evidence were sufficiently material to demonstrate a substantial or significant possibility that the result of the proceeding may have been different." The court concluded that "the allegations contained in Petitioner's Motion are without merit."

Assuming, *arguendo*, that Jenkins has correctly interpreted Detective Hollowell's notes,[3] we agree with the State that the circuit court did not abuse its discretion in deciding that Jenkins did not establish that there was a substantial or significant possibility that the result of his trial would have been different "if that jury had had the benefit of the newly discovered evidence." *Yonga*, 221 Md. App. at 69.

Jenkins contends that "the improper exclusion of a critical witness's prior inconsistent statement, even if cumulative, is substantially likely to have changed the outcome." He bases this contention on this Court's statement in *McCray v. State*, that "when the State's case depends virtually exclusively on the credibility of a witness, . . . the bolstering of the witness's credibility by prior consistent statements cannot be harmless

[3] We note that, at the hearing on the Petition, Jenkins did not call Detective Hollowell or Kelley to testify as to whether the detective's notes accurately reflect the substance of their conversations.

error." 122 Md. App. 598, 610-11 (1998). Jenkins does not cite, and we have not found, any case that supports his conclusion that the same rationale must apply to prior *inconsistent* statements. On the contrary, we have held on numerous occasions that, unlike the bolstering by prior *consistent* statements of the credibility of a witness on which the State's case depends virtually exclusively, the erroneous exclusion of a prior *inconsistent* statement by a witness, that is cumulative of other contradictory evidence introduced at trial, can indeed be harmless beyond a reasonable doubt. *See, e.g.*, *Lindsey v. State*, 235 Md. App. 299, 322 (2018). We decline to extend the holding of *McCray* to cover prior inconsistent statements, especially in the context of this case in which we employ a different standard of review. As mentioned at the outset of our discussion, rather than review for legal error, we review the trial court's determination on a petition for actual innocence following a hearing for an abuse of discretion. We cannot conclude that the circuit court abused its discretion in determining that there was no substantial or significant possibility that the cumulative evidence in Detective Hollowell's notes would have altered the result of Jenkins's trial.

We also disagree with Jenkins's argument that Detective Hollowell's notes from the October 4, 2007 photo identification mandate a conclusion that Kelley "struggled" to make the identification. Jenkins does not cite any case holding that an identification is unreliable simply because a witness states that the person identified "resembles" an assailant, rather than "is" the assailant. In light of the weakness in the discrepancies between Kelley's trial testimony and Detective Hollowell's notes from October 4, 2007, and the fact that the only

photo selected by Kelley from the array was a photo of Jenkins, we cannot say the circuit court abused its discretion in determining that Jenkins's argument was without merit.

Finally, other aspects of Jenkins's trial indicate that there is no substantial or significant possibility that the withholding of Detective Hollowell's notes caused the result of the trial to differ. This Court's analysis in Jenkins's direct appeal of his convictions indicates that the case turned not on the consistency of Kelley's version of events as told to the police, nor on the reliability of his identification of a photo of Jenkins, but on Kelley's in-court identification of Jenkins and total lack of doubt as to whether Jenkins was the person who shot Kelley and Fils-Aime. The jury was given a reason to question Kelley's character, specifically his admission that he sold marijuana to Jenkins, and his contradictory pre-trial statements in this regard, but nevertheless found Kelley's testimony credible. Therefore, we cannot say that the circuit court's decision to deny Jenkins's Petition was so far "removed from any center mark" and "beyond the fringe of what [we] deem[] minimally acceptable[]" as to constitute an abuse of discretion. *See Patterson*, 229 Md. App. at 639 (citation omitted).

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.