Circuit Court for Baltimore City
Case No. 117331026

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1420

September Term, 2019

ROBERT GARRIS

v.

STATE OF MARYLAND

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

JJ.

Opinion by Fader, C.J.

Filed: December 14, 2020

A jury in the Circuit Court for Baltimore City convicted Robert Garris, the appellant, of the second-degree murder of Lamontrey Tynes and related offenses. Mr. Garris contends that the trial court erred or abused its discretion in: (1) denying his *Batson* challenge; (2) calling three witnesses solely for the purpose of impeaching them; (3) admitting the prior recorded statements of those same witnesses; and (4) violating his confrontation rights by allowing one witness's prior statement to be played for the jury when the witness was not available for cross-examination. Finding no error or abuse of discretion by the trial court, we will affirm.

BACKGROUND[1]

On August 5, 2017, two men robbed Malika Ben, Mr. Tynes's girlfriend, at gunpoint while she was seated in her car in Baltimore City. Shortly thereafter, Ms. Ben told Mr. Tynes that she had been robbed, and he drove them both to the scene of the robbery. As Mr. Tynes exited the car, an assailant shot and killed him. The State charged Mr. Garris with Mr. Tynes's murder and related offenses.

As relevant to the issues on appeal, at trial, the State called three witnesses who had identified Mr. Garris in connection with the incident in recorded statements, but who subsequently disavowed those statements or claimed to have forgotten key facts. The testimony and prior statements of those three witnesses—Ms. Ben, Darian Clark, and Jennifer Smith—are discussed below.

[1] Our recitation of the facts is based on the evidence presented at trial, "including all reasonable inferences to be drawn therefrom," "view[ed] . . . in the light most favorable to the State." *Fuentes v. State*, 454 Md. 296, 307 (2017).

The jury found Mr. Garris guilty of second-degree murder, use of a handgun in the commission of a felony, and possession of a regulated firearm after a disqualifying conviction. This timely appeal followed.

DISCUSSION

I. THE TRIAL COURT DID NOT ERR IN DENYING MR. GARRIS'S *BATSON* CHALLENGE.

During jury selection, Mr. Garris challenged the prosecutor's use of peremptory strikes to remove five African American male jurors from the venire and failure "to articulate plausible, fact-based race-neutral reasons" for the strikes. Mr. Garris argues that the trial court erred in denying that challenge. The State counters that the trial court did not err in accepting the prosecutor's explanations for her strikes as race-neutral and nondiscriminatory.

In *Batson v. Kentucky*, the United States Supreme Court held that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." 476 U.S. 79, 86 (1986). The decision in *Batson* establishes a three-step process for determining when a strike is discriminatory. *See id*. at 96-98. The first step requires that the party raising the challenge make a prima facie showing that the peremptory challenge was made on "one or more of the constitutionally prohibited bases," including race. *Ray-Simmons v. State*, 446 Md. 429, 436 (2016). Step one may be satisfied by showing a "pattern" of strikes against African American jurors in the venire. *Batson*, 476 U.S. at 97.

If the requisite showing is made under step one, "'the burden of production shifts to the proponent of the strike to come forward with' an explanation for the strike that is neutral as to race, gender, and ethnicity." *Ray-Simmons*, 446 Md. at 436 (quoting *Purkett v. Elem*, 514 U.S. 765, 767 (1995)). Any tendered explanation will be considered "race-neutral unless a discriminatory intent is inherent in the explanation." *Ray-Simmons*, 446 Md. at 436 (quoting *Edmonds v. State*, 372 Md. 314, 330 (2002)). In assessing the "facial validity" of the explanation, the persuasiveness of the reason given is not a factor. *Edmonds*, 372 Md. at 332.

In the third and final step, the trial court must decide whether the complaining party has met the burden of proving "purposeful racial discrimination." *Ray-Simmons*, 446 Md. at 437 (quoting *Purkett*, 514 U.S. at 767). "[T]he decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality opinion). This determination rests largely on the court's assessment of the credibility of the striking party. *Id.* Because the trial court's resolution of a *Batson* challenge is essentially a factual determination, the court's decision is afforded great deference and will not be reversed unless it is clearly erroneous. *Id.; accord Ray-Simmons*, 446 Md. at 437; *see also Khan v. State*, 213 Md. App. 554, 568 (2013) ("In reviewing [a] trial judge's [*Batson*] decision, appellate courts do not presume to second-guess the call by the 'umpire on the field' either by way of *de novo* fact finding or by way of independent constitutional judgment." (quoting *Bailey v. State*, 84 Md. App. 323, 328 (1990))). "[I]f any competent material evidence exists in support of the trial court's factual findings, those findings cannot be held to be clearly

erroneous[.]" *Spencer v. State*, 450 Md. 530, 548 (2016) (quoting *Webb v. Nowak*, 433 Md. 666, 678 (2013)). It is "generally[] for the trial court—not an appellate court—to determine" "the credibility of the proponent offering the reasons" for the strikes. *Ball v. Martin*, 108 Md. App. 435, 456 (1996).

Toward the end of jury selection, Mr. Garris objected that the prosecutor had exercised peremptory strikes to remove only "black males and most of them haven't answered questions." The court noted that the prosecutor had indeed used five of its six strikes to remove African American males from the venire, which the court found to be "a pattern" satisfying the first step of the *Batson* test and requiring further inquiry. The court thus asked the prosecutor to provide "race-neutral reasons" for the strikes. This colloquy ensued:

> [PROSECUTOR]: Juror . . . 4422, had tattoos and one appeared to be a tear. Juror . . . 4435, when I made my first strike he mumbled, "Of course." Juror No. – in reference to Juror . . . 4499, when I stated, "Acceptable to the State." He yelled out, "For Defense" –
>
> THE COURT: So –
>
> [DEFENSE COUNSEL]: I didn't hear that.
>
> [PROSECUTOR]: – and looked at Defense indicating to me that he was confused. And 4494 . . . was late and then late to respond during jury panel.
>
> [DEFENSE COUNSEL]: And, Your Honor, I respect the Court's ruling, but I just want to make the record clear, none of the jurors – I didn't hear any of that from any of these jurors and none of these jurors answered a question and I'll just submit.
>
> [PROSECUTOR]: Your Honor –
>
> [DEFENSE COUNSEL]: Yes, thank you.

[PROSECUTOR]: – may I make a record just for Juror 4434 mumbled, of course he was closest to me when he said it in the line.

THE COURT: Right. In the future though, you're going to have to put it on the record because if nobody else notices it, how do – you know, it's – okay. So what about 4548 who was also a black male?

[PROSECUTOR]: 4548?

THE COURT: Right.

[PROSECUTOR]: This is the one who indicated that he – if you remember, he was the one who was late and off when he approached. He said, "I don't want to be a juror."

THE COURT: Okay.

[PROSECUTOR]: And was late when you called him up.

THE COURT: Okay. So you said 4435 said, "Of course," when you struck him or –

. . . .

[PROSECUTOR]: When I made my first strike he said, "Of course."

THE COURT: I don't know what that means, "when you made your first strike."

[PROSECUTOR]: When I made my first strike with the woman with the pink hair. The – . . .

. . . .

4435 commented about my first strike. He was standing–

THE COURT: Okay.

[PROSECUTOR]: – closest to me.

THE COURT: All right. I will accept those race neutral reasons, but please know it is a pattern so be careful.

Shortly after this exchange, and after the selection of all of the jurors other than the alternates, the court asked both attorneys if they accepted the empaneled jury. The prosecutor and defense counsel both confirmed that the jury was acceptable. Mr. Garris made no further objections during or following selection of the alternate jurors and accepted each alternate individually.

Later that day, the court further explained its reasoning for rejecting Mr. Garris's *Batson* challenge:

> Prior to the break, [defense counsel] made a [*Batson*] [c]hallenge and because I found that there were six African-American jurors stricken by the State and five of them were men, I did find there to be a pattern and therefore requested that [the prosecutor] place her race-neutral reasons on the record.
>
> I'm afraid that my findings were not as explicit as they should have been, so what I'm going to say is this. The reason that I accepted her race-neutral reasons is, number one, I found that she was being candid with the Court as to the reasons that she struck the jurors she did. I noted that she was looking at notes that she had recorded with respect to each juror number at the time that she gave me the reason for having stricken them.
>
> So despite the fact that there were some reasons that could not be verified by other folks because, frankly, they were utterances made by the jurors as [the prosecutor] pointed out, closest to her, she would have been the only one in a position to hear them. So based on that, based on my evaluation of [the prosecutor's] credibility with respect to her race-neutral reasons, I did find that her reasons for striking the jurors were race-neutral.
>
> I also will note . . . [n]umber one, [defense counsel] struck every – I think every white male there was. I wanted to state that for the record. I'm not making a *Batson* challenge. I'm just observing what I saw and I will also note that the jury is primarily made up of African Americans.

The court asked defense counsel if there was anything further he sought to place on the record, and counsel declined, stating that he had previously "accepted" the court's ruling on the *Batson* challenge.

We hold that Mr. Garris's unqualified acceptance of the jury waived his *Batson* objections. "Generally, a party waives his or her voir dire objection going to the inclusion or exclusion of a prospective juror (or jurors) . . . if the objecting party accepts unqualifiedly the jury panel (thus seated) as satisfactory at the conclusion of the jury-selection process." *State v. Stringfellow*, 425 Md. 461, 469 (2012). In contrast to objections challenging specific voir dire questions and other matters incidental to jury selection, "[o]bjections related to the inclusion/exclusion of prospective jurors are treated differently for preservation purposes because accepting the empaneled jury, without qualification or reservation, 'is directly inconsistent with [the] earlier complaint [about the jury],' which 'the party is clearly waiving or abandoning.'" *Id.* at 470 (quoting *Gilchrist v. State*, 340 Md. 606, 618 (1995)).

Mr. Garris affirmatively abandoned his complaint about the State's use of its peremptory challenges by accepting the empaneled jury after the court denied his *Batson* challenge.[2] *Compare Gantt v. State*, 241 Md. App. 276, 302-07, *cert. denied*, 466 Md. 200 (2019) (holding that a pro se defendant's acceptance of an empaneled jury waived prior *Batson* objection), *with Mills v. State*, 239 Md. App. 258, 271 n.4 (2018) (holding that

[2] Mr. Garris contends that if we find that his *Batson* challenge was waived, we should nonetheless treat it as preserved based on a "substantial compliance" rationale. In doing so, he analogizes his *Batson* challenge to a challenge to jury instructions under Rule 4-325(e). Mr. Garris has not identified any authority supporting application of substantial compliance to a *Batson* challenge. Even if he had, the argument would fail because the record does not support his assertion that a renewal of his objection would necessarily have been futile. *See, e.g.*, *Bowman v. State*, 337 Md. 65, 69 (1994) (identifying as a condition for application of substantial compliance that the "circumstances must be such that a renewal of the objection . . . would be futile or useless" (quoting *Gore v. State*, 309 Md. 203, 209 (1987))).

accepting a jury "pursuant to my motions" preserved a *Batson* challenge for appellate review).

Even if Mr. Garris had preserved his *Batson* challenge, we would not disturb the circuit court's decision. The court found that the striking of five African American males from the venire indicated a pattern sufficient to establish a prima facie showing of discrimination, and so it proceeded to the second *Batson* step. The prosecutor then gave facially non-discriminatory reasons for striking the jurors, including that one had a tattoo of a tear,[3] one stated "[f]or the Defense" in response to the State's acceptance of another juror, another arrived late and was late to respond, another mumbled "of course" in response to the State's striking of another juror, and the fifth stated that he did not want to be a juror. The court correctly identified these reasons as facially nondiscriminatory in that none of them were based on the race or gender of the jurors. *See Edmonds*, 372 Md. at 332 (stating that a neutral explanation is one based on something other than race).

At the third step of the *Batson* analysis, the court credited the prosecutor's explanations of the reasons for her strikes and so determined that Mr. Garris had not satisfied his burden of proving that the State's strikes were racially motivated. In doing so, the court provided a detailed explanation for its assessment of the prosecutor's credibility.

[3] Although the prosecutor did not explain her concern with the tear tattoo, tear-shaped tattoos have been identified as recognizable among gang members and prisoners. *See* John M. Hagedorn & Bradley A. MacLean, *Breaking the Frame: Responding to Gang Stereotyping in Capital Cases*, 42 U. Mem. L. Rev. 1027, 1034-35 (2012) (describing popular interpretation of tear tattoos in gang culture); Margo Demello, *The Convict Body: Tattooing Among Male American Prisoners*, 9 Anthropology Today 6, 10-11 (Dec., 1993) (describing symbology of prison tattoos).

The court also explained that it was reasonable to believe that the prosecutor may have heard comments that the court and defense counsel did not hear—including "[f]or the Defense" and "of course"—because of the prosecutor's proximity to the jury. On this record, we cannot conclude that the court's findings were clearly erroneous. *See Hernandez*, 500 U.S. at 360 ("Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.").

Relying on *Chew v. State*, 317 Md. 233 (1989), Mr. Garris contends that the court erred by not expressly finding that the statements and behaviors the prosecutor identified as the basis for her strikes at the second *Batson* step had in fact occurred. As an initial matter, to the extent that Mr. Garris implies that *Chew* requires a court to be able to confirm itself the behaviors on which a strike is purportedly exercised, we disagree. In *Chew*, the Court of Appeals held that, "[b]efore a trial judge can determine that a ground is racially neutral, [the judge] must be convinced that it exists in fact." *Id.* at 248. In determining that the trial court erred in not finding that the ground asserted actually existed, the Court did not hold that the trial court had to independently verify the existence of the ground. To the contrary, the Court observed that the outcome of that case might have been different if the trial court "had . . . found, perhaps bolstered by his own recollection of the juror's demeanor, that the predicate fact had been established[.]" *Id.* The Court's use of "perhaps" indicates that the judge's own observation would have been beneficial, but not a requirement, in making an appropriate finding. Here, we think that the circuit court's comments crediting the explanations provided by the prosecutor reflect that it was

convinced that the articulated grounds for the strikes "exist[ed] in fact," *id.*, even though the court had not witnessed all of them.

Moreover, following *Chew*, the Supreme Court provided additional guidance regarding the appropriate inquiry at each step of a *Batson* analysis in *Purkett v. Elem*, 514 U.S. 765 (1995). The Court of Appeals' analysis in *Chew* was based on an understanding that the proponent of a strike bears the burden of proof to show both that a reason other than race existed and that the reason "has some reasonable nexus to the case and was in fact the motivating factor in the exercise of the challenge." 317 Md. at 247. In *Purkett*, the Supreme Court clarified that a proponent's burden at *Batson* step two is that of production only. 514 U.S. at 767. Moreover, the proponent's burden at step two "does not demand an explanation that is persuasive, or even plausible." *Id.* at 767-68. That is because "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Id.* at 768. In other words, an assessment of the credibility of the proponent's asserted reasons for the strikes takes place only at *Batson* step three, at which the opponent of the strike has the burden of proof.[4] *See Gilchrist*, 340

[4] The Supreme Court also explained that the statements in *Batson* that the federal appellate court in *Purkett*—and many other courts, including the Court of Appeals in *Chew*—had interpreted as imposing a burden of persuasion on the proponent of a strike, did not actually do so:

> The [federal] Court of Appeals appears to have seized on our admonition in *Batson* that to rebut a prima facie case, the proponent of a strike "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges," *Batson, supra,* 476 U.S. at 98, n.20, and that the reason must be "related to the particular case to be tried," 476 U.S. at 98. This warning was meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying

Md. at 641 (Chasanow, J., concurring) (observing that the analysis in *Chew* "is similar to what the Supreme Court condemned in *Purkett*"); *Ball*, 108 Md. App. at 450-51 (observing that *Purkett* limited the power of appellate courts to review factual findings of a trial court that accepts facially neutral reasons for strikes at *Batson* step two).

Here, the trial court correctly identified a pattern of strikes that satisfied step one of the *Batson* analysis; properly concluded at step two that the prosecutor had offered facially nondiscriminatory reasons for her strikes; and then made factual findings at step three that those reasons were credible. In light of the degree of deference afforded to trial courts in resolving *Batson* challenges, we discern no error or abuse of discretion in those determinations.

II. THE TRIAL COURT DID NOT ERR IN ADMITTING RECORDED STATEMENTS OF MALIKA BEN, DARIAN CLARK, AND JENNIFER SMITH.

Mr. Garris argues that the trial court erred in admitting the recorded statements of three State witnesses under exceptions to the rule against hearsay evidence. Hearsay, which is an out-of-court statement that is offered for the truth of the matters asserted therein, is generally inadmissible under Rule 5-802. Here, the court admitted the witnesses' out-of-court statements under two exceptions to that rule: Rule 5-802.1(a), which permits the admission of certain prior inconsistent statements; and Rule 5-802.1(e), which permits the limited admission of prior recollection recorded.

> that he had a discriminatory motive or by merely affirming his good faith. What it means by a "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection.

Purkett, 514 U.S. at 768-69 (some internal citations removed).

We ordinarily review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *See Dulyx v. State*, 425 Md. 273, 285 (2012). A trial court's determination regarding whether evidence is admissible under a hearsay exception, however, is a legal question that we review without deference. *Id.* A ruling as to the admissibility of hearsay evidence may also involve factual findings, which we review for clear error. *Gordon v. State*, 431 Md. 527, 538 (2013).

A. The Trial Court Did Not Err in Admitting Malika Ben's Statement to Police as a Prior Inconsistent Statement.

Malika Ben, Mr. Tynes's girlfriend at the time, was with him when he was shot. On the day of the shooting, Ms. Ben provided a statement to police that, among other things, identified several individuals she had observed on the street at the time of the shooting and provided other details about events surrounding the shooting. Before jury selection, the State informed the court that Ms. Ben had refused to testify and stated that, if forced to testify, she would state that she "can't remember." When the State called Ms. Ben to the stand, she claimed that she could not "remember the majority" of the events concerning the shooting.[5] However, she was then able to testify in some detail regarding some of the events surrounding the shooting, including the robbery that preceded it, traveling with Mr. Tynes to the location of the shooting, and her subsequent trip to the hospital with Mr. Tynes. But Ms. Ben claimed that she could not recall anyone who was present on the street at the time of the shooting and denied having previously told the police the names of several

[5] Ms. Ben testified that she takes Oxycodone every six hours, including on the day of the shooting and on the day that she testified, and blamed it for her faulty memory. However, she also claimed that she was not "high" on the day of the shooting.

individuals who were there, including, among others, "Fats." Ms. Ben acknowledged knowing Mr. Garris as "Ock" and that she had heard others around the neighborhood say that "Ock did it," but she testified that she could not recall whether he was there at the time of the shooting.[6]

The court permitted the State to introduce portions of Ms. Ben's videotaped statement to the police as a prior inconsistent statement. In doing so, the court found that Ms. Ben's memory loss on the witness stand was feigned, noting that she recalled certain events "perfectly well" but claimed not to recall other surrounding events. In her recorded statement, portions of which the State played for the jury, Ms. Ben acknowledged being scared and appeared reluctant to identify anyone at the scene, especially a "boy on the street" whom she appeared to associate at one point with the nickname "Fats" and at another point as "Ock." Ms. Ben also identified several individuals who were at the scene of the shooting by their nicknames, including two "Blacks," "Leak Leak," and "Man Man." When asked to identify "the guy that was shooting," Ms. Ben said that she was trying to recall his name and then asked, "Is it Fats?" She described "Fats" as being skinny with a beard. Later in the interview, Ms. Ben stated that an individual called "Ock" was "out there . . . on the curb" just before Mr. Tynes was shot, and that she was aware that others were saying that "Ock" killed Mr. Tynes.[7]

[6] In a separate recorded interview, which was also played for the jury, Mr. Garris acknowledged that he was known by multiple nicknames, including "Ockrock" and "Fats." Ms. Ben testified that she knew multiple individuals as "Ock."

[7] Ms. Ben also stated that "[a]ll the Ocks" had beards like the "Ock" who was at the scene, and said she knew approximately eight individuals with similar beards.

Mr. Garris contends that the trial court erred in admitting the videotape of the interview as a prior inconsistent statement under Rule 5-802.1(a)(3). That Rule, as relevant here, permits the admission of a prior inconsistent statement of a testifying witness "who is subject to cross-examination concerning the statement . . . if the statement was . . . recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement[.]" Inconsistency between a witness's trial testimony and a prior statement "includes both positive contradictions and claimed lapses of memory." *Nance v. State*, 331 Md. 549, 564 n.5 (1993). A pretrial statement that is directly contradicted at trial may come into evidence as a prior inconsistent statement without regard to the cause of the inconsistency, provided it "present[s] a material contradiction." *Wise v. State*, ___ Md. ___, No. 73, Sept. Term 2019, 2020 WL 6878892, *10 (Nov. 24, 2020). A material inconsistency need not be a "stark about-face . . . without elaboration," *id.* at 11 n.14, but it must be more than "a trivial inconsistency," *id.* at *4 (citing *Wise v. State*, 243 Md. App. 257, 272 (2019)).

Mr. Garris contends that the circuit court erred in admitting Ms. Ben's prior statement under this rule because, he argues, it was not inconsistent with her trial testimony. To the contrary, where a witness "professes not to remember an event in an effort to avoid testifying about it," if he or she "in fact remembers it[,] . . . [l]ogic dictates that inconsistency may be implied[.]" *Corbett v. State*, 130 Md. App. 408, 425 (2000). The determination of "whether a witness's lack of memory is feigned or actual is a demeanor-based credibility finding that is within the sound discretion of the trial court to make[]" and cannot be made "from the cold record." *Id*. at 426; *see also McLain v. State*, 425 Md. 238,

250 (2012) ("When determining whether inconsistency exists between testimony and prior statements, 'in case of doubt the courts should lean toward receiving such statements to aid in evaluating the testimony.'" (quoting Kenneth S. Broun, McCormick on Evidence § 34, at 153 (6th ed. 2006))).

Here, the trial court was in the superior position to assess Ms. Ben's credibility. The court focused on Ms. Ben's demeanor and what it "ha[d] observed regarding her desire not to be here," in determining that she had feigned memory loss about the details of the shooting and, particularly, who was present at the time and what she had told the police. That presented a material contradiction with her prior statement. Giving "great deference" to the trial court's credibility determination, *Furda v. State*, 421 Md. 332, 353 (2011) (quoting *Longshore v. State*, 399 Md. 486, 520 (2007)), we perceive no abuse of discretion in the court's finding that Ms. Ben was feigning her memory loss, and so no error in the admission of the recorded statement as a prior inconsistent statement.[8]

B. The Trial Court Did Not Err in Admitting Darian Clark's Videotaped Statement as a Prior Inconsistent Statement.

Mr. Garris also contends that the trial court erred in admitting the video-recorded statement of Darian Clark as a prior inconsistent statement. According to Mr. Garris, Mr. Clark's prior statement was not inconsistent with his trial testimony because Mr. Clark

[8] Subsequent to briefing and argument in this appeal, the Court of Appeals clarified that even "actual memory loss may produce a positive contradiction from what the witness *does* say." *Wise*, 2020 WL 6878892, at *8. In light of our determination that the trial court did not abuse its discretion in determining that Ms. Ben's memory loss was feigned, we need not determine if her statement could have been admitted if her memory loss were genuine.

never denied having made the statements contained in the video; he only denied that they were true.

The State introduced evidence that on the day of the shooting, a person who had identified himself as "Yiris Garrison" called the police from a phone number ending in the digits 8-1-1-8 and reported that the assailant who shot Mr. Tynes was named "Ock." On the second day of trial, Mr. Clark testified that he recalled having had a phone number ending in "8118," but he denied calling the police to report the shooting. Mr. Clark also testified that he knew Mr. Garris as "Ock" and had met him "once or twice," and he acknowledged that he had provided a videotaped statement to police incriminating Mr. Garris. According to Mr. Clark, however, he provided that statement only after the police had arrested him on a burglary charge sometime after Mr. Tynes's death and offered him leniency in exchange for testimony against Mr. Garris in connection with Mr. Tynes's murder. At trial, Mr. Clark testified that the information he had provided in the videotaped statement had been fed to him by the police and that he wanted to "recant" anything that he had previously said about the shooting. Over Mr. Garris's objection, the court admitted the videotaped statement into evidence as a prior inconsistent statement. The State did not play the statement for the jury during Mr. Clark's testimony.

On the fourth day of trial, Baltimore City Police Detective Ryan O'Connor, the lead investigator in the case, testified that he had interviewed Mr. Clark in the homicide unit roughly three weeks after the shooting. The State then played a redacted version of the video recording of Mr. Clark's interview for the jury. In the video, Mr. Clark identified himself as the anonymous caller who had provided information about the shooting. He

said that he had been sitting on his front steps on Sargent Street when three men, one of them named "Ock," approached Ms. Ben and Mr. Tynes and tried to take a pouch that Mr. Tynes was carrying. Ock argued with Mr. Tynes about selling drugs in Ock's territory, then Ock shot Mr. Tynes. Mr. Clark described Ock in a manner matching Mr. Garris. The video also showed Mr. Clark identifying a picture of Mr. Garris from a photo array as "the one who shot . . . Tre," whom he again identified as Ock. The State separately introduced the photo array into evidence.

At trial and on appeal, Mr. Garris contends that Mr. Clark's prior statement was not inconsistent with his trial testimony because Mr. Clark did not deny that he had made the statements at issue to the police; he only denied that they were true. The trial court disagreed, as do we. Mr. Clark testified at trial that he did not know anything about the shooting, he did not know Mr. Garris well enough to actually identify him, he was not present at the scene of the shooting, and the police told him what to say in the interview. All of that is inconsistent with his prior statements, which he expressly "recant[ed]" on the stand. In light of the "positive contradictions," *see Wise*, 243 Md. App. at 268, between Mr. Clark's recorded statement and his trial testimony, the trial court did not err in admitting his recorded statement under Rule 5-802.1(a). *See Thomas v. State*, 113 Md. App. 1, 5, 11 (1996) (observing that the trial court properly admitted a pretrial statement as a prior inconsistent statement where the witness recanted the statement at trial and claimed that he had been forced to sign a photo identifying the defendant).

C. The Trial Court Did Not Err in Admitting Jennifer Smith's Videotaped Statement as a Present Recollection Recorded.

Mr. Garris also contends that the trial court erred in admitting a video recording of a police interview of a third witness, Jennifer Smith, under the prior recollection recorded exception to the rule against hearsay contained in Rule 5-802.1(e). That Rule provides:

> (e) A statement that is in the form of a memorandum or record concerning a matter about which the witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, if the statement was made or adopted by the witness when the matter was fresh in the witness' memory and reflects that knowledge correctly. If admitted, the statement may be read into evidence but the memorandum or record may not itself be received as an exhibit unless offered by an adverse party.

After the court found that the statement met the requirements of the Rule, it permitted portions of the video to be played for the jury, but did not permit the recording to be received as an exhibit. Mr. Garris argues that the court erred in admitting the recording of Ms. Smith's interview because the State failed to establish (1) that the events were fresh in Ms. Smith's memory when she spoke to the detectives, and (2) that she had adopted her statement as true. The State argues that Mr. Garris failed to preserve this argument because although he objected to playing the video of Ms. Smith's interview, he did not object when the court separately admitted Ms. Smith's contemporaneous written statement identifying Mr. Garris's picture from the photo array or when she identified him at trial. Alternatively, the State argues that the video statement was properly admitted as Ms. Smith's prior recollection recorded. We agree only in part with the State's preservation argument but conclude that the court did not abuse its discretion in admitting Ms. Smith's statement.

1. Preservation

"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." Md. Rule 4-323(a). To preserve an objection, a party must object "each time a question concerning the [matter is] posed or . . . request a continuing objection to the entire line of questioning." *Wimbish v. State*, 201 Md. App. 239, 261 (2011) (quoting *Brown v. State*, 90 Md. App. 220, 225 (1992)). The Court of Appeals "has long approved the proposition that we will not find reversible error on appeal when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury *without objection* through the prior testimony of other witnesses." *Yates v. State*, 429 Md. 112, 120 (2012) (quoting *Grandison v. State*, 341 Md. 175, 218-19 (1995)). Similarly, even when a party's objection is overruled, the objection is waived "if, at another point during the trial, evidence on the same point is admitted without objection."[9] *Benton v. State*, 224 Md. App. 612, 627 (2015) (quoting *DeLeon v. State*, 407 Md. 16, 31 (2008)).

Ms. Smith testified on both the third and fourth days of trial. On the third day, she testified that she did not recall anything about the shooting, although she recalled being present at the scene. She also acknowledged that she had been interviewed by homicide

[9] A court by request or at its own discretion may grant a continuing objection to avoid repetitive interruptions when all parties know the objection will be overruled. *See* Md. Rule 4-323(b) ("At the request of a party or on its own initiative, the court may grant a continuing objection to a line of questions by an opposing party."). Here, a continuing objection was neither requested nor given.

detectives two and a half months after the incident but did not recall describing the shooting to the detectives, drawing a map of the neighborhood for them, or identifying Mr. Garris as the shooter.[10] During Ms. Smith's testimony, the court admitted without objection a photo array containing a photograph of Mr. Garris that the police had presented to Ms. Smith at her interview, on which she wrote: "This is the man who shot and killed that guy." Ms. Smith also identified Mr. Garris in the courtroom as the individual she had identified in the photo array, again without objection.

The State then offered into evidence a video recording of Ms. Smith's police interview as her past recollection recorded. Mr. Garris objected on the ground that the State had not established a sufficient foundation that Ms. Smith had adopted the statement as true and that the matter was fresh in her memory at the time that she made the statement. The court sustained the objection and did not admit the statement at that time.

On the next trial day, the State recalled Ms. Smith as a witness and asked her whether, at the time she was speaking with homicide detectives, she was "truthful with them about what happened." Ms. Smith responded, "From what I gathered from my own eyes, I'm assuming so." She added that she "really d[id]n't remember" and, when asked if there was a reason for her lack of recollection, she stated that it had "been a long time," there "was just so much going on and I wasn't really focused," and the events had "like blurred" for her. The State then renewed its request to introduce the video recording of

[10] Ms. Smith testified that at the time of the murder, she was a drug addict who used heroin multiple times per day and "possibly" took drugs on both the day of the murder and the day that she spoke with the detectives.

Ms. Smith's statement as her past recollection recorded. This time the court overruled the objection, observing that "[Ms. Smith] did just adopt it as true[.]" Applying Rule 5-802.1(e), the court permitted portions of the statement to be played for the jury but did not allow the video recording to be received as an exhibit.

We agree in part with the State's contention that Mr. Garris's failure to object to the introduction of the photo array and Ms. Smith's identification in open court constituted a waiver of his current objection, but only as to the portions of the video in which Ms. Smith identified Mr. Garris as the shooter. However, Ms. Smith's statement was not limited to that sequence. During the portions of the interview that the State played for the jury,[11] in addition to identifying the picture of Mr. Garris in the photo array, Ms. Smith identified the shooter as "Ock," described the events leading up to the shooting and the shooting itself, identified the shooter as someone from whom she had purchased drugs, and said that she had not used any drugs or alcohol before witnessing the shooting. The prior introduction of the photo array and Ms. Smith's in-court identification did not waive Mr. Garris's hearsay objection to these other statements. We will therefore proceed to consider the merits of his argument as to these points.

[11] A transcript of a portion of the interview was marked for identification as State's Exhibit 23 and is in the record. Because of technical difficulties, the only portions of the interview that the State played for the jury were those transcribed on pages one through the top of page eight and pages 17 through 20. Mr. Garris later played an additional portion of Ms. Smith's interview, which was not transcribed.

2. Merits

We find no abuse of discretion in the trial court's ruling that Ms. Smith's statement was admissible as her past recollection recorded. The video was a recording of Ms. Smith's statements about an incident that she testified she had witnessed but claimed to have insufficient recollection of at the time of trial. She also responded affirmatively that: (1) her memory of the incident was better in October 2017, when she made the statement, than at the time of trial; and (2) she believed she had been truthful when speaking with the detectives during her interview, stating "From what I gathered from my own eyes, I'm assuming so[.]" Although that last response, as reflected in the cold transcript, is not free of equivocation, the trial court interpreted it as an adoption of the recorded statement as true at the time it was made, based on what Ms. Smith had seen with her "own eyes." We are in no position to second guess that finding. The trial court, not we, had the opportunity to observe and consider Ms. Smith's behavior and tone while testifying to inform the court of her degree of confidence in her prior recollection. Moreover, although the interview occurred two-and-a-half months after the shooting, the recording itself supports the trial court's conclusion that the events were still sufficiently fresh in Ms. Smith's memory, based on the details she provided. We therefore find no abuse of discretion in the court's ruling. *Cf. Clark v. State*, 140 Md. App. 540, 566-67 (2001) (affirming trial court's admission of an adopted statement recorded in a police officer's notes where the witness testified that the statement was likely more accurate than his present memory, and the officer testified that he had reviewed the statement with the witness at the time to confirm its truth).

III. MR. GARRIS'S ARGUMENT THAT THE STATE CALLED MS. BEN, MR. CLARK, AND MS. SMITH SOLELY TO IMPEACH THEM IS NOT PRESERVED AND LACKS MERIT.

Mr. Garris also argues that the circuit court erred in permitting the State to call Ms. Ben, Mr. Clark, and Ms. Smith for the sole purpose of impeaching them with their prior inconsistent statements. The State responds that Mr. Garris failed to preserve this claim for review and, even if preserved, the trial court did not err because the State offered the witnesses to provide substantive evidence. We agree with the State.

Rule 5-616(b) permits the admission of extrinsic evidence of a prior inconsistent statement for impeachment purposes with certain limitations. One such limitation is that a party may not call a witness "as a subterfuge" for the sole purpose of impeaching the witness with otherwise inadmissible hearsay evidence. *Jones v. State*, 178 Md. App. 123, 138-39 (2008). But that constraint applies only when the evidence at issue would come in solely for impeachment purposes, not when it is also admissible as substantive evidence. *See Stewart v. State*, 342 Md. 230, 242-43 (1996) (explaining that the rule against allowing the State to impeach its own witnesses is designed to guard against the jury's use of the impeachment evidence as substantive evidence, and so the rule does not apply when the evidence is introduced substantively); *see, e.g.*, *Thomas v. State*, 213 Md. App. 388, 407 (2013) (finding that because two prior recorded statements were admissible as substantive evidence, Rule 5-616(b) in accordance with Rule 5-613(b) was inapplicable).

On appeal, Mr. Garris contends that the State was aware that Ms. Ben, Mr. Clark, and Ms. Smith would all claim that they had no recollection of any relevant events, and that the State's sole purpose in calling each of them was therefore to impeach them with

their prior statements. Mr. Garris never made this objection at trial and thus failed to preserve it for appeal. Moreover, even if Mr. Garris had preserved it, the argument lacks merit. As we have already discussed, the State offered each of these witnesses' statements as substantive evidence based on exceptions to the rule against hearsay, not as otherwise inadmissible hearsay that could be used solely as impeachment. The rule against calling a witness solely as a subterfuge to introduce inadmissible hearsay is thus not implicated.

IV. MR. GARRIS DID NOT PRESERVE HIS ARGUMENT THAT THE TRIAL COURT VIOLATED HIS CONFRONTATION RIGHTS, AND THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING HIS MOTION FOR A NEW TRIAL.

Mr. Garris argues that the trial court erred in (1) restricting his constitutional right to cross-examine Mr. Clark by declining to recall him as a witness after playing his recorded statement, and (2) later denying Mr. Garris's motion for a new trial on that ground. The State counters that Mr. Garris failed to preserve his objection and, even if preserved, the court did not actually limit Mr. Garris's cross-examination of Mr. Clark and therefore did not abuse its discretion in denying his motion for a new trial.

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that a defendant in a criminal trial has the right "to be confronted with the witnesses against him." U.S. CONST. amend. VI. In *Crawford v. Washington*, the Supreme Court explained that the Confrontation Clause prohibits the admission of testimonial statements against the accused by a non-testifying witness if there was no prior opportunity for cross-examination. 541 U.S. 36, 53-54 (2004). But a defendant's right to cross-examination is not absolute; a trial court may impose reasonable limits when necessary. *See Martinez v. State*, 416 Md. 418, 428 (2010) (listing reasons to limit cross-examination

that include "witness safety or to prevent harassment, prejudice, confusion of the issues, and inquiry that is repetitive or only marginally relevant"). Likewise, the right of confrontation is satisfied when defense counsel has been allowed to expose the facts necessary for the jurors to "appropriately draw inferences relating to the reliability of the witness[.]" *Id.* (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)). "Consequently, a trial court may exercise its discretion to limit cross-examination only after the defendant has been afforded the constitutionally required threshold level of inquiry." *Martinez*, 416 Md. at 428 (quoting *Smallwood v. State*, 320 Md. 300, 307 (1990)) (internal quotations omitted). "The appropriate test to determine abuse of discretion in limiting cross-examination is whether, under the particular circumstances of the case, the limitation inhibited the ability of the defendant to receive a fair trial." *Hall v. State*, 233 Md. App. 118, 133-34 (2017) (quoting *Martin v. State*, 364 Md. 692, 698 (2001)).

We review without deference a claim that the Confrontation Clause was violated. *See Langley v. State*, 421 Md. 560, 567 (2011). However, a defendant may not raise confrontation arguments for the first time on appeal. *See Martin v. State*, 218 Md. App. 1, 22-23 (2014) (holding that defendant waived a Confrontation Clause objection by failing to raise it at trial); *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 n.3 (2009) ("The right to confrontation may, of course, be waived, including by failure to object to the offending evidence[.]").

The parties addressed Mr. Clark's recorded statement on three consecutive trial days. As discussed above, on the second day of trial, during Mr. Clark's direct testimony, the court admitted the statement into evidence over Mr. Garris's objection. At that time,

the court granted Mr. Garris a continuing objection on hearsay grounds to the State's use of the statement. Although the court admitted the statement during Mr. Clark's direct testimony, the prosecutor did not ask to play the recording for the jury that day. Nonetheless, on cross-examination, Mr. Garris questioned Mr. Clark about his statement and the truthfulness of his testimony. The court did not restrict Mr. Garris's cross-examination of Mr. Clark that day.

The following day, the State provided Mr. Garris with a redacted version of Mr. Clark's statement, which the State announced it intended to play for the jury during the testimony of the interviewing officer, Det. O'Connor. Although the full statement was already in evidence from the day before, Mr. Garris's counsel expressed a concern that the redacted version contained other crimes evidence and announced that he wished to further cross-examine Mr. Clark on that issue. The trial court agreed and directed that Mr. Clark, who was then incarcerated, be recalled the following trial day.

On the next (and final) day of trial, the State reported that corrections officers would not transport Mr. Clark to court that day because he had threatened some of the officers. The following ensued:

> THE COURT: [Defense counsel], let me ask you this. Was it your intention to call back Mr. – to recall Mr. Clark?
>
> [DEFENSE COUNSEL]: Yes, Your Honor, only for the reasons that we stated last week. For convenience, I allowed the State's – Madam State's Attorney to prepare the redacted document and look at the tape overnight. And after thinking about it, I realized that the tape wasn't played in front of [Mr. Clark] and I couldn't cross-examine him on the issues of what the State was trying to put into the record.

> And, Your Honor, you know, as a defense attorney, I'm going to disagree with anything she puts on the tape, you know. That's just the nature of the situation and I understand some things will be put on the tape. And just for the record, I would object to the tape being used, again just for the – in the sense because Mr. Clark said he did say those things but the police had told him to say it. So he didn't deny saying what's on tape –
>
> THE COURT: Right. But he did deny that they were true.
>
> [DEFENSE COUNSEL]: Yeah. I just want to make the record clear. . . .
>
> THE COURT: I do believe that [defense counsel] was able to not only skillfully cross-examine Mr. Clark, but he did so at length. What I'm going to do is allow [the prosecutor] to play those portions of the tape because both of you were in agreement that that is what was going to happen. And at that time, after that, [defense counsel], if you had specific points that you wanted to proffer for which you believe that you would have had to recall Mr. Clark, I'll let you place anything on the record that you wanted – that you would have wanted to ask him.
>
> [DEFENSE COUNSEL]: Perfect, Judge.
>
> THE COURT: If at that point I determine that there's some reason to try to get him here, I'll figure out what hoops we need to jump through to do that.
>
> [DEFENSE COUNSEL]: Thank you, Your Honor.

The court then proceeded to admit the redacted version of Mr. Clark's recorded statement into evidence, and the State played the statement for the jury. When the recording finished playing, Mr. Garris neither made a proffer regarding what he would have asked Mr. Clark nor asked the court to recall him. The issue did not come up again at trial.

At Mr. Garris's sentencing hearing, he moved for a new trial on the ground that the court had violated his confrontation rights by denying him an opportunity to further cross-examine Mr. Clark after the redacted version of his statement was played for the jury. The

court denied the motion on the ground that Mr. Garris had had the opportunity to cross-examine Mr. Clark earlier in the trial.

We hold that Mr. Garris failed to preserve his argument that the trial court violated his rights under the Confrontation Clause. Although Mr. Garris initially objected to the prosecutor playing the redacted version of Mr. Clark's statement when he was not present to be cross-examined, the court permitted the statement to be played only after providing the express assurance that afterward, if defense counsel thought there were any further questions he would want to ask Mr. Clark, (1) counsel could make a proffer regarding the questions he "would have wanted to ask him," and (2) if the court thought there was a reason to bring Mr. Clark back, it would "figure out what hoops we need to jump through to do that." Contrary to Mr. Garris's argument on appeal, the trial court thus provided a path for Mr. Garris to cross-examine Mr. Clark after the statement was played, if Mr. Garris thought it was necessary. By failing to pursue that path after the recording was played, Mr. Garris failed to preserve that issue for appeal.[12]

Moreover, even if Mr. Garris had preserved his confrontation claim, and even if we were to assume that Mr. Clark still would have been unavailable for further cross-examination had Mr. Garris raised the issue after the video was played, we conclude that there was no violation of Mr. Garris's confrontation rights. The court admitted Mr. Clark's recorded statement during his direct examination on the second day of trial. Although the

[12] In his reply brief, Mr. Garris contends that raising the issue again after the statement was played would have been futile because the court had already denied his request twice. That contention is directly at odds with the court's clear statement that it would consider such a request.

statement was not played for the jury at that time, it was in evidence when Mr. Garris cross-examined Mr. Clark. Indeed, defense counsel did cross-examine Mr. Clark about the map he drew of the crime scene during the interview, the information he had provided police about the shooting, whether he had called the police following the shooting, and the extent of his dealings with Mr. Garris. Defense counsel's cross-examination also explored Mr. Clark's credibility, including his testimony that he had lied in his statement to police in exchange for leniency on another charge because the police had "dangled that freedom in front of [him]" and he "wanted to grab it." Mr. Garris also elicited that Mr. Clark never received "the freedom fruit" he expected in exchange for his cooperation.

Although Mr. Garris's cross-examination of Mr. Clark might not have been as thorough as he would have preferred, it occurred after the recorded statement was admitted into evidence, sufficed to expose Mr. Clark's credibility issues to the jury, and satisfied constitutional safeguards. *See Davis*, 415 U.S. at 318 (requiring for Confrontation Clause purposes that "defense counsel should [be] permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness"); *see also United States v. Walker*, 673 F.3d 649, 657 (7th Cir. 2012) ("The Confrontation Clause guarantees an opportunity for a thorough and effective cross-examination, though not one that is unbounded." (citing *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985))); *cf. Calloway v. State*, 414 Md. 616, 637 (2010) (holding that the trial court violated defendant's rights by limiting cross-examination of the State's chief witness about his expectation of leniency); *Martinez*, 416 Md. at 431-32 (holding that the trial court's restriction on the defense's inquiry into the potential bias of

the surviving crime victim violated the Confrontation Clause); *Hall*, 233 Md. App. at 134 (finding a Confrontation Clause violation where the defense was not permitted to cross-examine the State's two key witnesses about their motives to testify falsely). For those reasons as well, we will affirm.

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