Circuit Court for Baltimore County
Case No. 3-K-15-5136

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2670

September Term, 2016

CLIFTON WILLIAMS, JR.

v.

STATE OF MARYLAND

Wright,
Kehoe,
Krauser, Peter B.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Krauser, J.

Filed: September 28, 2018

Convicted, by a jury, sitting in the Circuit Court for Baltimore County, of two counts of first degree assault, false imprisonment, and use of a firearm in the commission of a crime of violence, Clifton Williams, appellant, presents three questions for our review. They are:

I. Did the trial court abuse its discretion by denying appellant's motion to sever his trial from that of his uncle and co-defendant, Marcus Pittman?

II. Did the trial court err by admitting into evidence the prior statement of Lasarge Williams?

III. Did the trial court err by admitting into evidence the prior statement of Darius Wilson?

Because we conclude that the trial court neither erred in denying appellant's motion to sever nor admitting into evidence the prior statements of Lasarge Williams and Darius Wilson, we shall affirm.

FACTS

In August 2015, Darius Wilson and Lasarge Williams (whom we shall hereinafter refer to by their first names to avoid confusion) drove to the house of Kelly Anderson at 1515 Barkley Avenue, later identified by police, at trial, as a "drug house." When they arrived there and entered the house, four men emerged from the basement with guns pointed at them. Those men then forced Lasarge and Darius down into the basement of the house, where they tied and bound them with duct tape and rope, beat them, and sprayed paint into their eyes. They next removed Lasarge and Darius from the basement and placed them into a vehicle, which they then drove to a wooded area, where they untied Lasarge and Darius and told them to run. As they fled, they were repeatedly shot at. Lasarge was

able to escape without further injury and implored neighboring property owners to call the police. Unfortunately, Darius was shot eight times, but did survive his injuries. Appellant and his uncle, Marcus Pittman, were later arrested for the assault and tried together, as co-defendants, in the Baltimore County circuit court.

On the day that the assault occurred, Lasarge was subsequently interviewed by officers of the Baltimore County Police Department. That interview was video-taped. At that time, Lasarge recounted, for the officers, his trip to Kelly Anderson's house and the violent events that followed. While so doing, he referred to Darius as his "brother" and identified appellant and Pittman as two of his assailants. In so doing, he referred to appellant as "Cliff" or "CC" and to Pittman as "Cheese," nicknames, which were largely confirmed, at trial by both Kelly Anderson, the owner of 1515 Barkley Avenue, and Gary Kline, a tenant there, who referred to Pittman as "Cheese" and to appellant simply as "C" (as did Pittman in recorded jailhouse calls). Moreover, Lasarge informed police that appellant had driven him and Darius from Kelly Anderson's house, where the assault began, to the wooded area where it ended. And, during that interview, he repeatedly identified appellant, from a photograph, as the driver of that car and the person whom he knew as "Cliff" or "CC."

Nonetheless, Lasarge later testified, at trial, that he did not know any of the individuals alleged to be involved in the incident, that is, Darius, appellant, Pittman, or Kelly Anderson nor could he identify them as his assailants. And he further claimed that he did not even remember going to Ms. Anderson's house or being interviewed by the

police and, furthermore, when shown his videotaped interview he claimed he did not recognize himself in that video.

In response to the testimony, the court, believing that Lasarge was "feigning memory loss," permitted the State to introduce portions of Lasarge's prior videotaped statement to police, over defense objection. Specifically, it allowed the State to play the parts of the videotaped statement Lasarge had given police, during which he described how the events at issue had occurred and identified appellant and Mr. Pittman as two of his assailants.

Also, during their investigation of this incident, police audiotaped a conversation with the other victim, Darius, in which he stated, in reference to the appellant, "I know he was a part of this" and "I think he was used." But, at trial, Darius, joined his co-victim, Lasarge, in insisting during his testimony, that he had never identified appellant as one of those who had attacked him and Lasarge. Consequently, the State was also permitted, by the court, to introduce the above portions of his recorded statement, contradicting that testimony. Then, before the trial concluded, the State introduced an ammunition clip found in the woods, where the shooting occurred, bearing Pittman's fingerprints.

After appellant was found guilty of two counts of first degree assault, two counts of false imprisonment, and two counts of use of a firearm in the commission of a crime of violence, he was sentenced to a term of 45 years of imprisonment, 20 years of which were suspended.

DISCUSSION

I. Motion to Sever

Appellant contends that the circuit court erred in denying his motion to sever his case from that of Pittman's, his uncle and co-defendant, "by determining, first, that all the evidence the State sought to introduce against Mr. Pittman would be mutually admissible against Appellant, and then by determining, evidently, that the introduction of such evidence would not cause unfair prejudice to Appellant's case."

Before trial, appellant moved to sever his trial from that of Pittman's, based on the State's intent to introduce the recordings of three telephone calls made by Pittman to an unidentified "third party" (which we shall hereinafter refer to as the "jailhouse calls"). The defense claimed that the jailhouse calls were not "mutually admissible" and unfairly prejudiced appellant.

In the first such call, Pittman asks the third party to get "C," the nickname by which appellant is purportedly known, on the line. But, despite his or her efforts to do so, he or she was unable to reach appellant. Then, during the second jailhouse call, Pittman exclaims, "they got me for two attempts. They say my prints are on a clip," referring to the ammunition clip of a gun, recovered by police in the woods. And, finally, during the third jailhouse call, Pittman states once again, "they got my prints on a clip" and adds, "they're trying to say my name is Cheese."

Maryland Rule 4-253(c) provides that, "if it appears that any party will be prejudiced by the joinder for trial of … defendants, the court may, on its own initiative or

on motion of any party, order separate trials of … defendants, or grant any other relief as justice requires." But, in rendering such decisions, trial judges should, as the Court of Appeals instructed in *State v. Hines*, consider: (1) whether non-mutually admissible evidence would be introduced against the defendant, (2) whether the admission of such evidence will unfairly prejudice the defendant, and (3) how to respond to the unfair prejudice to ensure justice. 450 Md. 352, 369-370 (2016). Ultimately, however, "[t]he proper standard of review when reviewing a severance determination in cases of codefendant joinder remains whether the trial court abused its discretion." *Id.* at 366.

First of all, as the State notes, "[a]ppellant's first point" – the mutual inadmissibility of the evidence – "is waived because he presents no argument as why the . . . 'evidence the State sought to introduce against Mr. Pittman' was not mutually admissible." Indeed, as we shall later discuss in more detail, appellant's challenge to the admissibility of that evidence is confined entirely to what he believes was the prejudice engendered by the "familial relationship" between the co-defendants.

In any event, Pittman's three jailhouse calls were, as the court below found, "mutually admissible." Indeed, appellant's counsel conceded, at the motion hearing, that the first jailhouse call was relevant and mutually admissible, as to the conspiracy charge against both defendants,[1] to show that the defendants knew each other and, we should add, were acting together and in concert when they committed the crimes charged. And, indeed,

[1] The conspiracy charge was nolle prossed at the conclusion of the State's case in chief.

the other two calls were properly admitted for precisely the same reasons. As the court below expressed it, the second and third jailhouse calls were mutually admissible because "a reasonable trier of fact could conclude that Mr. Pittman and [appellant] were involved in this crime" together.

But, even if the second and third jailhouse calls were not mutually admissible, they were not unfairly prejudicial under the second prong of the aforementioned *Hines* test. The only argument appellant offers to support his "unfairly prejudicial" claim is what he described as the "critically important fact" that a "familial relationship" existed "between Appellant and Mr. Pittman" and thus "inculpatory evidence against one member of the family would shine a guilty light on the other member of the family" and thereby make, as he maintains the State planned, "shared intent" easier to prove.

Moreover, in *Hines*, the Court of Appeals stated, "it is foreseeable that in some instances evidence that is non-mutually admissible may not unfairly prejudice the defendant against whom it is inadmissible because the evidence does not implicate or even pertain to that defendant." 450 Md. at 375. In jailhouse calls two and three, Pittman's statements were about *his* charges, *his* fingerprints, and *his* nickname, and did not implicate or even pertain to appellant.

Appellant's reasoning, if it has any merit at all, was ultimately dispelled by the fact that the jury, despite the "familial relationship" between appellant and Pittman, found appellant guilty but acquitted Pittman of all charges - an outcome that hardly supports appellants speculative thesis.

Because the trial court did not err in finding that the phone calls were mutually admissible and did not prejudice appellant's case, we find no abuse of discretion in its denial of appellant's motion to sever.

II. Lasarge Williams' prior statement

As noted earlier, after Lasarge's testimony, the State was permitted to introduce into evidence, under Maryland Rule 5-802.1(a), Lasarge's prior videotaped statement to police. That rule creates an exception to the hearsay rule for statements that are inconsistent with the declarant's testimony at trial provided that the statement was recorded verbatim and the declarant is subject to cross-examination,[2] which is precisely what occurred here.

Nonetheless, appellant contends, that the court erred in admitting that statement because Lasarge's lack-of-memory testimony was the "functional equivalent of a refusal to testify" and, therefore, Lasarge was not "available" for cross-examination and his testimony was not "inconsistent", within the meaning of Rule 5-802.1(a), under *Tyler v. State*, 342 Md. 766 (1996). In *Tyler*, the State sought to introduce a witness's prior testimony from a previous trial in which he implicated the defendant, as a prior inconsistent statement, after the witness repeatedly responded, "I cannot answer that question" to a series of questions posed by the State at the subsequent trial. *Id*. at 771. The Court of

[2] Md. Rule 5-802.1 provides that "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."

Appeals held that the witness's response was a "refusal to testify" and therefore could not be considered "inconsistent" to any prior statements and the witness could not be considered "available" for cross-examination. *Id.* at 776. Consequently, the Court ruled the witness's prior testimony was inadmissible hearsay. *Id.* at 768.

The State begins its response, to this argument, by noting that because this argument was not made below, it cannot now be made on appeal. It further suggests that, even if that argument was preserved for appeal, Lasarge's testimonial loss of memory far more closely resembled what occurred in *Nance v. State*, 331 Md. 549 (1993), than what transpired in *Tyler*. In *Nance*, the Court of Appeals held that a prior written statement, signed by a witness, was admissible, when the witness, during his testimony at trial, as here, claimed "selective memory loss." This, of course, is not what happened in *Tyler*. There, unlike what happened here and in *Nance*, the witness simply refused to testify and therefore was, as the Court noted, unavailable for cross-examination and thus his prior statements were inadmissible.

To begin with, the State is correct that appellant did not raise this argument below. Consequently, it was not preserved for appellate review. Md Rule 8-131(a); *Klauenberg v. State*, 355 Md. 528, 541 (1999).[3] Moreover, we reject Lasarge's contention that his

[3] "It is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal."

"feigned lack of memory" was the "functional equivalent of a refusal to testify" that occurred in *Tyler*. This is clearly not so. As the *Tyler* Court explained:

> The case where the witness claims not to remember events about which he or she testified earlier is far different from the situation in the instant case, where the witness effectively gave *no testimony* at all in the second trial … One of the reasons … is that a witness who claims memory failure may still be cross examined, but a witness who absolutely refuses to testify is not available for cross examination.

342 Md. at 777-778.

Lasarge's testimony that he could not remember, among other things, going to Anderson's house or ever being interviewed by police, was inconsistent with his prior statement to police, in which he gave a detailed account of what occurred at that house on the day that he and Darius were attacked. Thus, unlike the witness in *Tyler* who, in effect cut off any further examination by declaring, "I cannot answer that question", Lasarge remained "available for cross-examination" as to his loss of memory and other claims that he had made.[4] Hence, under Maryland Rule 5-802.1(a), his prior statements to police were admissible.

III. Darius Wilson's prior statement

Appellant also contends that the circuit court erred in admitting into evidence portions of Darius's recorded statement. After being called to the witness stand by the State, Darius testified, in direct conflict with the statements recorded by police, that he had never identified appellant as being part of the incident at issue. Then, over defense's

[4] The record indicates that Lasarge was still available to be recalled by either side.

objection, the State was permitted, by the court, to introduce portions of the recording where Darius flatly asserts, "I know [appellant] was a part of this" and "I think [appellant] was used."

Although Maryland Rule 5-802.1(c) provides that an out-of-court statement that is "one of identification of a person made after perceiving the person" is admissible as substantive evidence, appellant suggests that the identification exception to the hearsay rule did not apply, here, because the statements in question were not made after perceiving appellant but rather were statements of belief and therefore were inadmissible.

The State responds, that the "argument attacks a strawman because [Darius's] statements were admitted as prior inconsistent statements, not statements of identifications." We agree. The State, at trial, made it very clear that they were offering the statements under the prior inconsistent statement exception to Rule 5-802.1(a):

> [PROSECUTOR]: [T]hrough Detective Hardesty, who is not the State's next witness, I plan to introduce two very brief clips of Darius Wilson's interview with him.
>
> The theory under which I would argue that they'd be admissible is that they would be inconsistent with the way he testified yesterday when he said [appellant] was not involved at all.

We therefore conclude that the circuit court did not err in admitting into evidence portions of Darius's recorded statement to police.

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