UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 991

September Term, 2016

WILLIAM WARREN

v.

STATE OF MARYLAND

Leahy,
Friedman,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Davis, J.

Filed: March 23, 2017

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

The events concerning the instant appeal involve a September 2014 shooting, in Baltimore City, where Kevin Bass was shot and later died from his injuries. Appellant was tried and convicted by a jury in the Circuit Court for Baltimore City (White, J.) of possession of a firearm by a prohibited individual and two counts of wearing and carrying a firearm. Appellant was sentenced to twelve years' incarceration, the first five years to be served without the possibility of parole for possession of a firearm by a prohibited individual. The court merged one of the counts of wearing and carrying a firearm with possession of a firearm by a prohibited individual and ordered that appellant serve three years' incarceration for the non-merged count.

Appellant filed the instant appeal, in which he raises the following questions for our review:

1. Did the trial court err in admitting prior statements made by a witness for the State as substantive evidence?
2. Did the trial court err in instructing the jury that prior statements made by a witness for the State could be treated as substantive evidence?

FACTS AND LEGAL PROCEEDINGS

Appellant's jury trial commenced on May 3, 2016 and ended on May 10, 2016. Tazra McGaney testified that, in September 2014,[1] while at a block party on Cecil Avenue, her former best friend, Latisha Majette, was shot. McGaney did not see anyone discharge a firearm, although she testified that she thought she heard gunshots earlier in the evening

[1] The events in question began September 5, 2014 and continued past midnight into September 6, 2014.

while at another block party on Boone Street, but was told that the sounds were firecrackers. McGaney also stated that she saw a person named Kevin at the Cecil Avenue block party.

Majette testified that she went to a block party in September 2014 with McGaney and their children. She remembered hearing "pop, pop, pop," when she was sitting on steps at the party around midnight. As she was running, she was struck by a gunshot that injured her liver and diaphragm. She testified that the shooting occurred along Cecil Avenue and that she was transported to the hospital by McGaney. Majette, however, did not see anyone with a gun.

Reginald George, who was sixteen years old at the time of trial, testified that he used to live in the 2000 block of Cecil Avenue and that he knew an individual named Kevin Bass. One night, in September 2014, George was on the phone in his mother's truck when he saw two males come from behind a corner and begin shooting down Cecil Avenue. He was unsure how many shots that he had heard and he did not recognize the shooters. Afterwards, he learned that Kevin Bass had been shot and had died at a hospital several hours after the shooting. George later spoke with Detective Gary Neidermeier of the Baltimore City Police Department (BCPD) about what he saw that night.

Jonathan Goines testified that he attended a block party in September 2014 on Boone Street between 20th and 21st Streets. Goines was unsure whether an individual, named Kevin, whom he had known briefly, was also at the party. At some point, he heard three or four shots at the party and began running. At the time of the shooting, he did not

see an individual who went by the name "Gutter" or a person who was known by the name Fry. When he was later arrested for selling drugs, Goines told police that he had information about a murder. He recalled that he spoke with Detective Niedermeier and he remembered being shown a video in which he recognized Gutter and Fry by their clothing. In particular, Goines testified that Gutter usually wore a distinctive hat. He did not see either individual in the courtroom during his testimony; however, he identified Gutter in a photo array as someone he knew, but he did not testify that he saw Gutter shoot anyone. After meeting with Detective Niedermeier, Goines was never charged with selling drugs, notwithstanding that he admitted to drug addiction for a period of time in 2014.

Helen Washington, a crime scene technician with the BCPD, testified on behalf of the State that she responded to the 2000 block of Cecil Avenue and the 1000 block of 22nd Street. In addition to sketching the scene, she found approximately sixteen firearm cartridges and casings, some of which were .40 caliber and some of which were .45 caliber. Washington also recovered three shirts, a towel and suspected blood in the 2000 block of Cecil Avenue.

Ronald Washington, also a technician testifying for the State, stated that he responded to an earlier shooting incident in the area of Boone Street and 20th Street on September 6, 2014. According to Washington, he recovered cartridges and casings at the scene and processed the cartridges for possible fingerprints.

Baltimore City Deputy Sheriffs Jerrod Martin and Jamile Boles testified that appellant was arrested at a Garrison Avenue residence on October 22, 2016. Deputy Boles

described the home as something of a boarding house, with three bedrooms upstairs and two bedrooms downstairs. In an upstairs bedroom with documents listing appellant's name, police found a bin with a firearm inside of it. Crime scene technician Amanda Pesay was called to the Garrison Avenue residence after the discovery of the weapon. She identified the recovered weapon as a .45 Bursa Thunder pistol and she verified that she processed it for potential DNA and fingerprints, noting that although she was able to lift two possible prints from the gun magazine, she was unsure if, at the time, any were suitable for analysis.

Christopher Faber of the BCPD, testified as an accepted expert in firearms examinations. In addition to determining that the .45 Bursa was operable, Faber analyzed the ballistics evidence recovered from the Boone Street incident and the Cecil Avenue incident. Faber analyzed the following sixteen fired cartridges: ten .40 "S&W" cartridges, five "GAP" .45 cartridges and one fired .45 "auto" cartridge. Faber testified that, overall, the evidence indicated the involvement of four firearms. Additionally, he determined that the Bursa handgun recovered at the Garrison Avenue residence fired the .45 "auto" cartridge, that the .45 "GAP" cartridges would have been fired from the same Glock-style handgun and that two additional firearms would have accounted for the firing of the other .40 cartridges.

Jennifer Bresett testified as an accepted expert in DNA identification and comparison.[2] She analyzed swabs of the trigger of the Bursa firearm recovered from the

[2] Appellant notes, in his brief, that before Bresett testified, the parties stipulated that his DNA was collected by police for comparison purposes and that the swabs of the Bursa

Garrison Avenue residence, as well as swabs from the handle, slide, grip and butt of the firearm magazine. The swabs from the trigger yielded a partial DNA profile of an unknown male, however, appellant was excluded as having been involved. Although the other swabs produced only an "indeterminate" profile of at least two individuals, no one, however, could be included or excluded as a contributor.

Detective Neidermeier was the lead investigator in the case. After Kevin Bass died from his injuries, the Detective interviewed McGaney and learned that there had been an earlier shooting of her friend, Majette, on September 6th, at approximately between 8:00 and 9:00 p.m. at Boone Street and 20th Street. Detective Neidermeier also verified that, as part of his investigation, he spoke with George and Goines. Goines watched camera footage from Roman's Market, located on East 22nd Street, from before and after midnight on September 6th with the Detective and recognized, in the footage, appellant as someone who had walked by the store.

On September 17th, Detective Neidermeier first interviewed appellant and, on September 18th, he first interviewed Erica Williams, mother to three children with appellant. During his first interview, appellant stated that, at the time of the shooting, he was with Williams at a residence on Lafayette Avenue. During her first interview, by contrast, Williams stated that, at the time of the incident, she was at University of Maryland Hospital with a sick child and that appellant, the child's father, did not accompany them.

handgun, taken by Pesay, were forwarded for DNA analysis.

When the detective interviewed him later, appellant stated that he was actually at Mercy Hospital with Williams at the time of the shooting. During the detective's direct-examination, the State played, for the jury, portions of the Roman's Market camera footage from the night of the incident. The State also introduced photographic stills of the footage depicting an individual wearing a hat and the actual hat worn by appellant when he spoke with police.

Erica Williams Testimony

Erica Williams testified that appellant is the father of her three children and that he sometimes "goes by the name Gutter." She described her relationship with appellant as "up and down" and acknowledged being upset with him in 2014 because he cheated on her. In September 2014, she took one of her daughters to several hospitals in Baltimore to be treated for a medical condition. During direct examination, she did not recall mentioning to Detective Niedermeier a conversation that she had with appellant when she was in the hospital in which appellant had stated that individuals at a block party had shot at him. After being shown State's Exhibit 16, a transcript of her first interview with police, Williams indicated that she still did not remember the conversation regarding the block party and noted that she is currently on medication that affects her memory. The prosecutor then asked Williams whether she remembered mentioning the conversation regarding the block-party during her second interview with police. Williams again indicated that she did not remember broaching the subject during the second interview either.

At that point, the State approached the bench and asked the court to make a finding that Williams was feigning her lack of memory. The State sought this determination in order to introduce Williams's statements to police about a conversation that she had with appellant concerning an altercation at a block party. The court reserved judgment at that time and asked the State to attempt to lay a more substantive evidentiary foundation. The State then continued to question Williams about her statements to police and whether she recalled them. Williams vacillated between whether or not she remembered telling police that appellant mentioned an altercation at a block-party and whether or not appellant visited her when she was in the hospital with her daughter at the beginning of September 2014. The following is an excerpt of the relevant colloquy:

Q Ms. Williams, is it fair to say that you don't want to be here today?

A I wouldn't say that, but—

Q "But" what?

A I just don't remember all this stuff that he's saying I said. I don't remember a lot of this stuff. I don't even remember probably saying some of this stuff. I probably didn't even say some of this stuff.

Q You probably what?

A I probably didn't say all of this stuff. I don't remember this stuff.

THE COURT: I don't know what you just said. "I probably did say that stuff?"

THE WITNESS: I said I don't remember saying all this stuff. I don't remember. I probably didn't say all this stuff.

THE COURT: So, you're saying, "I probably didn't say all this stuff?"

THE WITNESS: Yeah.

THE COURT: Is that accurate?

THE WITNESS: I don't remember saying all this stuff that he's saying I said.

THE COURT: And now you're saying, "I probably didn't say all this stuff"?

THE WITNESS: I never said—

THE COURT: Is that correct? Is that what you just said?

THE WITNESS: I said I probably didn't say all this stuff.

THE COURT: Okay.

BY [PROSECUTOR]:

Q And you just started to say "I never" what?

A I said I never said all—I don't remember saying that stuff.

Q Is it that you don't remember, or you never said it?

A I mean, it's on this paper, but I don't remember saying all of this stuff. Like this stuff, I don't remember saying all of this stuff . . . .

* * *

Q You told the detectives about a conversation you had with Mr. Warren where he had gotten into a fight—

A I don't remember telling the detective that. Because you told me to read it on this paper, that's how I know that I probably did. That's how I remember.

Q That's how you know that, what?

A I said because it's on this paper that you made me read.

Q That helps you remember that makes you remember that that's what you said, or you're saying did not say that?

A No, I didn't say it.

Q You didn't say it?

A No.

Q So, you're saying that you did not tell the detectives about a conversation you had on the phone where Mr. Warren told you—

A No.

Q —he got into a fight at a block party?

A No, that's not—I said because I read—remember you told me to read the paper?

Q Correct.

A Okay. I read that. That's what it say on here. That's how I remembers **(sic)** what it say on the paper, because you—

Q Correct. Are you saying today that you did not tell the detectives that?

A I probably did say it. I don't—I probably did say it. I don't know.

The Assistant State's Attorney then renewed her request to introduce Williams' prior statements and specifically requested to have the statements introduced as substantive evidence. Outside the presence of the jury, the following colloquy occurred:

THE COURT: All right. So, there's a motion.

[PROSECUTOR]: Yes, Your Honor. Pursuant to the testimony of Ms. Williams, Your Honor, she, I think, has demonstrated an unwillingness to provide information, or to testify. The State does believe and stands by its original position that the memory loss that Ms. Williams has expressed is feigned memory loss and is not attributable to any medical condition or disease. It is very clear from the record that she is involved in a continuing relationship with the defendant, Mr. Warren; that she

remains in contact with him. She ultimately remembers things and doesn't remember things.

In addition, Your Honor, beyond just feigned memory loss, at this point I believe we also have a true recant of Ms. Williams' statement, as after reviewing the document and pursuant to questioning, she indicated that, while she sees the words on the paper, she does not believe and indicated, actually, that she did not tell the detective all of this information.

As such, the State is asking permission in this instance to play only portions of her statement as agreed to by defense because there is a lot of information that's background and history. We've included enough of that to show where the questions came from, but nothing about the prohibited information.

THE COURT: I'll hear from the defense.

[DEFENSE COUNSEL]: Just briefly, Your Honor. At one point she did say she didn't say it, but then she kind of said, "Well, if it's on the paper, then I probably did." It was very unclear. She was back and forth, but she did say at one point, "Even looking at it on the paper, I didn't say it," and when it came to the video, she did deny it. So, at this point, I mean, I can't really say she didn't deny it.

What [prosecutor] and I did was to—if the State is looking to—you know, the information that the State wants to bring out is specifically the conversation she had with Mr. Warren when she was at the hospital and she talked to him on the phone, and that's one portion of the tape; and, then, the other part is her looking at the video and saying, "That's Gutter." She says it over and over and over during her statement, but my feeling is it's only necessary to play one part of it. We don't have to play her saying it over and over and over, especially since she uses very interesting language. So, [prosecutor] has agreed to that, as well.

So, I believe we have agreed on which portions go directly to the issue and to her recantation.

[PROSECUTOR]: I think we have a dispute as to the remainder because—not the remainder. Not all of the remainder. To be specific, the State is looking to play more of, I guess, her identification of Mr. Warren on the video than defense counsel wishes, is my understanding.

[DEFENSE COUNSEL]: Oh, okay.

[PROSECUTOR]: We did talk about that a little bit and I wanted to make sure we addressed it here. Your Honor, Ms. Williams indicates—she first looks at the tape and she says, "That's Gutter," and then he says, "Well, let's watch it through because, you know, they pass by twice." So, as she watches it through, she actually talks to him about trying to identify the other individual who is there. She keeps saying she believes it's "Freaky." She talks about the difference between hairstyles and things. I don't think we have any dispute about that coming in. Then, after that, my belief is it's when they're coming back. She says, "Oh, that's Gutter," and he says, "No, no confusion about that?" or something along those lines. She says, "I'm a hundred percent sure. That's him." I know him. He's always wearing a hat. That's him," and she calls him a "big dummy," among other things, but she says, "That's him, you know, right there walking. No confusion in my mind. Nothing like that."

Your Honor, in addition to the fact that it's a very clear and concise identification of the defendant, which is important in this case, Your Honor, I think it also goes to the level of cooperation that she was providing and her demeanor with the detectives, as opposed to how she was on the witness stand, and as such, the State is asking to play and break it after that identification so we don't continue into—there's a lot of supposition afterwards about what happens at the corner. In fact, the witness yells out, "Oh, my God, they're shooting!" That part, obviously, is not admissible because she's just watching and seeing what happens, and we've agreed to cut that portion, but in terms of the remainder, I think it's a very solid, consistent identification. It's her statement and it just completely goes to her demeanor and how her demeanor is on the stand today.

THE COURT: [Defense counsel].

[DEFENSE COUNSEL]: Well, I don't know that it's relevant to present her demeanor in the statement. I mean, the point is the statement and what she said, and if the point is that during her statement she looked at the video, she identified her, you know, boyfriend, "Gutta," Mr. Warren, as being one of the individuals on the video, I get that. Like [prosecutor] said, she says it several times. The first time she watches the video, she said, "That's Gutta." The detective says, "That's Gutta?" She says, "I know how he walked and he wears a fitted." "Does he always wear that hat?" "He don't always wear that hat, but he's a big dummy." I mean, that part has nothing to do with—that's not part of an impeachment, and, then, as they go on, they go through the stuff about "Freaky," which is relevant, and then he goes back to "All right. So, who is that?" "That's Gutta." It's the same thing. He says, "No doubt in your mind?" She says—and I'm quoting—"No fucking, no mind."

So, I mean, I don't know what the point of putting that in is if the point is she looked at the video, she identified "Gutta," there's no question about it. I don't think playing all these other ways of her saying "That's Gutta" is proper impeachment.

[PROSECUTOR]: Well, at this point, Your Honor, the State isn't asking to use this as impeachment. We're asking to use that portion as substantive evidence.

THE COURT: I'm not going to—

[DEFENSE COUNSEL]: Your Honor, I don't think it's appropriate to play it all for that reason.

THE COURT: I'm not going to require parsing this set of—the entirety of the testimony relating to his identification coming and going. I think it would be—you're going to play it without chopping it up.

[PROSECUTOR]: That portion. The video is chopped up now because we have had to move things around and I will have to ask the Court—and I didn't run this by you sooner—

THE COURT: The video identification.

[PROSECUTOR]: Thank you.

THE COURT: You don't need to chop it. When the officer says, "You sure, a hundred percent sure?" and she makes noise about confirming her identification, I don't see any point or necessary basis or prejudicial bias, even if it sounds redundant, to allow the completion of that testimony in response to the detective's inquiry about "Are you sure?"

[PROSECUTOR]: Now, Your Honor, the only other difficulty that we're going to have and I'm going to ask the Court for either some type of instruction, or some type of way that I can indicate to Ms. Williams in front of the jury that we're going to show her portions of her statement because there are obvious—there's a portion where the detective is sitting talking to her and then it cuts and the detective is coming back into the room. So, it's obvious that there's been some kind of manipulation and—

THE COURT: I'll instruct the jury that I've made some decisions.

[PROSECUTOR]: Okay.

> THE COURT: Anything else?
>
> [PROSECUTOR]: Anything, [Defense Counsel]? No? I think we're good, Your Honor. If I can just have a minute to save this so that it incorporates the changes.
>
> The court then ruled on the record regarding the admission of the video statements:
>
> THE COURT: Reviewing Rule 5–613 and the requirements of the rule, not to mention the advice and instruction of *Nance-Hardy* for the record, the citation is 331 Md. 549, a 1993 decision out of the Court of Appeals . . . when the State revisited the matter to lay a foundation as I indicated had not been met*, there was a pretty specific, especially in response to my questions, denial about the statements made*. I never said all this stuff. I probably didn't say all this stuff, but when you got to page 14, there was an acknowledgment of the statement and the acknowledgment of the statement was specifically as to the contents in the vicinity of page 14.
>
> So, looking at the general and specific requirements of Rule 5–613, I am going to permit the excerpted audio to come in. Anything else for the record?
>
> [DEFENSE COUNSEL]: No.

(Emphasis supplied).

When the prosecution sought to admit the video of the first statement, appellant's trial counsel objected, but did not argue against its admission. She noted that the objection was "[j]ust for the record." When the Assistant State's Attorney sought to admit the video of the second statement, appellant's trial counsel "renew[ed her] objection" on the grounds earlier stated. Both objections were overruled and the State subsequently played the statements for the jury. In the statements, Williams indicated, *inter alia*, that appellant did not visit her in the hospital and that, while she was in the hospital, appellant told her that he got into an altercation with "the boys that be around on Cecil Street." In particular, Williams told police that appellant indicated that "KB" tried to shoot at him. After the

prosecution played the statements for the jury, the prosecutor concluded the State's examination of Williams.

The court later gave the following instruction to the jury as it pertained to the statements:

> You will recall that Ms. Williams testified in the State's case during the trial. You will also recall that it was brought out that, before this trial, she made statements concerning the subject matter of this trial. Even though these statements were not made in this courtroom, you may consider Ms. Williams' statements as if they were made at this trial and you may rely on them as much or as little as you think proper.

DISCUSSION

I.

Appellant contends that the trial court erred by admitting the video-recorded statements Williams made to police as substantive evidence. Appellant argues that the statements did not meet the threshold for admission under Maryland Rules 5–802.1 or 5–613. Citing *Corbett v. State*, 130 Md. App. 408 (1996), appellant asserts that, because "the trial court did not make a finding that Williams recanted or that her memory loss was feigned and not actual[,]" the "preliminary-finding requirement" was not met and the court erred in admitting the statements.

The State's primary rebuttal is that the issue has not been preserved for our review. Specifically, the State draws attention to several places in the record, noting that appellant failed to make an argument as to why the statements should not be admitted and, in fact, "entirely acquiesced to the trial court's finding that Williams had recanted." The State acknowledges appellant's objections at trial, but distinguishes them as not objections

"regarding the threshold admissibility of the prior statements," but rather that appellant's objections related to "how much, *i.e.*, which portions, of the statements fell within the hearsay exception."

Moreover, the State asserts that, if appellant's claim has been preserved for our review, it is without merit because the trial court provided "clear indication," on the record, that it "had concluded Williams had recanted."

As a preliminary matter, we address the State's contention that this issue has not been preserved for our review. As Md. Rule 8–131(a) provides, an "appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Typically, this Rule "requires a defendant to make 'timely objections in the lower court,' or 'he will be considered to have waived them and he cannot now raise such objections on appeal.'" *Brice v. State*, 225 Md. App. 666, 678 (2015) (quoting *Breakfield v. State*, 195 Md. App. 377, 390 (2010)), *cert. denied*, 447 Md. 298 (2016).

Md. Rule 4–323(a) governs objections made regarding the admissibility of evidence. Although the Rule requires a timely objection to the evidence sought to be admitted, "[t]he grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs." In fact,

> [i]f a general objection is made, and neither the court nor a rule requires otherwise, *it is sufficient to preserve all grounds of objection which may exist*. But, when particular grounds for an objection are volunteered or requested by the court, that party *will be limited on appeal to a review of those grounds* and will be deemed to have waived any ground not stated.

State v. Jones, 138 Md. App. 178, 218 (2001) (Emphasis supplied) (citations omitted).

In the case *sub judice*, the State asserts that appellant has not preserved his argument for our review because, citing *White v. State*, 324 Md. 626, 640 (1991), an "argument not made at trial in support of admission of evidence cannot be asserted for the first time on appeal." However, *White* is a case that does not engage Rule 4–323(a), because it does not concern the grounds for an objection. Rather, *White* engages Rule 8–131(a) because it concerns the proffer by defendants, in support of witness testimony for the defense and the State's objection to its admission, which was sustained. In *White*, the defendants proffered the witness testimony because the witness was "familiar" with the individual in question and the area "and he's going to testify that he has previous occasions when he has known that [the individual] has asked people to provide cocaine in return for sex." *Id.* at 632. On appeal, however, the White cousins additionally asserted, for the first time, "that the ruling deprived them of their constitutional right to present witnesses in their defense." *Id.* at 640. The State cites the Court of Appeal's holding that the "argument was not made to the trial court and thus is not properly before [the Court]." *Id.* However, the State's reliance upon *White* is misplaced because, in the instant case, appellant is not asserting, for the first time on appeal, an argument that is in addition to or different from an argument asserted at trial. Appellant did not provide a ground for objection to the admission of the evidence and the court did not request one, therefore, the objection and renewed objection were "sufficient

to preserve all grounds of objection which may exist." *Jones*, 138 Md. App. at 218. Accordingly, we hold that appellant has preserved the issue for our review.

Analysis

Appellant contends that, although "the court clearly indicated that it was admitting the statements under Md. Rule 5–613," despite referencing *Nance v. State*, 331 Md. 549 (1993), "a case typically associated with Md. Rule 5–802.1," nevertheless, admission of the statements, regardless of the Rule under which the evidence was admitted, constituted reversible error. Pertaining to Md. Rule 5–802.1(a), appellant cites *Corbett,* 130 Md. App. at 426 which requires a trial court to make a "preliminary finding" under Rule 5–104 that the witness is a "*bona fide* turncoat."[3] According to appellant, "[t]here is no reason why the need for a preliminary finding should not also extend to admissions under Rule 5–613." Therefore, appellant urges that, because the court did not make a "preliminary finding," we should reverse.

The State maintains that, appellant's claim should be "rejected outright" because the claim's sole assertion is that the trial court failed to make a preliminary finding, which the State argues is without merit. Furthermore, the State indicates the trial court did make a finding that Williams had recanted her prior statements, but that "[i]t is of no consequence" that the court did not make a reasoned, preliminary finding, on the record, that Williams was a turncoat witness. Citing *McClain v. State*, 425 Md. 238 (2012), the

[3] "A witness whose testimony was expected to be favorable but who becomes (usu. during the trial) a hostile witness." Black's Law Dictionary 1632 (8th ed. 2004).

State asserts that the trial court needed only to make a finding that the witness's statements be inconsistent in order to satisfy the admissibility requirements under both Rule 5–104 and 8–201.1.

In *Corbett*, *supra*, we held that "the decision whether a witness's lack of memory is feigned or actual is a demeanor-based credibility finding that is within the sound discretion of the trial court to make." 130 Md. App. at 426. However, in *Corbett*, we did not find the trial court's exercise of discretion dispositive.

> Rather, we are confronted with an absence of any finding on the issue. The admissibility of LaDonna's prior inconsistent statement depended upon a preliminary finding by the court that her lack of memory of the events in question was not actual, but a contrivance. The court erred in permitting LaDonna's statement to come into evidence as a prior inconsistent statement without first making a finding on that preliminary, predicate issue.

Id. at 426–27. Accordingly, appellant interprets our ruling in *Corbett* as applicable to the case *sub judice*.

The Court of Appeals, however, in *McClain,* 425 Md. at 252, distinguished *Corbett* and noted "[n]owhere, however, does the *Corbett* Court require that such a finding be made on the record." Furthermore, the Court noted that "Rule 5–802.1, unlike some other Rules, does not require explicitly that findings be placed on the record, and we decline to read into the Rule such a requirement." *Id.* Citing *Powell v. State,* 394 Md. 632, 641 n. 7 (2006), the Court further noted that certain Maryland Rules have express language that "requires the court to make findings on the record" and, therefore, the *Powell* Court held "that a Rule will not be interpreted to include such a requirement when it contains no explicit language

mandating that findings be placed on the record." *Id.* at 252–53. Accordingly, we turn to the language of the Rules to determine what was required of the circuit court.

Maryland Rule 5–802.1 governs Hearsay Exceptions for prior statements made by witnesses and provides, that certain "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[.]" Subsection (a) permits the admission of a prior inconsistent statement, provided that the statement was

> (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and was signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement[.]

Subsection (c) permits the admission of a previous statement that is "one of identification or a person made after perceiving the person[.]"

Rule 5–613(a) does not concern hearsay exceptions, but governs prior statements of witnesses and provides that

> [a] party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.

Subsection (b) provides that extrinsic evidence of a prior inconsistent statement of witness is not admissible, under the Rule, "unless the interests of justice otherwise require"

and "until the requirements of section (a) have been met and the witness has failed to admit having made the statement and . . . unless the statement concerns a non-collateral matter."

Neither Rule requires a court to make an express, preliminary finding on the record that "the witness whose statements are at issue is in fact a bona fide turncoat" witness, as appellant characterizes the court's duty in his brief. As the Court of Appeals held in *Powell, supra*, "a Rule will not be interpreted to include such a requirement when it contains no explicit language mandating that findings be placed on the record." 394 Md. at 641 n. 7.

The circuit court also noted its reliance upon the "guidance" of *Nance, supra.* The Court of Appeals in *Nance*, noted that

> [i]t is well settled in Maryland that a court may admit, as substantive proof, evidence of a third party testifying as to an extrajudicial identification by an eyewitness when made under circumstances precluding the suspicion of unfairness or unreliability, where the out-of-court declarant is present at trial and subject to cross-examination.

331 Md. at 560.

Regarding the admission of hearsay evidence of prior extrajudicial identification, the Court expressly affirmed the admission for substantive purposes.

> The rationales for this exception to the rule against hearsay have been fully articulated. The extrajudicial identification is admitted for its greater probative value because it occurred closer to the time of the offense, and is therefore more likely to be accurate. It is admitted because the original identification was made under less suggestive circumstances than those existing at trial, and is accordingly more reliable. Because 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.

Id. at 561 (citations omitted).

Additionally, the *Nance* Court addressed the availability of witnesses for cross-examination when there is memory loss. The Court noted that "[t]he tendency of unwilling or untruthful witnesses to seek refuge in forgetfulness is well recognized" and that "[w]hen witnesses display such a selective loss of memory, a court may appropriately admit their prior statements." *Id.* at 572 (distinguishing "unavailable" witnesses for Confrontation Clause purposes as those asserting a privilege to exempt them from testifying at trial). The Court did not articulate a requirement that an express, on-the-record finding by the court be made; rather, the court need only assess the "display" of the witnesses for "selective loss of memory." The Court opined that, the witnesses

> did not uniformly testify that they had no memory of their sessions with police or the grand jury in which they made the identifications or statements. Instead, they remembered some parts of these earlier events, did not remember others, and outright denied or repudiated other parts. Their lapses of memory conspicuously occurred whenever the questions at trial approached matters potentially implicating Nance and Hardy in the murder.

Id.

In the instant case, the circuit court was not required to make an express, on-the-record, "preliminary finding," as appellant characterizes it. The court expressly stated that it was admitting the evidence under Rule 5–613(a) which requires, for the admission of a non-collateral matter, that the witness fail to admit making the prior inconsistent statements and be given an opportunity to explain or deny them. The transcript clearly illustrates that the witness failed to admit to making the statements and was given an opportunity to explain or deny them.

However, as the State notes, the court did make a finding that Williams recanted her prior extrajudicial identification of appellant, as the trial judge stated: "[W]hen the State revisited the matter to lay a foundation as I indicated had not been met, there was a pretty specific, especially in response to my questions, denial about the statements made."

Although appellant asserts that, in referencing *Nance*, the court was also seeking to admit the evidence under Rule 8–201.1, we disagree. As the State articulated in its brief, "it is of no consequence" whether the court was actually admitting the prior statements under Rule 5–613(a) or Rule 8–201.1 because neither Rule requires the court to make a preliminary finding. As we explained, *supra*, Rule 5–613(a) does not require a preliminary finding and the Court of Appeals in *McClain,* 425 Md. at 252 discussed, "Rule 5–802.1, unlike some other Rules, does not require explicitly that findings be placed on the record."

Moreover, we note that the Court of Appeals, in *Nance*, held that prior inconsistent extrajudicial identifications were admissible as substantive evidence when the witness was exhibiting "selective" memory loss. The circuit court in noting its reliance upon the "guidance" of *Nance*, was not required to make an on-the-record "preliminary finding" of Williams' feigned memory loss. When the court admitted Williams' statements, the judge noted that, Williams was not uniformly testifying to memory loss concerning all interactions with police about identifying appellant prior to trial. Appellant made explicit denials, stating that she "probably didn't say all this stuff" and then acknowledged some of the prior statement. Accordingly, for the foregoing reasons, we hold that the court

directly complied with the mandates of Rule 5–613(a) and implicitly complied with Rule 8–201.1.

Finally, appellant asserts that the trial court's error was not harmless. Appellant contends that the evidence against him was "solely circumstantial" and that the State relied "heavily" on the prior statements made by Williams to police and that the State cannot prove beyond a reasonable doubt that the admitted statements did not influence the jury.

"[T]he harmless error rule 'has been and should be carefully circumscribed[.]'" *Dorsey v. State*, 276 Md. 638, 661 (1976). "[T]he burden is on the appellant in all cases to show prejudice as well as error." *Crane v. Dunn*, 382 Md. 83, 91 (2004) (citing *Rippon v. Mercantile Safe Deposit Co*., 213 Md. 215, 222 (1957)) "Prejudice will be found if a showing is made that the error was likely to have affected the verdict below. 'It is not the possibility, but the probability, of prejudice which is the object of the appellate inquiry.'" *Id.* (quoting *State Deposit Ins. Fund Corp. v. Billman*, 321 Md. 3, 17 (1990)). "Courts are reluctant to set aside verdicts for errors in the admission or exclusion of evidence unless they cause substantial injustice." *Id.* at 92 (citing *Hance v. State Roads Comm*., 221 Md. 164, 176 (1959)).

In the instant case, we are unpersuaded that the trial court erred in admitting Williams' prior inconsistent statements. Assuming, *arguendo*, that the court did err, appellant has not provided evidence that there was a probability that he was prejudiced from the admission of the statements, causing substantial injustice. Although appellant argues that the case was "solely circumstantial" because the State heavily relied upon

Williams' prior statements, the record illustrates that there is testimonial and physical evidence to support the verdict. Goines testified as to his identification of appellant *via* the Roman Market video and a photographic array. Additionally, Detective Neidermeier testified that appellant made inconsistent accountings of his whereabouts on the night of the incident. Furthermore, physical evidence of a gun identified as having been used at the crime scene was recovered from appellant's residence and, although appellant was excluded from one DNA swab, he could not be excluded from the remaining swabs. Accordingly, appellant has failed to illustrate that, if it was error for the court to admit Williams' prior inconsistent statements, that it was reversible error.

II.

Appellant next contends that the trial court incorrectly instructed the jury regarding how it could consider Williams' out-of-court statements as substantive evidence. Appellant asserts that Rule 5–613 only permits the use of such statements for impeachment purposes and, therefore, the trial court's instruction that such extrinsic evidence could be treated as substantive evidence constituted reversible error. Appellant acknowledges "that defense counsel did not object specifically to the . . . instruction" but, nevertheless, urges this Court to exercise its discretion to review his claim under plain error review.

The State reiterates that appellant has not only "affirmatively waived this claim" by failing to object to the jury instruction, but also expressly agreed to the instruction. Furthermore, the State notes the "rare, rare phenomenon" of the plain error doctrine and

that appellant has not satisfied his "high hurdle." Because there was no error, the State maintains, appellant's claim should be rejected.

Generally, a prompt, contemporaneous objection and grounds for the objection are required when a party contests a particular jury instruction. *Yates v. State*, 429 Md. 112, 130 (2012) (citing MD. RULE 4–325(e)). Without such an objection, the issue is not preserved for appellate review. MD. RULE 4–325(e). However, "[a]n appellate court, on its own initiative or on the suggestion of a party, may, however, take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object." *Id.*

In the instant case, appellant concedes that he failed to make a contemporaneous objection at trial. Therefore, his claim on appeal has not been preserved for our review. However, appellant requests that we exercise our discretion to review for plain error.

"Plain error review is reserved for errors that are 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Id.* at 130–31 (quoting *State v. Savoy*, 420 Md. 232, 243 (2011)). We rarely exercise our discretion to review unpreserved issues for plain error. *Id.* Furthermore, although "[f]orfeited rights are reviewable for plain error . . . waived rights are not." *Olson v. State*, 208 Md. App. 309, 365 (2012) (citations omitted).

> Forfeiture is the failure to make a timely assertion of a right, whereas waiver is the intentional relinquishment or abandonment of a known right. Under the 'invited error' doctrine, which is a 'shorthand term for the concept that a defendant who himself invites or creates error cannot obtain a benefit—mistrial or reversal—from

> that error, [i]f the defendant has both invited the error, and relinquished a known right, then the error is waived and therefore unreviewable.

Id. (internal quotation marks omitted) (citations omitted) (alterations in original).

In the instant case, the following colloquy from the trial is instructive:

> [THE COURT]: All right. You all can remind me as to who qualifies under column "A" and who qualifies under column "B" as to 3:19.
>
> [PROSECUTOR]: Your Honor, with respect to section "A," substantive evidence, I believe and the State would indicate that I believe the only person who it came in as substantive evidence in terms of the rule would be Ms. Williams; that Mr. Goines and Ms. McGaney—I suppose Ms. McGaney by defense counsel and I guess even Mr. George by defense counsel and Ms. McGaney by the State to either impeach or refresh recollection, but I'm not even sure to the extent impeachment is applicable. It was more refreshing of recollection than impeaching that happened during this trial.
>
> [THE COURT]: Well, as to Goines, we heard a lot of impeachment. McGaney was refreshing recollection. George was refreshing recollection. And who else?
>
> [PROSECUTOR]: It would have been Ms. Williams as substantive evidence.
>
> [THE COURT]: But as to impeachment, I think that's only Goines, isn't it?
>
> [PROSECUTOR]: I'm not certain if—I believe that defense counsel attempted to impeach Mr. George with respect to some portions of his statement, particularly concerning the street locations.
>
> [THE COURT]: You're right. All right. [Defense counsel], so you agree that Williams is the only subject of subpart "A"?
>
> [DEFENSE COUNSEL]: Yes.

The record clearly illustrates that appellant, through counsel, agreed that Williams' testimony was under subpart "A" of the Maryland Criminal Pattern Jury Instructions (MCPJ-Cr) 3:19 which concerned substantive evidence. Furthermore, the Maryland State

Bar Association Manual explains that Part A of the jury instruction is applicable for the introduction of a statement as substantive evidence and Part B is applicable for both prior inconsistent statements and prior consistent statements when introduced for impeachment or credibility purposes. Maryland State Bar Ass'n, *MPJI- Cr* 3:19, at 305 (2012).

Therefore, we hold that appellant affirmatively accepted the jury instruction and, thereby, waived his right to assert error on appeal.

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