Circuit Court for Montgomery County
Case No. 131774C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1155

September Term, 2020

DAMIEN OSIRIS FRAZIER

v.

STATE OF MARYLAND

Kehoe,
Berger,
Ripken,

JJ.

Opinion by Kehoe, J.

Filed: December 17, 2021

A jury sitting in the Circuit Court for Montgomery County convicted Damien Osiris Frazier ("appellant") of first- and second-degree assault. On April 12, 2018, the court sentenced appellant to a term of incarceration for twenty-five years, with all but twelve years suspended, to be followed by five years of supervised probation. On November 20, 2020, the post-conviction court granted the appellant the right to file a belated appeal. He presents three questions for our review, which we have rephrased slightly:[1]

> 1. Did the court err in admitting the victim's pre-trial remarks as prior inconsistent statements pursuant to Maryland Rule 5-802.1(a)?
>
> 2. Did the court commit reversible error by permitting the State to refer to appellant's pre-trial incarceration during its direct examination of the victim?
>
> 3. Did the court commit plain error by allowing the State to make an improper closing argument?

We will affirm the judgments of the circuit court.

[1] In his brief, the appellant frames the issues as (formatting altered):

> 1. Did the trial court err by admitting Ms. Mukamba's out-of-court statements as prior inconsistent statements under Maryland Rule 5-802.1?
>
> 2. Did the trial court err by permitting the State to refer to Appellant's incarceration when asking Ms. Mukamba about her telephone conversations with appellant?
>
> 3. Did the trial court commit plain error by permitting the State to make improper closing argument?

BACKGROUND

We will start with a summary of the trial testimony of Kamwanya Mukamba, appellant's domestic partner and the victim in this case. We will then contrast Ms. Mukamba's in-court testimony with her pre-trial statements to the first responders and the District Court.

A. Ms. Mukamba's Trial Testimony

On April 21, 2017, and after completing her shift at a Chik-fil-A restaurant, Ms. Mukamba returned to the Montgomery County apartment where she and appellant resided. Upon arriving home, Ms. Mukamba prepared to go bowling with Jessica (her friend and appellant's niece).[2] Ms. Mukamba testified that she was under the influence of Phencyclidine ("PCP") while she and Jessica bowled.

In the early morning hours of April 22nd, Ms. Mukamba was accompanied back to her apartment by a friend and former coworker whom she knew only as "Derek."[3] When she arrived home, appellant was asleep in bed. Derek and Ms. Mukamba proceeded to smoke a PCP-laced cigarette in her living room. Thereafter, Ms. Mukamba attempted to rouse appellant from his slumber and attract his attention by blowing smoke from that cigarette in his face. After appellant woke up, Ms. Mukamba attempted to persuade him to

[2] The record does not include Jessica's surname.

[3] According to Ms. Mukamba, Derek was also the individual who had procured the PCP that she had taken.

The trial transcript refers to both "Derek" and "Derrick." We will use "Derek" because it is consistent with Ms. Mukamba's written statement.

ingest PCP, but he refused. Derek subsequently entered the bedroom, whereupon he and appellant engaged in a physical altercation. The next thing that Ms. Mukamba recalled was pain from having been stabbed in the rib and "blood all over [her] t-shirt." Thereafter, she lost consciousness. When she awoke in the hospital, Ms. Mukamba had sustained seven stab wounds to her arms, back, rib, and thigh.[4]

Ms. Mukamba later discovered that a lighter and hundreds of dollars in cash were missing from the apartment. Her only contact with Derek following the stabbing was in a text message she sent him inquiring about the missing lighter. In that text message, Ms. Mukamba neither referred to the stabbing nor mentioned appellant's having been propelled through an apartment window.

B. Ms. Mukamba's pre-trial statements

Ms. Mukamba's in-court testimony was not consistent with statements that she had made to a paramedic, police officers, and the District Court for Montgomery County.

Upon arriving at the scene, Officer Alexander Waddell[5] observed a broken third-story apartment window and appellant lying on the ground outside as fire and rescue personnel treated injuries that he had sustained. Officer Waddell entered the apartment where he found Ms. Mukamba with what appeared to be a stab wound to her back. Footage from Officer Waddell's body camera captured his arrival at the scene and was played for

[4] According to Ms. Mukamba's medical records, she also suffered a broken rib and a fractured scapula.

[5] All of the police officers involved in this case were members of the Montgomery County Police Department.

the jury. In that footage, Ms. Mukamba can be heard pleading for assistance and identifying "Damien" as her assailant.

Scott Anderson, a paramedic with the Montgomery County Fire and Rescue Service, also responded to the scene. He provided Ms. Mukamba with medical care. En route to the hospital, Mr. Anderson asked Ms. Mukamba how she had sustained her injuries. Ms. Mukamba answered that "Damien had stabbed her because she didn't want to smoke with him."

After arriving at the hospital and being treated for her injuries, Ms. Mukamba was interviewed by Detective Bach.[6] During that interview, which was captured by Officer Waddell's body camera, Ms. Mukamba identified appellant as her boyfriend of seven months. Ms. Mukamba informed Detective Bach that she and appellant had planned to go to a furniture store that day. When Ms. Mukamba returned home, however, appellant was "on edge," wielding a knife, and holding "some kind of smoking thing." Ms. Mukamba further recounted:

> I said, "Damien I want to lay down. I've been working five days straight. I'm exhausted. . . . . Let's just go to bed. And then you can watch the kid while I'm getting ready," and Damien is walking back and forth pacing. I said, "[W]hat's wrong?" He said, "[N]othing." I said, "[N]othing? Why are you walking around?" He said, "I am not." I said, "[O]kay. What did you have? Did you smoke? Did you drink? What did you do?" He said, "[N]one of the above but I have this." [S]o he had a stick in his hand. Some form of cigarette that was wet.
>
> * * *
>
> He smoked this and he passed it to me. I said, "[N]o. I don't want it." So, he said, "[A]ll right." He's asking me to take a hit and I said, "[N]o." So, I sat

[6] The record does not include Detective Bach's first name.

> down and then he was just talking. "I feel great. This feels good. I'm on top of the world. You're killing my high, Kami. Why won't you just take a hit?" I said, "I don't want to. I don't feel comfortable especially with me having the kids today." I said, "I don't want to be on anything." And he said, "[O]kay." And then I shut the door to my room. And the next thing I know me and him are fighting and he throws me into the wall.
>
> * * *
>
> [A]fter he threw me at the wall, I told him to calm down. I said, "I will do whatever you want just stop. Relax. You're too loud. It's too early." And the next thing I know everything turned black. I might have spaced out or something. . . . . And I warned him. I said, "[I]f you don't relax the neighbors will call or I will call." We've fought before. (Unintelligible) And I know he was on something with the way he was acting.

(Quotation marks and commas added.)

Ms. Mukamba further reported to Detective Bach that appellant had thrown her into a wall, forced her to the ground, and repeatedly stabbed her with a grey pocketknife that he routinely carried with him. After he had done so, Ms. Mukamba heard appellant exclaim: "I'm on top of the hill. This is it." Ms. Mukamba then watched as appellant ran and jumped out of an apartment window. At no point during her interview with Detective Bach did Ms. Mukamba utter the name "Derek" or suggest that anyone other than appellant had been with her in the apartment on the morning of the incident.

Appellant was also transported to the hospital where he was treated, tested positive for both cocaine and PCP, and was interviewed by Officer Vaca.[7] During the interview, appellant denied ever having used PCP and stated that he had no memory of having fallen from the apartment window in front of which he was found lying on the ground. Detective

[7] The record does not include Officer Vaca's first name.

Kari Widup conducted a second interview of appellant on April 24, 2017, during which he again denied having used PCP on the morning of the assault and claimed that he had been pushed out of the window.

Also on April 24th, Detective Theresa Durham re-interviewed Ms. Mukamba. The narrative Ms. Mukamba gave during that interview was consistent with the one she had given to Detective Bach. Specifically, Ms. Mukamba told Detective Durham that on the morning of April 22nd, appellant had smoked an unspecified substance. Although he repeatedly urged Ms. Mukamba to partake, she declined. Approximately 20 or 30 minutes later, appellant began to exhibit erratic behavior, including throwing objects in the bedroom and proclaiming a sense of invulnerability. Despite having been exhausted from her ten-hour shift, Ms. Mukamba remained awake for fear that appellant would injure himself. Ms. Mukamba attempted to calm appellant, but in so doing only agitated him further.

Ms. Mukamba also told Detective Durham that her efforts to calm appellant eventually succeeded. For a period, she and appellant sat on the bedroom carpet near a mirror. Appellant's erratic behavior resumed, however, when he discovered a pocketknife hanging from his jean pocket, which he began "swinging . . . around." When Ms. Mukamba disarmed appellant by knocking the knife from his hand, violence ensued. Appellant repeatedly punched Ms. Mukamba in the midsection, struck her right temple, and repeatedly threw her (twice against the wall and once into a mirror). During the fray, Ms. Mukamba fell to the floor. As she struggled to stand, appellant retrieved the knife, approached Ms. Mukamba from behind, and cut her arm. He continued to attack Ms.

Mukamba despite her pleas for him to stop. When appellant finally relented, he began "pacing back and forth" in search of something with which to apply pressure to Ms. Mukamba's wounds. After assuring Ms. Mukamba that he would call 911, appellant took a running start and "lunged" out of a window while making a "woo" sound. Ms. Mukamba, in turn, crawled to her bed, retrieved her phone, and called her mother. Believing that she was bleeding to death, Ms. Mukamba curled into a fetal position on her bed, where she remained until the police arrived. During her interview with Detective Durham, Ms. Mukamba neither made mention of Derek, nor indicated that anyone but she and appellant had been present in the apartment during the assault.[8]

On May 5, 2017, Ms. Mukamba filed a petition for protection from domestic violence in the District Court for Montgomery County, alleging that appellant, while under the influence of drugs, had punched her torso, thrown her against a wall, applied a bear hug, and repeatedly stabbed her. An excerpt of the hearing on the petition was admitted into evidence and played to the jury. The following colloquy occurred:

THE COURT: This temporary -- this [is a] petition for a protective order.

MS. MUKAMBA: This is for my safety.

THE COURT: No. I mean what happened that caused you to do this?

MS. MUKAMBA: Oh. He assaulted me, sir.

THE COURT: Tell me a little bit about what happened? When was it?

[8] According to Ms. Mukamba's trial testimony, she subsequently attempted to contact Detective Durham to convey her suspicion that Derek had defenestrated appellant but was unable to do so.

MS. MUKAMBA: Saturday April 22nd in my home. He was under the influence of some kind of drug. And he assaulted me. He tried to beat me first and then he ended up stabbing me multiple times.

THE COURT: With a knife?

MS. MUKAMBA: With a pocket knife.

THE COURT: And you went to the hospital as a result of that?

MS. MUKAMBA: Yes, sir.

THE COURT: When did you get out of the hospital?

MS. MUKAMBA: I got out of the hospital Wednesday.

THE COURT: Okay.

MS. MUKAMBA: The 26th.

THE COURT: Were the police involved? Did they arrest him?

MS. MUKAMBA: Well, they arrested him at the hospital. Not outside because he was injured.

THE COURT: How did he get injured?

MS. MUKAMBA: He fell out of a window. He ran out of the window.

When asked at trial why she had filed the petition, Ms. Mukamba testified that she had only done so because Detective Durham had advised her that she could lose custody of her two minor children if she did not.

Ms. Mukamba's upstairs neighbor, Mavis Afutu, was among the witnesses to testify at trial. According to Ms. Afutu, between 6:00 and 6:30 on the morning of April 22nd, she heard objects being thrown and a male and female screaming at each other in the apartment below. Ms. Afutu stated that she had heard only a single male's voice. After about 20 to

30 minutes of listening to the screaming and feeling the building shake, Ms. Afutu called 911.

We will include additional facts as necessary to our resolution of the issues.

ANALYSIS

A. MS. MUKAMBA'S PRE-TRIAL STATEMENTS

Appellant contends the trial court erred in admitting several of Ms. Mukamba's pre-trial statements as substantive evidence pursuant to the prior inconsistent statement exception to the rule against hearsay. Appellant argues that without a finding by the court that she feigned forgetfulness at trial, Ms. Mukamba's claimed memory loss was not inconsistent with those prior statements. The State responds that appellant failed to preserve this contention for appellate review. Alternatively, it asserts "[t]he trial court implicitly found that Ms. Mukamba [had] feigned memory loss about the stabbing, justifying admission of her out-of-court statements under Maryland Rule 5-802.1(a)." (Footnote omitted). We agree with the State's latter contention and therefore decline to entertain its non-preservation arguments.

"[A]ppellate review of whether evidence is hearsay and, if so, whether it falls within an exception and is therefore admissible, is *de novo*." *Hallowell v. State*, 235 Md. App. 484, 522 (2018) (citation omitted). In many cases, however, a court's ruling as to admissibility also involves a factual assessment. We review the trial court's factual findings for clear error. *See Hailes v. State*, 442 Md. 488, 499 (2015) ("In reviewing a trial court's ruling on whether evidence falls under an exception to the rule against hearsay, an appellate

court reviews for clear error the trial court's findings of fact[.]" (Citation and footnote omitted)).

Hearsay is defined 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." Md. Rule 5-801(c). Hearsay is inadmissible unless "otherwise provided by [the Maryland Rules] or permitted by applicable constitutional provisions or statutes[.]" Md. Rule 5-802. For our purposes, the relevant rule is Maryland Rule 5-802.1, which provides, in pertinent part:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> (a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and was signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement[.]

The Controverted Evidence

The first piece of evidence the appellant asserts the court erred in admitting was Ms. Mukamba's petition for a temporary protective order. Before offering the petition into evidence at trial, the State asked Ms. Mukamba whether she remembered writing that appellant stabbed her. Although Ms. Mukamba confirmed she had completed and signed the petition, she asserted she could not recall what she wrote therein. When the State offered the petition into evidence, defense counsel objected, which the court overruled.

The second piece of evidence to which the appellant objects is Ms. Mukamba's testimony at the protective order hearing. At trial, she claimed to remember testifying appellant was injured when he ran out of a window, but not that he stabbed her. Despite defense counsel's objection, the court permitted the State to introduce an audio recording of Ms. Mukamba's testimony at the protective order hearing into evidence as a prior inconsistent statement pursuant to Maryland Rule 5-802.1.

The third piece of evidence in contention was the footage from Officer Waddell's body camera. During its direct examination of Officer Waddell, the State offered the footage into evidence. The footage recorded statements Ms. Mukamba made to officers in her apartment on the morning of the stabbing, as well as footage from Detective Bach's interview of Ms. Mukamba at the hospital. The court permitted entry of both videos over objection from defense counsel.

The final piece of evidence appellant objected to was a transcript of Ms. Mukamba's April 24, 2017 interview with Detective Durham. During direct examination, Ms. Mukamba testified that she remembered being interviewed by Detective Durham and recalled portions of that interview. However, she denied remembering that she told Detective Durham appellant took PCP and got angry with her on the morning of April 22, 2017. As the State continued its line of questioning, Ms. Mukamba further claimed she did not remember telling Detective Durham appellant had punched, thrown, and stabbed her, or remember telling the detective appellant "sprinted and lunged through the window and . . . let out a . . . whoop as he sprinted to the window[.]" Defense counsel objected to all of

this, which the court again overruled. The following day, defense counsel objected to the admission of a partially redacted transcript of Ms. Mukamba's interview with Detective Durham. The court overruled the objection, noting the transcript was permitted as a prior inconsistent statement.

The Legal Context

Appellant challenges only the threshold requirement that the statements at issue are inconsistent with Ms. Mukamba's trial testimony. Claiming the court did not find Ms. Mukamba feigned memory loss, he asserts her pre-trial statements were inadmissible. The narrow issue before us, therefore, is whether the court—either expressly or implicitly—made such a finding. *See McClain v. State*, 425 Md. 238, 252 (2012).

The Maryland Court of Appeals has adopted a liberal test for determining whether a prior statement is "inconsistent" with trial testimony:

> Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

Carr v. State, 284 Md. 455, 461 (1979) (quoting *Jencks v. United States*, 353 U.S. 657, 667 (1957)). A witness's prior statement must be materially inconsistent with his or her testimony. *See Wise v. State*, 243 Md. App. 257, 271-72 (2019). Ancillary or peripheral discrepancies in detail do not suffice. *Id*. at 456.

In addition to positive inconsistencies, Rule 5-802.1(a) permits the introduction of a witness's prior statements when that witness feigns forgetfulness at trial "because by

claiming that he [or she] does not remember an event that he [or she] does remember, the witness is denying, albeit indirectly, that the event occurred." *Corbett v. State*, 130 Md. App. 408, 425, *cert. denied*, 359 Md. 31 (2000); *see also Nance v. State*, 331 Md. 549, 564 n.5 (1993) ("When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied." (Cleaned up.)). However, when "a witness truthfully testifies that he [or she] does not remember an event, that testimony is not 'inconsistent' with his [or her] prior . . . statement . . . within the meaning of Rule 5-802.1(a)." *Corbett*, 130 Md. App. at 425.

The determination of whether a witness's purported lack of memory is genuine or contrived "'is a demeanor-based credibility finding that is within the sound discretion of the trial court to make,' and such a decision cannot be made 'from the cold record.'" *McClain*, 425 Md. at 252 (quoting *Corbett*, 130 Md. App. at 426). Accordingly, before admitting a witness's prior statement they claim to have forgotten pursuant to Rule 5-802.1(a), a court must find such forgetfulness is, in fact, feigned. *See Corbett*, 130 Md. App. at 426. That finding need not, however, be made expressly on the record. *See McClain*, 425 Md. at 252 ("Rule 5-802.1, unlike some other Rules, does not require explicitly that findings be placed on the record, and we decline to read into the Rule such a requirement." (Citations omitted)). Absent an indication to the contrary, we will presume the court knew and properly applied the law. *Id.*; *see also Davis v. State*, 344 Md. 331, 339 (1996) ("It is preferable that the determination be reflected in an express finding; however, because judges are presumed to know and, properly to have applied, the law where the

required foundation is itself independently admissible, it may be implicit." (Internal citation omitted)).

The extent of a purported memory lapse is relevant to the determination of whether it is genuine or contrived. A witness's feigned forgetfulness "may be implied from partial testimony, i.e., an omission, because it is reasonable to infer from the witness's ability to testify partially that he [or she] has the ability to testify fully but is unwilling to do so." *Corbett*, 130 Md. App. at 425. Even when a witness fails to testify regarding a matter entirely, however, a court may reasonably infer inconsistency "when under the circumstances he [or she] reasonably would be expected to do so." *Id.* (citation omitted). Ultimately, "'in case of doubt the courts should lean toward receiving such statements to aid in evaluating the testimony.'" *McClain*, 425 Md. at 250 (quoting Kenneth S. Broun, *McCormick on Evidence* § 34, p. 153 (6th ed. 2006)).

The Court's Rulings

Shortly after Ms. Mukamba denied recalling that she identified appellant as her assailant to the police and emergency personnel, the court declared her a hostile witness, reasoning, in part:

> [A]ccording to the testimony told in the statement as I understand it is inconsistent with what she originally told the police.
>
> * **
>
> I am permitting the leading in light of . . . what has occurred and transpired in this witness prior to her taking the stand as well as on the stand. It is apparent to me that she is a hostile witness. And so the State is permitted to lead her.

From that ruling alone, we could reasonably infer the court implicitly found Ms. Mukamba's purported memory loss was insincere. When the State subsequently offered the audio recording of Ms. Mukamba's protective order hearing into evidence, it expressly argued it was admissible as a prior inconsistent statement pursuant to Rule 5-802.1. Over defense counsel's objections, the court admitted the recording. The court's admission of the recording as a prior inconsistent statement under Rule 5-802.1 amounted to an implicit finding that Ms. Mukamba's lack of memory was a contrivance. *See McClain*, 425 Md. at 252 (holding that the court's comments—including its announcement that an audio recording was admissible under Rule 5-802.1—"indicate, even if not expressly, that the court admitted the statement as a prior inconsistent statement under the Rule").

When overruling defense counsel's hearsay objections to questions eliciting Ms. Mukamba's memories of statements she made to Detective Durham, the court again referred to Ms. Mukamba as a hostile witness and asked defense counsel why the remarks to which the State referred would not be admissible as prior inconsistent statements. When the court admitted the redacted transcript of Ms. Mukamba's interview with Detective Durham over an objection, the court was directly confronted with defense counsel's argument that "it's not an inconsistency if she didn't remember." Again, the court nevertheless ruled "it would be a prior inconsistent statement at the least." Any doubts as to whether the court had implicitly found Ms. Mukamba had feigned her forgetfulness were dispelled at the close of the evidence, when the court expressly ruled Ms. Mukamba's pretrial statements were "all admissible as substantive evidence under 5-802.1[.]"

Based on the trial court's comments and consistent with the presumption it knew and properly applied the law, we are persuaded that the court implicitly found Ms. Mukamba feigned memory loss, and therefore hold her pre-trial remarks were properly admitted as prior inconsistent statements pursuant to Rule 5-802.1(a).

B. THE STATE'S REFERENCES TO APPELLANT'S PRE-TRIAL INCARCERATION

Background

Next, the appellant claims the trial court committed reversible error by permitting the State to refer to his pre-trial incarceration when asking Ms. Mukamba about hundreds of "jail calls" she exchanged with appellant. Preliminarily, he argues "the fact that the telephone conversations . . . were jail calls was not probative of any issue of consequence in this case, and the State's references to [appellant's] incarceration were therefore irrelevant." Alternatively, appellant asserts that the probative value of his pre-trial incarceration was substantially outweighed by the danger of unfair prejudice. The State counters that the references to appellant's pre-trial incarceration are relevant to rebut the defense theory that it was Derek who both stabbed Ms. Mukamba and pushed appellant out of the third-story window from which he fell. It argues that evidence Ms. Mukamba neither discussed the alleged third-party suspect with appellant, nor implicated Derek—despite appellant's continued incarceration—"could discredit her recantation and was relevant to impeachment." Again, we agree with the State.

Prior to trial, the State made a motion *in limine*, requesting the court permit it to elicit testimony from Ms. Mukamba relating to appellant's pre-trial incarceration. The State

sought to show that, although appellant was arrested on April 22, 2017 and was in pre-trial detention thereafter, Ms. Mukamba did not identify Derek as a suspect until September 13, 2017.[9] The State argued Ms. Mukamba's failure to come forward with this information during the first four months of appellant's detention was relevant to impeach her credibility as to her new narrative of events.

The State also sought the court's permission to ask Ms. Mukamba about hundreds of telephone calls that she and appellant exchanged while he was in pre-trial detention. The State proffered that in none of those calls did either appellant or Ms. Mukamba suggest a third-party assailant stabbed Ms. Mukamba or threw appellant out of the window. The State also argued that Ms. Mukamba's silence on these matters was relevant to Ms. Mukamba's credibility, reasoning: "You would think that that would be [the] sort of thing you would bring up if it actually happened." Defense counsel objected, claiming appellant's incarceration was "probative of nothing and simply prejudicial."

The court preliminarily ruled that the State's requested lines of inquiry were permissible. The court explained:

> [B]ased upon the proffer it would seem to me that the fact that he may have been in jail particularly given the severity of the charges between April and

[9] On September 13, 2017, Ms. Mukamba provided defense counsel with a signed handwritten statement in which she recanted her previous identification of appellant as her assailant, claiming she had no memory of who stabbed her. In that statement, Ms. Mukamba first identified Derek as a suspect in her stabbing, claiming she was stabbed during a physical altercation between appellant and him. She also suggested Derek may have pushed appellant out of the window. The remainder of her written account was likewise consistent with her trial testimony.

> September would not be of significant, if any, prejudice to him. The probative value in light of the State's proffer I think is significant.
>
> You might think a person would do one thing if the person they loved wasn't locked up whereas if they were locked up there is -- I mean the person who is locked up has much more incentive on their part to want to get them out of jail if they are sitting in jail as a result of, you know, through no fault of their own. They are an innocent person. Enormous impetus to do something to set the record straight, particularly since she is the reason he is sitting in jail. So the fact that he is in jail is a significant factor in that examination from my point of view.
>
> There doesn't need to be any reference to the fact that he continued to be in jail after September and we don't need to indicate the time frame with respect to the calls but if there were 200 calls or whatever there was that nowhere during the course of the 200 calls was there ever a discussion about who this other person was. To me that is permissible.

The court then heard argument from defense counsel, who suggested that the omission of any mention of a third-party assailant may have been the result of an attorney's having advised appellant not to discuss the case. To that argument, the court responded, in part:

> Here arguably from the defense standpoint that it is an innocent man and to think in light of that advice that the innocent man when talking to his girlfriend predictably when the girlfriend has falsely accused him and it has resulted in him being in jail would because of that advice not say to her what are you doing to me? Why don't you go tell the police what really happened? I think it's a whole different issue and I think it's a fair argument to make. I understand your objection but it is overruled. I will permit the inquiry.

During the State's direct examination, Ms. Mukamba affirmed that she and appellant had frequently spoken on the telephone during the weeks following his incarceration. The State then elicited the following testimony:

[THE STATE]: So I don't mean on May 1st but in the weeks that followed you started talking to the defendant on [the] telephone. Right?

[MS. MUKAMBA]: Yes.

[THE STATE]: And you started talking to him very frequently. Right?

[MS. MUKAMBA]: Yes.

[THE STATE]: Between the dates of April 24 and September 9 would it be accurate to say that he called you around 300 times?

[MS. MUKAMBA]: I don't know.

[THE STATE]: That's not a crazy number? You guys talked a lot?

[MS. MUKAMBA]: Yeah. That sounds like an awful lot of times but I don't know.

[THE STATE]: Okay. And you two reconciled during these phone calls. Right?

[MS. MUKAMBA]: What do you mean reconciled?

[THE STATE]: Sorry. So you had been—you two got back together if you were ever broken up?

[MS. MUKAMBA]: We were never broken up.

* * *

[THE STATE]: *Now on these jail calls* the person you are describing as Derrick his last name you don't know[,] he didn't know Mr. Frazier. Correct? Before this.

* * *

[MS. MUKAMBA]: No.

[THE STATE]: So they were strangers until this violent incident on April 22nd?

[MS. MUKAMBA]: Mr. Frazier still didn't know who this person was even when the person was in my home. No.

[THE STATE]: And in all those times of the phone calls you two never discussed Derrick. Did you?

[MS. MUKAMBA]: I don't remember.

[THE STATE]: Do you remember a specific phone call in which the defendant, Mr. Frazier, asked you hey who is this Derrick or who is the person who stabbed you?

* * *

[MS. MUKAMBA]: Yes. Vaguely. Yes.

[THE STATE]: *Was that in a phone call that took place while Mr. Frazier was incarcerated?*

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[MS. MUKAMBA]: Yes.

[THE STATE]: Do you remember about when that phone call took place?

[MS. MUKAMBA]: No. I don't remember.

(Emphasis added.)

Relevance

Whether evidence is relevant is a question of law which we review *de novo*. *Schisler v. State*, 394 Md. 519, 535 (2006). "Evidence is relevant when it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Montague v. State*, 244 Md. App. 24, 39 (2019) (quoting Md. Rule 5-401), *aff'd*, 471 Md. 657 (2020). "[R]elevant evidence is admissible, under Maryland Rule 5-402, subject to the court's exercise of discretion to exclude it, under Maryland Rule 5-403, 'if its probative value is substantially

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" *Odum v. State*, 412 Md. 593, 615 (2010) (quoting Md. Rule 5-403).

Evidence of appellant's protracted pre-trial incarceration—as evidenced by his hundreds of jail calls with Ms. Mukamba—was relevant to discredit Ms. Mukamba's recantation of her initial identification of appellant as her assailant. Appellant's confinement—particularly coupled with his ongoing relationship with Ms. Mukamba—provided Ms. Mukamba with a clear motive to discuss with him their purported mutual assailant, to promptly recant her initial account, and to identify Derek as a suspect in her stabbing. That motive notwithstanding, according to the State's proffer, she took no such action until after appellant had been incarcerated for nearly five months. Under such circumstances, we are persuaded that the fact of appellant's incarceration was relevant to impeach Ms. Mukamba. *See Williams v. State*, 344 Md. 358, 365 (1996) ("[A] witness's pretrial silence is relevant if it would have been natural for the witness to report evidence exculpatory of the defendant . . . immediately to law enforcement authorities." (Citation omitted)); *see also Jenkins v. Anderson*, 447 U.S. 231, 239 (1980) ("Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted." (Citation omitted)).

Probative Value v. Danger of Unfair Prejudice

A trial court should exclude relevant evidence if its probative value "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the

jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. Evidence is unfairly prejudicial "when it tends to have some adverse effect beyond tending to prove the fact or issue that justified its admission." *Hannah v. State*, 420 Md. 339, 347 (2011). Whether the unfairly prejudicial impact of relevant evidence substantially outweighs its probative value is an issue entrusted to the sound discretion of the trial court and will not be disturbed absent a clear abuse thereof. *Montague*, 244 Md. App. at 40.

Appellant argues that "while there is no difference in probative value between a reference to 'telephone calls' versus one to 'jail calls,' the difference in prejudice is immeasurable." In support of that assertion, he cites cases that held a defendant's appearance at trial in visible physical restraints or in prison garb undermined the presumption of innocence and unfairly prejudiced the accused. *See Estelle v. Williams*, 425 U.S. 501, 504-05 (1976); *Whittlesey v. State*, 340 Md. 30, 85-86 (1995); *Knott v. State*, 349 Md. 277, 285-86 (1998). We do not believe these cases are particularly relevant to the issue before us.

We are of course aware that courts must "carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (citing *In re Winship*, 397 U.S. 358, 364 (1970)). In *Estelle*, the United States Supreme Court held that compelling a defendant to stand trial before a jury clad in prison attire offends their Fourteenth Amendment right to a fair trial. The Court reasoned that "the constant reminder of the accused's condition

implicit in such distinctive, identifiable attire may affect a juror's judgment" and is "likely to be a continuing influence throughout the trial[.]" *Id.* at 504-05. The use of visible physical restraints is likewise inherently prejudicial, offends due process, and is, therefore, prohibited absent an "essential state interest[] such as physical security, escape prevention, or courtroom decorum." *Deck v. Missouri*, 544 U.S. 622, 628 (2005) (citations omitted).

"The admission of [a defendant's] jail calls [do] not pose the same constant and visible risk of prejudice as shackling, prison garb or other external signs of a defendant's incarceration or perceived threat to the community at large." *United States v. Arayatanon*, 980 F.3d 444, 450 (5th Cir. 2020) (footnote omitted); *see also United States v. Johnson*, 624 F.3d 815, 821-22 (7th Cir. 2010) ("[T]he occasional reference to the fact that [the defendant] had at some point been in jail is quite different than the 'constant reminder of the accused's condition implicit in such distinctive, identifiable attire' that underlies the injustice inherent in requiring a defendant to stand trial in prison garb." (Quoting *Estelle*, 425 U.S. at 504-05)).

In the context of the hundreds of telephone calls exchanged between Ms. Mukamba and appellant while he was in jail awaiting trial, we cannot say the court's decision to permit the State to make brief references to his incarceration constituted an abuse of discretion. *See Norwood v. State*, 222 Md. App. 620, 643 (2015). Accordingly, we perceive no reversible error here.

C. THE STATE'S CLOSING ARGUMENT

Finally, appellant contends the court erred by permitting the State to impermissibly shift the burden of proof during its concluding argument. Recognizing he failed to preserve this issue, he asks that we exercise our discretion to engage in plain error review.

"Plain error review is a rarely used and tightly circumscribed method by which appellate courts can, at their discretion, address unpreserved errors by a trial court which 'vitally affect[] a defendant's right to a fair and impartial trial.'" *Malaska v. State*, 216 Md. App. 492, 524 (quoting *Diggs v. State*, 409 Md. 260, 286 (2009)), *cert. denied*, 439 Md. 696 (2014)). This discretion should rarely be exercised, as "considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court[.]" *Chaney v. State*, 397 Md. 460, 468 (2007). The Court of Appeals has established four conditions that must be satisfied "before an appellate court will reverse for plain error[.]" *Winston v. State*, 235 Md. App. 540, 567 (2018). They are:

> 1. There must be a legal error that has not been intentionally relinquished or abandoned by the appellant.
>
> 2. The error must be clear or obvious, and not subject to reasonable dispute.
>
> 3. The error must have affected the appellant's substantial rights, which in the ordinary case means that it affected the outcome of the proceedings.
>
> 4. If the previous three parts are satisfied, the appellate court has discretion to remedy the error, but it should exercise that discretion only if the error affects the fairness, integrity or reputation of judicial proceedings.

***

> Because each one of the four conditions is, in itself, a necessary condition for plain error review, the appellate court may not review the unpreserved error if any one of the four has not been met. For the same reason, the court's analysis need not proceed sequentially through the four conditions; instead, the court may begin with any one of the four and may end its analysis if it concludes that that condition has not been met.
>
> Meeting all four conditions is, and should be, difficult.

Id. at 568 (citing *Newton v. State*, 455 Md. 341, 364 (2017); *Givens v. State*, 449 Md. at 433, 469 (2016); and *State v. Rich*, 415 Md. 567, 578, 3 A.3d 1210 (2010)). For these reasons, successful "invocation of the 'plain error doctrine' 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003), *cert. denied*, 380 Md. 618 (2004).

Parties are "afforded great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400, 429 (1999) (citations omitted). This leeway is not limitless, however. Although the State may expose weaknesses in the defense's theory of the case, the State may not attempt to shift the burden of proof to the defendant. Reversal is warranted only when the State's comments either "actually misled the jury or were likely to have misled or influenced the jury to the defendant's prejudice," a determination which is entrusted to the sound discretion of the trial court. *Hill v. State*, 355 Md. 206, 224 (1999), *cert. denied*, 405 Md. 64 (2008).

During its concluding argument in this case, the State made the following remarks, to which appellant did not object, but about which he now complains:

> Now, there's some things that [*defense counsel*] didn't choose to explain.

> He didn't choose to explain the 911 call. He didn't explain why that 911 call matched up perfectly with what the State's allegations are in this case.
>
> *He didn't explain the dead-bolted door*. There's been no explanation. He says someone, maybe somebody could have, someone else could have done it. ***The defendant didn't prove that***. They could have tested more DNA. Well, for what? The door was dead-bolted, and she said who did it. And there was no other way in or out, other than through the window.
>
> *He's not even trying to explain Derek*. He was given information about Derek. *No one is trying to explain who Derek is* or why we don't know any information about him, or why he remains a one-named mystery person all these months later.
>
> And *he's not trying to explain why there was no blood outside the apartment, no blood on the door, no blood in the hallway, no blood on the doorknob*. Wouldn't all those things be there i[f] someone else had been there?
>
> Wouldn't the 911 caller say, and then I heard a third person come in, or I heard a series of people yelling? It's because we all know what happened. It was the defendant and it was the victim. They were the only two people there.

(Emphasis added).

The statement that "the defendant didn't prove" that "someone else" could have assaulted Ms. Mukamba was clearly improper.[10] If defense counsel had objected and asked for a corrective instruction, the trial court should have given one. Defense counsel,

[10] The remainder of the State's concluding argument was within the bounds of proper argument. As the State correctly notes, by addressing defense counsel by name, the State made clear it was responding to defense counsel and commenting on the third-party perpetrator theory advanced thereby. The State had the right to point out deficiencies in the defense's theory of the case. *See Williams v. State*, 216 Md. App. 235, 256 ("The actual evidence in the case did not support many of the statements the defense made or the counter-narrative that the defense was suggesting. The State was fully entitled to point that out. This was no shifting of the burden of proof."), *cert. denied*, 438 Md. 741 (2014).

however, did not object. For us to reverse the conviction, we must conclude the error "affected the outcome of the proceedings." *Winston*, 235 Md. App. at 568.

We think that it is unlikely that the improper statement affected the jury's verdict. In its totality, the State's case was a strong one. Additionally, the prosecutor's improper reference to what appellant did not prove was a brief isolated statement uttered during a lengthy concluding argument. Furthermore, the court properly instructed the jury that the State bore the burden of proof.

For the foregoing reasons, we affirm the judgments of the circuit court.

THE JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY ARE AFFIRMED. COSTS TO BE PAID BY APPELLANT.