Circuit Court for Baltimore City
Case No. 116266005

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 718

September Term, 2018

KANEILUS HULL

v.

STATE OF MARYLAND

Fader, C.J.,
Wright,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: April 15, 2019

Kaneilus Hull, appellant, was tried before a jury in the Circuit Court for Baltimore City on charges of first-degree murder, conspiracy to commit murder, and use of a handgun in the commission of a crime of violence. The jury returned a verdict of guilty as to the crime of conspiracy to commit murder and Hull was sentenced to life imprisonment. He then filed a Motion for New Trial based on newly discovered evidence, which the court denied without a hearing. Thereafter, he unsuccessfully filed a Motion to Reconsider the Denial of Motion for New Trial. Appellant noted this appeal, and presents the following question for our review, which we have rephrased slightly, as follows:[1]

1. Whether the circuit court abused its discretion in denying Kaneilus Hull's Motion for New Trial based on newly discovered evidence pursuant to Maryland Rule 4-331?

For reasons to follow, we affirm the judgment of the circuit court.

BACKGROUND

Kaneilus Hull was convicted on August 28, 2017, by a jury in the Circuit Court for Baltimore City of conspiracy to commit the murder of Hassan Fields. During trial, the State presented evidence that on May 22, 2015, Hull and another man approached Fields and an aggressive conversation ensued between them. Fields was then taken under duress by Hull and his co-conspirator into a vehicle that appeared to be a black Honda Accord. With Fields in tow, Hull and his co-conspirator drove to an alley behind the 100 block of

[1] Before rephrasing, appellant presented the following question: Whether the circuit court erred in the abuse of its discretion to grant a hearing and a new trial in denying Kaneilus Hull's Motion for a New Trial based on newly discovered evidence pursuant to Maryland Rule 4-331?

South Augusta Street, where Hull led Fields into the alley and shot him ten times. While Hull carried out the murder, his co-conspirator waited in the vehicle, as a means for a quick escape. Hull then ran from the alley and returned to the passenger side of the car and his co-conspirator quickly drove off.

Infiniti Alston, a friend of Fields who was one of the last people to see him before he was murdered, identified Hull from a photographic array as one of the men Fields left with on the night in question. Alston also gave a statement to the police regarding the events that occurred prior to Fields leaving with Hull and the other man. Alston was subpoenaed to appear for Hull's trial. Although Alston confirmed with the prosecutor that she would appear for trial on August 22, 2017 at 1:30 p.m., she did not. The court excused the jury at 3:00 p.m. that day to allow the prosecutor to "prepare an application for material witness warrant" for Alston. At 4:00 p.m., the prosecutor notified the court that Alston was present after being brought in "by a member of the Bar as a courtesy." The prosecutor told the court that he believed Alston failed to appear out of fear and that she was "terrified." The court ordered Alston to appear at 9:00 a.m. the following morning and warned her that if she failed to appear the court would be inclined to issue a body attachment and that she could be found in contempt.

Despite the court's order, Alston failed to appear the next morning. The court then signed an order for a body attachment and the Operations Unit proceeded to search for Alston. On August 24, 2017, the prosecutor informed the court that the Operations Unit was still trying to locate Alston and the search for Alston continued throughout that day of

trial. The following day, August 25, 2017, the Prosecutor notified the court that he had been in contact with Alston's mother and she confirmed that Alston was in hiding. Alston's mother told investigators that Alston contacted her via Instagram and stated that she was "afraid" that Hull's friend would kill her if she testified. Alston's mother then gave the Operations Unit the address of a family member where she believed Alston was staying. The Operations Unit located Alston at that address and brought her into court.

Once she arrived at the courtroom, the State called Alston as a witness. Alston testified that she was brought to court "against [her] will" and that she did not wish to be present. She testified that she and Fields were friends and when asked about the events that occurred on May 22, 2015 (the alleged evening of Fields' death) she stated, "I don't remember." She also stated that on that evening she was in her car along with her sister, Daria Williamson, and Fields smoking marijuana, and that Fields left with his "friends." When asked about the statement she provided to the police regarding the events that occurred that evening, the following conversation ensued:

[PROSECUTOR]: Ms. Alston, at some point in late May of 2015, did you give a statement to the police?

[ALSTON]: Yes.

[PROSECUTOR]: And what was -- where was that statement given?

[ALSTON]: At the police station.

[PROSECUTOR]: And what was the statement regarding, if you know?

[ALSTON]: Hassan.

[PROSECUTOR]: Specifically what about Hassan?

[ALSTON]: Hassan being killed.

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[PROSECUTOR]: Ms. Alston, I'm placing before you what has been marked as State's Exhibit 39 for identification purposes only, could you please take a moment and perhaps read the first page to yourself and when you're finished let me know?

[ALSTON]: (Witness complying). Um, that Infiniti Alston is correct. Uh-huh.

[THE COURT]: Ms. -- Ms. Alston, the instruction was --

[PROSECUTOR]: To yourself.

[THE COURT]: -- to read it to yourself.

[ALSTON]: Oh, to myself.

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[PROSECUTOR]: Okay. And what were you just reading?

[ALSTON]: A statement by me.

[PROSECUTOR]: Okay. And was that the statement that we're discussing today, the one in late May of 2015 that you gave to police about Hassan's death?

[ALSTON]: I don't remember.

[PROSECUTOR]: Well, will watching a video of the statement help you refresh your memory?

[ALSTON]: Like I said, I don't remember, sir.

[PROSECUTOR]: Okay. Well --

[ALSTON]: That happened over two --

[PROSECUTOR]: I would ask you to keep reading the statement to yourself, then. We're going to go through every page--

[ALSTON]: (Sighing). Sir, I'm not reading this statement --

[PROSECUTOR]: -- until you remember?

[ALSTON]: -- to myself.

[THE COURT]: Ms. Alston, you are ordered . . . by the court to read the statement to yourself and let us know when you are finished. Thank you for your cooperation.

[ALSTON]: (Reading statement).

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[PROSECUTOR]: Ms. Alston, have you had the opportunity to read through the transcript of your statement?

[ALSTON]: Yes.

[PROSECUTOR]: Does this generally refresh your memory as to giving that statement?

[ALSTON]: No.

[PROSECUTOR]: None of these words refresh your memory?

[ALSTON]: No. I remember some, but like I said, it was a long time ago and I was high. I don't really remember.

[PROSECUTOR]: Okay. You just testified that you remember some of those words, correct?

[ALSTON]: Yeah.

[PROSECUTOR]: Okay. Ms. Alston, I'm going to turn your attention then to page five --

[ALSTON]: Um-hum.

[PROSECUTOR]: -- of your statement, . . . I'd ask you to read the paragraph I'm pointing to to yourself first, and when your finished reading that paragraph, let me know.

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[ALSTON]: I've already read this.

[PROSECUTOR]: Okay. Does that paragraph refresh your memory as to what if anything the two individuals did to Hassan's body when he left the car?

[ALSTON]: No.

[PROSECUTOR]: It does refresh your memory as to what you told them?

[ALSTON]: No.

[PROSECUTOR]: Did they pat him down?

[ALSTON]: I don't remember. I don't care what this paper says, I don't remember.

[PROSECUTOR]: So no matter what the paper says you're going to say "I don't remember?"

[ALSTON]: No, its [sic] no matter what the paper says, I just don't remember.

[PROSECUTOR]: May we approach?

At this juncture, counsel approached the bench and the following exchange ensued:

[PROSECUTOR]: Your Honor, this is my first approach to inform the [c]ourt that I believe she's feigning lack of memory of this statement. Um, she's extremely difficult with the State in terms of her ability or her interest in answering any of these questions.

As your Honor noticed from the bench, she was flipping through the pages at about one per every second or half second. There's no way she was actually giving a bona fide attempt to read them to see if they refreshed her memory.

She's extremely recalcitrant, and at this point, I would ask that -- I am moving at some point to play her entire statement that she gave to the police . . . .

[DEFENSE]: Your Honor, I don't think that they have reached a point where they can just play the whole tape . . .

> And I think the State, if it chooses to, should go question by question . . . And they can get what they need out of that rather than playing a whole taped statement that has a bunch of irrelevant stuff.
>
> ***

[THE COURT]: . . . I agree with [Defense Counsel], we're not there yet.

The Prosecutor returned to his direct examination of Alston, and continued to question her about the statement she gave to the police regarding the events that occurred on the evening of May 22nd. Alston remained a reluctant witness, answering "I don't remember" to any question asked regarding the specifics of the night in question. After about twenty to thirty minutes of questions and attempts to refresh Alston's memory to no avail, the Prosecutor renewed his motion to move Alston's taped statement to police into evidence. In response, Defense Counsel noted that he believed her lack of memory was due to Alston smoking weed at the time of the incident. Over the defense's objection, the court found:

> . . . the witness recalls details except those that would endanger her, which does suggest to me that her lack of memory is born of a sense of self-preservation.
>
> So I -- I want to [be] clear, I'm not finding, you know, moral or ethical flaw with the witness. But I -- but it does lead me, and there's a lot more for the basis of my decision, but it does strongly suggest to me that the lack of memory is feigned.
>
> . . . .
>
> I will also say that I've observed that she, um, recalls details but disclaims knowledge of the defendant, um. She has a very selective memory. Remembering that there was a tall man and a short man, but everything else is "I don't remember."
>
> . . . .
>
> So, the details that she remembers are, some of them are particularized, but all of the details that she recalls are very innocuous. When

> details are asked of her, reflected in her prior statement, that would tend to inculpate the defendant, um, she does disavow any memory of them.
>
> She has been very recalcitrant and resistant to the [c]ourt's process.
>
> . . . .
>
> She has agreed she does not want to be here. She has been extremely combative and sarcastic . . . her behavior in the totality of what I'm evaluating does tend to cause me to conclude that she is feigning an ability to remember the details that she provided to the police on the date of the statement that the State is asking about [sic].
>
> Um, she is evasive and inconsistent where it suits her[]. So, although I'm not saying that -- I think she wasn't smoking pot, that may not be the case, um, I don't believe her absence of memory in totality as she has proclaimed it as truthful.
>
> And I do find that her assertion of a lack of memory lacks credibility, and that's feigning a lack of memory.
>
> . . . I will, pursuant to 5-892.1(a), allow the State to introduce the police statement that she gave the day after the incident in question as substantive evidence.

A redacted copy of Alston's previously recorded statement to the police was played for the jury, where Alston stated that she was in her vehicle with Fields and Williamson when two men approached, and Fields "rolled down the window like yo its Hassan." According to Alston, Fields exited the car and the men "patted him down and like checked him I guess [to] make sure he [didn't] have [any] weapons on him." Alston described one man as short with a dark complexion and the other as tall with a brown complexion wearing a blue hoody. She stated that the tall man "did all the talking," at one point saying, "I put this on my life . . . I don't mean you no harm or anything like that." Alston further asserted that the tall man "was talking to us like I'm [Fields'] brother. [Y'all] don't gotta worry, I'm [Fields'] brother and all this stuff." Alston said that she knew Fields' "whole family," and she had "never seen [the two men] before. We hang around [Fields] every day."

Alston indicated that the conversation between Fields and the taller man "definitely wasn't a normal conversation," and that it was "aggressive." Alston told detectives that the taller man told her to "go ahead and pull off," and that Fields was "good." Alston did not pull off right away, but Fields eventually told her that he was "good," so she and Williamson "pulled up the street," leaving Fields with the two men. Alston waited for Fields because she "didn't think he was going anywhere." Shortly afterwards, she saw Fields in a car with the two men drive past her. She was certain that the "short dark skin" man was driving, the taller man was seated in the passenger seat, and Fields was seated in the rear passenger seat.

After the video was played to the jury, Alston testified she was shown a photographic array, in which she identified a photograph of Kaneilus Hull, stating, "[h]is facial structure resembles one of the guys. His nose stands out." She confirmed that she voluntarily wrote that statement in her own words on the photographic array form. On cross examination, Alston confirmed that when making this identification she said, "I'm not 100 percent sure that's him."

At the conclusion of the State's case, Hull moved for judgment of acquittal, arguing that there was insufficient evidence as to a conspiracy to commit Fields' murder. The court denied the motion. The defense consisted of the jury being allowed to observe Hull's body for the presence of tattoos and other identifying marks. Thereafter, defense counsel renewed his motion for judgment of acquittal, which the court denied. The court proceeded with jury instructions, including, over objection, instructions as to accomplice liability.

Ultimately, the jury acquitted Hull of first degree murder and convicted him of conspiracy to murder Fields. Hull filed a Motion for New Trial, contending there was insufficient evidence to support the conspiracy conviction, which the court denied. On December 12, 2017, Hull was sentenced to life incarceration.

On March 12, 2018, Hull filed a Motion for New Trial based on newly-discovered evidence. The motion was accompanied by an affidavit signed by Infiniti Alston one month after Hull's sentencing, in which she indicated Hull was not one of the men she saw Fields leave with on the night of his murder, as well as other allegations. The motion was denied without a hearing. Hull then filed a Motion to Reconsider the Denial, which the court also denied without a hearing. This appeal followed.

DISCUSSION

I. The court did not err in denying Hull's Motion for New Trial based on newly discovered evidence.

The standard of review employed when reviewing a trial court's decision to deny a motion for new trial is abuse of discretion. *Mason v. Lynch*, 151 Md. App. 17, 28 (2003). In considering a motion for new trial, a trial court has broad discretion and may consider several factors including witness credibility. *Argyrou v. State*, 349 Md. 587, 599 (1998). Also, trial courts "have [the] authority to weigh the evidence and to consider credibility of witnesses when the motion is grounded on newly discovered evidence." *Id.* at 600; *see also Jones v. State*, 16 Md. App. 472, 477 (1973) ("It is essentially the function of the trial judge to evaluate and assess the newly discovered evidence and where such evidence consists of testimonial evidence from a witness allegedly discovered after the trial has been

concluded, it is for the trial judge to determine the materiality and the credibility of such testimony.").

The degree of a trial judge's discretion, however, to grant or deny a new trial is not fixed or immutable. *Buck v. Cam's Broadloom Rugs, Inc.*, 328 Md. 51, 57 (1992). The Court of Appeals explained that a trial judge's discretion will:

> [E]xpand or contract depending upon the nature of the factors being considered, and the extent to which the exercise of that discretion depends upon the opportunity the trial judge had to feel the pulse of the trial and to rely on his own impressions in determining questions of fairness and justice.

Id.

The grant of a new trial on the basis of newly discovered evidence is governed by Maryland Rule 4-331(c), which provides that in the interest of justice, "the court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial [within ten days after the verdict.]" In addition, the evidence offered as newly discovered must be more than "merely cumulative or impeaching," it must meet the threshold inquiry of whether it is material to the result. *Jones v. State,* 16 Md. App. 472, 477 (1973); *see also Stevenson v. State*, 299 Md. 297, 302 (1984). The trial court must determine that "[t]he newly discovered evidence may well have produced a different result, that is, there was a substantial or significant possibility that the verdict of the trier of fact would have been affected." *Argyrou v. State*, 349 Md. 587, 601 (1998) (quoting *Yorke v. State*, 315 Md. 578, 588 (1989)).

However, like materiality, whether the evidence in question is, in fact, "newly discovered evidence which could not have been discovered by due diligence," is a threshold inquiry. Thus:

> Unless and until there is found to be "newly discovered evidence which could not have been discovered by due diligence," one does not weigh its significance. It is only when this definitional predicate has been established that the provisions of Rule 4-331(c) even become involved. Without this definitional predicate, the relief provided by subsection (c) is not available, no matter how compelling the cry of outraged justice may be.

Love v. State, 95 Md. App. 420, 432 (1993).

In the case before us, appellant argues the trial court abused its discretion in denying Hull's Motion for New Trial on the basis of newly discovered evidence without a hearing. Hull contends the following statements in the sworn affidavit by Infiniti Alston constitute newly discovered evidence:

1. [Alston] picked out several pictures of people [she] recognized and [Hull], but [Hull] was not the person who [she] saw leave with the victim that night;
2. When [Alston] was on the stand testifying, no one ever asked [her] whether [she] could identify the person who shot the victim and while testifying and seeing . . . Hull sitting next to his lawyer[,] [she] was certain that he was not the person who [she] saw leave with the victim the night of the murder; and
3. Since the shooting, [Alston] had been "harassed, threaten[ed], and treated unfairly" by the State's Attorney's Office for Baltimore City and the detectives with the Baltimore City Police Department which she believed was because she "could not say that [Hull] was the one who shot the victim the night of the murder."

In response, the State asserts that the trial court properly exercised its discretion in denying the motion without a hearing because Hull "failed to establish a prima facie basis for granting a new trial." We agree.

Maryland Rule 4-331(f) provides, in pertinent part:

> [T]he court shall hold a hearing on a motion filed under section (c) [newly discovered evidence] if a hearing was requested and the court finds that: (1) if the motion was filed pursuant to subsection (c)(1) of this Rule, it was timely filed, (2) the motion satisfies the requirements of section (e) of this Rule, *and (3) the movant has established a prima facie basis for granting a new trial.*

Md. Rule 4-331(f) (emphasis added). To establish a prima facie basis for granting a new trial, the moving party must "allege facts that, if true, would establish the required fact." That is, that the evidence was, in fact, newly discovered and that it would have produced a different result. *Genies v. State*, 426 Md. 148, 181 n.11 (2012).

Here, with the exercise of diligence, Hull could have discovered the proffered evidence within ten days after the jury's verdict. In fact, each of Alston's allegations could have been discovered at trial during cross-examination. It was apparent at trial that Alston was a reluctant witness who felt forced to testify for the State against her wishes. She even stated as much, testifying that she did not want to be in court and that she was present "against her will." Defense counsel had the opportunity to cross-examine Alston regarding her reluctance to testify, during which it could have revealed that Alston allegedly identified Hull's photo not because he was one of the men who left with Fields, but instead identified him because his face was familiar. Cross-examination also could have revealed that she felt "harassed, threaten[ed], and treated unfairly" by the State's Attorney's Office and detectives. Additionally, Alston had the opportunity to see Hull's face at trial, thus, there was an opportunity to query her as to whether she was "certain" Hull was not the

person she saw leave with Fields the night of the murder. Since each of these allegations were discoverable during trial, such statements are not newly discovered evidence.

Furthermore, the statements alleged in Alston's affidavit would not produce a different result if Hull was granted a new trial. The jury observed Alston's recalcitrant participation at trial, including her resistance to answer questions and her inability to recall detailed facts. At trial, Alston claimed she did not remember many details as to the identity of Hull on the night in question and that reading the statement she gave to the police did not aid in refreshing her recollection. Resultantly, the court found that Alston was feigning memory loss for self-preservation and allowed the jury to consider Alston's prior recorded statement instead. Thus, the statements in Alston's affidavit would be merely impeaching as they are contrary to her recorded statement played for the jury and her statement, "[h]is facial structure resembles one of the guys. His nose stands out," which she wrote on the photographic array form.

We hold that the trial court did not abuse its discretion in denying Hull's Motion for New Trial. Hull failed to establish a prima facie basis for granting a new trial, as the proffered evidence is not newly discovered nor would such evidence affect the verdict. Accordingly, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.