

Circuit Court for Baltimore City
Case No: 118024007

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2999

September Term, 2018

KAREEM SISCOE

v.

STATE OF MARYLAND

Wright,
Kehoe,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: September 30, 2019

*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.

Kareem Siscoe, appellant, was convicted by a jury in the Circuit Court for Baltimore City of first-degree assault (two counts) and using a firearm in the commission of a crime of violence. At trial, the State called witnesses Tracie Moore and Essence Ellis in its case-in-chief. On appeal, Mr. Siscoe contends that the trial court 1) abused its discretion in admitting a videotape of Ms. Moore’s interview with an investigating detective as substantive evidence and 2) violated his right to compulsory process after Ms. Ellis failed to comply with a subpoena to testify as a defense witness. We disagree and shall affirm.

I. Videotape Admission under Maryland Rule 5-802.1(a)

Upon direct examination by the State, Ms. Moore testified that a shooting occurred outside of her home on December 7, 2017, during which bullets struck her car, her home, and Ms. Ellis. Ms. Moore further testified to giving a statement to Detective Koo “right after it happened.” When initially asked whether she recalled what she told Detective Koo, she replied that she did not, prompting the State to refresh her recollection with a copy of the interview transcript. Her recollection refreshed, she was able to relay to the jury her previous statements to Detective Koo. She recalled telling him that prior to the shooting, Ms. Ellis and Mr. Siscoe were arguing in front of her home and that she exited her home to tell them to leave. After doing so, she “turnt [sic] around to go back into [her] house and [she] heard gunshots.” She recalled telling Detective Koo that Mr. Siscoe was the person who did the shooting that night.

However, when asked whether she recalled *talking to Detective Koo* about whether Mr. Siscoe had a mask on, Ms. Moore testified that she could not remember. The State allowed Ms. Moore to reread the interview transcript so that she could refresh her

recollection, but she continued to testify that she could not remember what, if anything, she told Detective Koo about a mask. After a third unsuccessful attempt to refresh her recollection, the State argued that Ms. Moore was “feigning memory loss” and requested that the videotape of the interview be played for the jury. The Court, finding that Ms. Moore was engaged in “subterfuge,” permitted the State’s request pursuant to Maryland Rule 5-802.1(a).

Maryland Rule 5-802.1(a) states, in pertinent part, that “a statement that is inconsistent with the declarant’s testimony” is admissible where the statement is “recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement.” The sufficiency of the videotape as a verbatim recording is not in dispute. The issue on appeal is whether Ms. Moore’s purported failed recollection qualifies as an inconsistent statement. We have previously held that a witness’s truthful testimony to not remembering an event is not an inconsistent statement. *Corbett v. State*, 130 Md. App. 408, 425 (2000). However, where a witness “professes not to remember an event in an effort to avoid testifying about it...[l]ogic dictates that inconsistency may be implied in that testimony.” *Id.*

Ultimately, the trial court has discretion in assessing the credibility of the witness and determining “whether a witness’s lack of memory is feigned or actual.” *Id.* at 426. We will not supplant the judgment of the trial court regarding Ms. Moore’s credibility because “credibility determinations are to be made by trial courts, not appellate courts.” *Furda v. State*, 421 Md. 332, 353 (2011) (internal citation omitted). Moreover, we cannot here hold that the court abused its discretion because “[i]nconsistency can be implied from

partial testimony.” *Id.* Having heard Ms. Moore testify about specific portions of her conversation with Detective Koo and having previously observed her recollection successfully refreshed by the interview transcript, it was reasonable for the court to infer that Ms. Moore had the ability to testify about what she told Detective Koo about a mask, but was unwilling to do so.¹

II. **Alleged Compulsory Process Violation**

Upon direct and cross-examination, the record reflects that Essence Ellis, either through feigned or actual ignorance, could not recall pertinent facts during her testimony. Though she remembered that gun shots came from behind her, she did not know who was behind her and she did not know who shot her. She testified that she didn’t see anyone with a gun in their hand. She did not recall whether she was outside talking with Mr. Siscoe before the shooting began.

It was the defense’s theory that Ms. Moore’s husband began shooting from the house at Mr. Siscoe, who had come to the house to engage in a fist fight, culminating in a shootout between the two men during which Ms. Ellis was shot. This theory was not supported by Ms. Ellis’s testimony. She did not recall whether Ms. Moore’s husband was

¹ Even if Ms. Moore’s statement was truthful that she could not remember, the transcription of the videotape would have, nevertheless, been admissible as a past recorded recollection pursuant to Maryland Rule 5-802.1(e). Though this Rule only permits the statement to be read into evidence and not the admission of the videotape, this error would have been harmless. Regardless of the form of its admission, the jury was going to hear the content of the interview and, therefore, we cannot say that the admission of the videotape, in itself, would have prejudicially influenced the jury.

at the house when she was shot, whether Ms. Moore’s husband and Mr. Siscoe had been in a fight that night, or whether Mr. Siscoe had come to the house to engage in a fist fight.

Despite having had the opportunity to cross-examine Ms. Ellis, Mr. Siscoe reserved the right to recall her as a defense witness. However, Ms. Ellis failed to comply with the defense subpoena and did not appear for a second round of testimony. While a body attachment was issued, the court was unwilling to postpone the trial pending her appearance. Ultimately, the body attachment proved fruitless and the court denied Mr. Siscoe’s following motions for a mistrial and a new trial stemming from her non-appearance. Mr. Siscoe argues that, in doing so, the trial court denied him compulsory process. We disagree.

While the Supreme Court of the United States has held that criminal defendants have the right to compulsory process for obtaining witnesses in their favor, *Washington v. Texas*, 388 U.S. 14, 17-19 (1967), it has also held that “the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.” *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). Moreover, to establish a violation of the compulsory process clause, the defendant must at least make some “plausible showing of how [the] testimony would have been both material and favorable to his defense.” *United States v. Valenzuela–Bernal*, 458 U.S. 858, 867 (1982). Satisfaction of this requirement is lacking in this case.

The trial court had a reasonable basis to support its finding that further testimony from Ms. Ellis was unlikely “to cause any different information to actually be developed.” Mr. Siscoe could not proffer to the court what new questions would be asked of Ms. Ellis,

only that he thought she would be more truthful when asked again. So, in fact, he was provided compulsory process, and permitted to ask Ms. Ellis the questions that he wished. He simply did not like the responses he received the first time around and desired a second attempt to repose the same questions. Even if Ms. Ellis's testimony were to change in the manner desired by the defense, such a change was likely to be at the expense of her credibility and would have rendered her testimony in support of the defense's theory unpersuasive. Moreover, as the court noted, were the jury to believe the defense theory about a shootout, there still would have been sufficient evidence to convict Mr. Siscoe of the charges to which he was ultimately convicted: first-degree assault and use of a firearm in the commission of a crime of violence.

Because the defense was unable to make a plausible showing that additional testimony from Ms. Ellis would have been material and favorable to his defense, the trial court did not violate Mr. Siscoe's right to compulsory process and did not abuse its discretion in denying Mr. Siscoe's requested relief.

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