

Circuit Court for Harford County
Case No. 12-K-17-001162

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2308

September Term, 2018

WILLARD TEMPLE ACKER

v.

STATE OF MARYLAND

Arthur,
Friedman,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: October 29, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant Willard Acker was convicted by a jury in the Circuit Court for Harford County of second-degree assault. Appellant presents the following questions for our review:

- “1. Did the Circuit Court err when it barred Mr. Acker from confronting Deborah Walther with a prior inconsistent written statement?
2. Did the Circuit Court err in failing to question Nathan Walther about his communications with Deborah Walther while she was on the witness stand?”¹

We shall hold that the trial court erred in precluding appellant from confronting Ms. Walther with a prior inconsistent statement in order to impeach her. Because this error was not harmless, we shall reverse and remand for a new trial.

I.

Appellant was indicted by the Grand Jury for the Circuit Court for Harford County on charges of second-degree assault, carrying a dangerous weapon openly with intent to injure, false imprisonment, and theft less than \$100. Following a two-day trial, a jury convicted appellant of second-degree assault and acquitted him of all other charges. The court sentenced him to a term of incarceration of ten years with three years suspended and five years of probation.

Prior to trial, the State moved to exclude a text message sent to appellant on the day of the incident from the phone of Deborah Walther, the victim of the assault. The message

¹ Because we shall reverse on the first question, we will not address this second issue.

read “I dont care what happens to you whether i lie or not i know you did not do anything to me i am mad because you talked mean to me.” Defense counsel argued that the message was impeachment evidence and stated that he was “not trying to enter this into evidence as a prior statement.” The court denied the State’s request to exclude the evidence and declined to rule on its admissibility until trial.

During trial, Ms. Walther testified as the only direct eyewitness to the assault. The other evidence presented was the responding officer’s testimony, surveillance video of appellant and Ms. Walther outside Ms. Walther’s apartment after the assault, photographs of the injuries to Ms. Walther’s upper body, and Ms. Walther’s statement to police. Ms. Walther testified that appellant grabbed her by the face and under the jaw, but in her statement to police, she stated that appellant grabbed her by the throat. She also testified that appellant threatened her with a knife but admitted that she showed the wrong knife to police. She also provided conflicting accounts of what occurred immediately after the incident. She testified, for example, that appellant left the apartment first, but surveillance video showed her leaving before appellant. The responding officer testified that Ms. Walther was “‘hysterical’ with fear and nearly “hyperventilating” when he arrived, and the surveillance video corroborated the officer’s impression of her mental state.

Ms. Walther also gave conflicting testimony about the alleged theft of her phone. On cross-examination, defense counsel tried to lay the evidentiary foundation to ask her about the text message. Defense counsel asked Ms. Walther her phone number and whether she had ever used the phone to send text messages to appellant. Before defense counsel could ask about the message itself, the State objected on the grounds that defense

counsel had not laid the proper foundation by asking Ms. Walther if she recognized the message. Defense counsel argued that he did not have to ask if she recognized the message to confront her with it for impeachment purposes. That exchange occurred as follows:

“[THE STATE]: . . . Is [defense counsel] trying to lay a . . . foundation for a piece of evidence? . . . He cannot ask her a question which elicits testimony of the text message if it cannot even be introduced into evidence.

[DEFENSE COUNSEL]: . . . I am not necessarily offering this as evidence. This is impeachment. This does not need to be introduced.

THE COURT: You need to ask her . . . does she recognize this. How is it impeachment otherwise?

[DEFENSE COUNSEL]: I think I can ask her if she said it, and if she says ‘no,’ I can confront her with it . . .

[THE STATE]: . . . It is a piece of evidence, and the Rules of Evidence require that a foundation be laid . . .

[DEFENSE COUNSEL]: That is not true.

THE COURT: . . . You have to lay a foundation if you are going to impeach a document like that.”

Defense counsel then resumed questioning Ms. Walther about whether she recalled texting with appellant on the day in question. The State again objected, and the parties conferred with the court as follows:

“[THE STATE]: How many times can Ms. Walther answer the same question . . . [?] The question has been answered. He cannot then confront her with it.

THE COURT: I understand. . . .

[DEFENSE COUNSEL]: If I am going to confront her with a piece of impeachment evidence with something that contradicts that, I have to first give her the opportunity to deny having said it, and I have to be specific.

THE COURT: You can give her the opportunity to *refresh her recollection*; however, what I cannot allow you to do is read it.

THE COURT: I have made my ruling. He can show it to her and see if it refreshes her recollection.”

Defense counsel then showed a screenshot of the text message to Ms. Walther and asked her if she recognized it. She testified that she did not, and defense counsel moved to a new line of questioning without the jury hearing the content of the text message.

The jury convicted appellant, and this timely appeal followed.

II.

We address appellant’s evidentiary issue. He argues that the trial court erred by (1) refusing to allow him to impeach Ms. Walther’s credibility with the content of the text message sent from her phone and (2) instead restricting its use to refreshing her recollection of sending the message. According to appellant, the court prevented him from using the text message as evidence of Ms. Walther’s prior inconsistent statement by refusing to allow him to ask her if she made the statement therein. Moreover, appellant argues, because the court prevented him from asking Ms. Walther about the content of the message, he could not satisfy the necessary requirements for admitting a copy of the text message as extrinsic

evidence of her prior inconsistent statement. The court did this, he contends, by only allowing him to ask her if she remembered sending the message. In appellant's view, the court should have allowed him to ask Ms. Walther if she made the statement in the text message, and if she denied doing so, permitted him to try to admit the text message as extrinsic evidence of her prior inconsistent statement.

Appellant further argues that these errors were not harmless because Ms. Walther's credibility was a central issue at trial. He maintains that if the jury heard the content of the text message, which directly contradicted her claim that an assault occurred, it could have placed more weight on this inconsistent testimony and acquitted him of the assault charge.

The State concedes that the trial court erred in applying the Maryland Rules of Evidence and that appellant was indeed entitled to use the text message to impeach the witness and not just to refresh her recollection. The State asserts that a witness does not need to authenticate the subject of an impeachment question because “[a]sking a witness to deny, what is claimed to be, his or her own prior statement is a quintessential form of proper impeachment” permitted by the Rules. The State acknowledges that defense counsel had a good-faith basis for asking the question and therefore should have been allowed to question Ms. Walther about the content of the message.

The State contends, however, that the error was harmless for two reasons. First, the State maintains that the court's error was insignificant in relation to the other evidence. In the State's view, the evidence overwhelmingly disproved appellant's narrow defense that he and Ms. Walther had a “nasty” argument but that it was not “physical,” and inconsistent testimony about the assault would therefore not have changed the jury's decision. Second,

the State maintains that the jury convicted appellant despite the other inconsistencies that defense counsel elicited in Ms. Walther’s testimony. These inconsistencies, the State argues, damaged her credibility enough for the jury to acquit appellant of the alleged theft. In the State’s view, there was a remote chance that the jury would have used the additional inconsistency that the text message would have elicited to acquit appellant of the assault charge because the other evidence provided by the State generally corroborated Ms. Walther’s testimony about the assault.

III.

We address appellant’s claim that the trial court improperly excluded from evidence the content of the text message sent from Ms. Walther’s phone. We review the court’s determination for abuse of discretion. *See Pantazes v. State*, 376 Md. 661, 681 (2003). Even if we find that the court abused its discretion, we will not reverse if the error was harmless. *Dorsey v. State*, 276 Md. 638, 659 (1976). Error is harmless if “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.” *Id.*

The court erred by preventing appellant from asking Ms. Walther if she sent the text message and permitting him to use the text message to refresh her recollection only. There is a basic difference in the trial technique of refreshing a witness’s recollection and impeaching a witness with a prior inconsistent statement. *Compare* Thomas A. Mauet, *Trial Techniques and Trials* 186 (10th ed. 2017) (stating that the need to refresh a witness’s memory is an “everyday” occurrence “during the direct examination”) *with id.* at 204

(noting that prior inconsistent statements are raised ordinarily “during the cross-examination of lay witnesses”). On direct examination, a prior inconsistent statement can *rehabilitate* the credibility of a forgetful witness in the eyes of the jury by giving the witness an opportunity to recall important details. *See id.* at 186. When a written statement is used for this purpose, opposing counsel and the witness can review the statement, but the writing is not admitted into evidence. *See id.* at 186, 188.

On cross-examination, by contrast, the ordinary purpose of the use of a prior inconsistent statement is to *damage* the witness’s credibility. Evidence of the prior inconsistent statement can prove the truth of the matter asserted in the statement (if offered against a party opponent) or highlight contradictions in the witness’s testimony. *See* 1 Richard A. Givens, *Advocacy: The Art of Pleading a Case* § 8.06 (3d ed. 1992); 28 Charles Alan Wright & Victor J. Gold, *Federal Practice and Procedure* § 6203 (2d ed. 2012). When used for the latter purpose, the jury should only assess whether the contradictory statement makes the witness less credible, not whether it is true. *See* Givens, *supra*.

The Maryland Rules of Evidence allow a party to ask about a witness’s prior inconsistent statements for the purpose of impeaching that witness. Rule 5-613(a) provides as follows:

“A party examining a witness about a prior written or oral 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.”

A party is not required to admit extrinsic evidence of that prior statement. *See* Rule 5-616(a)(1). Moreover, extrinsic evidence is not admissible unless the requirements of Rule 5-613(a) are met, the witness “has failed to admit having made the statement,” and “the statement concerns a non-collateral matter.” Rule 5-613(b); *see also Hardison v. State*, 118 Md. App. 225, 240 (1997) (“Rule 5-613(b) requires the opposite of acknowledgment: before extrinsic evidence may be used to impeach a witness about his prior inconsistent statement, he must refuse to admit that the statement was made by him.”).

By preventing appellant from using the text message to impeach the witness, the court misapplied the Rules of Evidence. When the State objected to appellant’s attempt to lay an evidentiary foundation to admit a copy of the text message, appellant told the court that he wished to use the message to impeach the witness. The court then misapplied Rule 5-613(a) by requiring appellant to authenticate the message before allowing him to even ask about the content of the message.² More importantly, the trial court precluded appellant from impeaching the witness. The court subsequently foreclosed appellant’s opportunity to admit a screenshot of the text message into evidence under Rule 5-613(b) by limiting his questions to refreshing the witness’s memory of sending the message. Once defense counsel told the court that the evidence would be used for impeachment purposes, the court should have allowed defense counsel to ask the witness about the content of the message and give the witness an opportunity to explain or deny it. If the witness did not admit to

² Appellant argues that even if he were required to authenticate the text message, he properly did so. We do not address this issue.

making the statement in the message, defense counsel could have tried to admit the screenshot as extrinsic evidence of the statement under Rule 5-613(b).³

Furthermore, the court’s error was not harmless. As indicated, we must be persuaded “beyond a reasonable doubt[] that the error in no way influenced the verdict” to find an error harmless. *Dorsey*, 276 Md. at 659. To make this determination, we do not consider whether evidence presented to the jury was independently sufficient to support a conviction but ask instead “whether the trial court’s error was unimportant in relation to everything else the jury considered in reaching its verdict.” *Dionas v. State*, 436 Md. 97, 118 (2013). Typically, a court’s failure to allow the jury to assess a witness’s credibility is not harmless, especially when that witness is also the victim. *See State v. Cox*, 298 Md. 173, 185 (1983).

In *Cox*, 298 Md. at 176–77, 185, the Court of Appeals reversed the trial court’s decision not to allow the defendant to ask the victim of a sexual assault about an allegedly false past sexual assault allegation against another man. The defendant did not dispute that the assault occurred but claimed that he was not the assailant. *Id.* at 176. The Court of Appeals stated that “[d]espite some corroborating physical evidence,” the crux of the prosecution’s case rested on the victim’s testimony. *Id.* at 185. Thus, the court concluded, “[i]f she were shown to be unworthy of belief, the jury might well have been unable to conclude that Cox was guilty beyond a reasonable doubt.” *Id.*

³ We do not address whether the copy of the text message would have been admissible.

As in *Cox*, the State in this case presented evidence that appellant assaulted Ms. Walther. Appellant did not dispute that the evidence placed him at the scene of the assault nor that an argument occurred. Appellant argued, however, that Ms. Walther’s testimony provided “[t]he only corroboration” that he attacked her. Thus, Ms. Walther’s credibility was central to the State’s case.

While we agree that the evidence presented along with Ms. Walther’s testimony is not insubstantial, particularly in relation to appellant’s defense, we cannot conclude beyond a reasonable doubt that presenting additional inconsistency in Ms. Walther’s testimony about whether appellant assaulted her would not have changed the verdict. Defense counsel was unable to ask Ms. Walther if she sent the text message that negated her account that appellant assaulted her. Because Ms. Walther’s testimony was central to the State’s case and because the jury did not have an opportunity to fully assess her credibility, the exclusion of the text message as impeachment evidence was not harmless.

**JUDGMENT OF THE
CIRCUIT COURT FOR
HARFORD COUNTY
REVERSED. CASE
REMANDED TO THAT
COURT FOR A NEW
TRIAL. COSTS TO BE
PAID BY HARFORD
COUNTY.**