Circuit Court for Washington County
Case No. C-21-CR-22-000458

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1005

September Term, 2024

MATTHEW STEVEN LOOKABAUGH

v.

STATE OF MARYLAND

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

JJ.

Opinion by Shaw, J.

Filed: March 6, 2026

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

A jury in the Circuit Court for Washington County convicted Appellant Matthew Steven Lookabaugh of attempted second-degree murder, first-degree assault, second-degree assault, use of a firearm in the commission of a crime of violence, handgun possession, and reckless endangerment. After merging offenses, the court sentenced him to 30 years of incarceration with all but fifteen years suspended for attempted second-degree murder, a consecutive fifteen years of incarceration with all but five years suspended for firearm use in the commission of a crime of violence, and, upon release, five years of supervised probation.

On appeal, Appellant presents four questions, which we have consolidated and rephrased:[1]

1. Did the circuit court err in admitting an envelope bearing appellant's name?

2. Did the circuit court err in admitting appellant's brother's recorded statement to police as a prior inconsistent statement?

3. Was the evidence sufficient to sustain appellant's conviction for attempted murder in the second degree?

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

[1] Appellant phrased the questions presented as follows:

1. Did the trial court err by admitting into evidence State's Exhibit #18?

2. Did the trial court err by admitting into evidence Andrew Lookabaugh's statement to police?

3. Is the evidence legally insufficient to sustain the conviction of attempted murder in the second degree?

4. Did the State fail to prove Mr. Lookabaugh's identity as the person who committed any of the charged offenses?

BACKGROUND

On the afternoon of June 8, 2022, according to the testimony adduced at trial, then-twenty one-year-old appellant and his thirteen-year-old brother Andrew Lookabaugh visited the Valley Mall in Hagerstown, Maryland. They ate at the food court, visited Dick's Sporting Goods, and went to the U.S. Cellular store. While there, two men, later identified as Calijah Paugh and Myzia Fisher, followed the Lookabaugh brothers and threatened them. Appellant then produced a handgun and fired several rounds at Mr. Paugh and Mr. Fisher. Mr. Paugh was struck by bullets multiple times. He was transported to a hospital and immediately underwent surgery. Mr. Fisher was not struck.

Jacob Johnson, who was at a Mission BBQ restaurant near the cell phone store, testified that he heard gunshots and looked outside. He observed a young man with dark shaggy hair and a dark large t-shirt shoot four to five rounds while moving backward. Mr. Johnson watched the shooter, and a "significantly smaller" companion get into a gray or silver Mercedes with rear damage and drive away. Frank Rucci, also at Mission BBQ, testified that he saw a white male, with dark hair, point a gun and fire.

Zachary Fulton, a U.S. Cellular employee, testified that he heard gunshots and then saw "two people running" past his store. Mr. Fulton recognized one of the runners as "Matthew," a customer he helped with a broken phone in late May 2022 and who returned to the store twenty to thirty minutes before the shooting. Mr. Fulton identified appellant as the person he knew as "Matthew" and the person he saw running from the scene. During the May encounter, Mr. Fulton had walked out to appellant's vehicle, a silver Mercedes Benz, and appellant told him the car belonged to his mother. Mr. Fulton later got "stuck

behind him in traffic" and he photographed the vehicle. After the shooting, he gave the photograph to police.

Deputies from the Washington County Sheriff's Office investigated the shooting. They interviewed witnesses and recovered six spent casings marked "9 mm Luger FC" from the area where the incident occurred. Later that day, the investigators located a silver Mercedes at Appellant's house that matched the description given to them. Appellant and his brother were arrested and Andrew Lookabaugh agreed to be interviewed by a detective. He gave a recorded statement, which was admitted into evidence, identifying his brother as the shooter of a 9mm handgun that day.

During the execution of a search warrant at his home, ten 9mm bullets and a manilla envelope labeled with Appellant's name and the word "summer" written on it were recovered from a bedroom identified as Appellant's. A 9mm handgun with a gold slide was also found. A firearms examiner determined that test-fired cartridges from that handgun were consistent with the crime-scene casings. The items were admitted into evidence.

At the conclusion of trial testimony, the court granted appellant's motion for judgment of acquittal as to two counts for attempted first degree murder. Following deliberations, a jury returned verdicts of guilty as to attempted second-degree murder, first-degree assault, second-degree assault, use of a firearm in the commission of a crime of violence, handgun possession, and reckless endangerment. Appellant was sentenced to thirty years of incarceration with all but fifteen years suspended for attempted second-degree murder, a consecutive fifteen years of incarceration with all but five years

suspended for firearm use in the commission of a crime of violence, and five years of supervised probation upon his release.

DISCUSSION

I. The court did not err in admitting an envelope bearing Appellant's name.

Appellant contends the trial judge erred in admitting into evidence, an envelope bearing his name and the word "summer" on it, as it was inadmissible hearsay. Appellant argues that the judge's ruling was not harmless error and thus, his conviction must be reversed. The State argues that the envelope was circumstantial evidence, and the court properly admitted it.

Maryland Rule 5-801(c) defines 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." "Maryland Rule 5-802 prohibits the admission of hearsay, unless it is otherwise admissible under a constitutional provision, statute, or another evidentiary rule." *Wallace-Bey v. State*, 234 Md. App. 501, 536 (2017). "Whether evidence is hearsay is an issue of law reviewed *de novo*." *Bernadyn v. State*, 390 Md. 1, 8 (2005).

"There are two threshold questions when a hearsay objection is raised: '(1) whether the declaration at issue is a "statement," and (2) whether it is offered for the truth of the matter asserted. If the declaration is not a statement, or if it is not offered for the truth of the matter asserted, it is not hearsay and it will not be excluded under the hearsay rule.'" *State v. Young*, 462 Md. 159, 170 (2018) (quoting *Stoddard v. State*, 389 Md. 681, 688-89 (2005)). When evidence is offered as "merely circumstantial non-assertive crime scene

evidence" linking a defendant to a location, it is not hearsay. *Fair v. State*, 198 Md. App. 1, 37-38 (2011).

In *Bernadyn v. State*, the Maryland Supreme Court examined whether a hospital bill containing the petitioner's address was inadmissible hearsay. *Bernadyn*, 390 Md. at 3. The State argued that the bill was nonhearsay evidence that showed that the petitioner lived at a certain address, "because 'any institution is going to make sure they have the right address when they want to get paid.'" *Id*. at 11. The trial court admitted the document into evidence. The Maryland Supreme Court reversed the judgment, holding that because the hospital bill was offered to prove the truth of a matter asserted, the petitioner's address, it was hearsay. *Id*. at 23. The Court further held that the document did not fall within any exception to the hearsay rule, and thus, the court erred in admitting the document. *Id*.

This Court, in *Fair v. State*, examined whether a paycheck stub with the appellant's name, found next to a firearm in a vehicle's center console, was admissible as non-hearsay. 198 Md. App. at 4, 38. We ruled that the paycheck's "presence supported an inference that [Fair], who happened to be the payee of the check, had recently accessed the console and was therefore aware of its contents." *Id*. at 37-38. We found that the check was "circumstantial non-assertive crime scene evidence" and we affirmed the judgment of the circuit court, holding that the court did not err in admitting the paycheck. *Id*. at 38.

In *Darling v. State*, 232 Md. App. 430 (2017), we held that the admission of a cell phone service receipt did not violate the rule against hearsay. 232 Md. App. at 460. At trial, the State used the receipt to link appellant to the phone to establish appellant's whereabouts and cell communications before, during, and after a murder. *Id*. The State

did not use the receipt to assert that appellant's phone number was the number on the receipt. *Id*. As a result, we held that, "there was no assertion "to prove the truth" of any matter contained in the receipt, and the receipt was properly admitted into evidence as non-hearsay evidence. *Id*.

Here, the envelope bearing Appellant's name, and the word "summer" was offered by the State as circumstantial evidence linking Appellant to the bedroom where the ammunition was found. As in *Fair*, the contents of the envelope were not relevant to the crime charged. However, the presence of the envelope with Appellant's name on it supported an inference that appellant had recently been in the room. The trial court held that the envelope was not admitted to prove the truth of any implied assertions. We agree that it was not hearsay, but rather it was circumstantial non-assertive evidence, and thus, it was properly admitted.

II. The court did not err in admitting Andrew Lookabaugh's recorded statement.

"We review rulings on the admissibility of evidence ordinarily on an abuse of discretion standard." *Bernadyn*, 390 Md. at 7. A trial court's ultimate determination, however, of whether evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal. *Young v. State*, 234 Md. App. 720, 733 (2017) (cleaned up). "[T]he factual findings underpinning [such] legal conclusion[s] necessitate a more deferential standard of review. Accordingly, the trial court's legal conclusions are reviewed de novo, but the trial court's factual findings will not be disturbed absent clear error." *Townes v. State*, 264 Md. App. 500, 516 (2025).

On the day of the shooting, Andrew Lookabaugh gave a recorded statement to police identifying appellant as the shooter. At trial, Andrew testified that he could not remember the shooting or what he had told police. The State then sought to admit Andrew's recorded statement as a prior inconsistent statement under Maryland Rule 5-802.1(a). Defense counsel objected, arguing that "under *Nance*, the state should not be allowed to use the video based on . . . [Andrew's] answers." The trial court overruled the objection and admitted the recording, observing that Andrew had "clearly become . . . more of a hostile witness."

Appellant contends the court erred in admitting Andrew Lookabaugh's recorded statement as a prior inconsistent statement. Appellant argues the court was required to make an explicit finding that he feigned memory loss. The State argues that the court's implicit finding was sufficient.

Under Maryland Rule 5-802.1(a) a statement that was previously made by a witness who testifies at trial and is subject to cross examination about the statement is not excluded by the hearsay rule if it "is inconsistent with the declarant's testimony" and was "recorded in a substantially verbatim fashion by stenographic or electronic means contemporaneously with making of the statement." "There are two categories of inconsistencies: positive contradictions and claimed lapses of memory." *Townes v. State*, 264 Md. App. at 518 (2025) (citing *Nance v. State*, 331 Md. 549, 564 n.5 (1993)). In *Nance*, the Supreme Court of Maryland held that "[w]hen a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied." *Id*.

By contrast, "when a witness truthfully testifies that he does not remember an event, that testimony is not 'inconsistent' with his prior written statement about the event, within the meaning of Rule 5-802.1(a)." *Corbett v. State*, 130 Md. App. 408, 425 (2000). "[T]he 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." *Id*. at 426. "To admit a prior inconsistent statement on the grounds of feigned lack of memory, the trial court must make a preliminary finding that the witness's 'lack of memory of the events in question was not actual, but a contrivance.'" *Townes*, 264 Md. App. at 518 (quoting *Corbett*, 130 Md. App. at 426). We review that factual finding for clear error. *Id*.

In the present case, we agree with Appellant that the court did not make an explicit finding. However, the Supreme Court of Maryland has rejected the proposition that an express finding is required. The Court noted, in *McClain v. State*, 425 Md. 238 (2012) that "Rule 5-802.1, unlike some other Rules, does not require explicitly that findings be placed on the record." 425 Md. at 252. The Court further stated that it has "decline[d] to read into the Rule such a requirement." *Id.*

When Andrew Lookabaugh claimed not to remember the shooting even after the State played his recorded statement to refresh his recollection, the trial court observed that "at this point, I think he's clearly become . . . more of a hostile witness." The court's observation marked a shift from the court's earlier assessment that Andrew's "memory might be bad but he's on the stand, he's cooperating." Based on this record, we perceive no error in the admission of Andrew's recorded statement under Rule 5-802.1(a) as the court made an implicit finding that there was no actual loss of memory.

III. *The Evidence Was Sufficient to Sustain Appellant's Convictions.*

Appellant challenges the sufficiency of the evidence. He contends that the State did not prove that he intended to kill Mr. Paugh and the State failed to establish that he was the person who fired at Mr. Paugh.

"In assessing the sufficiency of the evidence to sustain a criminal conviction, it is the responsibility of the appellate court to determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Howling v. State*, 478 Md. 472, 507 (2022) (quoting *State v. Manion*, 442 Md. 419, 430 (2015)); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (setting forth this standard).

A. Intent

"One has committed second-degree attempted murder when he or she harbors a specific intent to kill the victim and has taken a substantial step toward killing the victim." *Harrison v. State*, 382 Md. 477, 489 (2004).

The evidence adduced at trial, through the testimony of several witnesses was that Appellant fired six bullets at Mr. Paugh, striking him at least three times. Mr. Paugh's blood loss was severe enough that he was "rush[ed] into surgery" when he arrived at the hospital. Based on this evidence, a jury could reasonably infer that appellant intended to kill Mr. Paugh. Appellant's argument to the contrary asks us to draw inferences in his favor, which is not our role when reviewing the sufficiency of the evidence.

B. Identity

As to Appellant's identity challenge, the State argues that it is not preserved because it was not "raised in or decided by the trial court[.]" Md. Rule 8-131(a). Maryland Rule 4-324(a) provides that a motion for judgment of acquittal must "state with particularity all reasons why the motion should be granted." "The issue of sufficiency of evidence is not preserved when appellant's motion for judgment of acquittal is on a ground different than that set forth on appeal." *Poole v. State*, 207 Md. App. 614, 632–33 (2012) (quoting *Anthony v. State*, 117 Md. App. 119, 126 (1997)).

Here, defense counsel's motions for judgment of acquittal focused on premeditation and intent, not identity. We hold that appellant did not argue that the State failed to prove his identity as the shooter, and thus, this contention is not preserved.

Assuming arguendo, that the argument is preserved, we, nevertheless, hold the evidence was sufficient. First, Andrew Lookabaugh's recorded statement, which was played for the jury, identified appellant as the shooter. Second, Mr. Fulton identified appellant at trial as the person he saw running from the scene and that Appellant was a customer he knew from a prior visit to the store. Mr. Fulton also had photographed the getaway vehicle weeks earlier after meeting appellant at the store, and police located the vehicle at appellant's residence within hours of the shooting. Finally, police recovered a 9mm handgun from appellant's residence. The cartridges fired from the seized handgun were consistent with the fired cartridge cases recovered from the crime scene.

Viewing the evidence in the light most favorable to the State, we hold that the evidence was sufficient for a jury to reasonably conclude that Appellant was the person who shot Mr. Paugh and that he intended to do so.

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