UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2753

September Term, 2015

BERNARD WELLS, JR.

v.

STATE OF MARYLAND

Krauser, C.J.,
Graeff,
Nazarian,

JJ.

PER CURIAM

Filed: December 13, 2016

Convicted of possession with intent to distribute heroin, possession of heroin, possession of a regulated firearm after a disqualifying conviction, and possession of a firearm after a felony conviction, following a jury trial, in Circuit Court for Howard County, Bernard Wells, Jr., appellant, raises a single question on appeal: Whether the trial court erred in denying his motion to suppress two statements he made, while police officers were executing a search warrant of his residence, because, he claims, those statements were obtained in violation of his *Miranda* rights? For the reasons that follow, we affirm.

In reviewing the grant or denial of a motion to suppress, this Court views "the evidence and inferences that may be reasonably drawn therefrom in a light most favorable to the prevailing party on the motion, here the State." *Lindsey v. State*, 226 Md. App. 253, 262 (2015) (citation omitted). Furthermore, "[w]e extend great deference to the findings of the motions court as to first-level findings of fact and as to the credibility of witnesses, unless those findings are clearly erroneous." *Id*. (citation omitted). "The ultimate determination of whether there was a constitutional violation, however, is an independent determination that is made by the appellate court alone, applying the law to the facts found in each particular case." *Sinclair v. State,* 444 Md. 16, 27 (2015) (citation omitted).

The testimony at the suppression hearing established that approximately twenty officers from the Howard County and Baltimore City police departments executed a search warrant at Wells' residence at approximately 4:30 a.m. Wells and the other occupants were awoken, handcuffed, taken to the living room, and guarded by two officers while the remaining officers searched the residence. Wells was not advised of his *Miranda* rights.

After a safe was located in one of the bedrooms, Sergeant James Capone asked Wells if he knew the combination. Wells responded that "he had not been in it for a while and that he forgot." (Statement to Capone). This statement was not introduced at trial.

Shortly thereafter, Sergeant Toby Fulton observed several officers walk upstairs with a crowbar to try and open the safe. Sergeant Fulton then heard a loud banging upstairs. After the banging started, Wells "smirked" and stated, "They can't get in, it's a good safe, huh?" Approximately two to three minutes later, Sergeant Fulton heard a cheer from upstairs. He then turned to Wells and remarked "Sounds like they popped it open." In response, Wells "shook his head, put it down and said, oh." (Statement to Fulton). Sergeant Fulton testified that he did not know what was inside the safe and did not intend his comment to elicit a response from Wells.

On appeal, Wells claims that his statements to Capone and Fulton should have been suppressed because they were the products of custodial interrogations made without the benefit of *Miranda* warnings.[1] Wells acknowledges, however, that his statement to Capone was not introduced at trial, and asks this court to address its admissibility only if it finds that the failure to suppress his statement to Fulton constituted reversible error.

[1] The State contends that appellant did not preserve his claim regarding the statement to Fulton because he did not challenge the admissibility of that statement in his written motion to suppress or at the outset of the suppression hearing. However, at the conclusion of the suppression hearing, appellant and the State presented arguments to the suppression court regarding that statement and the trial court appears to have ruled on its admissibility. Consequently, we believe the issue is sufficiently preserved for appeal. *See* Maryland Rule 8-131(a) (stating that this Court can consider an issue on appeal if it "plainly appears by the record to have been raised in or decided by the trial court").

"[B]efore a defendant can claim the benefit of *Miranda* warnings, the defendant must establish two things: (1) custody; and (2) interrogation." *State v. Thomas,* 202 Md.App. 545, 565 (2011). We need not determine whether Wells was in custody, however, because his statement to Sergeant Fulton was not the result of an interrogation.

The test to be applied in determining whether Sergeant Fulton's statement was tantamount to interrogation is whether his words and actions "were reasonably likely to elicit incriminating responses from petitioner." *Prioleau v. State,* 411 Md. 629, 647 (2009) (citation omitted); *see also Rhode Island v. Innis,* 446 U.S. 291, 301 (1980) ("[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect"). In determining whether the police should have known that their words or actions would elicit an incriminating response from the suspect, courts must consider the intent of the police in making the statement or performing the action, whether the police had knowledge of a suspect's "unusual susceptibility" to persuasion, and whether the police invited the suspect to respond to their statements or actions. *Innis,* 446 U.S. at 302. Moreover, interrogation "must reflect a measure of compulsion above and beyond that inherent in custody itself." *Id*. at 301.

Sergeant Fulton's single, isolated statement "sounds like they popped it open" does not reflect any measure of compulsion that would trigger the protections of *Miranda*. Sergeant Fulton testified that he did not intend to elicit a response from Wells when he made the statement and no evidence demonstrated that Sergeant Fulton should have known

that his comment would be likely elicit an inculpatory response. In fact, when Sergeant Fulton made the statement he did not know that contraband had been found inside the safe and appellant had already intimated, voluntarily, that the safe belonged to him. Instead of being the functional equivalent of an interrogation, we are persuaded that Sergeant Fulton's statement was merely an offhand observation about what was occurring upstairs, to which no response was invited. *See Smith v. State*, 414 Md. 357, 367 (2010) (holding that the defendant was not subject to interrogation for purposes of *Miranda* when the officer displayed drugs that had been found while executing a search warrant of the defendant's apartment and then stated that he was going to arrest everyone in the apartment, including defendant's girlfriend); *Williams v. State,* 342 Md. 724, 760 (1996) (holding that comments by the police which simply advised the defendant that they had evidence, that they believed established his guilt in a double homicide, were not reasonably likely to elicit an incriminating response); *Conboy v. State,* 155 Md. App. 353, 373 (2004) (holding that the defendant was not subject to interrogation for the purposes of *Miranda* when, after seizing a key from the defendant and determining that it fit the ignition of a van that contained alcoholic beverages and had just been in an accident, the officer confronted the defendant and stated "it's funny, the key fits").

Because the circuit court did not err in denying appellant's motion to suppress Wells' statement to Fulton, we do not address whether his statement to Capone should have been suppressed as that statement was not introduced at his trial. *See United States v. Verdugo–Urquidez,* 494 U.S. 259, 264 (1990) ("The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants.

Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial" (citations omitted)).

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