Circuit Court for Caroline County
Case No. C-05-CR-18-000133

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2586

September Term, 2018

ROBERT QUITMAN CUNNINGHAM, JR.

v.

STATE OF MARYLAND

Meredith,*
Wells,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: October 29, 2020

*Meredith, Timothy E., J., now retired, participated in the hearing of this case while an active member of this Court, and after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

Following a bench trial in the Circuit Court for Caroline County, Robert Quitman Cunningham, Jr., appellant, was convicted of second-degree assault. The court imposed a sentence of three years' incarceration, all but six months suspended, and three years of supervised probation. Cunningham noted a timely appeal from his conviction and presents us with the following three questions:

1. Did the trial court err in admitting hearsay testimony by Rene Stafford?

2. Did the trial court err in admitting hearsay captured within Officer Ashley Collison's body camera video?

3. Is the evidence insufficient to sustain the conviction for second degree assault?

For the reasons set forth herein, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

In March of 2018, Mr. Cunningham's longtime girlfriend, Jessica Summers, lived in Federalsburg, Maryland, in a house owned by Rene Stafford. Mr. Cunningham was a frequent houseguest of Ms. Summers.

On the morning of March 18, 2018, Mr. Cunningham came to Ms. Stafford's house to have words with Ms. Summers because he had suspicions that she may have been seeing a former boyfriend that morning. At trial, Ms. Summers was reluctant to testify against Mr. Cunningham. She testified that she recalled the events of March 18, 2018 only "somewhat." She stated that she and Mr. Cunningham were "fussing and tussling[,]" but when the prosecutor asked whether "tussling" meant that they were "putting hands on each other[,]" Ms. Summers responded, "Um, no." She denied that she told Ms. Stafford to call

the police, and stated that she did not remember what she told the police when they arrived. Ms. Summers stated that she was under the influence of heroin and alcohol at the time of the incident.

But, on the morning of March 18, while Mr. Cunningham was in the house, Ms. Stafford heard a bump on the common wall between her bedroom and the bedroom of Jessica Summers, with whom Ms. Stafford shared her home. Ms. Summers then "yelled" or "almost screamed" for Ms. Stafford to call the police. At trial, Ms. Stafford explained, over objection, that Ms. Summers "yelled out for me to call the police, he hit me." Ms. Stafford further testified: "[A]nd so I called the police and Robert Cunningham asked if I, . . . he said you're not going to call the police are you Ms. Nan and . . . Jessie said yes." So Ms. Stafford called the Federalsburg Police Department, and Mr. Cunningham left before the police arrived.

Officer Ashley Collison and Sergeant Brian McNeil of the Federalsburg Police Department, which is located close to Ms. Stafford's house, arrived at the house about a minute after Ms. Stafford made the call to the police. Mr. Cunningham was not at the house when they arrived. According to Sergeant McNeil, when they arrived, Ms. Summers was "emotionally distraught" and "tearful."

Part of the recording made by Officer Collison's body camera was admitted into evidence over defense counsel's objection. In the recording, Ms. Summers is heard telling the police that Mr. Cunningham had climbed in through a bedroom window, and he had punched her in the face, "bust[ing] [her] lip open." She stated:

> He kept pulling me by my hair and I was yelling to tell him to get out and he kept trying to pull me in the room. I was telling him to get out and I asked her a favor to call the police. And then he was oh yeah, you're going to call the police on me[.] . . . [T]hen he punched me then he left.

Photographs of Ms. Summers's upper lip, face, and left hand, which were taken by Sergeant McNeil during the police officers' response to Ms. Stafford's call, were admitted into evidence.

Near the end of the police officers' visit to Ms. Stafford's house on the morning of March 18, Ms. Summers gave the police a handwritten statement in which she wrote that she and Mr. Cunningham were "fussing" over an ex-boyfriend and that Mr. Cunningham grabbed her by her hair and punched her in the mouth. In the statement, Ms. Summers wrote:

> Robert Cunningham climb through window we was fussing over ex Boyfriend he grab me by my hair twice i was yelling for him to get out wouldn't leave ask Reay calls cops he was mad cuz told her call cops he punch me in my mouth then left out door. we was fussing at front door he ask come in told he no then he went to window got it open said you not going open door i said no act like i was opening front door he came Back to front door it was locked so he climb through the window my Bedroom window [address redacted] Federalsburg 21632.

Defense counsel conceded that, in light of the testimony Ms. Summers had given at trial, her written statement was admissible pursuant to Maryland Rule 5-802.1(a)(2) as a prior written statement that was inconsistent with her trial testimony, and the statement was admitted without objection.

But, during Sergeant McNeil's testimony, the officer acknowledged that Ms. Summers called him later on March 18 and recanted her statement. Sergeant McNeil answered "yes" when defense counsel asked whether Ms. Summers told him that she had

fabricated the statement to get Mr. Cunningham into trouble. On re-direct examination, however, Sergeant McNeil agreed that Ms. Summers did not say that she had fabricated her statement but said only that she was recanting because she did not want to get Mr. Cunningham into trouble.

Mr. Cunningham testified at trial. He said that he had received a text message from Ms. Summers's teenaged daughter at around 6:00 a.m. on the morning of the incident, and in response to that message, he left his home in Salisbury and drove to Ms. Summers's home in Federalsburg to make sure the daughter was "all right." He arrived at the house just after 8:00 a.m. and knocked on the front door, which was answered by Ms. Summers. According to Mr. Cunningham, he could see that Ms. Summers was "under the influence." They got into an argument, and Mr. Cunningham admitted: "I used vulgar language." He acknowledged that he "disrespected her by calling her out of [sic] her name," and said that he called Ms. Summers a "bitch" and a "junkie," "stupid, dumb." Although Mr. Cunningham denied that he either punched Ms. Summers or that he dragged her by her hair, he asserted that Ms. Summers "tried to grab" him, and he then "put [his] arm up" and tried to get away from her because he "didn't want any problems." And he said: "[T]his morning we was already fussing." He said that, when Ms. Stafford called the police, he left because he was on probation and did not want any contact with the police.

DISCUSSION

I. Ms. Stafford's statement

Mr. Cunningham first contends that the circuit court erred in admitting Rene Stafford's testimony that Ms. Summers said that Mr. Cunningham hit her. Mr.

Cunningham asserts that this hearsay evidence did not fall within any of the recognized exceptions to the hearsay rule. The State contends that the court did not err in overruling the hearsay objection for two possible reasons: (1) the statement was not hearsay because it was not offered to prove the truth of the matter asserted (that Mr. Cunningham hit Ms. Summers), but instead was offered "to explain why Ms. Stafford took the action of calling the police[.]" (2) Alternatively, even if the statement had been offered as additional proof that Mr. Cunningham hit Ms. Summers, the statement was admissible pursuant to Maryland Rule 5-803(b)(2) as an excited utterance. The trial judge suggested that the statement "certainly might fall in the category of excited utterance," but he eventually ruled: "I don't think it's being offered for the truth of it."

Because this was a bench trial, we conclude that it was within the discretion of the trial judge to admit the evidence for the limited purpose of explaining why the police were called to Ms. Stafford's home at 8:00 a.m. on a Sunday morning. But we also conclude that, because Ms. Summers's statement was made while she and Mr. Cunningham were having an argument and literally within striking distance of each other, the statement was admissible pursuant to Rule 5-803(b)(2) as an excited utterance because it was a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The trial judge did not err in admitting the testimony.

II. Admissibility of Body Camera Video

Mr. Cunningham challenges on hearsay grounds the admission of the excerpts of Officer Collison's body camera recording. The State contends that Mr. Cunningham's

appellate argument was partially waived, and that what was not waived is without merit. We agree with the State.

At trial, defense counsel objected to the admission of the body camera footage on grounds that parts of it were not relevant to the charges Mr. Cunningham was facing, and that the video contained inadmissible hearsay. Specifically, defense counsel asserted that Ms. Summers's hearsay statements to police were not admissible as prior inconsistent statements under Rule 5-802.1(a)(3) because that rule does not apply to police body camera recordings. In addition, defense counsel maintained that the body camera footage was "unreliable" because there were "different witnesses talking," and "some of the witnesses who were talking" on the video (namely, the teenaged daughter of Ms. Summers) did not testify at trial. All statements made by Ms. Summers's daughter, who did not testify at trial, were "redacted" from the recording and only other portions of the recording were played for the court over Mr. Cunningham's objection.

Maryland Rule 5-803(b)(8)(D) provides an exception to the rule against hearsay and permits introduction of a recording from a body camera worn by a law enforcement person. The exception 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.

Maryland Rule 5-805 is the rule referred to in the first line of Rule 5-803(b)(8)(D), and it provides that hearsay within hearsay must be separately supported by an exception

to the hearsay rule. Rule 5-805 provides: "If one or more hearsay statements are contained within another hearsay statement, each must fall within an exception to the hearsay rule in order not to be excluded by that rule."

Mr. Cunningham asserts that the circuit court erred in admitting the footage from Officer Collison's body camera for two reasons: (1) the State failed to satisfy the prerequisite of trustworthiness, under Rule 5-803(b)(8)(D)(iii), because Ms. Summers testified that she was under the influence of heroin and/or alcohol at the time; and (2) the independent hearsay exception for recorded prior inconsistent statements—Rule 5-802.1(a)(3)—does not apply to footage from a police body camera.

The State responds that, because Mr. Cunningham did not argue in the circuit court that the body camera footage was untrustworthy for that reason, he has waived that claim on appeal. We agree with the State as to that point. As we have noted, "where specific grounds are delineated for an objection, the one objecting will be held to those grounds and will ordinarily be deemed to have waived grounds not specified." *Perry v. State*, 229 Md. App. 687, 709 (2016) (quoting *Thomas v. State*, 301 Md. 294, 328 (1984)) (additional citation omitted). Because defense counsel did not specify, in objecting to the admission of the body camera footage, that the recording was not trustworthy because Ms. Summers testified that she was under the influence of heroin and/or alcohol at the time, that objection was waived for purposes of appeal.

But Mr. Cunningham did preserve an argument with respect to the double hearsay issue, that is, hearsay statements made by Ms. Summers during the recording. He objected

at trial that "there's hearsay I mean, on the body cams its conversations . . . . A lot of what is said is hearsay that's inadmissible."

In his brief, Mr. Cunningham acknowledges that:

> Maryland law provides that the rule against hearsay does not preclude admission of "[a] statement that is inconsistent with the declarant's testimony if the statement was . . . recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement[.]" Md. Rule 5-802.1(a)(3); *Nance v. State*, 331 Md. 549 (1993).

He contends, however, that this exception to the hearsay rule applies only to "verbatim recordings made during police interviews, . . . not footage captured by police body cameras." In support of this argument, Mr. Cunningham cites two cases, both of which were decided before Rule 5-803(b)(8)(D) was adopted in 2016 to permit introduction of body camera recordings. Mr. Cunningham cites *McClain v. State,* 425 Md. 238, 249 (2012), and *Belton v. State*, 152 Md. App. 623, 632 (2003). In both of those cases, the Court of Appeals and this Court concluded that an audiotaped statement recorded by the police was admissible pursuant to Rule 5-802.1. *See McClain,* 425 Md. at 249; *Belton,* 152 Md. App. at 632. But neither of those cases limits the application of Rule 5-802.1(a)(3) such that it would not apply to police body camera footage. And we perceive no basis for concluding that the hearsay exception created by Rule 5-802.1(a)(3) for an inconsistent statement "recorded in substantially verbatim fashion by . . . electronic means contemporaneously with the making of the statement" would not apply to a statement recorded by a body worn camera.

In *Paydar v. State*, 243 Md. App. 441, 453-54 (2019) this Court traced the history of Rule 5-803(b)(8)(D), and explained:

> Md. Rule 5-803(b)(8)(D) permits a recording from a body camera worn by a law enforcement person to be "offered against an accused" if the recording: (1) is made contemporaneously; (2) is properly authenticated; (3) is otherwise trustworthy; and (4) any hearsay statements within the recording fall within an independent hearsay exception under Md. Rule 5-805. Although the last requirement is not expressly articulated in Md. Rule 5-803(b)(8)(D), it is subject to Md. Rule 5-805, which provides that "[i]f one or more hearsay statements are contained within another hearsay statement, each must fall within an exception to the hearsay rule in order not to be excluded by that rule."

Id. at 454. We added: "In other words, for the recording to be admissible, the party offering the evidence must establish a hearsay exception for statements contained therein." *Id*. We concluded that the declarant's recorded statements made in *Paydar* were not admissible pursuant to the body camera exception because, in that case, there was no applicable exception to permit admission of the hearsay statements recorded by the body camera. "In the absence of qualifying under another exception to the hearsay rule, they were not admissible under Md. Rule 5-803(b)(8)(D)." *Id*. at 456 (footnote omitted).

As the State points out, Ms. Summers's statements to police, as captured on the body camera footage, were inconsistent with her trial testimony that Mr. Cunningham did not assault her. In our view, Rule 5-802.1(a)(3) provided the hearsay exception necessary to admit statements made by the declarant (here, Ms. Summers) that were inconsistent with her trial testimony. The statements were recorded verbatim and by electronic means contemporaneously with the making of the statements. Accordingly, we conclude that Ms. Summers's hearsay statements recorded by Officer Collison's body worn camera were admissible pursuant to 5-802.1(a)(3) and Rule 5-803(b)(8)(D), and the trial court did not err in admitting that evidence.

III. Sufficiency of the Evidence

Mr. Cunningham contends that the evidence was insufficient to sustain the conviction for second-degree assault because the State failed to prove the element of lack of consent. He asserts that the evidence at trial demonstrated that "[a]ny contact appellant made with Ms. Summers was accidental or consensual and therefore not an assault."

The State asserts that Ms. Summers's written statement to police, as well as her statements recorded by Officer Collison's body camera, constituted evidence sufficient to sustain the conviction for second-degree assault. Viewing the evidence in the light most favorable to the State, as we must, we conclude that the evidence was sufficient to sustain the conviction.

"We review a challenge to the sufficiency of the evidence to determine 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." *Jones v. State*, 240 Md. App. 26, 41 (2019) (citation and internal quotation marks omitted). "When evaluating the sufficiency of the evidence in a non-jury trial, we will not set aside the judgment of the trial court on the evidence unless it is clearly erroneous, giving due regard to the trial judge's opportunity to judge the credibility of the witnesses." *Livingston v. State*, 192 Md. App. 553, 572 (2010). "If there is any competent evidence to support the factual findings of the trial court, those findings cannot be held to be clearly erroneous." *Goff v. State*, 387 Md. 327, 338 (2005) (citations and internal quotation marks omitted). "Circumstantial evidence is sufficient to sustain a conviction[,]" provided that "the inferences made from circumstantial evidence [ ] rest upon more than mere speculation or

conjecture." *Hall v. State*, 233 Md. App. 118, 137 (2017) (quoting *Corbin v. State*, 428 Md. 488, 514 (2012)).

To convict Mr. Cunningham of second-degree assault, the State was required to prove that Mr. Cunningham intentionally caused offensive physical contact to Ms. Summers without consent or legal justification. *Nicolas v. State*, 426 Md. 385, 403-04 (2012). Although Ms. Summers was not directly asked whether she consented to the assault, a reasonable factfinder could have inferred lack of consent from the contents of her signed statement and from the manner in which she described the incident to police, as seen in the body camera footage. In her oral statements to the police officers who responded to the scene within minutes of the conflict, and in her handwritten statement given to the officers, Ms. Summers reported being punched in the mouth, and the police took photographs documenting injury to Ms. Summers' mouth. Considered in the light most favorable to the State, there was sufficient evidence to support the trial court's finding of an assault.

JUDGMENT OF THE CIRCUIT COURT FOR CAROLINE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.