Circuit Court for Baltimore City
Case No. 118057021

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3010

September Term, 2018

ANTHONY ALSTON

v.

STATE OF MARYLAND

Berger,
Friedman,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 26, 2020

*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.

Following a jury trial in the Circuit Court for Baltimore City, Anthony Alston, appellant, was convicted of second-degree murder and use of a firearm in a crime of violence. He raises a single issue on appeal: whether the trial court erred in admitting out-of-court statements that the State's key witness made to the police. Because the witness's statements were properly admitted as prior inconsistent statements pursuant to Maryland Rule 5-802.1, we shall affirm.

BACKGROUND

On January 24, 2018, Officer Erwin Scofield was serving a summons in Baltimore City when he heard gunshots coming from a nearby apartment building. Officer Scofield went to the second floor of that apartment building and observed the victim, Quintez Harris, lying in the hallway with two gunshot wounds in his chest. The victim, who died from his injuries, was being held by Shayona Davis. The door to Ms. Davis's apartment was partially open and there was blood on the door. When the police went into the apartment, they observed "a lot of blood" and two bullet holes in the ceiling.

The police interviewed Ms. Davis on two separate occasions prior to trial. During the second interview, she stated that Mr. Alston had come to her apartment to pick up their daughter on the day of the shooting. After Mr. Alston left, the victim came over to watch television. When Mr. Alston returned to the apartment to drop off his daughter, the victim opened the front door. Mr. Alston then entered the apartment and threatened to "beat the shit out of [Ms. Davis]" because there was another man opening her door. After Ms. Davis asked Mr. Alston to leave, the victim stated "y'all come on, [ ] don't nobody got time for that like come on leave, like go [a]head." Suddenly, Mr. Alston and the victim began

wrestling and throwing punches at each other near the front door [1] According to Ms. Davis, the victim was "beating [Mr. Alston's] ass" and had pulled Mr. Alston's shirt over his head when "three or four" "shots went off." At this point, the victim "just turned around and just fell on [Ms. Davis.]" Ms. Davis did not see a gun and did not see the victim get shot because she was standing behind him. After the gun shots went off, Mr. Alston immediately left the apartment. Ms. Davis never saw the victim with a gun and did not find a gun on him, or in her apartment, after the shooting. Ms. Davis's statement was corroborated by evidence that Mr. Alston's DNA was found on the victim's sweatshirt.

Ms. Davis refused to comply with a subpoena that was issued by the State and the court issued an Order for Body Attachment to compel her appearance at trial. Ms. Davis then testified, consistent with her second interview with the police, that: (1) Mr. Alston had come over on the day of the shooting to pick up their daughter; (2) she was hanging out with the victim, her cousin, and another male in her apartment after Mr. Alston left; (3) the victim opened the front door to let Mr. Alston into the apartment when he returned to drop off their daughter; and (4) at some point she noticed the victim had been shot. However, she denied that Mr. Alston had yelled at her when he entered the apartment, that she and Mr. Alston had a conversation about why there was another man in her apartment, or that she had seen Mr. Alston and the victim get into a fight before the victim was shot. She also testified that she did not know who shot the victim, although she indicated that it was not her, her cousin, or the other person who was in the apartment. When the prosecutor

[1] Ms. Davis indicated that she did not know how the fight started because it "happened so fast."

questioned Ms. Davis about the prior statements that she had made to the police during the second interview, she stated that she did not remember what she had told the police because she was intoxicated. At this point, counsel for the parties approached the bench and the following exchange occurred:

> [THE PROSECUTOR]: Your Honor, at this time the State is going to be asking that according to Maryland rules of the –
>
> [THE COURT]: 8-502.1[2]
>
> [THE PROSECUTOR]: 8-502.1 and the case law (inaudible 14:14:46) that, at this point, she remembers everything up until the point that it talks about the fight and the gunshot. That the only time that she doesn't remember what happened is when you specifically talk about the actual fight and shooting. I would say, at this point, Your Honor, I would proffer to the Court she is feigning memory, and that based on the Maryland Rule and the case law as (inaudible 14:15:16) that Your Honor should find that she is feigning memory [loss] and allow her prior recorded statement to be played as an inconsistent statement.
>
> [THE COURT]: What do you think?
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> [DEFENSE COUNSEL]: I'll object, Your Honor.
>
> [THE COURT]: I'm sorry?
>
> [DEFENSE COUNSEL]: I'll object.
>
> [THE COURT]: What did she say in the statement?
>
> [THE PROSECUTOR]: She said in the statement that Mr. Alston came in. He was yelling, again something she doesn't remember now. She said that he comes in. He is yelling. He is on some – she says rah-rah shit. He is upset there [are] other men in the apartment. And then [the victim] tells him to leave, to get out. And then they become involved in a physical altercation. At that point, [the victim] has Anthony Alston by his hood, and he is pulling his hood down. And they're punching. And then the gun goes off, and [Mr.

[2] The court and the prosecutor appear to have misspoken as there is no Maryland Rule 8-502.1. Rather, the relevant rule is Maryland Rule 5-802.1.

Alston] runs out of the apartment. So she remembers everything up until and after, but she doesn't remember the actual physical altercation and gun shot. Obviously, she is feigning memory [loss] on that portion. And the State would ask to play the statement.

[THE COURT]: Agency is not the big issue here.

[THE PROSECUTOR]: Absolutely. Absolutely, Your Honor.

[THE COURT]: You will get past that. But in the opening statement you detailed about the circumstances. She has already said he is there. So he can't be argued he wasn't there. He has the DNA on him. Aren't both sides way more interested in why and how it happened? Isn't that the greater interest to us here?

[THE PROSECUTOR]: But Your Honor, the – Your Honor, the State has to prove beyond a reasonable doubt –

[THE COURT]: I know.

[THE PROSECUTOR]: – that the incident happened, and that the defendant was the one who committed it. And when the defense stood in opening, they are not conceding that he did.

[THE COURT]: I am.

[THE PROSECUTOR]: So I have to –

[THE COURT]: I am well aware of that. But my question is really to [the defense]

[DEFENSE COUNSEL]: Yes, sir.

[THE COURT]: If she has any justification for why this happens, don't you want to bring that out?

[THE PROSECUTOR]: Of course.

[DEFENSE COUNSEL]: I'll just stand on my objection.

[THE COURT]: Very well. You have a tape of it, I assume.

[THE PROSECUTOR]: I do, Your Honor.

The parties then engaged in additional discussion, during which, the court again noted that the contents of Ms. Davis's statement appeared to be "very much in the defendant's interest." Thereafter, the recording of Ms. Davis's second interview with the police was admitted into evidence and played for the jury.

DISCUSSION

On appeal, Mr. Alston concedes that the trial court admitted Ms. Davis's prior inconsistent statements pursuant to Maryland Rule 5-802.1(a). However, he claims that this was error because the court did not make a factual finding that Ms. Davis was feigning memory loss. Similar to the petitioner in *McClain v. State*, 425 Md. 238 (2012), Mr. Alston cites *Corbett v. State*, 130 Md. App. 408, 425-26 (2000), for the proposition that the trial court is required to make such an explicit finding. But in *McClain*, the Court of Appeals noted that, "[n]owhere . . . does the *Corbett* Court require that such a finding be made on the record." 425 Md. at 252. Instead, the Court of Appeals held that a witness's statements were properly admitted, despite the lack of an explicit factual finding, because the facts demonstrated that the trial court made an *implicit* finding that the testimony was inconsistent based on its inquiry into the inconsistency, the State's proffer that the statements were inconsistent, and its subsequent admittance of the prior inconsistent statement under Rule 5-802.1. *Id.*

Mr. Alston nevertheless contends that the court did not make an implicit finding of feigned memory loss because the only reason it provided for admitting the statements was that it might have contained helpful information for the defense. However, although the court noted on several occasions that the information contained in Ms. Davis's statements

appeared to be "very much in the defendant's interest," nothing in the court's exchange with counsel suggests that it admitted Ms. Davis's prior statements for this reason. Rather, the record indicates that Ms. Davis was clearly a reluctant witness who did not want to testify or implicate Mr. Alston in the charged crimes. In fact, the court had to instruct her at one point that she was required to answer the prosecutor's questions. More importantly, the court only admitted her statements after hearing extensive argument by the State in favor of their admissibility under Rule 5-802.1, during which the prosecutor specifically proffered that Ms. Davis was feigning memory loss and asked the court to "find that she is feigning memory [loss] and [to] allow her prior recorded statement to be played as an inconsistent statement." *See id.* ("The court's comments certainly indicate, even if not expressly, that the court admitted the statement . . . under the Rule. We presume, moreover, that the court recognized its obligations to satisfy itself of the existence of the two prerequisites for admission of that statement under that Rule."). Consequently, we are persuaded that the trial court implicitly found that Ms. Davis was feigning memory loss and that it did not err in admitting her prior inconsistent statements.

Finally, even if the court did not make an implicit finding that Ms. Davis's memory loss was feigned, her prior inconsistent statements were still properly admitted under Rule 5-802.1. "It is established in Maryland that if there is a prior inconsistent statement that is contradicted positively on the witness stand, then the pretrial statement may come into evidence regardless of the reason for the inconsistencies." *Wise v. State*, 243 Md. App. 257, 269 (2019). Therefore, the trial court does not need to make a "demeanor-based credibility finding" when "the 'cold record' itself demonstrates the inconsistency between

[the witness's] initial testimony and [her] prior [recorded] statement." *McClain*, 425 Md. at 252.

Here, the critical statements that Ms. Davis made to the police during the second interview were that Mr. Alston had been angry with her because the victim had opened the door to her apartment and that Mr. Alston and the victim were fighting immediately prior to the shooting. However, Ms. Davis did not simply testify that she could not remember making those statements to the police or that she did not know what happened. Rather, when asked, she specifically denied that those events occurred. Thus, there were clear material contradictions between Ms. Davis's recorded statement and her trial testimony, and the recorded statement was admissible even in the absence of a finding by the court that she was feigning memory loss. *See Wise*, 243 Md. App. at 274 (holding that, even though the trial court specifically admitted the prior inconsistent statement based on the witness's lack of memory, it was also admissible as a positive contradiction because the record clearly demonstrated that were material contradictions between the witness's prior statement and his trial testimony).

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