UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1089

September Term, 2016

KENNETH ORLANDO JORDAN

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: May 19, 2017

Kenneth Jordan, appellant, was convicted by a jury sitting in the Circuit Court for Baltimore County of second-degree assault.[1] Appellant asks the following questions on appeal, which we have slightly rephrased:

I. Did the trial court abuse its discretion in denying appellant's request for a postponement?

II. Did the trial court abuse its discretion in admitting a statement by a State's witness as a prior inconsistent statement?

For the reasons that follow, we shall affirm.

FACTS

During the early morning hours of July 3, 2015, Kelly Anderson walked to a friend's house from her house at 1515 Barkley Avenue in Essex. As she walked, a white car pulled up alongside of her and appellant got out. Appellant had lived with her at her house for two months, a month earlier. Appellant demanded money that he believed Anderson owed him, and he continued to do so as they walked to, and during the half an hour they stayed at, Anderson's friend's house. He continued to demand his money as she began walking home from her friend's house, and at one point, he reached into her shirt and took about $30 from her bra. He then got back into the white car, retrieved a gun from the glove compartment, and pointed the gun at her, which directed a red laser beam at her.

[1] Appellant was acquitted of first-degree burglary, attempted armed robbery, robbery, attempted robbery, first-degree assault, use of a firearm in the commission of a crime of violence, illegal possession of a firearm by a disqualified person, and home invasion.

Appellant was sentenced to ten years of imprisonment for assault, all but four years suspended, followed by three years of supervised probation.

Upset and scared, Anderson ran back to her house where she told her two roommates, Cole Harden and Tia Davis, what had happened. She then went upstairs. Shortly thereafter she heard a "scuffle" downstairs, after which appellant came up the stairs yelling about the money Anderson owed him. Davis called 911. While Anderson's back was pressed up against the wall in one of the upstairs bedrooms, appellant swung a pair of scissors he had in his hand at her face. Davis interceded and told appellant to stop. Someone yelled that the police had arrived, and appellant went downstairs to leave. Appellant was arrested on the front porch. During a search of the house, the police found a loaded handgun with a laser in the basement.

Davis, Anderson's roommate, testified that she and appellant were in an intimate relationship a few years prior to the assault on Anderson. She testified that she could not remember anything that happened at Anderson's house during the assault because she was intoxicated. She identified St. Exhibit 1 as her two-page statement to the police that she wrote and signed after the police arrived, but she said that reading the document did not refresh her memory. The court ruled that she was feigning memory loss and admitted her written statement as substantive evidence. In her statement, Davis wrote that appellant came into the house and went upstairs, after which Davis heard yelling. Davis ran up the stairs and found appellant and Anderson in one of the bedrooms. While appellant yelled at Anderson to give him his money, he held a sharp object in his hands that he raised to "cut" her. Davis got in between the two and told appellant to calm down. When someone from downstairs yelled that the police were coming, appellant tried to leave, but the police were already present.

DISCUSSION

I.

Appellant argues that the trial court abused its discretion when it denied his request for a postponement so he could subpoena unnamed witnesses. The State responds that the trial court did not abuse its discretion. We agree with the State.

Md. Rule 2-508(a), governing requests for continuances, provides: "On motion of any party or on its own initiative, the court may continue a trial or other proceeding as justice may require." The decision whether to grant a continuance "is committed to the sound discretion of the [trial] court." *Abeokuto v. State*, 391 Md. 289, 329 (2006)(citing *Ware v. State*, 360 Md. 650, 706 (2000), *cert. denied*, 531 U.S. 1115 (2001)). There have been a multitude of varying definitions of "abuse of discretion," but the Court of Appeals has stated that one of the "more helpful" standards is found in *North v. North*, 102 Md. App. 1 (1994). *Alexis v. State*, 437 Md. 457, 477 (2014)(quotation marks and citation omitted). In *North*, Judge Wilner wrote:

> Abuse of discretion . . . has been said to occur where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles. It has also been said to exist when the ruling under consideration appears to have been made on untenable grounds, when the ruling is clearly against the logic and effect of facts and inferences before the court, when the ruling is clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result, when the ruling is violative of fact and logic, or when it constitutes an untenable judicial act that defies reason and works an injustice.

437 Md. at 478 (quotation marks omitted). *See also Fontaine v. State*, 134 Md. App. 275, 288, *cert. denied*, 362 Md. 188 (2000)(where we said that an abuse of discretion occurs

"where no reasonable person would take the view adopted by the [trial] court" and "where a trial court's ruling is reasonable, even if we believe it might have gone the other way, we will not disturb it on appeal.")(quotation marks and citations omitted).

The burden of demonstrating an abuse of discretion on a motion for a postponement is on the party challenging the ruling. *State v. Taylor*, 431 Md. 615, 646 (2013)(citation omitted). A continuance to secure a missing witness is appropriate where: 1) there is a "reasonable expectation" of securing the witness "within some reasonable time"; 2) the witness's evidence was competent, material, and the case could not be "fairly tried" without it; and 3) "diligent and proper efforts" were made to secure the witness. *Jackson v. State*, 288 Md. 191, 194 (1980)(quotation marks and citation omitted); *Wright v. State*, 70 Md. App. 616, 623 (1987)(citations omitted).

A brief history of the case is necessary to place the question raised in context. Appellant was charged in a 15-count indictment and released on bond on July 29, 2015. Roughly five months later, on December 15, 2015, the county administrative judge granted the State's request for a postponement because a State's witness had not been served with a subpoena. On April 4, 2016, the county administrative judge granted the defense's request for a postponement because defense counsel needed more time to prepare. Prior to the start of trial on June 27, 2016, defense counsel requested a postponement and the following colloquy occurred:

> [DEFENSE COUNSEL]: Your Honor, this is the Defense's request for a postponement. Your Honor, this is, I believe, the third time that we have been in on this case. The first time was a mutual postpone – I think they were both mutual postponements prior to today. [Appellant] was shot in the shoulder, and that certainly limited my ability to – he was sort of

incommunicado for a while, so we haven't had adequate time to prepare, your Honor. He has informed me today that he has some additional witnesses he would like to bring forward. Obviously they haven't been subpoenaed, so they are not here. I'm asking for additional time to subpoena those witnesses to bring them into court.

It's my understanding that the State has several witnesses, that two of them are being held at the Baltimore County Detention Center on unrelated matters, and there's another individual who is, I believe, cooperative but is on call until needed to be brought in, so the inconvenience to the State is minimal, and [appellant] is currently on the street on this case, so we're asking for that time.

THE COURT: The witnesses are locked up and the Defendant is on the street. Is there anything else?

[THE STATE]: Your Honor, actually one of the witnesses is locked up on a body attachment for this –

THE COURT: Do you oppose the postponement request?

[THE STATE]: -- case and is being held. What's that? I do oppose it, your Honor.

THE COURT: Postponement's denied.

Appellant argues that the trial court abused its discretion in denying his request for a postponement. We disagree. First, appellant proffered no reasonable expectation that the witness's presence could be secured within a reasonable time. Second, there was no proffer that the testimony of the unnamed witnesses was competent, material, or that the case could not be "fairly tried" without them. Third, there was no proffer as to when appellant regained his ability to communicate with his defense counsel or when appellant learned of the witnesses to suggest that appellant had acted diligently. Under the circumstances, we are persuaded no abuse of discretion occurred.

II.

Appellant argues that the trial court erred in admitting Davis's written statement as a prior inconsistent statement. Appellant argues that Davis's memory loss was not feigned but stemmed from the lapse of time between the event and trial, and her intoxication, imagination, and medically diagnosed memory problems. The State argues that appellant's argument lacks merit. We agree with the State.

"Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Hearsay is generally inadmissible at trial because of its inherent untrustworthiness, unless some exception applies. *See* Md. Rule 5-802 and *Parker v. State*, 365 Md. 299, 312-13 (2001). Md. Rule 5-802.1 lists several exceptions to the hearsay rule for the admission of prior statements by a witness who testifies at trial and is subject to cross-examination. Two closely related exceptions are when the statement:

> (a) . . . is inconsistent with the declarant's testimony, if the statement was … reduced to writing and was signed by the declarant; or
>
> (e) . . . is in the form of a memorandum or record concerning a matter about which the witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, if the statement was made or adopted by the witness when the matter was fresh in the witness's memory and reflects that knowledge correctly.

A statement that is admitted under subsection (a) is admitted substantively; a statement admitted under subsection (e) may be read into evidence but it is not admissible as substantive evidence. *See Nance v. State*, 331 Md. 549, 569 (1993); Md. Rule 5-802.1(e); and *Corbett v. State*, 130 Md. App. 408, 427, *cert. denied*, 359 Md. 31 (2000).

"Inconsistency includes both positive contradictions and claimed lapses of memory." *Nance*, 331 Md. at 564 n.5 (citation omitted). A feigned lack of memory may be implied where a witness claims that he does not remember an event when under the circumstances he would be reasonably expected to do so, or where he remembers only part of an event but the circumstances suggest he has the ability to testify fully about the event but is unwilling to do so. *Corbett*, 130 Md. App. at 425. "[T]he decision [about] 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[.]" *Id*. at 426. In a "case of doubt" about whether there lies an inconsistency between the trial testimony and a prior statement of a witness, a trial court "should lean toward receiving such statements to aid in evaluating the [credibility of the witness's] testimony." *McClain v. State*, 425 Md. 238, 250 (2012) (quotation marks and citations omitted).

As related above, Davis testified that she and appellant had been in an intimate relationship a few years before the assault. Davis testified that she did not remember the assault because she was intoxicated. She testified that she had imbibed roughly two pints of liquor between 10:00 p.m. the night and the early morning hours before the assault. She identified St. Exhibit 1 as her two-page statement to the police that she wrote and signed around 6:00 a.m. after the police had arrived, but she testified that reading the document did not refresh her memory. Although she remembered how many drinks she had that night, that she was drinking while laying alone on her bed in her bedroom with the lights on but not watching television or listening to the radio, and that she had spoken to a few people during the night, she testified that she did not remember anything about the event,

until the police arrived. She claimed that she wrote what she did in her statement because she was writing a book and "my imagination went with whatever, whatever the truth and the false was in intoxication." In a further effort to explain her memory loss, she added that she had "a memory problem . . . that's on doctor's records[,]" which she testified she could have produced if she had known she would be testifying. The State argued that Davis's statement was substantively admissible under 8-502.1(a) while defense counsel argued it was admissible only under 8-502.1(e). The court deferred making a ruling but observed: "I don't think [Davis's] memory is lacking one little bit" and that the court could not "imagine that anyone who heard this testimony and watched [Davis's] body language would think that she actually can't remember."

The State then called a police officer, who had arrived at Anderson's house within minutes of the 911 call. The officer testified that he met Davis in the living room, and when he spoke to her she seemed "excited" because her "voice was raised" and "she was talking very fast." The officer testified that in his 13 years as a police officer he had come in contact with "quite a few" intoxicated persons, and that Davis did not appear to be intoxicated. He did not notice the odor of alcohol on her breath or anything unusual about her appearance or mannerisms to suggest that she was under the influence of alcohol. The officer testified that Davis described to him what had happened and had no difficulty navigating the stairs as she led him upstairs to find Anderson. Davis then wrote a two-page written statement as to what happened in which she also wrote her name, address, date, time, and age.

After the officer's testimony, the State again argued that Davis's statement was substantively admissible under 8-502.1(a) and defense counsel argued it was admissible only under 8-502.1(e). The court admitted Davis's earlier statement as a prior inconsistent statement under 8-502.1(a), ruling:

> I have to disagree with [defense counsel]. I think the case law is directly to the contrary. Once I determine, as I have, that it is absolutely, completely contrived. Her suggestion that she does not remember is untrue. That was pretty clear as she was testifying.
>
> It's been made even more clear now that we have the benefit of Officer Knight's testimony where he says she had no problem writing the statement, no trouble taking him right upstairs to where Ms. Anderson was, no difficulty maneuvering those stairs. He did not not[e] an [sic] hint of alcohol on her breath or in her speech, and he indicated that he was as close to her as he was sitting to Mr. Smith, which isn't even – what, it's not even four feet.
>
> So as I read the Corbett case, the real issue between 5-802.1(a) and (e) is whether the statement comes in itself or whether it can simply be read, and it turns on whether the witness generally can't remember, in which case it's (e) and you just read it; or whether its contrived, in which case it is (a), and then the statement comes in. I find without a doubt that it is, in fact, contrived, she is feigning this lack of memory. So the statement will be admitted.

Appellant argues on appeal that the trial court's ruling was in error because Davis was not feigning memory loss. Appellant's argument notwithstanding, we find no abuse of discretion by the trial court. Davis's feigned memory loss was a demeanor-based credibility finding left to the discretion of the trial court. Given Davis's ability to remember

some details of the night but not others, we are persuaded that the trial court's finding was not an abuse of discretion.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.