Circuit Court for Charles County
Case No. C-08-CR-18-000580

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0025

September Term, 2020

MELVIN JOHNSON

v.

STATE OF MARYLAND

Reed,
Wells,
Zic,

JJ.

Opinion by Wells, J.

Filed: June 3, 2021

After a four-day trial, a jury empaneled in the Circuit Court for Charles County convicted appellant Melvin Johnson of first-degree assault and reckless endangerment of Agnes Reed, second-degree assault on Kelvin Dickens, reckless endangerment of Ralph Sargant, second-degree assault and reckless endangerment of George Toye, home invasion, attempted arson, violation of a peace order, and malicious destruction of property valued at less than $1,000. The court sentenced Mr. Johnson to a total sentence of fifty-five years' incarceration, suspending all but twenty years, plus a period of probation.

Mr. Johnson filed a timely appeal and poses two questions which we have rephrased:[1]

1. If preserved, did the trial court properly exercise its discretion in the conduct of George Toye's examination?
2. Did the trial court properly overrule Mr. Johnson's hearsay objection to Kelvin Dickerson's testimony regarding an out-of-court question he had previously posed to Mr. Johnson?

Finding no error in either instance, we affirm.

[1] The questions which Mr. Johnson poses in his brief are:

1. Did the court abuse its discretion: (a) by failing to sufficiently inquire into Mr. Toye's competence; (b) by failing to control Mr. Toye's conduct while testifying; and (c) by foreclosing cross-examination of Mr. Toye?
2. Did the trial court err when it admitted Mr. Dickens' hearsay statements because the statements did not fall within a recognized hearsay exception?

FACTUAL BACKGROUND

The Bottom is a juke joint located in Mason Springs.[2] Late on the night of June 30, 2018, Agnes Reed, Kelvin ("Mike") Dickens, Ralph Sargant, and George Toye went there for a couple of hours to socialize. Sometime after midnight, the four returned to Ms. Reed's house. Ms. Reed and Mr. Dickens retired to her bedroom, while Messrs. Toye and Sargant went to a different room.

Ms. Reed testified that a barking dog awakened her. She got up and went to the kitchen where she heard someone knocking at her kitchen door. The door's glass panes were inexplicably blocked by a washer and dryer so she could not easily see who was outside. Whoever was outside asked Ms. Reed if they could use a phone because their car had broken down. She went to get Mr. Dickens, who upon arriving at the kitchen, quickly realized that "Melvin" (Johnson) was outside. Mr. Dickens told Ms. Reed not to let him in. Just then, Mr. Johnson used a porch chair to shatter a glass patio door and got inside the house.

Once inside, Ms. Reed said that Mr. Johnson threw gasoline "all in [her] face." Her eyes burning, Ms. Reed could see that Mr. Johnson was "spreading gas all through the house." After he got to the last bedroom—Mr. Sargant's—Mr. Johnson tried to set the house on fire, but only succeeded in burning the carpet. Mr. Dickens accosted Mr. Johnson

[2] From Penny's Tavern-the Bottom's Facebook page: "Penny's is a down home juke joint. Come anytime to hear the best blues, or rhythm and soul from back in the day." https://bit.ly/3mtuZEn. As Ms. Reed's testimony developed, however, it was unclear if the parties really were at the Bottom on the night of June 30, 2018, or Ford's Wonder Bar or the Mattawoman. The other occupants of the house confirmed that they were at "the Bottoms" and had gone to the other establishments earlier in the evening.

in the hallway and they began to fight. Mr. Johnson ran out of the house, lit another container of gasoline aflame and threw it at Ms. Reed, but missed her. Mr. Toye stopped Mr. Johnson before he could leave, and they began to fight. Ms. Reed intervened; Mr. Johnson ran to his van and drove away. Someone called the police and the fire department. Ms. Reed called it "a terrible, terrible night."

As it happens, Ms. Reed had a relationship with Mr. Johnson. Whether it was an intimate one or not depended on who was asked. Based on her cross-examination of Ms. Reed, the defense counsel believed that it was. Ms. Reed was adamant that it was not. Indeed, Ms. Reed testified that Mr. Johnson was so far out of her good graces that about two weeks before the incident she obtained a peace order against him. So, on the early morning of July 1, 2018, he was not supposed to be anywhere near her or her house. Cross-examination revealed, however, that despite the "no contact" provision in the peace order, Ms. Reed and Mr. Johnson still saw each other occasionally. This fact had prompted Mike Dickens, while the parties were at either the Bottom or Ford's Wonder Bar, and mere hours before the incident, to demand that Mr. Johnson stop "seeing" Ms. Reed.

The other occupants of the house that night all testified to the same version of events as Ms. Reed. To be sure, each witnesses' testimony varied and there were occasional lapses in memory, but each person consistently related the same essential facts. For example, Mr. Toye said that he and Mr. Sargant were watching television in the latter's room when he heard a dog barking and assumed someone was outside the house. His suspicion was confirmed when he heard "a ramming noise" coming from outside the house. He left the bedroom and saw Mr. Johnson "trying to break the window." "When he busted the

window, he . . . he was . . . he had gas. And . . . and was trying to light, it seemed like to light the you, know, light a match to burn the house down." According to Mr. Toye, he and Mr. Dickens began fighting with Mr. Johnson, who was swinging a lamp like a club. Mr. Toye struck Mr. Johnson on the head with a bottle. Mr. Johnson retreated outside of the house, threw something at Ms. Reed, and then fled. Mr. Toye's testimony and his conduct during examination will be discussed in detail later in this opinion.

The law enforcement officers who responded to the scene, Cody Garner, Renee Cyler, Cornelius Harris, Kenneth Kleiza, and Raymond Brooks, all testified that when they arrived, Ms. Reed's person and her house reeked of the odor of gasoline, that her patio door was smashed, there were blood droplets in various places throughout the house, and there were burned areas of carpeting. Officer Garner testified that he also found a "smoldering" rag fused into a burned area of a hall carpet. There was, surreally, also a small fire burning in Ms. Reed's driveway. The police took numerous photographs documenting the scene, all of which were entered into evidence. Genetic evidence was also gathered, chiefly from blood on the glass shards of the smashed patio door and blood left on the bludgeon-lamp. These samples were later compared with Mr. Johnson's genetic material and were found to be a match.

The defense declined to present any evidence at trial. The jury convicted Mr. Johnson of the crimes previously mentioned. The court sentenced Johnson to a total sentence of fifty-five years' incarceration, suspending all but twenty years. He filed this timely appeal. Additional facts will be discussed in the following sections of this opinion.

DISCUSSION

I. WHETHER THE COURT ABUSED ITS DISCRETION DURING GEORGE TOYE'S TESTIMONY IS NOT PRESERVED AND, REGARDLESS, THE COURT PROPERLY EXERCISED ITS DISCRETION.

A. The Parties' Contentions

Mr. Johnson insists that over the course of Mr. Toye's testimony, the circuit court erred in three distinct but related ways. *First*, Mr. Johnson asserts the trial court abused its discretion under Rule 5-601 for "failing to sufficiently inquire into Mr. Toye's competence to testify, or to make a finding on that issue, despite observing Mr. Toye struggling to answer questions properly, suspecting that he may have been intoxicated, and learning of defense counsel's personal knowledge of Mr. Toye's history of intoxication in court." Mr. Johnson acknowledges that the court "inquired into whether Mr. Toye was intoxicated," but claims that "it never resolved the question of his competency[.]" Mr. Johnson claims that a substantial question regarding Toye's competency was raised based on his conduct, claiming that he could not "observe, recollect, and recount pertinent facts" and that he "failed to 'demonstrate an understanding of the duty to tell the truth.'" Because a substantial question was raised, according to Mr. Johnson, he believes that the court failed to meet its consequential requirement to conduct an inquiry to "satisfy the [c]ourt that the witness [wa]s competent to testify."

Second, Mr. Johnson argues that the trial court failed to "properly control" Mr. Toye's conduct while testifying. Mr. Johnson aims this argument at Mr. Toye's testimony overall, but specifically points us to the following statements by Mr. Toye with which Mr. Johnson takes issue:

- (1) "Well, I could sit here and answer no questions, and what can you do? I don't have to say anything, you know what I'm saying?";
- (2) "I just don't like to answer--" before being interrupted by the State's objection;
- (3) "I just don't like to see . . . my thing is, I don't like to see this happen, and I don't like to see nobody, you know, 'cause I don't know anything about this fella. That hurts me real ba[d], you know, to talk of this."

Mr. Johnson believes that he was seriously prejudiced by Mr. Toye's behavior in stating these responses because "Mr. Toye was an important witness" who "was one of the only witnesses who testified to actually seeing Mr. Johnson set something on fire." As support, Mr. Johnson points us to the Court of Appeals' *Marshall v. State*, 291 Md. 205, 213 (1981) opinion, which he cites to mean that "intervention can be necessary to maintain the integrity of court proceedings and defendants' rights to a fair trial."

Third, Mr. Johnson argues that the trial court violated his right to confront a witness against him under the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights. Mr. Johnson relies on footnote one of this Court's opinion in *Cruz v. State*, where we noted in dicta "that appellant was free to question the victim about the degree of drug influence . . . and to argue to the jury that, because the victim had used drugs that morning, her version of the events was unreliable." 232 Md. App. 108, 111 (2017) (citing *Lyba v. State*, 321 Md. 564, 571 (1991) (explaining that defense counsel could delve into the degree of drug influence on the witness **on the day of the alleged crime** "so that the jury could decide the credibility of the victim and how much weight to give her testimony")).

The State responds by grouping Mr. Johnson's three alleged errors together arguing, first, that the matters are not preserved for appellate review and second that, even if preserved, the trial court committed no error. With respect to the preservation issue, the State claims that none of Mr. Johnson's objections satisfied Rule 4-323's requirement that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." Rule 4-323(a). The State notes that although (1) defense counsel had stated that Mr. Toye had apparently appeared in court under the influence of alcohol in a previous, unrelated case, (2) defense counsel and Mr. Toye appeared to mishear each other during cross-examination, and (3) defense counsel asked that Mr. Toye be admonished and his testimony be stricken for speaking to Mr. Johnson, the court nonetheless admonished Mr. Toye and defense counsel continued cross-examination without further objection. Importantly, the State also highlights that Mr. Johnson did not "raise the issue of Mr. Toye's competency [n]or Mr. Johnson's constitutional right to confrontation." The State believes that "Mr. Johnson failed to object or acquiesced in the court's resolution of the objections that he did make."

Even if preserved, however, the State contends that Mr. Johnson's claims fail on the merits. With regards to competency, the State believes that Mr. Johnson "did not even attempt" to "carry his burden to show that Mr. Toye was incompetent[.]" With respect to the court's control over Mr. Toye, the State notes that the court admonished him every time that it was requested to do so by Mr. Johnson and that there is no indication that this left Mr. Johnson unable to explore any topic on cross-examination. And as to Mr. Johnson's

Sixth Amendment right to confrontation, the State rejects the notion that the court inhibited Mr. Johnson from cross-examining Mr. Toye. After the court's exploration into Mr. Toye's alleged intoxication at the bench, the State argues that defense counsel voluntarily chose not to undertake further questioning.

B. Standard of Review

The relevant standard of review is undisputed as both parties agree that an abuse of discretion standard applies. Indeed, we have held that competency determinations are "within the sound discretion of the trial judge." *Perry v. State*, 381 Md. 138, 148 (2004). "Absent an abuse of discretion," the trial judge's assessment "will not be disturbed on appeal." *Id.* "In determining whether a witness is competent to testify, the trial court, in its discretion, should determine 'whether an individual witness has sufficient capacity to observe, recollect, and recount pertinent facts and whether that individual demonstrates an understanding of the duty to tell the truth.'" *Cruz v. State*, 232 Md. App. 108, 112 (2017) (quoting *Perry*, 381 Md. at 148). Similarly, whether a trial court is able to intervene when a witness disrupts court proceedings is reviewed under an abuse of discretion standard. *Marshall*, 291 Md. at 206.

Moreover, we likewise review the limitation of cross-examination under an abuse of discretion standard. *Baires v. State*, 249 Md. App. 62, 96 (2021). While criminal defendants hold the right to cross-examine witnesses against them, which comes from the Sixth Amendment's Confrontation Clause and Maryland Declaration of Rights Article 21 right to confront witnesses against them, *Pantazes v. State*, 376 Md. 661, 680 (2003) (citation omitted), such a right is not limitless. *Smallwood v. State*, 320 Md. 300, 307

(1990). Indeed, trial judges have the authority and the sound discretion to limit the scope of cross-examination. *Id.* Trial judges are afforded "wide latitude to establish reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Pantazes*, 376 Md. at 680 (citations omitted). Accordingly, we review with an abuse of discretion standard any cross-examination limitation imposed by the court on Mr. Johnson.

C. Preservation Analysis

We first address whether Mr. Johnson's alleged errors are appealable. Should we find them to be unappealable, then it becomes unimportant as to whether Mr. Johnson succeeds on the merits as we would be unable to grant him relief.

The State alleges Mr. Johnson waived an objection under Maryland Rule 4-323. The Rule, in relevant part, provides:

> **(a) Objections to Evidence.** An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs. The court shall rule upon the objection promptly.
>
> . . . .
>
> **(c) Objections to Other Rulings or Orders.** For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court.

1. Appealability of Competence Inquiry

Taking *first* the issue of whether the trial court failed to sufficiently inquire into Mr. Toye's competence, we agree with the State that the issue is not properly preserved. In order for the matter to be appealable, Rule 4-323 provides that Mr. Johnson must have made an objection "at the time the evidence [wa]s offered or as soon thereafter as the grounds for objection bec[a]me apparent[,]" Rule 4-323(a), or, with respect to a ruling by the trial court, that Mr. Johnson made "known to the court the action that the party desire[d] the court to take or the objection to the action of the court." Rule 4-323(c). Here, we are unable to find that Mr. Johnson's counsel made any objection at trial that would have preserved his contention that the trial court did not adequately resolve whether Mr. Toye was incompetent to testify as a result of alleged intoxication.

Just prior to the State's direct examination of Mr. Toye, Mr. Johnson's counsel asked to approach the bench where she made the judge and prosecutor aware that she had seen Mr. Toye "in the courtroom, very drunk, very high" in a previous, unrelated case. Immediately after, however, Mr. Johnson's counsel indicated that she had no reason to believe that Mr. Toye was under the influence and that she did not "plan on bringing it up[.]" The State's direct examination of Mr. Toye, which lasted over thirteen full transcript pages, proceeded without objection as to Mr. Toye's supposed intoxication or incompetence. At another bench conference, Mr. Toye's lack of impeachable prior offenses was discussed—apparently Mr. Johnson's attorney had confused another witness's criminal record with Mr. Toye's—but Mr. Johnson's counsel still did not state that Mr. Toye was incompetent to testify because she thought he was intoxicated.

Indeed, Mr. Johnson's counsel did not even bring up the possibility of intoxication until midway through Mr. Toye's cross-examination, when she pointedly asked him, "Are you . . . are you drunk today?" Although the judge sustained the State's objection to this question, defense counsel revisited the subject: "I am going to ask you one more time . . . are you under the influence right now?" After the State again objected, a bench conference ensued. The trial judge stated that any inquiry about Mr. Toye's possible intoxication would have to be done outside the presence of the jury, and both the State and the defense agreed.

Indeed, Mr. Johnson acknowledges that the judge "briefly inquired into whether Mr. Toye was intoxicated," but he claims that the trial judge also suspected that Mr. Toye was intoxicated but the judge failed to "resolve[] the question of his competency[.]" Due to its importance to our preservation analysis, we reprint the relevant inquiry in full:

> THE COURT: Alright, come up here.
>
> [COUNSEL FOR JOHNSON]: He can stand in the middle.
>
> THE COURT: Are you under the influence--
>
> GEORGE TOYE: Huh? Excuse me.
>
> THE COURT: Are you under the influence of alcohol at this time?
>
> GEORGE TOYE: No ma'am. If it is, I want you to test me.
>
> THE COURT: Have you had anything to drink today?
>
> GEORGE TOYE: Huh . . . huh?
>
> THE COURT: Have you had anything to drink today?

GEORGE TOYE: No, I haven't, I haven't. I have no reason to lie to you.

THE COURT: I am just asking you if you have had anything to drink today?

GEORGE TOYE: Ma'am?

THE COURT: Have you had anything to drink today?

GEORGE TOYE: No, I haven't.

THE COURT: Okay.

GEORGE TOYE: Because I comes out, I am the type of person, I comes out and say what I say.

THE COURT: Okay, but I need you to listen to the question.

GEORGE TOYE: Uh-hum . . . uh-hum?

THE COURT: Answer it without extra commentary, okay?

GEORGE TOYE: Well, okay then.

THE COURT: Sometimes the questions are yes or no. If so, just say- - - -

GEORGE TOYE: Well I'm sorry, 'cause I haven't never been into a situation like this.

THE COURT: That's okay.

[THE STATE]: Can I also reiterate--

THE COURT: Yes.

[THE STATE]: --because it is a State witness. Just answer her questions, sir.

GEORGE TOYE: Yeah.

THE COURT: Okay.

[THE STATE]: Okay, don't (inaudible)--

GEORGE TOYE: Don't say anything, just say yes or no. I'm trying . . . I am not trying to disrespect you, but I'm doing stuff that I haven't (inaudible).

[THE STATE]: That's fine, just answer the questions.

GEORGE TOYE: Just say yes or no.

THE COURT: Okay, thank you. If it is a yes or no [question].

Our review of the record illustrates that after this exchange, the neither the judge nor counsel revisited Mr. Toye's alleged intoxication.

Again, in order for us to be able to review Mr. Johnson's appeal under Rule 4-323(a), Mr. Johnson must have made an objection "at the time the evidence [wa]s offered or as soon thereafter as the grounds for objection bec[a]me apparent." Mr. Johnson's counsel (1) indicated that she had observed Mr. Toye under the influence of drugs or alcohol in court in a prior, unrelated case, (2) asked Mr. Toye on cross-examination whether he was under the influence of drugs or alcohol, and (3) raised the issue at a bench conference and the trial judge questioned Mr. Toye about whether he had consumed alcohol before coming to court. He denied that he had. The important point is, however, that Mr. Johnson's counsel did not object to Mr. Toye's testimony—neither during nor after he had testified. Accordingly, because no objection was made, the matter is not appealable under Rule 4-323(a).

Likewise, the issue is not made appealable under Rule 4-323(c). As we have stated, in order to be appealable under this section of the Rule, defense counsel should have

"ma[d]e known to the court the action that [she] desire[d] the court to take or the objection to the action of the court." We acknowledge that Mr. Johnson indeed made known that he desired the court to conduct an inquiry into Mr. Toye's competence outside the presence of the jury. However, as our review of the transcript reveals, and as Mr. Johnson now concedes, the judge conducted exactly that inquiry. Significantly, Mr. Johnson's counsel took no issue with the court's inquiry and thanked both the judge and Mr. Toye before proceeding with cross-examination and did not raise the issue of competency again.

The Court of Appeals has held that "the doctrine of acquiescence—or waiver—is that a *voluntary* act of a party which is inconsistent with the assignment of errors on appeal normally precludes that party from obtaining appellate review." *Exxon Mobil Corp. v. Ford*, 433 Md. 426, 462, *as supplemented on denial of reconsideration*, 433 Md. 493 (2013) (emphasis in original) (internal quotation and citation omitted). Here, we believe the relevant voluntary act to be Mr. Johnson's acquiescence to the inquiry conducted by the trial judge. Straightforwardly, "where a party acquiesces in a court's ruling, there is no basis for appeal from that ruling." *Simms v. State*, 240 Md. App. 606, 617 (2019) (citing *Grandison v. State*, 305 Md. 685, 765 (1986) ("By dropping the subject and never again raising it, [appellant] waived his right to appellate review[.]"), *cert. denied*, 479 U.S. 873 (1986)). Because Mr. Johnson acquiesced to the judge's inquiry into Mr. Toye's competency, he may not seek relief from this Court for the alleged error.

2. Appealability of Control and Admonishment Issue

Second, and also in the Rule 4-323 context, we examine the preservation argument raised by the State that concerns Mr. Johnson's contention that the trial court erred by

failing to control Mr. Toye's conduct while testifying. Specifically, Mr. Johnson argues that the trial court did not properly control Toye's testimony and that "[t]he court should have done more to admonish Mr. Toye[.]" For reasons similar to those discussed above, we conclude that this argument is not preserved.

In this instance, we are unable to find any specific objection that Mr. Johnson's counsel made that the court overruled, *see* Rule 4-323(a), nor a request for the court to take action but the court declined to do so, *see* Rule 4-323(c). Just as in the preceding section of this opinion discussing Mr. Toye's alleged incompetence, in this instance defense counsel likewise raised no objection about the court not admonishing or otherwise trying to control Mr. Toye during examination. To be sure, there are instances during cross-examination in which Mr. Johnson's counsel asked the judge to admonish Mr. Toye. But, importantly, the trial judge did as counsel requested. And Mr. Johnson's counsel did not object to how the court admonished Mr. Toye or suggest another method of attempting to get Mr. Toye to answer the questions posed to him directly.

For example, defense counsel asked the judge: "Your Honor, if we can ask [Mr. Toye] just to answer the question?" The trial judge agreed, instructing Mr. Toye, "Okay, just . . . just answer the question please . . . Just answer the question without the extra commentary, okay?" Counsel did not object to the judge's response, or otherwise state how the court could more effectively "control" Mr. Toye. Instead counsel turned her attention to Mr. Toye and continued with cross-examination. Later, counsel again requested that the trial judge instruct Mr. Toye to answer the question: "Your Honor, if we can just ask the . . . Mr. Toye, just to answer the question?" And again, the trial judge

satisfied defense counsel's request, instructing, "Yes, please answer the question, sir." Like before, Mr. Johnson's counsel made no objection to the judge's response or ask the judge to further control or admonish Mr. Toye.

Soon thereafter, when Mr. Toye was silent when asked a question, defense counsel again pleaded with the trial judge: "Your Honor, then I am going to ask that everything that [Mr. Toye] said be stricken, and I am asking to admonish the witness?" When the trial judge instructed Mr. Toye, "Alright, you need to answer the questions if you know the answer. You can ask another question, [counsel for Johnson,]" defense counsel resumed cross-examination without expressing any disagreement with the court's response. Later, the trial judge stated that "the jury will disregard the nonresponsive answer." At the end of cross-examination, defense counsel did not lodge an objection or request the court take any further action. Further, counsel did not express any dissatisfaction whatsoever with the judge's repeated admonishments to Mr. Toye. Similarly, at the end of redirect examination, when the judge inquired as to whether defense counsel had "anything else[,]" defense counsel replied "[a]bsolutely none." Finally, when Mr. Toye was excused, defense counsel requested that Mr. Toye "not say anything to [her] client." And the judge told Mr. Toye, "[d]o not say anything." In sum, we are unable to find that Mr. Johnson's counsel expressed any dissatisfaction whatsoever with how the trial judge responded to counsel's requests to get Mr. Toye to answer counsel's questions.

We note that Mr. Johnson takes exception to three specific instances where Mr. Toye made comments. They are when Mr. Toye said: (1) "Well, I could sit here and answer no questions, and what can you do? I don't have to say anything, you know what I'm

saying?"; (2) "I just don't like to answer--" before being interrupted by the State's objection; and (3) "I just don't like to see . . . my thing is, I don't like to see this happen, and I don't like to see nobody, you know, 'cause I don't know anything about this fella. That hurts me real ba[d], you know, to talk of this." In each instance, counsel either (1) expressed no dissatisfaction with the court's admonishment or (2) made no objection whatsoever. Although, on appeal, Mr. Johnson alleges that the court committed error. We disagree. If Mr. Johnson felt that the court's actions were inadequate or in some way prejudiced him, he was obliged to point that out to the court to give the court an opportunity to address the perceived error. He did not, thus, his complaints are not preserved for review. *See Jordan v. State*, 246 Md. App. 561, 587, *cert. denied*, 471 Md. 120 (2020).

3. Appealability of Confrontation Issue

Finally, we consider the State's argument that Mr. Johnson's claimed inability to confront Mr. Toye is not appealable. At the outset, we concede that the trial court did in fact sustain the State's objection when defense counsel pointedly asked Mr. Toye if he was drunk. Importantly, however, when defense counsel revisited the topic, again asking Mr. Toye whether he was under the influence, the court did not sustain the State's objection. Instead, a bench conference ensued where—significantly—defense counsel acquiesced in the court assessing Mr. Toye's competency outside the presence of the jury:

> [THE STATE]: I object. But you can't just accuse people of being drunk--
>
> THE COURT: We would have to do this . . . we would have to do this outside the presence of the jury if we are going to explore that.
>
> [JOHNSON'S COUNSEL]: **Right.**

. . . .

THE COURT: Okay, do you want me to bring him up here and just let, you can ask him that up here?

[THE STATE]: If you want to do that, that is okay.

THE COURT: Or do you want me to excuse them? Are you--

[JOHNSON'S COUNSEL]: **He (sic) can bring him up here. It doesn't matter to me**.

(Emphasis supplied). After the court inquired, defense counsel thanked the judge and Mr. Toye, but declined to pursue the topic of Mr. Toye's alleged intoxication. As noted, defense counsel did not revisit the topic when the cross-examination resumed.

We agree with the State that defense counsel's actions here constitute waiver. Although the trial judge at first sustained an objection to defense counsel's question regarding Mr. Toye's drunkenness/competency, the next, nearly identical question led to a competency inquiry—albeit outside the presence of the jury. If Mr. Johnson was unsatisfied with this, he was required to object or note his requested course of action at trial in order for us to be able to consider his grievance on appeal. Instead, counsel for Mr. Johnson noted her agreement with the method of inquiry into Mr. Toye's competency, thanked the judge for conducting such an inquiry, and never revisited the topic. Considering Mr. Johnson's alleged error on appeal would go against our precedent that ensures "that the trial court has been given the opportunity to correct its own error." *Jordan*, 246 Md. App. at 587. Accordingly, like Mr. Johnson's other complaints, we hold

that his alleged error in being denied the right to confront a witness against him is not appealable.

D. Merits

Although we hold above that all of the claims that Mr. Johnson has raised with respect to Mr. Toye are not appealable, we nonetheless hold as an alternative basis that even if any of Mr. Johnson's claims were appealable, his claims fail on the merits.

1. Merits of Competence Inquiry

We first consider whether the court sufficiently inquired into Mr. Toye's competency and correctly decided that he was competent. Under Rule 5-601, "[e]xcept as otherwise provided by law, every person is competent to be a witness." Nonetheless, as referenced in the committee note to the Rule, "[a] court could find, however, that because of insufficient memory, intelligence, or ability to express oneself, or inability to appreciate the need to tell the truth, a particular witness is not competent to testify as to certain matters." *Id.* Still, under Rule 5-601, "almost no one is *per se* incompetent to testify." *Perry*, 381 Md. at 145 (citing Lynn McLain, *Maryland Rules of Evidence* 103 (2d ed.2002)).

The Court of Appeals has determined that "[i]t is left to the trial court in its discretion to determine 'whether an individual witness has sufficient capacity to observe, recollect, and recount pertinent facts' and whether that individual 'demonstrates an understanding of the duty to tell the truth.'" *Id.* This Court has since stated that the determination is to be made by "the trial court, in its discretion." *Cruz*, 232 Md. App. at 112 (citing *Perry*, 381 Md. at 145). Respecting the discretion held by the trial court in

making such competency determinations, we afford great deference to the determination of the trial court:

> A trial court's determination that a witness is competent to testify is a matter within the trial court's discretion, and a decision in that regard will not be disturbed absent an abuse of discretion. [*Perry*] at 148[.] An abuse of discretion will be found only "'where no reasonable person would take the view adopted by the trial court,'" when the court acts "'without reference to any guiding principles or rules[,]'" or when the ruling is "'clearly against the logic and effect of facts and inferences before the court.'" *Md. Bd. of Physicians v. Geier*, 451 Md. 526, 544[] (2017) (quoting *Gallagher Evelius & Jones, LLP v. Joppa Drive–Thru, Inc.*, 195 Md. App. 583, 597[] (2010)).

Cruz, 232 Md. App. at 112.

Mr. Johnson largely relies on *Cruz* and *Perry* in arguing that the court erroneously allowed Mr. Toye to testify despite, according to Mr. Johnson, his incompetency as a result of his alleged intoxication. *See* 232 Md. App. 108; 381 Md. 138. As discussed in the preservation analysis on this point, we agree that Mr. Johnson raised the issue of incompetency by questioning whether Mr. Toye was intoxicated. But raising the issue alone is not enough. Indeed, this Court and the Court of Appeals have held that the burden of demonstrating that a witness is incompetent lies with the party who is opposing the witness. *Perry*, 381 Md. at 145, 153; *Cruz*, 232 Md. App. at 111-12.

Despite raising the issue to the trial court, Mr. Johnson did not meet his burden of demonstrating that Mr. Toye was incompetent. First, this Court has made clear that intoxication alone, "without more, does not render a witness incompetent to testify." *Cruz*, 232 Md. App. at 113. Therefore, even if Mr. Johnson had proven that Mr. Toye was intoxicated, that alone would not have been enough to prove that he was incompetent. And although Mr. Johnson 's attorney argued to the trial court that Mr. Toye was "not answering

the questions," "rambling," "talking," "cursing," and "doing all kinds of stuff[,]" these facts alone were not sufficient to meet the burden in proving that Mr. Toye was intoxicated, much less incompetent. There were no indicia of intoxication, such, as bloodshot eyes, slurred speech, or more importantly, the odor of alcohol. We note that after the judge questioned Mr. Toye, she allowed him to continue to testify, bolstering the conclusion that Mr. Toye was competent.

We also observe that simply because some witnesses may not express themselves articulately does not mean that they are intoxicated or incompetent. In the context of the trial, and after listening to the actual recording of Mr. Toye's testimony, it seemed that the prosecutor and defense counsel were confronted with an older gentleman who was unversed in the mechanics of a trial or oral examination. Both seemed to get frustrated that, either Mr. Toye might say something he should not, or that Mr. Toye would not answer a question directly. It would be unwise for us to hold that solely because a witness rambles, falls silent occasionally, or sometimes talks under their breath, without more, should indicate that they are intoxicated or incompetent.

Given that Mr. Johnson has not demonstrated that Mr. Toye was intoxicated or incompetent, we cannot conclude that "no reasonable person would take the view adopted by the trial court," that the trial court acted "without reference to any guiding principles or rules[,]" or that the ruling was "clearly against the logic and effect of facts and inferences before the court." *See Cruz*, 232 Md. App. at 112 (internal quotations and citations omitted). Consequently, we refuse to disturb the trial court's decision.

2. Merits of Control and Admonishment Issue

We next address whether the court adequately "controlled" Mr. Toye. When discussing whether this issue was preserved, we noted every instance in which defense counsel requested that the trial judge control or admonish Mr. Toye, so we will not repeat them here. As we explained, in each of these instances, the court appropriately admonished (and otherwise controlled) Mr. Toye, as defense counsel requested. We cannot see how the court abused its discretion in doing exactly as the defense asked.

Moreover, we do not believe that the trial court abused its discretion by declining to *sua sponte* control or admonish Mr. Toye at other junctures during his testimony when the defense did not ask the court to admonish Mr. Toye. Mr. Johnson relies on the Court of Appeals' opinion in *Marshall*, for the proposition that judges have "the right to interrogate [a] witness[] in an effort to clarify the issues[.]" *Marshall*, 291 Md. at 213. He also argues that "intervention can be necessary to maintain the integrity of court proceedings and defendants' right to a fair trial."

Our reading of *Marshal* differs. *Marshall* involved a set of factual circumstances in which the trial judge admonished a defendant witness "to tell the truth or be prosecuted for perjury." *Id.* at 206. We held the trial court's admonishments were proper, stating that "the court below acted only to insure that the witness testified truthfully." *Marshall v. State*, 46 Md. App. 695, 701 (1980), *rev'd*, 291 Md. 205 (1981). However, the Court of Appeals reversed us, holding that:

> the admonitions of the trial judge unnecessarily affected the remainder of the appellant's testimony and thereby infringed upon his right to present a defense and to have the jury perform its function in resolving inconsistencies

> between the statement as recorded by [a state police trooper] and the defendant's own testimony at trial. The trial judge abused his discretion and the defendant's conviction cannot stand.

Marshall, 291 Md. at 214.

Indeed, throughout *Marshall* the Court emphasized that trial courts should "proceed with extreme care" when warning witnesses:

> Reasons abound for the trial court to proceed with extreme care when warning a witness about the penalties of perjury. First, it is the jury's function to assess the credibility of the witnesses and determine the facts from the evidence presented. When the judge unnecessarily warns a witness of the consequences of perjury, he may unwittingly change the course of the witness' testimony so that it jibes with the court's concept of what is true or is persuasive, or, he may discourage the witness from testifying at all. Such a result infringes upon the defendant's Sixth Amendment rights to confront the witness against him and to present witnesses in his own defense . . . Second, the defendant is entitled to present and conduct his defense unhampered by the judge's idea of what that defense is or how it should be presented. Third, the defendant's right to competent representation during the course of the trial should remain untrammeled. Perjury warnings may intimidate defense counsel as well as the defendant himself, thereby discouraging counsel from eliciting essential testimony from the witness . . . Last, and perhaps most fundamental, a defendant in every case, whether it is a jury trial or not, is entitled to an impartial judge. A defendant is plainly denied this right when the judge's participation in the trial stifles the defendant's ability to freely present all of the competent evidence available.

291 Md. at 213-14. In fact, although Mr. Johnson quotes a partial sentence of *Marshall* to read that judges have "the right to interrogate witnesses in an effort to clarify the issues[,]" the rest of that same sentence reads, "**we stress that he should exercise this right sparingly**." *Id.* at 213 (emphasis added).

In sum, we are unconvinced—and Mr. Johnson points us to no authority to suggest—that the trial court should have *sua sponte* admonished or controlled Mr. Toye in addition to the numerous times that the trial court admonished Mr. Toye at the defense's

request. Accordingly, we conclude that the court did not abuse its discretion, assuming for the sake of argument that the issue is preserved for appeal.

3. Merits of Confrontation Issue

Finally, we consider the merits of Mr. Johnson's Sixth Amendment confrontation argument. Mr. Johnson argues here that the trial judge did not allow him to confront Mr. Toye about whether he was intoxicated in the presence of the jury. We perceive multiple problems with Mr. Johnson's reasoning. *First*, is his reliance on *Cruz*. *See Cruz*, 232 Md. App. at 112. In a footnote in *Cruz*, we briefly noted in dicta that the appellant there "was free to question the victim about the degree of drug influence[.]" *Id.* (citing *Lyba*, 321 Md. at 571). However, we see significant differences between the facts here and *Cruz*. In *Cruz*, the testifying witness freely admitted that she was a heroin addict and had used heroin on the day of trial. *Cruz*, 232 Md. App. at 110. Here, in contrast, Mr. Toye consistently maintained that he was not under the influence of alcohol or drugs, and the trial judge—as well as defense counsel—appeared to accept Mr. Toye's denial, since the issue was never again raised after the bench conference in which the court questioned Mr. Toye.

Greater distinctions arise between this case and *Lyba*—the case on which *Cruz* relies and to which we give even greater weight as it involves the actual holding of the Court of Appeals rather than a comment in a footnote in *Cruz*. *See Lyba*, 321 Md. at 571. *But cf. Cruz*, 232 Md. App. at 112. In *Lyba*, the question was not whether the witness was under the influence of drugs or alcohol while testifying but whether she had been under the influence on the day that she had observed the alleged crime. *Lyba*, 321 Md. at 571. There, the Court of Appeals held:

> It is clear that [the defendant] was entitled, on cross-examination of the victim, to ask whether she had ingested narcotics **on the day of the assault** and whether she had consumed alcohol on the day she saw [the defendant] in the park. Those questions went no further than calling for a "yes" or "no" answer. The questions were within the constitutionally required level of inquiry, and, therefore, not subject to limitation. Thus, the questions were proper, and triggered no exercise of discretion on the part of the trial judge.
>
> **If the answer to a question were "no[,]" that would be an end to the inquiry on that subject unless [the defendant] was able to produce evidence, contrary to the denial, which was sufficient to support further inquiry.** Judicial discretion and the balancing procedure would come into play only upon further inquiry.
>
> If the answer to a question were "yes," the defense could follow up the admission by delving into the degree of drug influence or alcohol intoxication so that the jury could decide the credibility of the victim and how much weight to give her testimony. The propriety of the questions seeking to ascertain the degree to which narcotics or alcohol affected the victim would be subject to the sound discretion of the trial judge, who, in the exercise of that discretion, would be called upon to balance the probative value of the testimony sought against unfair prejudice or harassment which might inure to the victim.

Id. (emphasis added).

Bearing in mind that the questioning in *Lyba* did not even involve supposed intoxication at trial but rather the day of the alleged crime, we nonetheless note that the Court of Appeals held that a defendant is required to "produce evidence, contrary to the denial [of intoxication,] which w[ould be] sufficient to support further inquiry." *Id.* As we stated earlier, we believe that just because a witness rambles, falls silent, or curses, does not alone indicate that the witness is intoxicated. Both parties, each of whom cite *Peterson v. State*, agree that defense counsel needed a good faith basis to conduct that line of questioning at trial. 444 Md. 105, 125 and 146 (2015). Based on the Court of Appeals'

decision in *Lyba* and in light of the facts of this case, we conclude that the defense had not established a good faith basis to believe that Mr. Toye was intoxicated when he testified at trial.

It would be especially unwise for us to hold otherwise given that the trial judge was in the best position to determine whether Mr. Toye was intoxicated during his testimony. While trial courts must certainly assure that defendants are afforded a constitutional threshold level of inquiry, it is equally true that "trial courts may limit the scope of cross-examination 'when necessary for witness safety or to prevent harassment, prejudice, confusion of the issues, and inquiry that is repetitive or only marginally relevant.'" *Peterson*, 444 Md. at 122–23 (internal quotation omitted). Accordingly, the trial court here did not abuse its discretion in disallowing defense counsel from conducting its initial questioning of Mr. Toye outside the presence of the jury to determine if he might be intoxicated.

II. THE TRIAL COURT MADE NO ERROR IN OVERRULING Mr. JOHNSON'S HEARSAY OBJECTION TO KELVIN (MIKE) DICKENS' TESTIMONY.

A. The Parties' Contentions

Mr. Johnson claims additional error by asserting that the trial court improperly admitted a statement Mr. Dickens made which Mr. Johnson claims is hearsay and does not fall within an exception. Mr. Johnson is referring to the prosecutor asking Mr. Dickens to tell the jury about an incident that occurred hours before the attempted arson while the parties were at Ford's Wonder Bar. At that time, Ms. Reed, Messrs. Sargent, Toye, and Dickens all happened to be at the bar together. Mr. Dickens' testimony began, "At Ford's,

it was a . . . I had a . . . I had a conversation, I had a conversation with [Mr. Johnson]. And I explained to him, man to man, I told him, 'Listen--[.]'" The defense objected. A bench conference ensued in which the court and the attorneys argued about whether Mr. Dickens' anticipated statement would be allowed under the hearsay rule:

> [JOHNSON'S COUNSEL]: It's hearsay, classic. It is an out of court statement offered--
>
> [STATE]: He is saying what he said to him.
>
> [JOHNSON'S COUNSEL]: Yeah, it's still--
>
> [STATE]: And also . . . number one. And number two is, he is going to say what he said, which is admission, party opponent admission. How does that not come in? And on top of that, it's relevant--
>
> [JOHNSON'S COUNSEL]: It's not an exception.
>
> THE COURT: What's that?
>
> [JOHNSON'S COUNSEL]: I don't know what exception that is. It's an out of court statement.
>
> THE COURT: That would be a statement against that party opponent?
>
> [JOHNSON'S COUNSEL]: He is not a party. The State is the party.
>
> [STATE]: He is a party.
>
> THE COURT: No, I am talking about what he said?
>
> [JOHNSON'S COUNSEL]: Yeah, (inaudible).
>
> THE COURT: But then he is going to say what the defendant said to him.
>
> [JOHNSON'S COUNSEL]: Right (inaudible).
>
> [STATE]: Exactly, and it puts it in context.

THE COURT: Yeah, it puts it in context.

[JOHNSON'S COUNSEL]: Your Honor?

THE COURT: Overruled.

[STATE]: Go ahead? You can answer that, go ahead, sir?

KELVIN DICKENS: Okay, it was . . . it was more or less a man to man conversation. And I explained to him, I said, you know, I called him by his name. I said, "[Mr. Johnson], now you know you're not supposed to have no contact with Agnes Reed?"

[STATE]: And what did he--

[JOHNSON'S COUNSEL]: Objection, Your Honor. It--

THE COURT: Okay, overruled.

[STATE]: And what did he say to you in response to that?

KELVIN DICKENS: His response was more or less, he knew I was right, so he pretty much nodded his head and said, you know, he took what I said.

From this colloquy, Mr. Johnson believes that the court permitting Mr. Dickens' testimony about what Mr. Johnson said or did constituted hearsay to which no recognized hearsay exception applies. Specifically, Mr. Johnson argues that the adoptive admission exception does not apply to allow Mr. Dickens' testimony to come in. Mr. Johnson argues that in order for a statement to be admitted as an adoptive admission, then the (non-testifying) declarant must unambiguously adopt the statement. Further, Mr. Johnson argues that, because Mr. Dickens' used phrases like, "more or less[,]" "pretty much[,]" and "he took what I said[,]" the jury could not reasonably conclude that Mr. Johnson unambiguously adopted what Dickens said. In his reply brief, Mr. Johnson concedes that

this issue "turns on whether Mr. Johnson unambiguously adopted this statement."

The State responds with two arguments. *First*, the State argues that Mr. Dickens' statement was not hearsay because the statements were offered only to show the statement's effect on Mr. Johnson, not that the statements were true. *Second*, the State contends that Mr. Dickens' question was admissible because by nodding, Mr. Johnson adopted Mr. Dickens' statement.

B. Standard of Review

We review *de novo* a trial court's determination of whether evidence constitutes hearsay, as well as whether a statement that does qualify as hearsay is excepted and admissible under Rule 5-803. *Gordon v. State*, 431 Md. 527, 538 (2013); *Bernadyn v. State*, 390 Md. 1, 8 (2005). We do not disturb "absent clear error[,]" however, the "factual findings underpinning [such a] legal conclusion." *Gordon*, 431 Md. 527, 538. Moreover, "[t]he determination of whether a declarant manifested an adoption . . . is a preliminary factual determination to be made by the trial court." *Id.* at 539–40, 550.

C. Analysis

In order for Mr. Johnson to be successful on this claim, we would have to find (1) that Mr. Dickens' statement is hearsay, (2) that the statement is not covered by an exception to the hearsay rule, and (3) that the error was prejudicial. If any one of these three requirements were not met, then we would be required to affirm the trial court's decision to admit the statement.

We begin by considering even if the statement was hearsay, would it fall under the adoptive admission exception to the hearsay rule. For the reasons we explain, Mr. Dickens'

statement is an adoptive admission. Therefore, even if we concluded that the statement was hearsay, it would fit within the adoptive admission exception. Consequently, the trial court did not commit reversable error in admitting the statement.

The Maryland Rules define hearsay as "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(c). Moreover, "[e]xcept as otherwise provided by [the Maryland Rules] or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Rule 5-802. Expressly excepted from the general hearsay inadmissibility rule are statements "offered against a party and . . . statement[s] of which the party has manifested an adoption or belief in its truth[.]" Rule. 5-803(a)(2).

The Court of Appeals has opined that "[i]n many, if not most, circumstances, a trial court's decision about whether a person made an adoptive admission will be factual. This is certainly so when there are disputed facts about whether a question was asked, what was said, and what words or non-verbal conduct were involved in reply." *Gordon*, 431 Md. at 539-40. But, "[e]ven if there is no dispute about what was said or done," as appears to be the case here with Mr. Johnson's head-nodding, "the decision of whether there was an adoptive admission may still be factual when the circumstances allow different inferences depending on the trial court's interpretation of those facts." *Id.* at 540. Moreover, "on appeal of an allegedly erroneous admission of evidence as an adoptive admission, the question is *not* whether the evidence before the judge clearly proved that the person against whom the statement was admitted unambiguously adopted the statement." *Id.* at 547 (emphasis added). Instead, the relevant determination to be made "is whether 'there is

sufficient evidence from which a jury could reasonably conclude that the defendant unambiguously adopted another person's incriminating statement.'" *Id.*

Here, we are tasked with determining whether there was sufficient evidence by which a jury could conclude that Mr. Johnson unambiguously adopted Mr. Dickens' statement that he knew that he was supposed to stay away from Ms. Reed. As noted, in his reply brief, Mr. Johnson admits that this allegation of error "turns on whether Mr. Johnson unambiguously adopted this statement." *First*, we note that the parties do not dispute that the nodding of one's of the head may qualify as an adoptive admission. *See Brandon v. Molesworth*, 104 Md. App. 167 (1995), *aff'd in part and rev'd in part on other grounds*, 341 Md. 621 (1996). Mr. Johnson takes issue, with whether Mr. Johnson's head nodding under the circumstances presented here constitutes an unambiguous adoption of Mr. Dickens' statement.

We do not agree with Mr. Johnson's assertion that simply because Mr. Dickens used the phrases like "more or less[,]" "pretty much[,]" and "he took what I said[,]" that the jury would be unable to reasonably conclude that Mr. Johnson unambiguously adopted Mr. Dickens' statement. *First*, we do not see how the phrase, "he took what I said," could be ambiguous. And, *second*, despite Mr. Dickens' use of the qualifiers like "more or less" and "pretty much[,]"our review of all of Mr. Dickens' testimony reveals that he used such phrases all of the time. In other words, the use of those qualifiers reflected how Mr. Dickens normally spoke, rather than representing an alleged ambiguity. Throughout his testimony, Mr. Dickens' consistently employed qualifiers. For example, just prior to his use of the phrase "more or less", Mr. Dickens used the same phrase to describe the

conversation he had with Mr. Johnson as a "man to man conversation." From what we observed about Mr. Dickens' verbal ticks, Mr. Dickens did not suggest that he had anything other than "a man to man conversation" with Mr. Johnson about whether he should be seeing Ms. Reed because the protective order was in effect. We hold that the jury, which was able to observe Mr. Dickens' style of speech from the witness box, could have reasonably concluded that when he nodded his head after Mr. Dickens' told him that he should not be seeing Ms. Reed, Mr. Johnson unambiguously adopted that assertion.

Finally, we disagree with Mr. Johnson, who claims that the trial judge did not have the adoptive admission exception in mind when she overruled the defense's objection to the admission of the statement. Although the judge stated that Mr. Dickens' statement was admitted for "context," after reviewing the transcript, we believe that she was referring to the adoptive admission exception because she had just previously referred to the same Rule in noting the admission was allowed because it was a statement of a party opponent. A "trial judge is presumed to know the law and apply it properly." *State v. Chaney*, 375 Md. 168, 179 (2003) (quotations omitted).

In sum, we find no error by the trial court and believe that the jury was able to reasonably conclude that Mr. Johnson unambiguously adopted Mr. Dickens' statement. Consequently, even if the statement were hearsay, we conclude that the trial court properly admitted the statement under Rule 5-803(a)(2).

THE JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY IS AFFIRMED. APPELLANT TO PAY THE COSTS.