Circuit Court for Prince George's County
Case No. CT161560X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3002

September Term, 2018

ALVIN DONNELL VAUGHN

v.

STATE OF MARYLAND

Fader, C.J.,
Shaw Geter,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: December 10, 2020

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

In 2018, a Prince George's County jury convicted appellant Alvin Donnell Vaughn ("Vaughn") of first degree murder, home invasion, use of a handgun in a crime of violence, committing a violent crime in the presence of a minor, illegal possession of a regulated firearm, and possession of a firearm with a felony conviction. On appeal, Vaughn presents four questions for this court's review, which we have rephrased slightly, as follows:

1. Did the circuit court err in using compound voir dire questions and a "catch-all" question?

2. Was trial counsel ineffective in failing to object to the voir dire questions?

3. Did the circuit court err in admitting a witness's prior statement under Rule 802.1(e)?

4. Did the circuit court abuse its discretion in propounding a curative instruction during Appellant's closing argument?

5. Was the evidence admitted at trial sufficient to support Appellant's convictions?

For the reasons set forth below, we affirm the circuit court.

BACKGROUND & PROCEDURAL HISTORY

In November of 2016, Nicole Wilkins ("Wilkins") was living in Laurel, Maryland with her three children; her mother and grandmother; her sister, Rina Saunders ("Saunders"); and Saunders' three children. On the evening of November 26, 2016, everyone was in the house, including Gregory Myles ("Myles"), the father of Saunders' two young daughters. Wilkins was in the living room dozing off. When she heard a knock on the door, she answered it to find her friend "Bean" who asked to speak with

Saunders. Wilkins texted Saunders to come downstairs. When Saunders came downstairs, she went to speak with Bean outside while Wilkins went back to watching tv and dozing off. Suddenly, Wilkins heard a lot of screaming and saw kids "all over the place[.]" When Wilkins went upstairs, she saw Myles bleeding on the bedroom floor and began administering CPR. Myles suffered multiple gunshot wounds. After the paramedics arrived, Wilkins went to the police station where she was interviewed by Detective Kingston. During this interview, Wilkins identified the man who visited their house as "Bean," and recalled that he kicked in the door, ran upstairs with a gun, and shot Myles after engaging in a verbal altercation. Bean was identified as Vaughn.

Vaughn was convicted of first degree murder, home invasion, use of a handgun in a crime of violence, committing a violent crime in the presence of a minor, illegal possession of a regulated firearm, and possession of a firearm with a felony conviction. Vaughn was sentenced on November 15, 2018 and this timely appeal follows. We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

I. VOIR DIRE QUESTIONS

Vaughn asserts that the circuit court erred when it asked five questions in *voir dire* that requested the jurors assess their own bias. Vaughn alleges the following four questions were improper compound questions:

> (1) Would the fact that much of the testimony adduced by the State of Maryland will be from police officers influence you in any way or preclude you from reaching a fair and impartial decision based on the evidence?;

> (2) Is there any member of the jury panel who is so offended by the allegations that a gun was used, that they would be unable to render a fair and impartial verdict?;
> (3) This case involves children. Is there any member of the jury panel that is so offended by the fact that children are involved that they cannot render a fair and impartial verdict?;
> (4) Is there any member of the jury panel who has definite ideas regarding certain ethnic groups that would prevent them from rendering a fair and impartial verdict?

Vaughn asserts that the following "catch-all" question was also improper:

> Do you know any reason not yet mentioned that will impair your ability to listen fairly and objectively to the evidence in this case in order to render a fair and impartial verdict?

As trial counsel failed to note an objection to any of *voir dire* questions, Vaughn urges this court to invoke its discretionary plain error review. Plain error review is "reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Newton v. State*, 455 Md. 341, 364 (2017) (Internal quotations and citations omitted). Four conditions must be met in order to exercise our discretion to find plain error:

> "(1) there must be an error or defect—some sort of 'deviation from a legal rule'—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant; (2) the legal error must be clear or obvious, rather than subject to reasonable dispute; (3) the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings."

Id. (Internal quotations and citations omitted). Further, "[w]e review the trial judge's rulings on the record of the voir dire process as a whole for an abuse of

discretion, that is, questioning that is not reasonably sufficient to test the jury for bias, partiality, or prejudice." *Stewart v. State*, 399 Md. 146, 160 (2007) (Citations omitted).

With respect to the compound questions propounded by the circuit court, the first condition in *Newton* has not been met as Vaughn affirmatively waived any objection to his contentions. "Waiver is the intentional relinquishment or abandonment of a known right. Forfeited rights are reviewable for plain error, while waived rights are not." *State v. Rich*, 415 Md. 567, 580 (2010) (Internal citations and quotations omitted). "It is sufficient to preserve an objection during the *voir dire* stage of trial simply by making it known to the circuit court what is wanted done." *Brice v. State*, 225 Md. App. 666, 679 (2015) (Internal citations and quotations omitted). In this case, trial counsel failed to do so.

The circuit court asked defense counsel if she had any objection to the State's proposed *voir dire*. Defense counsel's only objection was with respect to the description of the crime. When asked if she had any other objections to the State's proposed *voir dire*, she stated there were no further objections. Similarly, after the court promulgated *voir dire*, defense counsel did not request the court to ask any additional questions. Defense counsel further stated she was satisfied with the *voir dire*. Defense counsel failed to preserve an objection, and intentionally relinquished the right to an objection when affirmatively advising the court that there were no further objections and counsel was satisfied with *voir dire*. Vaughn waived any right to plain error review by affirmatively advising the circuit court that he did not object to the *voir dire*, rather than merely failing to raise an objection when the court asked if they had an objection.

Additionally, "counsel not only failed to object to the *voir dire* question at any point, but counsel also accepted the impaneled jury without objection or qualification." *Burris v. State*, 206 Md. App. 89, 142 (2012), *rev'd on other grounds*, 435 Md. 370 (2013). Counsel's failure to object "supports the conclusion that appellant failed to satisfy the second prong of plain error review under *Rich*—that the alleged legal error must be clear or obvious, rather than subject to reasonable dispute." *Id.*

II. INEFFECTIVE ASSISTANCE OF COUNSEL

The second issue on appeal concerns whether trial counsel was ineffective in failing to object to the compound nature of the court's *voir dire*. "It is the general rule that a claim for ineffective assistance of counsel is raised most appropriately in a post-conviction proceeding." *In re Parris W.*, 363 Md. 717, 726 (2001). With respect to ineffective assistance of counsel claims, post-conviction proceedings are preferred because "the trial record rarely reveals why counsel acted or omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel's ineffectiveness." *Mosley v. State*, 378 Md. 548, 561 (2003).

Vaughn alleges that "the only conceivable reason" for his counsel's failure to object to the *voir dire* questions was ignorance of the law which constitutes deficient performance. As this court does not have the opportunity to develop a full record including the basis for the challenged conduct by counsel, we will not reach Vaughn's claim of ineffective assistance of counsel.

III. ADMISSION OF WITNESS'S PRIOR STATEMENT

Vaughn asserts that the circuit court abused its discretion in three different ways by admitting Wilkins' statement to Detective Kingston. First, Vaughn alleges that the court failed to make a finding that Wilkins' memory loss was feigned or real prior to admitting her prior inconsistent statement. Second, Vaughn avers that the record did not establish that Wilkins was being untruthful when she stated she did not remember what she told Detective Kingston with respect to how Myles sustained his injuries and how her front door was damaged. Finally, Vaughn claims the court erred in admitting Wilkins' statement because it was predominantly Detective Kingston's testimony "summarizing" Wilkins' inaudible testimony.

Maryland Rule 5-802.1 permits a circuit court to admit otherwise inadmissible hearsay statements if the statement is "inconsistent with the declarant's testimony" and 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). An inconsistent statement "may arise from memory loss or any other reason." *Wise v. State*, __ Md. __, slip op. at 8 (2020). The court "need not inquire into the reason for the inconsistency and may treat actual memory loss in the same way as feigned memory loss." *Id*. at 6. The Court in *Wise* explained, "[w]hen a witness testifies to a contradictory version of events, whether through conflation, omission, or some other reason, it qualifies as a positive contradiction. The reason for the inconsistency is irrelevant." *Id*.

Though the reason for inconsistent testimony is irrelevant, it is within the discretion of the trial court to determine whether the lack of memory is real or feigned. *See McClain v. State*, 425 Md. 238, 254 (2012). "The decision 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, and such a decision cannot be made from the cold record." *Id*. (Internal quotations and citations omitted). The rule does not explicitly require "that findings be placed on the record." *Id*. at 252. After the State requested that the court find that Wilkins feigned her memory loss, the court ruled that the prior inconsistent statements would be admitted as evidence. We presume by the court's implicit acceptance of the State's argument that the court made the proper finding that the memory loss was feigned.

Vaughn next alleges that the circuit court erred in finding that Wilkins' memory loss was feigned because the record failed to establish that she was being untruthful about her memory loss. The State argues that "it would be remarkable to remember some of the more banal events of the evening and forget the most extraordinary one." In determining whether memory loss is real or feigned, "[i]nconsistency may be implied from partial testimony, i.e., an omission, because it is reasonable to infer from the witness's ability to testify partially that [s]he has the ability to testify fully but is unwilling to do so." *Corbett v. State*, 130 Md. App. 408, 425 (2000).

Prior to trial, Wilkins was interviewed by police the night of the murder. In that interview, Wilkins told police that after Vaughn knocked on the door, she opened the

door and alerted her sister that Vaughn was there. She then stated that after Saunders went outside with Vaughn, Myles came downstairs, went outside, and closed and locked the door behind him. Finally, Wilkins told police that Vaughn then kicked the door in, ran upstairs with a black gun, had a verbal altercation with Myles, and shot him.

At trial, however, Wilkins testified that she opened the door for Vaughn and called or texted her sister to alert her to his arrival, but then she could not recall what happened until later when she saw children running down the stairs. She recalled walking upstairs to find Myles bleeding from gunshot wounds. Despite repeated attempts by the State to refresh Wilkins' recollection with her previous statements, Wilkins maintained that she could not recall what occurred after she opened the door.

The record shows that Wilkins' trial testimony was inconsistent with her prior statement and that the circuit court found her assertions of memory loss of specific events to be disingenuous. It is reasonable to infer from Wilkins' ability to testify partially about the events of the evening that she had the ability to testify fully but was unwilling to do so. We conclude the circuit court did not err in admitting Wilkins' prior statement as substantive evidence.

Finally, Vaughn asserts that the court erred in admitting Wilkins' statement because much of the conversation consisted of Detective Kingston summarizing or repeating Wilkins' statement. At trial, Vaughn objected to the admissibility of the entire conversation, including statements made by Detective Kingston. The State explained that the detective was repeating Wilkins' testimony when her statements were inaudible.

Further, the State noted that the two relevant portions – how Myles was injured and how the door was broken – were audible and not muffled. The court ultimately admitted the evidence, determining that some of Detective Kingston's statements were repeating Wilkins' statements.

We perceive no abuse of discretion in admitting the statement in its entirety because the court determined that the prior inconsistent statement was audible with respect to the State's questions regarding how Myles was injured and how the door was damaged, and the court further determined that the detective was merely repeating Wilkins' inaudible testimony.

IV. JURY INSTRUCTION

Vaughn asserts that the circuit court abused its discretion during closing argument by reminding the jury that Mia Saunders' video statement had not been admitted in evidence and promulgating the instruction in the middle of defense counsel's closing argument. Vaughn alleges the content and timing of the judges' instruction undermined his right to a fair trial.

Maryland Rule 4-325(a) permits the court to give interim instructions to the jury in its discretion. Md. Rule 4-325(a). "[W]hen the court finds that inadmissible evidence has been presented to the jury, it is within the discretion of the trial court to decide whether a cautionary or limiting instruction should be given." *Carter v. State*, 366 Md. 574, 588 (2001).

At trial, Vaughn's counsel paraphrased statements in Mia Saunders' videotaped interview with Detective Shapiro. The interview included statements that she was in her room watching TV, that someone kicked down the door, was arguing with her father, and pulled out a gun and shot her dad, yet her door was closed the entire time. Mia Saunders' interview had been used to refresh her memory; however, it was not admitted in evidence. The purpose of the court's instruction in the instant case was "to guide the jury in its receipt of the evidence and to eliminate any confusion that irrelevant and prejudicial evidence might have caused in the minds of the jury." *Carter*, at 588. Under the circumstances, given that two other prior statements had been admitted at trial for substantive purposes, it was within the circuit court's discretion to advise the jury that this particular statement was not admitted in evidence and to provide the curative instruction at that time.

V. SUFFICIENCY OF THE EVIDENCE

Vaughn alleges that the evidence was insufficient to support his conviction because there was "no definitive evidence that anyone saw [Vaughn] actually kill anyone." Specifically, Vaughn argues the evidence is insufficient because (1) of the four people inside the home that called 911, no one identified the shooter; (2) the two witnesses that did identify Vaughn as the shooter gave numerous accounts that were inconsistent; (3) there was no forensic evidence connecting Vaughn to the crime scene; and (4) there was an alternate suspect.

The standard of review for determining whether sufficient evidence exists to support a conviction on appeal is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier or fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Coleman*, 423 Md. 666, 672 (2011) (quoting *Facon v. State*, 375 Md. 435, 454 (2003)). The verdict must be 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 offenses charged beyond a reasonable doubt." *State v. Albrecht*, 336 Md. 475, 479 (1994).

At trial, Detective Kingston testified that the police did not have a suspect until Wilkins provided a statement identifying Vaughn as the man who came to the house. Although no one identified the shooter when calling 911, both Mia Saunders and Wilkins identified Vaughn as the man that came to their house on the night of the murder. Wilkins told Detective Kingston that "Bean" kicked the door open and had a black gun. Akira Dunbar, Saunders' daughter, told the police that "Bean killed Greg." Detective Talley, the lead investigator, testified that police determined the other suspect was not involved in the crimes, but Vaughn became a suspect after witness interviews following the murder.

Though there were inconsistencies in Wilkins' and Dunbar's statements, "it is the jury's task to resolve any conflicts in the evidence and assess the credibility of the witnesses." *Smiley v. State*, 138 Md. App. 709, 718 (2001). The jury in this case resolved

any inconsistencies raised by the evidence in favor of finding that, beyond a reasonable doubt, Vaughn committed the crimes. We hold that there was sufficient evidence from which a rational juror could find that Vaughn committed these crimes.

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