

UNREPORTED  
IN THE APPELLATE COURT  
OF MARYLAND

No. 1646

September Term, 2024

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ANDREW NESHAWN DWIGHT BURKE

v.

STATE OF MARYLAND

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Berger,  
Shaw,  
Kehoe, Christopher B.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Shaw, J.

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Filed: May 22, 2026

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

A jury sitting in the Circuit Court for Washington County found Appellant, Andrew Neshawn Dwight Burke, guilty of two counts of second-degree assault. Appellant was sentenced to two consecutive ten-year terms of imprisonment, one of which the court suspended, to be followed by five years of supervised probation.

Appellant filed a timely appeal and presents one question for our review:

Whether the trial court erred by admitting hearsay evidence relating to the identification of [A]ppellant?

We conclude the evidence was properly admitted, and we affirm the judgment of the court.

### **BACKGROUND**

The State charged Appellant with assaulting Isaiah Carlton and Misty Carbaugh outside of a hookah lounge on January 21, 2023.<sup>1</sup> The State’s first witness was the owner of the lounge, Mitch Soufran, who stated at the outset of his direct examination, that he did not want to testify but had been compelled to appear by the issuance of a subpoena. Through Mr. Soufran, who did not personally witness the assaults, the State introduced into evidence video footage of the incident from security cameras inside and outside of the lounge, which was then shown to the jury. Mr. Soufran was not asked to identify Appellant. The defense waived cross-examination.

At the conclusion of Mr. Soufran’s testimony, the prosecutor advised the court that Mr. Soufran was not yet excused as a witness. The court told Mr. Soufran that he was still

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<sup>1</sup> Appellant was also tried on charges of first-degree assault, reckless endangerment, and related weapons charges. The jury acquitted Appellant of those charges.

under subpoena, reminded him not to discuss his testimony with anyone, and asked him to step out into the hallway.

The security footage from inside the lounge showed that, as a woman in a plaid shirt was leaving, a man standing by the door threw a drink at her. The woman turned and threw a bottle at the man, then left. At trial, Sergeant Scott St. Clair, an eleven-year veteran of the Hagerstown Police Department, who had known Appellant, as a resident of Hagerstown, for “[s]everal years,” identified the man in the video as Appellant.

The security footage from a camera mounted outside of the lounge showed that, as the woman in the plaid shirt walked away from the lounge, Appellant followed her and struck her from behind, causing her to fall to the ground, where he appeared to hit her again. The woman eventually stood up, and after some physical and verbal interaction with Appellant and others in the area, was escorted away by another woman.

A few minutes later, a person wearing a pink hooded sweatshirt exited the lounge. Appellant approached that person and a gun was fired. The person in the pink hoodie fell to the ground and was subsequently helped to a car by bystanders. The car was then driven away from the scene.

Ms. Misty Carbaugh testified on behalf of the State, pursuant to a subpoena. When the prosecutor asked Ms. Carbaugh if she wanted to be there, she replied, “Definitely not.” She acknowledged she was at the hookah lounge on January 21, 2023, and she identified herself as the woman in the plaid shirt in the security camera footage. The prosecutor did not ask Ms. Carbaugh about the circumstances leading to the assault or the identity of her assailant.

The State introduced hospital records showing Ms. Carbaugh was seen at the emergency room later that same day and diagnosed with fractures to bones in her nose and jaw. According to triage notes, Ms. Carbaugh told hospital personnel she was “attacked after leaving a club around 0400 this AM.”

Mr. Isaiah Carlton was not called as a witness, but the State introduced evidence he was treated at a nearby hospital shortly after the incident for a non-fatal gunshot wound to his leg. Police questioned Mr. Carlton but he was “not cooperative.” Among Mr. Carlton’s personal belongings collected by the hospital was a pink and white hooded sweatshirt, which was introduced into evidence.

Master Deputy Tyler Repp of the Washington County Sheriff’s Office responded to the hookah lounge following the assaults. Deputy Repp spoke to Mr. Soufran, who allowed him to review the security camera footage. A still image from the footage which, according to Deputy Repp, depicted the suspect, was admitted into evidence.

Over Appellant’s objection, Deputy Repp testified that Mr. Soufran identified the suspect as “Neshawn.” Deputy Repp provided that name to the Washington County Emergency Communication Center, which in turn provided Deputy Repp with Appellant’s full name and his MVA (Motor Vehicle Administration) photo. Deputy Repp compared the MVA photo with the still image of the suspect shown in the security footage and determined it was the same person.

The jury convicted Appellant of second-degree assault of Ms. Carbaugh and Mr. Carlton. This timely appeal followed.

## STANDARD OF REVIEW

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). Maryland Rule 5-802 provides hearsay is not admissible at trial, “[e]xcept as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes[.]” *See also Vielot v. State*, 225 Md. App. 492, 500 (2015) (“A trial court has ‘no discretion to admit hearsay in the absence of a provision providing for its admissibility.’”) (citation omitted). “[W]hen ‘reviewing a trial court’s ruling on whether evidence falls under an exception to the rule against hearsay,’ this Court ‘reviews for clear error the trial court’s findings of fact, and reviews without deference the trial court’s application of the law to its findings of fact.’” *Smith v. State*, 259 Md. App. 622, 667 (2023) (quoting *Hailes v. State*, 442 Md. 488, 499 (2015)).

## DISCUSSION

“Maryland courts have recognized that witnesses can be victim to memory loss and outside pressures, which may later affect their testimony.” *Belton v. State*, 152 Md. App. 623, 631 (2003) (citing *Corbett v. State*, 130 Md. App. 408, 421 (2000)); *see also Nance v. State*, 331 Md. 549, 563 (1993) (noting a witness’s failure to repeat an extrajudicial identification in court may be explained by loss of memory or other circumstances, including “threats and fear of retaliation”). “In such instances, and under the circumstances set forth in [Maryland] Rule 5-802.1, statements made prior to trial can have probative value.” *Belton*, 152 Md. App. at 632.

Here, the State moved to admit Mr. Soufran’s out-of-court identification of Appellant pursuant to Maryland Rule 5-802.1(c), which provides “[a] statement that is one of identification of a person made after perceiving the person” is not excluded by the hearsay rule if the statement was “previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement[.]” Md. Rule 5-802.1(c). The rationale for admitting a prior statement of identification is (1) “it occurred closer to the time of the offense, and is therefore more likely to be accurate[.]” (2) it “was made under less suggestive circumstances than those existing at trial, and is accordingly more reliable,” and (3) “[b]ecause the declarant is available as a witness at trial for cross-examination about the prior identification, some of the danger that the hearsay rule seeks to avoid is not present.” *Nance*, 331 Md. at 561. (citations omitted).

Appellant argues Mr. Soufran’s statement identifying Appellant was improperly admitted through the testimony of Deputy Repp because the conditions of Rule 5-802.1(c) were not met. Specifically, Appellant claims he had no opportunity to cross-examine Mr. Soufran about his prior identification because the State “skip[ped] the step” of asking Mr. Soufran about it during direct examination. The State maintains the hearsay exception for prior statements of identification does not require the proponent of the statement to first elicit testimony from the declarant regarding the identification. We agree with the State.

“The principles that guide our interpretation of statutes also apply to our construction of the Maryland Rules.” *State v. Thomas*, 488 Md. 456, 465 (2024).

We first apply the ordinary meaning of the words used in the rule’s text. We do so in the context of the rule as a whole and the larger set of rules of which that rule is part. If the text is not ambiguous, we may stop our

analysis there and simply apply its ordinary meaning. If the rule is ambiguous in either language or application, we inform our understanding by examining the rule’s history and the ramifications of competing interpretations.

*Id.* (internal citation omitted). “We do not add or delete language ‘so as to reflect an intent not evidenced in the plain and unambiguous language of the [rule],’ nor do we ‘construe the [rule] with forced or subtle interpretations that limit or extend its application.’” *Nationwide Mut. Ins. Co. v. Regency Furniture, Inc.*, 183 Md. App. 710, 739 (2009) (quoting *Price v. State*, 378 Md. 378, 387 (2003)).

The plain language of Rule 5-802.1(c) is unambiguous. It grants the trial court discretion to admit an out-of-court statement of identification when the declarant testifies at trial and is subject to cross-examination. There is nothing in the language of the Rule requiring the proponent to elicit testimony from the declarant regarding their statement as a precondition to offering it into evidence through another witness.

Appellant claims he was precluded from cross-examining Mr. Soufran regarding the statement because Mr. Soufran was not questioned about it in the State’s case, and it was not preserved for review as the trial court was never asked to rule on the issue. Md. Rule 8-131(a). As the State points out, Appellant was free to cross-examine Mr. Soufran in the defense portion of the case pursuant to Maryland Rule 5-806(a), which provides, “[i]f the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.” Because Appellant did not attempt to cross-examine Mr. Soufran in the defense portion of the case, there is no factual basis upon which we could conclude that

Appellant was denied an opportunity to cross-examine Mr. Soufran regarding his prior statement.

Appellant argues requiring him to recall Mr. Soufran to the witness stand for purposes of cross-examination “impermissibly shifted the burden of proof” to the defense. The State maintains because “the act of discrediting a declarant-witness falls upon the party against whom the hearsay statement was admitted,” and not on the proponent of the evidence, there was no shifting of the prosecution’s burden of proof. We agree with the State. Mr. Soufran’s statement to Deputy Repp was admissible evidence pertaining to identity. If Appellant wished to cast doubt on such evidence, he was free to question Mr. Soufran about it, but in no sense was Appellant obligated to put on evidence in his defense or prove or disprove any element of the State’s case. In our view, that Appellant would have to recall Mr. Soufran to the witness stand to cross-examine him is immaterial. Appellant cites no authority to the contrary.

In sum, because Mr. Soufran had testified at trial and was subject to cross-examination, his out-of-court statement of identification was admissible. The court did not err in admitting Deputy Repp’s testimony regarding Mr. Soufran’s statement as an exception to the hearsay rule.<sup>2</sup>

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<sup>2</sup> The State asserts even if the out-of-court identification was admitted in error, it was harmless error. We agree. Sergeant St. Clair had already identified Appellant, from personal knowledge, as the man in the security footage who threw a drink at Ms. Carbaugh. Moreover, the jury was able to compare Appellant’s appearance at trial and in his booking photo, which was taken the same day as the incident, with the appearance of the assailant in the security footage. *See Dove v. State* 415 Md. 727, 744 (2010) (improperly admitted evidence that proves the same point as other evidence presented during trial is harmless

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

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where there is “no reasonable possibility that the decision of the finder of fact would have been different had the tainted evidence been excluded.”) (citation omitted).