UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0745

September Term, 2015

SHELTON BURRIS

v.

STATE OF MARYLAND

Krauser, C.J.,
Berger,
Reed,

JJ.

Opinion by Krauser, C.J.

Filed: August 30, 2016

Convicted, after a jury trial in the Circuit Court for Baltimore City, of murder in the second degree and use of a handgun in the commission of a crime of violence, Shelton Burris, appellant, presents a single issue for our review:

> Whether the circuit court erred in admitting the prior inconsistent statements of three witnesses, who claimed a loss of memory at trial, without a predicate finding that each witness did not actually suffer memory loss but, instead, was feigning memory loss to avoid testifying.

For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In the early morning of February 21, 2009, Baltimore City Police Officers responded to a call of a shooting in the 2500 block of West Baltimore Street in Baltimore City. Upon arriving at the scene, they discovered a man, identified as "Hubert Dickerson," lying on the sidewalk, gravely wounded and surrounded by half-a-dozen empty shell casings. Dickerson was subsequently transported to the University of Maryland Shock Trauma Center where he was declared dead shortly after his arrival at the Center. Later that morning, an assistant Medical Examiner determined that the cause of death was multiple gunshot wounds and that the manner of death was homicide.

Detective Julian Min, who had responded to the aforesaid call, later testified that, initially, there were "no witnesses." "[A]pproximately four or five days later," however, a break in the investigation occurred when a juvenile, Joshua Johnson, was arrested on unrelated charges and, during an ensuing interview, stated that, in Detective Min's words, "he had some knowledge of" the murder of Hubert Dickerson.

Police detectives ultimately conducted two separate interviews of Johnson; the first occurred at approximately 10:20 p.m. on February 25, 2009, and the second the following morning. Both interviews were recorded and subsequently played for the jury at Burris's trial.[1] During the first interview, Johnson disclosed that a man he knew as "69" was "sen[t] . . . up there to kill" the murder victim, by a second suspect, known to him as "Bam," because the murder victim "[owed] Bam some money"; and that "69," "Bam," and several others maintained a safe house at 2613 West Fayette Street, where the murder weapon was kept. Johnson further told police detectives "69's" actual name was "Shelton Burris." He then provided them with a physical description of "69," describing him as a "tall" black male, with "a little light-brown" complexion, a tattoo of the number "69" on his face, and a small amount of facial hair.

During that same interview, Johnson was shown a photographic array, from which he identified "Bam," who, according to Johnson, was the "guy who told [69] what to do," that is, to kill Hubert Dickerson. Because, at that time, Detective Min "didn't know who 69 was," he created a second photographic array, using a computer program, a police database, and Johnson's physical description of "69." From that array, Johnson was unable to make an identification. But, that array did not include a picture of Burris.

[1]Only the first statement was admitted into evidence. After the second statement was played for the jury, the State did not request that it be moved into evidence.

Because Johnson had not yet been "booked," he was sent to "Juvenile Bookings" for processing. Thereafter, Detective Min "spoke to district officers" who patrolled the area where the murder took place. Those officers knew who "69" was, and, armed with that information, Detective Min prepared a third photographic array, went to "Juvenile Bookings," and there showed that array to Johnson. Johnson selected a picture of Burris from that array and wrote, on the back of it, that "this is 69," and "he told me he killed [Hubert Dickerson]" on "[the] North [sic] Franklin [and] Baltimore St." Johnson then gave a second statement to police detectives, confirming what he had written on the back of the third photographic array, that "69" had told Johnson that he, Burris, had "killed him up the North [sic] on Franklin and Baltimore Street."

Based upon information obtained from Johnson, police obtained a search warrant for 2613 West Fayette Street. Upon executing that warrant, on February 27, 2009, police officers detained a woman named "Ashley Sparrow" and then transported her to the Homicide Office to be interviewed. During that interview, which was also recorded and admitted into evidence at Burris's ensuing trial, as a prior inconsistent statement, Sparrow told police detectives that she and "a couple of [her] home-girls and some of the guys that's from around [her] way" were sitting in her grandmother's kitchen, at the Fayette Street premises, "drinking and smoking and stuff" when she overheard a conversation between two men, known to her as "Stacks" and "69." During that conversation, "Stacks," according to Sparrow, asked "69" whether he "remember[ed] what happened the other night" and whether

Dickerson was dead "69" replied, "I don't know if he's dead but I know I popped his ass," that is, he "shot him."

During that same interview, Sparrow was shown two photographic arrays, one of which depicted "Bam" and the other "69." After identifying "Bam" as the subject of the first array, she wrote, on the back of it, that she was present during a conversation between "Stacks" and "69," in the kitchen of 2613 West Fayette Street, during which "69" stated that "[h]e knew [the victim] owed Bam [some] money." Then, after identifying "69" as the subject of the other array, she wrote, on the back of that array, that, during that same conversation, she overheard "69" state that, although he did not know whether the victim was dead, he had "pop[p]ed his ass."

Five days later, on March 4, 2009, police detectives interviewed a third witness, Dominic Falcon, who, they believed, "ha[d] information" concerning the murder of Hubert Dickerson. That interview, like the other aforementioned interviews, was recorded and subsequently admitted into evidence, at Burris's trial, as a prior inconsistent statement. During that interview, Falcon told police detectives that he had had "a conversation at 2723 West Fairmount Avenue," in which "69" explained "how he killed the boy," remarking, "that's how you suppose [sic] to do it." After "69" bragged about his prowess for murder, "Bam," according to Falcon, entered the room and exclaimed, "that's my fucking son. . . . that's my boy straight gorilla." "[S]traight gorilla" meant, Falcon said, that "Bam" and "69" belonged to the "Black Guerilla Family" gang, of which "Bam," according to Falcon, was

"the boss." He further stated that "69" was a "hit man for Bam," that the gang maintained a safe house at 2723 West Fairmount Avenue, and that they stored weapons in a trash can at the rear of those premises.

During that same interview, Falcon was shown two photographic arrays, one of which depicted "Bam" and the other "69." After identifying "Bam" from one of those arrays, Falcon wrote, on the back of that array: "He was in there [too] and there was talking about that's how you suppose to do the dam[n] thing. Bam told 69 to kill him[,] and Bam was saying that that's my fucking son." Then, after identifying "69" from the other photographic array, Falcon wrote, on the back of that array: "We had a conversation at 2723 [West] Fairmount Ave. He was bragging about killing the boy on Baltimore Street. He was saying that's how you suppose to do [a] job. . . . I had this conversation with 69."

Police detectives then obtained a search warrant for 2723 West Fairmount Avenue, in the hope of recovering the murder weapon. When, on March 5, 2009, police officers arrived at 2723 West Fairmount Avenue, they encountered a man named "Austin Lockwood" at those premises.[2] Lockwood was transported to the Homicide Office and, there, interviewed by police detectives. That interview, like the others, was recorded and subsequently admitted into evidence at Burris's trial, as a prior inconsistent statement. During that interview, Lockwood, whose residence was "real close to" the murder scene,

[2]Police failed, however, to recover the murder weapon.

confirmed that "69's" real name was "Shelton Burris." He further told police detectives that, on the night of the murder, he had observed the victim, walking out of a nearby bar and being met by Burris; that the two men then had a brief conversation; and that, upon the conclusion of that conversation, Burris had drawn a "big gun," "shot him[,] and killed him" because, according to Lockwood, the victim owed Burris money. Lockwood further confirmed that Burris belonged to the "Black Guerilla Family" and that he, Lockwood, feared for his safety as a result of his having made his statement to the police.

During that same interview, Lockwood was shown a photographic array, from which he identified "69." On the back of that array, Lockwood wrote: "69 murdered a guy on the corner on Friday, 2-21-09. 69 is the person in the picture. I saw 69 shoot the man."

Subsequently, at trial, Joshua Johnson, Ashley Sparrow, Dominic Falcon, and Austin Lockwood were called as witnesses by the State, but all of them disavowed the statements they had made during their respective interviews. Burris was, nonetheless, convicted of first-degree murder and use of a handgun in the commission of a crime of violence, but the Court of Appeals ultimately reversed those convictions, for reasons unrelated to the present appeal.[3] *Burris v. State*, 435 Md. 370 (2013).

[3]At Burris's first trial, the court admitted into evidence testimony of an expert in criminal gangs, because Burris was reputed to be a member of the "Black Guerrilla Family," and the State's theory of the case was that Burris had been ordered to commit the murder by "Bam," a higher-ranking member of that gang. The Court of Appeals held that it was an abuse of discretion to admit that expert testimony, and it reversed Burris's convictions and (continued...)

During the retrial that followed, all four of the witnesses: Johnson, Sparrow, Falcon, and Lockwood, were once again called to testify, and, once again, they all disavowed the statements they had given during their interviews. Sparrow and Johnson claimed that they could not remember what they had told police because they had been intoxicated, and Lockwood claimed both a loss of memory and that he had lied in giving his statement to police. In each instance, the court eventually admitted into evidence, over defense objection, each of their recorded statements as "prior inconsistent statements." The jury ultimately acquitted Burris of first-degree murder but found him guilty of second-degree murder and use of a handgun in the commission of a crime of violence. After the circuit court imposed the maximum possible sentence, a term of thirty years' imprisonment for second-degree murder and a term of twenty years' imprisonment (the first five of which were imposed without the possibility of parole) for the handgun offense, which was to run consecutively to his sentence for second-degree murder, Burris noted this appeal.

DISCUSSION

Burris contends that the circuit court erred in admitting, as prior inconsistent statements, the unsworn out-of-court statements of three of the four recalcitrant witnesses: Austin Lockwood, Ashley Sparrow, and Joshua Johnson,[4] each of whom claimed, at trial, not

[3](...continued)
remanded for a new trial. *Burris v. State*, 435 Md. 370, 392-98 (2013).

[4]Burris does not argue, in his brief, that either the admission into evidence of the (continued...)

to remember the subject matter of those statements. Burris relies primarily upon *Corbett v. State*, 130 Md. App. 408 (2000), where we reversed a defendant's convictions for attempted second-degree rape, child abuse, and attempted third-degree sexual offense because the circuit court had admitted into evidence, as a prior inconsistent statement, the victim's out-of-court statement, made to police investigators, without making a preliminary finding as to whether her lack of memory, while testifying at the defendant's trial, of the events in question had been real or contrived. That case, maintains Burris, required the court below to make factual findings as to whether each of the three witnesses, whose prior inconsistent statements were admitted, was presently unable to remember his or her prior statement or was merely feigning an inability to remember the prior statement. The answer, as we shall explain, determines whether the out-of-court statements at issue were admissible or not.

It is uncontested that each of the out-of-court statements at issue was admitted for its truth and thus qualifies as "hearsay," that is, "a statement, other than one made by the

[4](...continued)
recorded statement made by Dominic Falcon or the broadcast to the jury of the second recorded statement made by Joshua Johnson was error, and we therefore do not address whether either of those out-of-court statements was admissible. Md. Rule 8-504(a)(6) (stating that a brief shall contain "[a]rgument in support of the party's position on each issue"); *Poole v. State*, 207 Md. App. 614, 633 (2012) (noting that matters not argued in an appellant's brief will not be addressed by an appellate court). We further note that, in light of our determination, in this opinion, that all of the other statements at issue were properly admitted into evidence, the remaining statements were merely cumulative, and thus, even if it were assumed that their admission into evidence (or playback before the jury) was error, such hypothetical error would have been harmless.

declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). A "circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility." *Bernadyn v. State*, 390 Md. 1, 8 (2005). Whether a circuit court admits such evidence or declines to do so, we review, on appeal, the findings of fact supporting that ruling for clear error and the legal conclusion reached by the circuit court de novo. *Gordon v. State*, 431 Md. 527, 538 (2013).

The hearsay exception at issue, here, may be found in Maryland Rule 5-802.1(a)(3), which provides:

> 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 . . . (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement[.]

As there is no dispute that the out-of-court statements at issue were electronically recorded contemporaneously with their making, the only remaining issue is whether the in-court testimony of each witness was "inconsistent" with his or her prior recorded statement. "Inconsistency includes both positive contradictions and claimed lapses of memory." *Nance v. State*, 331 Md. 549, 564 n.5 (1993) (citation omitted). "When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied."

Id. But, "when a witness truthfully testifies that he does not remember an event, that testimony is not 'inconsistent' with his prior written statement about the event, within the meaning of Rule 5-802.1(a)." *Corbett*, 130 Md. App. at 425.

We now turn to the in-court testimony of each of the three witnesses, whose hearsay statements are at issue, to determine whether the State established the necessary inconsistency that is the precondition, which must be met, before their respective out-of-court statements would be properly admitted by the circuit court.

Austin Lockwood

Austin Lockwood was one of the witnesses, whose out-of-court statement, inculpating Burris, was admitted into evidence as a prior inconsistent statement.[5] His testimony, at trial, was as follows:

> [THE STATE]: Good morning, Mr. Lockwood. First of all, let me ask you, **do you remember February the 21st, 2009?**
>
> [LOCKWOOD]: **No. Not really. It's been a long time, and I'm dealing with situations of my own. So, no.**
>
> [THE STATE]: **But do you recall on March the 5th, 2009, going down and speaking with detectives** about something that you had witnessed that had happened on February the 21st, 2009?
>
> [LOCKWOOD]: **Yeah, I recall, I recall the meeting.**

[5]Lockwood was the only witness who ever claimed to have witnessed the murder.

[THE STATE]: Okay. Do you recall that during the course of that interview -- and you recall that it was recorded? That it was tape recorded?

[LOCKWOOD]: It all records, if you're in the --

[THE STATE]: Okay. Do you recall what information you gave to them when you were down there?

[LOCKWOOD]: **I recall saying whatever to get me out of the situation I was in.** That's what I recall. Just like I told you and the detectives -- **at the time, what I said, I didn't see.**

[THE STATE]: But do you recall speaking to the detectives and telling them that you had witnessed a murder on February the 21st, 2009?

[LOCKWOOD]: Yeah, **I recall telling them such things. That wasn't true.** As I say it again --

[THE STATE]: So you're saying today that everything you said wasn't true?

[Defense objection sustained.]

THE COURT: Next question.

[THE STATE]: But do you recall that -- you do recall that the interview was recorded?

[LOCKWOOD]: Yes.

[THE STATE]: I want you to just listen to something I've marked as State's Exhibit Number 9.

* * *

(At 10:42 a.m., the tape recording of Austin Lockwood was played. At 10:43 a.m., the recording was stopped.)

[THE STATE]: Do you recognize that? Can you hear that?

[LOCKWOOD]: I can hear it. I don't --

(At 10:43 a.m., the tape recording of Austin Lockwood was played. At 10:43 a.m., the recording was stopped.)

[THE STATE]: Do you recognize that voice, sir?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[THE STATE]: **Do you recognize that voice on there?**

[LOCKWOOD]: **Of course I recognize it. It's my voice.**

[THE STATE]: May we approach for one second, Your Honor?

THE COURT: You may not. Next question.

[THE STATE]: Your Honor, the State would request to admit --

THE COURT: Next question.

[THE STATE]: Well, during the course of that interview, do you recall telling detectives what you observed on February the 21st, 2009?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled. You can answer.

[LOCKWOOD]: The same thing I just told you. **I recall telling them the situation I didn't see or have nothing to do about**, which I told --

[THE STATE]: So --

[LOCKWOOD]: -- which I told. Listen. Which I told you the last trial, and which I told you in your office. **Just like I told detectives. What I said was a lie. I did not witness. I was not there.**

[THE STATE]: So are you saying today that what you said to the detectives was a lie?

[LOCKWOOD]: I'm not saying today. I said it before. Before the day came. When we first went through this, I said it. It's not like I'm saying something new now. **I never saw nobody do nothing. I wasn't there.**

[THE STATE]: Well, you also recall you went down and spoke to detectives on March the 22nd, 2009.

[LOCKWOOD]: I didn't have a choice. I was in, I was in custody. They took me. I couldn't say no. I said no, I couldn't --

[THE STATE]: You weren't in custody on March the 22nd, 2009 --

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[LOCKWOOD]: When I -- when detectives brought me down the first time, that's when they raided my house. Anything after that when they brought me down, I was in custody. So I couldn't even refuse if I wanted to.

[THE STATE]: Your Honor, the State would request to place State's Exhibit Number 9.

[DEFENSE COUNSEL]: Objection.

THE COURT: Approach.

(Counsel approached the bench and the following ensued:)

THE COURT: Basis for objection?

[DEFENSE COUNSEL]: Your Honor, okay, first of all, I'm going to object to the whole statement being [played], Your Honor. Looking at the case of Stewart v. State,[6] it indicates that the out of court, the out of court statement is inconsistent with the prior statement. Basically, Your Honor, she wants to play the whole tape, when --

THE COURT: What is your objection, Mr. [defense counsel]?

[DEFENSE COUNSEL]: My objection is that there's no specific inconsistent statement that she's trying to elicit. She's trying to play the whole tape rather than specific, uh, statements the [witness[7]] made.

THE COURT: Okay.

[DEFENSE COUNSEL]: I think that --

THE COURT: Okay. Okay. You want to respond?

[THE STATE]: Well, Your Honor, he's saying everything he said on the statement is a lie. And pretty much the whole statement is about what he witnessed in that murder.

THE COURT: All right. **Based on what has been presented, the witness has indicated that he did not see the shooting, that he said a lie, and that everything that is on the tape isn't true. For those reasons, I do believe it is a prior inconsistent**

[6]342 Md. 230 (1996).

[7]The transcript actually states "defendant" rather than "witness," but, taken in context, it would seem that defense counsel intended to say "witness," as it is the inconsistency between the witness's out-of-court statement and his in-court testimony that is at issue.

> **statement**, and the State's request to play will be allowed over the defense objection.

(Emphasis added.)

As the State points out in its brief, Lockwood did not simply claim a lack of memory. Rather, he specifically repudiated the most important aspects of his out-of-court statement—that he had actually witnessed Burris commit the murder, stating at trial: "What I said was a lie. I did not witness. I was not there. . . . I never saw nobody do nothing. I wasn't there." Moreover, contrary to Burris's contention that the circuit court failed to make the necessary predicate factual finding, that court, in fact, made an express finding that Lockwood's out-of-court statement was inconsistent with his trial testimony, stating: "Based on what has been presented, the witness has indicated that he did not see the shooting, that he said a lie, and that everything that is on the tape isn't true. For those reasons, I do believe it is a prior inconsistent statement[.]" The circuit court's factual finding was not clearly erroneous, nor was its legal conclusion flawed. We therefore conclude that Lockwood's out-of-court statement contradicted his trial testimony, and thus, his prior statement was inconsistent and therefore admissible. *Nance*, *supra*, 331 Md. at 564 n.5.

Ashley Sparrow

Ashley Sparrow was another witness, whose out-of-court taped statement, inculpating Burris, was admitted into evidence at trial. After the State established that she knew Burris by his nickname, "69," the following exchange occurred:

[THE STATE]: **Now, Ms. Sparrow, did there come a point in time when you overheard a conversation that 69 was having about a homicide --**

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Overruled.

[THE STATE]: -- that happened in February 2009?

[SPARROW]: **No.**

[THE STATE]: **You don't remember that?**

[SPARROW]: **No, ma'am.**

[THE STATE]: Do you recall going down to homicide at the Baltimore City Police Department headquarters and speaking to detectives on February the 27th, 2009?

[SPARROW]: **I don't remember,** [**M**]**iss. I was intoxicated, like I told them the last time. I don't remember.**

[THE STATE]: So you don't remember anything that you said during the course of that interview?

[SPARROW]: **No.**

[THE STATE]: Do you -- did 69 ever tell you about -- **did you ever hear a conversation where 69 said that he has killed someone?**

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Overruled.

[SPARROW]: **No.**

[THE STATE]: Now, do you recall that during the course of that interview on February the 27th, 2009, that that was recorded?

[SPARROW]: **I don't know. I don't remember.**

[THE STATE]: You don't remember?

[SPARROW]: **Like I said, I was intoxicated.**

[THE STATE]: I'm going to mark this as State's Exhibit Number 12. I'd just like you to listen to this briefly.

* * *

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Overruled.

[Ashley Sparrow's recorded statement, from February 27, 2009, was played back for approximately one minute.]

[THE STATE]: **Do you recognize that voice?**

[SPARROW]: **Of course. That's me.**

[THE STATE]: Does that remind you of this interview that you had with the detectives on February 27th, 2009?

[SPARROW]: When they was interviewing me, interrogating me, they was yelling at me, I was scared, and I just wanted to go home. So I don't really know. I don't remember. I was intoxicated. I don't recall.

[THE STATE]: Your Honor, the State would request to play State's Exhibit Number 12.

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Sustained.

[THE STATE]: Well, let me ask you this, Ms. Sparrow. You know -- you testified that you know 69. Did 69 ever have -- **did you ever overhear a conversation with 69?**

[SPARROW]: **No.**

[THE STATE]: So you're saying you've never, ever heard any conversation --

[SPARROW]: **I've never overheard any conversation. No, I did not.**

[THE STATE]: So when you went down and spoke to detectives, you didn't tell them about a conversation you overheard with 69?

[SPARROW]: **I don't remember.**

[THE STATE]: Well, you've testified -- do you recall testifying about this case before?

[DEFENSE COUNSEL]: Objection, Your Honor.

[SPARROW]: No.

THE COURT: Sustained.

[THE STATE]: Your Honor, the State would --

THE COURT: Strike the question and answer.

[THE STATE]: Your Honor, the State would request to play State's Exhibit 12.

THE COURT: All right. Denied at this point.

(Emphasis added.)

The State then examined Sparrow about the photographic array, presented to her during the police interview, from which she had identified "69" and which she had signed, dated, and provided written comment upon. During that examination, Sparrow claimed not to remember being presented with the photographic array and even claimed not to recognize the handwriting and signature on it as her own.

The subject of the examination eventually returned to Sparrow's claimed lack of memory regarding her prior recorded statement:

> [THE STATE]: **Well, you recognize your voice in the tape. Would that be a fair statement?**
>
> [SPARROW]: **I don't recognize that neither.**
>
> [THE STATE]: **Okay, now you don't recognize it? You just testified that you did recognize your voice.**
>
> [SPARROW]: Because it says my birthday, so of course that's going to be me.
>
> [THE STATE]: Your Honor, I would request to play State's Exhibit Number 12.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled. You may play it.

(Emphasis added.)

In admitting Sparrow's out-of-court statement, under Rule 5-802.1(a), the circuit court did not make an express finding of inconsistency. But such an express finding was unnecessary. In *McClain v. State*, 425 Md. 238 (2012), the Court of Appeals stated as much.

In rejecting a defendant's argument that *Corbett* required such an express factual finding as a precondition for the admission of a prior inconsistent statement, the Court of Appeals applied the settled proposition that a judge is presumed to know and properly apply the law, and it held that, when the record supports its ultimate ruling of admissibility, a circuit court is not required to make an express finding, on the record, of inconsistency between the in-court testimony and the out-of-court statement. *McClain*, 425 Md. at 250-53; *accord Davis v. State*, 344 Md. 331, 339 (1996) (stating that, although it is "preferable" that a court make an express finding of inconsistency, before admitting a prior inconsistent statement, as long as there is an adequate foundation, that finding "may be implicit").

In the instant case, the circuit court's implicit finding of inconsistency is amply supported by the record. Indeed, when Sparrow directly contradicted her own testimony, which she had just given moments earlier, and claimed not to recognize her own voice in the recorded statement, after previously having claimed not to recognize her own handwriting and signature on the photographic array depicting Burris, the circuit court apparently found that Sparrow was feigning loss of memory, a finding that, under the foregoing circumstances, was not clearly erroneous.

Moreover, there was, in any event, a material inconsistency between Sparrow's testimony and her prior statement. At trial, she asserted that she had "never overheard any conversation" and yet, in her pre-trial recorded statement, she said that she had overheard a man named "Stacks" ask "69" whether he remembered what had happened "the other night"

and whether he knew he was "dead," to which "69" replied, "I don't know if he's dead but I know I popped his ass." The circuit court apparently noticed this inconsistency and, accordingly, admitted the prior recorded statement into evidence. We find no error in that ruling.

Joshua Johnson

The third and final witness, whose prior inconsistent statement is at issue in this appeal, is Joshua Johnson. As noted earlier, Johnson actually made two separate statements, both of which inculpated Burris and both of which were played for the jury, though only the first statement was admitted into evidence. Because, in his brief, Burris cites only the testimony relating to the first statement, we shall analyze only the admissibility of that statement. Md. Rule 8-504(a)(6) (stating that a brief shall contain "[a]rgument in support of the party's position on each issue"); *Poole v. State*, 207 Md. App. 614, 633 (2012) (noting that matters not argued in an appellant's brief will not be addressed by an appellate court). Johnson testified as follows:

> [THE STATE]: . . . Do you -- first of all, **do you know somebody by the name of 69?**
>
> [JOHNSON]: **No.**
>
> [THE STATE]: You don't know anybody by the name of 69?
>
> [JOHNSON]: No.
>
> [THE STATE]: Never heard of him before in your life?

[JOHNSON]: No.

[THE STATE]: Well, let me ask you this. **Did there come a point in time when you went down to homicide and spoke to detectives** on February the 5th, 2009?[8] Do you remember doing that?

[JOHNSON]: **Yeah.**

* * *

[THE STATE]: Now, Mr. Johnson, I'm going to approach you with what I've marked for identification at this point as State's Exhibit Number 16. **Do you recognize what this is that I've placed in front of you?**

[JOHNSON]: **A lineup.**

[THE STATE]: **Do you recognize the signature on top of one of those pictures?**

[JOHNSON]: **No.**

[THE STATE]: Yes?

[JOHNSON]: No.

[THE STATE]: Is there a date on there?

[JOHNSON]: 26-09.

[THE STATE]: Can I get you to flip that over for a second? **There's some writing on the back of there. Do you recognize that?**

[8]The prosecutor mis-spoke; the actual date of the interview in question was February 25, 2009.

[JOHNSON]: **No.**

[THE STATE]: **Is this your signature right there?**

[JOHNSON]: **No.**

[THE STATE]: No?

[JOHNSON]: Nuh-uh.

* * *

[THE STATE]: And I will approach you with what I've marked for identification as State's Exhibit Number 17. Do you recognize what this is?

* * *

[JOHNSON]: Same lineup photo array.

[THE STATE]: **There's a signature above that. Do you recognize that?**

[JOHNSON]: **No.**

[THE STATE]: No?

[JOHNSON]: No.

[THE STATE]: Do you know who that's a picture of?

[JOHNSON]: No.

[THE STATE]: **Do you know somebody by the name of Bam?**

[JOHNSON]: **No.**

[THE STATE]: No?

[JOHNSON]: No.

[THE STATE]: Can I get you to flip that over? There's some writing on the back. **There's a signature there.** [**Whose**] **signature is that?**

[JOHNSON]: **I don't know. That's my name on it, but not my signature.**

* * *

[THE STATE]: **Now, do you recall ever going down to homicide in 2009 to speak to detectives?**

[JOHNSON]: **Yeah.**

[THE STATE]: You do?

[JOHNSON]: Mm-hmm.

[THE STATE]: Okay. February 25th, 2009, sound like the date that you went down?

[JOHNSON]: I mean, I don't remember the date.

[THE STATE]: But you do recall that you went down and spoke to the detectives/

[JOHNSON]: Mm-hmm.

[THE STATE]: **Do you recall what you spoke to them about?**

[JOHNSON]: **No. I was intoxicated.**

[THE STATE]: You were intoxicated?

[JOHNSON]: Mm-hmm.

[THE STATE]: **Do you know somebody by the name of 69?**

[JOHNSON]: **No.**

[THE STATE]: You never talked to 69?

[JOHNSON]: No.

[THE STATE]: No? **Never had a conversation with 69?**

[JOHNSON]: **Nu-huh.**

[THE STATE]: **Do you know somebody by the name of Bam?**

[JOHNSON]: **No.**

[THE STATE]: No? I'm going to play for you what I've marked as what would be State's Exhibit 18. If you could just listen to this for a moment.

[Joshua Johnson's first recorded statement, from February 25, 2009, was played back for less than one minute.]

[THE STATE]: **Do you recognize that voice?**

[JOHNSON]: **Yeah.**

[THE STATE]: **Whose is it?**

[JOHNSON]: **That's my voice.**

[THE STATE]: That's your voice?

[JOHNSON]: Yeah.

[THE STATE]: So is this -- when you went and spoke to the detectives, was it recorded?

[JOHNSON]: I guess.

[THE STATE]: Your Honor, the State would request to play State's Exhibit Number 18.

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

[THE STATE]: Okay. Now, you went down and spoke to detectives on February the 25th, 2009. What did -- tell us, how did you get there?

[JOHNSON]: I don't remember.

[THE STATE]: Where were you -- I mean, **how did you get from wherever you were to headquarters?**

[JOHNSON]: **I was already -- I was arrested on the 25th.**

* * *

[THE STATE]: **So you remember being arrested. Okay. You went down, and do you remember -- you remember speaking to detectives, correct?**

[JOHNSON]: **I mean, I remember being threatened by them.**

[THE STATE]: I remember being threatened.

[JOHNSON]: Yeah.

[THE STATE]: **Well, you just heard that tape. That's your voice on there, isn't it?**

[JOHNSON]: **I mean, yeah.**

[THE STATE]: And you spoke to detectives on February the 25th, 2009, didn't you?

[JOHNSON]: Yeah.

* * *

[THE STATE]: **So it's fair to say that when you spoke to detectives on February the 25th, 2009, you obviously said something during the course of that interview. Isn't that true?**

[THE STATE]: **I mean, I don't remember. I was intoxicated.**

[THE STATE]: You were intoxicated?

[JOHNSON]: Yeah.

[THE STATE]: Do you recall speaking to detectives about something that you had heard somebody else say?

[JOHNSON]: No.

[THE STATE]: **You don't recall telling detectives that you heard 69 --**

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Overruled.

[THE STATE]: **-- that you heard 69 talk about having just killed someone?**

[JOHNSON]: **No.**

[THE STATE]: You don't remember that?

[JOHNSON]: No.

[THE STATE]: But you heard your voice in this tape, didn't you?

> [JOHNSON]: Yeah, but once again, I was intoxicated.
>
> [THE STATE]: Your Honor, the State would request to play State's Exhibit 18.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.

(Emphasis added.)

Johnson's first out-of-court statement was admissible for the reasons, which we have previously outlined in finding the out-of-court statement of Ashley Sparrow admissible. As in addressing the admissibility of Sparrow's statement, the circuit court, in evaluating the admissibility of Johnson's first out-of-court statement, did not make express factual findings on the record, but, as was the case with Sparrow's statement, no express findings were necessary, because it is clear from the record that there were material inconsistencies between Johnson's testimony and his first out-of-court statement. *McClain*, *supra*, 425 Md. at 250-53; *Davis*, *supra*, 344 Md. at 339.

Specifically, Johnson testified that he did not "know anybody by the name of 69" and that he had "[n]ever heard of him before in [his] life," whereas, in the out-of-court statement at issue, Johnson stated that he and "69" were "friends," and he not only gave police detectives "69's" actual name, Shelton Burris, but he further provided those detectives with a detailed description of "69"—a "tall" black male, with "a little light-brown" complexion, a tattoo of the number "69" on his face, and a small amount of facial hair. Johnson also

testified that he did not know "Bam," but, in the out-of-court statement at issue, Johnson stated that he had known "Bam" "a good two or three years," and he identified "Bam" as the man who ordered "69" to kill the victim because "he owed Bam" some money. And, furthermore, Johnson testified that he had "[n]ever had a conversation with 69," but, in the out-of-court statement at issue, he stated that he and "69" had engaged in a "conversation," approximately a day-and-a-half after the murder, during which "69" told him that Bam had ordered him to kill the victim and that he had used a "Glock" to do so.

Moreover, given Johnson's repeated claims that he could not recall what he said to police because he was, at that time, intoxicated, and his claimed failure to even recognize his own handwriting and signature on the photographic arrays, the circuit court apparently concluded that he was feigning loss of memory. *McClain*, *supra*, 425 Md. at 250-53; *Davis*, *supra*, 344 Md. at 339. That implied finding (like the implied finding as to Ms. Sparrow's statement) was not clearly erroneous. We hold that, because Johnson's testimony was materially inconsistent with his out-of-court statement, and the record amply supports the inference that the circuit court believed that Johnson's claimed lack of memory was feigned, his out-of-court statement was admissible under Rule 5-802.1(a), and, therefore, the circuit court did not err in admitting it into evidence.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS ASSESSED TO APPELLANT.