FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-1993

DARIUS MITCHUM,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Alachua County.
James M. Colaw, Judge.

August 17, 2022

JAY, J.

A jury found Appellant guilty of armed robbery. In this appeal, Appellant asks us to grant him a new trial because in his view, the trial court erroneously allowed the State to call a witness for the primary purpose of impeaching him with his prior inconsistent statements. Because we hold that the trial court made no error, we affirm. We also hold that even if the trial court should have excluded the witness' testimony, the error would have been harmless.

I.

The witness at issue is James Lewis. The State alleged that in the early morning hours of January 8, 2020, Appellant and

Lewis robbed the McDonald's restaurant in Gainesville where they were employees. Lewis pleaded guilty. Appellant proceeded to trial.

Lewis' sentencing hearing occurred approximately two and a half months before Appellant's trial. At that hearing, the State asked Lewis, "Did you, along with Darius Mitchum, rob the McDonald's, each of you armed with a firearm?" Lewis answered, "Yes, sir." Lewis also gave a deposition in Appellant's case one week before Appellant's trial. Lewis refused to answer most of the deposition questions. However, he did testify that Appellant was the "mastermind" who planned the McDonald's robbery.

Near the end of its case-in-chief at Appellant's trial, the State announced its intention to call Lewis as a witness. Defense counsel objected. Citing Lewis' overall lack of cooperation at his deposition, defense counsel alleged that Lewis would not offer any useful trial testimony. Defense counsel maintained that the State was only calling Lewis as a witness so that it could impeach him with his prior statements from his sentencing hearing and deposition. After considering Lewis' proffered testimony and arguments from defense counsel and the State, the trial court took the matter under advisement and called a recess. Thereafter, the trial court overruled defense counsel's objection.

After another State witness testified, Lewis took the stand. He initially claimed that he did not recall being sentenced in his case. The State provided him with the transcript from his sentencing hearing. When asked whether he could then recall pleading guilty to armed robbery, Lewis answered, "I guess so." He agreed that he and Appellant are good friends who spent time together daily. However, he denied that they robbed the McDonald's. When confronted with the contrary response that he gave to that question in his sentencing hearing, Lewis alleged that he had not understood the question at the sentencing hearing. Lewis also claimed that he did not recall giving a deposition in this case. When the State confronted him with his deposition testimony that Appellant was the "mastermind" who planned the robbery, Lewis insisted that he did not recall making the statement.

II.

Appellant argues that the trial court erred by allowing the State to call Lewis as a witness primarily to impeach him with his prior statements. Generally, an appellate court reviews a trial court's ruling on the admissibility of evidence for an abuse of discretion. *Penalver v. State*, 926 So. 2d 1118, 1132 (Fla. 2006). When such a ruling depends on interpreting the evidence code and applicable cases—such as when deciding if a statement is hearsay—the standard of review is de novo. *Hardy v. State*, 140 So. 3d 1016, 1019 (Fla. 1st DCA 2014); *Chavez v. State*, 25 So. 3d 49, 51 (Fla. 1st DCA 2009).

Any party, including the party calling the witness, may attack the witness' credibility by introducing prior statements made by the witness that are inconsistent with the witness' present testimony. § 90.608(1), Fla. Stat. However, it is improper to call a witness "merely as a device to place the impeaching testimony before the jury." *Curtis v. State*, 876 So. 2d 13, 20 (Fla. 1st DCA 2004). As the Florida Supreme Court has explained:

> [I]f a party knowingly calls a witness for the primary purpose of introducing a prior statement which otherwise would be inadmissible, impeachment should ordinarily be excluded. On the other hand, a party may always impeach its witness if the witness gives affirmatively harmful testimony. In a case where a witness gives both favorable and unfavorable testimony, the party calling the witness should usually be permitted to impeach the witness with a prior inconsistent statement. . . . In addressing these issues, trial judges must have broad discretion in determining whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice or confusion.

Bradley v. State, 214 So. 3d 648, 655 (Fla. 2017) (quoting *Morton v. State*, 689 So. 2d 259, 264 (Fla. 1997)) (alterations in original).

A.

The threshold issue is whether Lewis' prior statements—those from his sentencing hearing and deposition that inculpated himself and Appellant—would be admissible if they were not offered for impeachment purposes. *See id.* ("a party may not call a witness primarily for the purpose of getting an inadmissible statement before the jury as impeachment"). Stated differently, the first question is whether Lewis' prior statements were admissible as substantive evidence.

The rule against hearsay generally bars the admission of a declarant's out-of-court statements when a party offers those statements for the truth of the matter asserted. *See generally* § 90.801 and 90.802, Fla. Stat. Indeed, the rule from *Morton* and *Bradley* exists to prevent a party from circumventing the rule against hearsay:

> This rule prevents the abuse of the rules of evidence, as illustrated by a hypothetical situation which arguably tracks the facts in this case:
>
> > A prosecutor calls a witness who has made a previous statement implicating the defendant in a crime; that statement would be excluded as hearsay if offered for its truth; the prosecutor knows that the witness has repudiated the statement and if called, will testify in favor of the defendant; nonetheless, the prosecutor calls the witness for the ostensible purpose of "impeaching" him with the prior inconsistent statement. The reason that this practice appears abusive is that there is no legitimate forensic purpose in calling a witness solely to impeach him.

Bradley, 214 So. 3d at 656 (quoting *Morton*, 689 So. 2d at 263).

However, the Florida Evidence Code recognizes that under certain conditions, a statement from a prior judicial proceeding is *not* hearsay and is admissible as substantive evidence:

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> (a) Inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition[.]

§ 90.801(2)(a), Fla. Stat.; *see also id.* at Law Revision Council Note ("The prior statement may be used as substantive evidence."); *Pearce v. State*, 880 So. 2d 561, 569 (Fla. 2004) ("Prior inconsistent statements are not hearsay and can be admitted as substantive evidence" when they comply with section 90.801(2)(a)); *Moore v. State*, 452 So. 2d 559 (Fla. 1984) (explaining the origins and purpose of section 90.801(2)(a) and noting that statements that comply with the statute are substantively admissible).

Here, the prior statements satisfy these requirements for admission as substantive evidence. Lewis' statements from his sentencing hearing and deposition were statements that he gave "under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." Additionally, Lewis was subject to cross-examination by Appellant at the proceeding—Appellant's trial—where the State offered Lewis' prior sworn statements as evidence.

Finally, Lewis' trial testimony was inconsistent with his prior sworn statements. *See Pearce*, 880 So. 2d at 569 ("To be inconsistent, a prior statement must either directly contradict or be materially different from the expected testimony at trial."). When asked at Appellant's trial whether he and Appellant committed the McDonald's robbery together, Lewis answered, "No." This testimony plainly contradicted his prior sworn statements at his sentencing hearing and deposition. Moreover, under the circumstances present here, Lewis' claims of memory loss were also contradictory of his prior sworn statements.

A witness' trial testimony that he does not remember the events at issue is not necessarily contradictory of his previous statements describing those events. *See, e.g.*, *James v. State*, 765

So. 2d 763, 766 (Fla. 1st DCA 2000) (where there was no indication that a witness' memory loss was disingenuous, the witness' trial testimony that "he had no recollection" of seeing a shooting was not truly inconsistent with his prior out-of-court statement to a victim's family member that he witnessed the shooting); *Calhoun v. State*, 502 So. 2d 1364, 1365 (Fla. 2d DCA 1987) ("Deputy Manger made no statement inconsistent with her alleged prior statement. She merely could not recall making the statement."). However, such testimony *is* contradictory when there is evidence suggesting that the witness' claimed memory loss is insincere. *See James*, 765 So. 2d at 766 (adopting the reasoning of *State v. Staley*, 995 P.2d 1217, 1220 (Or. Ct. App. 2000), which held that "[t]he only thing that is inconsistent with a claimed loss of memory is evidence that suggests that the witness in fact remembers."); *Davis v. State*, 52 So. 3d 52, 54 (Fla. 1st DCA 2010) (a witness' claimed loss of memory contradicts his prior statements when the loss of memory is fabricated); *see also United States v. Cisneros-Gutierrez*, 517 F.3d 751, 757–58 (5th Cir. 2008) (under Federal Rule of Evidence 801(d)(1)(A)—the corollary to section 90.801(2)(a)—a witness' prior statement, made under oath, can be substantively admissible if the witness feigns memory loss when testifying at trial); *United States v. Mornan*, 413 F.3d 372, 379 (3d Cir. 2005) ("a prior statement may be admitted under Rule 801(d)(1)(A) *where the witness's memory loss is not genuine*.") (emphasis in original).

In this case, the trial court found that Lewis' memory loss was contrived and there was ample evidence to support that finding. As the trial court noted, Lewis claimed that he did not remember pleading guilty in his case, "and then in the next sentence, almost unsolicited, [made] a statement that he was coerced into the plea that he just told everyone he didn't recall even entering [.]" Furthermore, despite claiming that he could not remember being sentenced, Lewis corrected the prosecutor when the prosecutor stated that Lewis' attorney was standing next to him during the sentencing hearing (Lewis' sentencing hearing took place on Zoom). Additionally, during his proffered testimony, Lewis acknowledged that he refused to answer most questions at his deposition. Then, despite this acknowledgement and the fact that his deposition occurred merely one week before Appellant's trial, he later claimed that he did not recall being deposed at all. Under these circumstances, Lewis' claimed memory loss at trial was truly

inconsistent with his prior sworn statements, which rendered those statements substantively admissible. *See, e.g.*, *United States v. Valiente*, 392 Fed. Appx. 844 (11th Cir. 2010) (holding that a witness' prior statements were substantively admissible under Federal Rule 801(d)(1)(a) because the witness, who pleaded guilty to committing tax fraud with the defendant and agreed with the government's fact proffer at her own plea hearing, later claimed at the defendant's trial that she did not remember pleading guilty or any other facts relevant to her tax fraud scheme with the defendant).

Because Lewis' prior statements were substantively admissible, the trial court did not err when it overruled defense counsel's objection. *See Bradley*, 214 So. 3d at 655 ("a party may not call a witness primarily for the purpose of getting an *inadmissible* statement before the jury as impeachment.") (emphasis added).

B.

Furthermore, even if, as Appellant contends, Lewis' testimony should have been excluded entirely, Appellant would still not be entitled to a new trial because any error was harmless. In a harmless error analysis, "[t]he question is whether there is a reasonable possibility that the error affected the verdict." *State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986). Here, because the remainder of the State's evidence left no doubt about Appellant's participation in the robbery, there is no reasonable possibility that the jury would have acquitted Appellant or found him guilty of a lesser crime if only Lewis had not testified at trial.

Excising Lewis' testimony, the State still proved beyond a reasonable doubt that Appellant was one of the two men who robbed the McDonald's on January 8, 2020. The State presented restaurant surveillance video of Appellant and Lewis entering the McDonald's dining room around 3:25 A.M. Neither man clocked-in to work. The video depicts Appellant going to the restaurant's office to look inside the safe, which was open. Approximately two hours later, two masked men whose builds matched those of Appellant and Lewis returned to the restaurant via the backdoor

and went straight to the office safe. There, they stole approximately $1400 in cash.

Tasha Williams was the McDonald's shift manager at the time of the robbery. She testified that Lewis was her boyfriend and Appellant was like a son to her. Appellant and Lewis were good friends who regularly spent time together. On the night of January 7th, Williams picked-up Appellant and Lewis from Lewis' home with the intention of having both men work with her on the overnight shift. However, when they arrived at the restaurant, both men were sleeping and would not get up to go to work. Williams left the men in her car and went inside the restaurant. Appellant and Lewis entered the restaurant shortly before 3:30 A.M. to ask Williams for her car keys so that they could turn on the heat. Williams refused. Lewis and Appellant went to the back of the restaurant, where the office safe was open. At 4:00 A.M., Williams took a break and went to her car with Lewis and Appellant. This time, when Williams returned to work, she left her keys in the car.

Approximately one hour later, Williams heard her co-worker, Jamaya Burgess, yelling. Williams saw two masked men, whom she identified as Lewis and Appellant, go to the restaurant's office. Williams recognized Lewis' gun as one that she saw him with previously. Williams went to the office to confront Lewis and Appellant. While in the office, she pushed Lewis and placed her hand on Appellant's shoulder, which she testified she would not have done if she was uncertain about the robbers' identities. As Williams expected, neither man retaliated. Appellant took the money from the restaurant's safe. After Lewis and Appellant left the scene, Williams tried calling them on the phone[1] to ask them to return the money. Neither man answered, but Lewis eventually returned Williams' call. Lewis claimed that he had been at home sleeping. However, this assertion was belied by cell phone geolocation data, which placed Lewis in the vicinity of the McDonald's at the time of the robbery.

[1] Phone records introduced by the State corroborated Williams' testimony on this point.

Williams reported the robbery to the police, but she initially concealed her knowledge of Lewis' and Appellant's guilt. She also instructed Burgess not to cooperate with the investigation. However, Williams eventually disclosed her full knowledge of the robbery to the investigating detective.

The State also presented testimony from Burgess. She was acquainted with Appellant and Lewis because she worked with them at McDonald's. Although both robbers wore masks, Burgess identified Appellant as one of the robbers because he wore a distinctive silver chain that Appellant wore virtually every day while at work.[2] She also identified Appellant based on his voice and his gait. Appellant's silver chain is visible in the surveillance video of the robbery. The State produced a photograph from Appellant's social media account of Appellant wearing the chain, which Burgess confirmed was the same chain that Appellant wore during the robbery.

In sum, the outcome of Appellant's trial was no longer in doubt when Lewis took the stand as the State's final witness. Because there is no reasonable possibility that Lewis' testimony changed the result of Appellant's trial, any error in admitting Lewis' testimony was harmless.

III.

To summarize, we hold that the trial court did not err by allowing Lewis to testify. Additionally, the record shows that even if it had been error to admit Lewis' testimony, the error would have been harmless.

AFFIRMED.

ROBERTS and MAKAR, JJ., concur.

---

[2] Antwinette Battle, an area supervisor for McDonald's, also testified that Appellant "always wore a chain" that was silver and tight around his neck.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Jessica J. Yeary, Public Defender, and Danielle Jorden, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and David Welch, Assistant Attorney General, Tallahassee, for Appellee.