



2012

Recent Developments: McClain v. State: The Transcript of a Witness's Taped Statement Is Admissible as a Prior Inconsistent Statement Absent an Express Finding of Inconsistency, and May Be Sent to the Jury Room Pursuant to Maryland Rule 4-326 without a Request from the Jury

Kristine L. Dietz

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/lf>



Part of the [Law Commons](#)

Recommended Citation

Dietz, Kristine L. (2012) "Recent Developments: McClain v. State: The Transcript of a Witness's Taped Statement Is Admissible as a Prior Inconsistent Statement Absent an Express Finding of Inconsistency, and May Be Sent to the Jury Room Pursuant to Maryland Rule 4-326 without a Request from the Jury," *University of Baltimore Law Forum*: Vol. 43 : No. 1 , Article 7.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol43/iss1/7>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Forum by an authorized editor of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

RECENT DEVELOPMENT

MCCLAIN V. STATE: THE TRANSCRIPT OF A WITNESS'S TAPED STATEMENT IS ADMISSIBLE AS A PRIOR INCONSISTENT STATEMENT ABSENT AN EXPRESS FINDING OF INCONSISTENCY, AND MAY BE SENT TO THE JURY ROOM PURSUANT TO MARYLAND RULE 4-326 WITHOUT A REQUEST FROM THE JURY.

By: Kristine L. Dietz

The Court of Appeals of Maryland held that a trial court could admit into evidence the transcript of a witness's prior recorded statement without making an express finding that the statement was inconsistent with the witness's testimony. *McClain v. State*, 425 Md. 238, 40 A.3d 396 (2012). The court further held that the taped statement was not a deposition under Maryland Rule 4-326 because it was not made under oath, and therefore could be sent to the jury room absent the jury's request. *Id.* at 253-54, 40 A.3d at 405-06.

In June 2004, Detective Ciralo questioned Elliott McClain ("McClain") regarding the shooting death of Tidell Harris ("Harris"). McClain told Detective Ciralo that he was at Sooner's Bar on the night of the shooting; he observed Harris enter the bar and leave a short time later. McClain informed Detective Ciralo that sometime after the victim left, he heard gunshots outside and told Sheila Billings ("Billings"), a server, to call the police. Months later, Detective Ciralo conducted a taped interview of Billings. Billings indicated that McClain left the bar prior to Harris being shot.

At trial, Billings testified as a witness for the State. Contrary to her prior statement, she answered in the affirmative when asked if McClain was still in the bar when the shooting was reported. The State attempted to show Billings a transcript of her prior interview, but defense counsel objected to giving Billings anything to refresh her recollection. The court overruled the objection, and allowed Billings to look at her prior statement. In overruling the objection, the court referenced both refreshing Billings's recollection and the inconsistency between her testimony at trial and her statement to Detective Ciralo. Subsequently, Billings stated that the transcript refreshed her recollection and testified that McClain left the bar before a witness reported the shooting. The circuit court admitted the taped statement into evidence and it was played for the jury.

The State, citing Maryland Rule 4-326(b), requested that the court send the audiotapes to the jury room during deliberations. In granting the State's request, the circuit court found that the prior statement was admitted either as a prior inconsistent statement, or a consistent statement used to rehabilitate Billings's credibility after cross-examination pursuant to Maryland Rules 5-802.1(a) or (b), respectively. The jury found McClain guilty of first-degree murder, conspiracy to commit murder, and related handgun offenses. On appeal, the Court of Special Appeals of Maryland affirmed the convictions. The Court of Appeals of Maryland granted McClain's petition for a writ of certiorari.

The Court of Appeals of Maryland began its analysis by focusing on whether a circuit court may admit a witness's taped statement into evidence as a prior inconsistent statement without making an express finding on the record that the statement qualified as a hearsay exception. *McClain*, 425 Md. at 246, 40 A.3d at 400. As an initial matter, the court rejected the possibility that Billings's prior statement was admitted under a theory of refreshed recollection. *Id.* at 248, 40 A.3d at 401. Instead, the court presumed the circuit court understood that Maryland Rule 5-612 specifically disallowed the taped statement to be offered into evidence under this theory. *Id.* at 248, 40 A.3d at 401 (citing *Germain v. State*, 363 Md. 511, 534, 769 A.2d 931, 944 (2001)). The court reasoned that the circuit court removed any doubt as to the basis for admission by explicitly explaining that the statements were offered into evidence pursuant to Maryland Rule 5-802.1(a) or (b). *McClain*, 425 Md. at 248, 40 A.3d at 402.

The Court of Appeals of Maryland explained that a statement is admissible under Maryland Rule 5-802.1(a) if the prior statement is both inconsistent and recorded in verbatim fashion by electronic means. *McClain*, 425 Md. at 249, 40 A.3d at 402. Billings's statement to Detective Ciruolo months after the murder was contrary to her initial testimony at trial, and was therefore inconsistent. *Id.* Billings's statement was also audiotape-recorded and thus satisfied the second requirement of Maryland Rule 5-802.1(a). *Id.*

The court ruled that the circuit court was not required to make express findings on the record, and that the requirements of Rule 5-802.1(a) were met. *McClain*, 425 Md. at 252, 40 A.3d at 404. Specifically, the court rejected McClain's reference to case law that held the circuit court was required to make an express finding of whether a witness's inability to remember was genuine or false. *Id.* at 251-52, 40 A.3d at 403-04 (citing *Corbett v. State*, 130 Md. App. 408, 426-27, 746 A.2d 954, 963 (2000)). Unlike in *Corbett*, Billings was able to remember, and therefore it was not necessary for the circuit court to make a "demeanor-based credibility finding." *McClain*, 425 Md. at 252, 40 A.3d at 404. The record itself

was enough to establish the inconsistency between her testimony and her taped statement. *Id.*

Finally, the Court of Appeals addressed whether the circuit court abused its discretion when sending Billings's taped statement to the jury room. *McClain*, 425 Md. at 253, 40 A.3d at 404. The court examined Maryland Rule 4-326(c), which allows the court to provide the jury with any testimony or other evidence they request. *McClain*, 425 Md. at 253-54, 40 A.3d at 405. The court found that Maryland Rule 4-326(c) only applies where the jury requests testimony or other evidence that has not been admitted as an exhibit. *Id.* at 254, 40 A.3d at 405 (citing *Adams v. State*, 415 Md. 585, 599-600, 4 A.3d 499, 507-08 (2010)). Because the circuit court admitted the audiotapes into evidence as exhibits, it was irrelevant whether the jury requested the tapes. *McClain*, 425 Md. at 254, 40 A.3d at 405. The court held that Maryland Rule 4-326(b) controlled, which allows all exhibits, except depositions, into the jury room unless "good cause" exists to withhold them. *Id.* at 253, 40 A.3d at 405.

The court rejected McClain's argument that taped statements qualified as "depositions" because Billings was not placed under oath as required by Maryland Rule 2-414(a). *McClain*, 425 Md. at 255, 40 A.3d at 405. Instead, the court focused on the "good cause" provision, and concluded that the circuit court did not abuse its discretion in determining that there was not "good cause" to withhold the tapes from the jury. *Id.* at 255, 40 A.3d at 406.

The dissent believed that because Billings did not persist in testifying inconsistently, the statement was not inconsistent, and there were no grounds for admission under Maryland Rule 5-802.1(a). *McClain*, 425 Md. at 271, 40 A.3d at 415 (Bell, C.J. dissenting). In response to the dissent's concern, the majority emphasized that although Billings did not persist in testifying inconsistently, her initial testimony could have influenced the jurors, and therefore must be considered inconsistent. *Id.* at 250, 40 A.3d at 403.

In *McClain*, the Court of Appeals of Maryland broadened the scope of statements that might be admissible under the "inconsistent statement" hearsay exception. As a result a trial court does not need to make an express finding of inconsistency to admit a witness's prior recorded statement. Favoring statements that aid in the evaluation of testimony, the court created a potential loophole for clever practitioners to admit evidence that has been used to refresh a witness's recollection under the guise of an inconsistent statement. This ruling has the potential to render the limits of Maryland Rule 5-612 insignificant if the items used to refresh a witness's memory can otherwise be admitted as substantive evidence.