Circuit Court for Kent County
Case No.: C-14-CR-19-000075

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 48

September Term, 2020

TROY RUSH

v.

STATE OF MARYLAND

Reed,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: December 15, 2021

*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 trial in the Circuit Court for Kent County, a jury found Troy Rush, appellant, guilty of second-degree assault. Thereafter, the court sentenced him to 8 years' imprisonment. Appellant then noted this appeal contending that the trial court erred in admitting a recording of a 911 call into evidence. For the reasons that follow, we shall affirm.

BACKGROUND

At trial, the State played for the jury a recording of a 911 call from a person who identified herself as Kiara Wilson.[1] The following exchange occurred between the 911 operator and Kiara Wilson:

> 911 OPERATOR: Kent County 911, what's the address of your emergency?
>
> MS. WILSON: 6356 Edesville Road [Rock Hall, Maryland].
>
> 911 OPERATOR: All right. Repeat the address for verification.
>
> MS. WILSON: 6356 Edesville Road.
>
> 911 OPERATOR: All right. That match the house. Tell me exactly what happened.
>
> MS. WILSON: Yes, so I wanna report a domestic violence.
>
> 911 OPERATOR: Okay. What's your name?
>
> MS. WILSON: Kiara Wilson.
>
> 911 OPERATOR: And what's the phone number you're calling from?
>
> MS. WILSON: [XXX]-[XXX] -- what is it -- 2887 is mine.

[1] We note that the 911 recording was played in court and transcribed four separate times during trial and no two transcriptions are identical. What is reproduced herein is a composite of the two times the recording was played for the jury. There were no material distinctions between any of the four transcriptions.

911 OPERATOR: Okay. What phone you're calling from?

MS. WILSON: This is the one I'm calling from, 3818.

911 OPERATOR: 3818, that's what I'm showing. Okay. Everything -- tell me what happened.

MS. WILSON: I don't know. I don't know. We usually going through this, but today he's just like -- I don't know. I just want him to go and he won't leave. And then he wait 'til I got out of the car, wanna fight with me shovels and stuff, threw my phone. Like, I'm real tired. All I ask is his --

911 OPERATOR: Okay.

Ms. Wilson: -- best to do is leave.

911 OPERATOR: Okay. Is it – was it physical?

MS. WILSON: Yes.

911 OPERATOR: Okay.

MS. WILSON: I told -- he stepped all the way and throw it all in the water. Like, he was beating me up when I'm talking to my mom.

911 OPERATOR: All right. Are you separated from him?

MS. WILSON: He's at my house. I came with somebody else's house.

911 OPERATOR: Okay.

MS. WILSON: I keep calling his cell phone and I'm tired.

911 OPERATOR: Were weapons involved or mentioned at all?

MS. WILSON: A shovel, that was it.

911 OPERATOR: A shovel. All right. So this is yourself – well, actually, we received another call about it. Well, actually, we already have police on the way, but just –

As a result of the various calls to 911 referenced above, two police officers from the Kent County Sheriff's Office, Corporal Scott Lockerman and Deputy Jordan Proudfoot, responded to 6356 Edesville Road to investigate the situation. Upon arrival, they found

that there was no one there. Deputy Proudfoot then saw appellant standing in a wooded area behind the home. Evidently, both Corporal Lockerman and Deputy Proudfoot were familiar with appellant and knew "that he likes to run." In any event, after the officers looked at appellant, appellant looked at them, and Corporal Lockerman shouted for appellant to stop and get on the ground, appellant ran away. The police chased him on foot until appellant got into a car and drove away. It took the police officers about a minute to go back to where they had parked their cars. Shortly thereafter Kiara Wilson, the victim, drove up and got out of her car. Corporal Lockerman stayed with the victim, and Deputy Proudfoot left the area to look for appellant.

Corporal Lockerman testified that the victim was "very hysterical," crying, "shaken up," and completely covered in mud on one side of her body. She had a few visible injuries on her arms and legs and had the imprint of a shovel on her leg which he photographed. She told him the following had occurred between her and appellant:

> She told me that it all started over a conversation they had inside the residence about infidelity, him cheating on her, and it escalated to the outside area, and Mr. Rush pushed her and grabbed her arm. She attempted to call 911. That's when she grabbed -- he grabbed the phone from her and threw it. And Ms. Wilson advised me that she went to get the phone and that's when Mr. Rush -- when she fell trying to grab the phone, Mr. Rush grabbed the shovel and struck her with the shovel. In the process when she went to defend herself from the blow of the shovel is how she got the marks on her arm and the mark on her leg from when the shovel hit her leg. And I asked Ms. Wilson if she could show me her leg to observe the injuries and she showed me the injury to her leg.

At trial, the victim testified that, on March 10, 2019, she lived at 6356 Edesville Road and that she and appellant were in a long-term relationship and had children together. She agreed that "at some point" that day she had gone to the hospital, but she was not sure

when. She claimed not to have recognized her medical records from the hospital record but agreed that the records displayed her name and birthdate. Those medical records indicated:

> 29 year-old female complaining of injury to her left leg. Patient reports that she was assaulted by her [redacted] earlier today. She was hit in the left thigh with a shovel. A police report was made, and the patient was sent to the emergency department for evaluation. She is able to ambulate but complains of pain to the site as well as bruising. No other injuries.

She repeatedly testified that she did not recall whether she called 911. After the recording of the 911 call recounted earlier was played for the jury at trial and after she acknowledged that it was possible that the caller was her, the recording was admitted into evidence.

She testified that she did not recall speaking with Corporal Lockerman. She said, "I mean, I was blacked out at the moment. There was just a lot going on. We -- I was drinking, smoking, like, I do not recall anything that happened that day at all." She testified that her first memory of March 10, 2019 was being at the hospital, but later added that she remembered "drinking, smoking, I mean all day long," and going through appellant's phone to find "messages from this woman, that woman, the next woman." She said, "I just had enough and I don't remember nothing at that time."

DISCUSSION

Prior to trial, appellant filed a motion in limine seeking to exclude the recording of the victim's 911 call on the basis that it did not meet the requirements of the excited utterance exception to the ban on the use of hearsay. Appellant argued that the excited utterance exception did not apply to the victim's recording because her 911 call was made at a different location from where the assault took place, it was not "immediate or

proximate to the event," and the call narrated past events. Before trial began, after hearing from the parties, and listening to the recording of the 911 call, the court decided to reserve on the issue of the admissibility of the victim's 911 recording and make a ruling during trial.

During the victim's testimony at trial, after the State asked her about the 911 call and she testified that she did not remember making it, the State unsuccessfully attempted to refresh her recollection of it. The following exchange then took place:

> THE STATE: It [the 911 call] can be played for -- I think, it can be played for the jury to impeach Ms. Wilson in her testimony here. And that was, I think it's acceptable and I also think it's an excited utterance.
>
> THE COURT: Okay.
>
> DEFENSE COUNSEL: But again, I'd preserve -- I'd say I object to it being an excited utterance and I don't think that -- well, as far as impeachment, I suppose it with [sic] depend on the --
>
> THE COURT: Well, I'm going to allow [the State] to play it
>
> DEFENSE COUNSEL: Okay.
>
> THE COURT: --and if she [Ms. Wilson] wants to say in front of the jury that it's not her, it's up to the jury as the finder of facts to determine whether or not they believe it's her or not.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Unless a hearsay statement falls within a recognized exception, it is not admissible. Md. Rule 5-802. "[T]he trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more

deferential standard of review." *Gordon v. State*, 431 Md. 527, 538 (2013). "Accordingly, the trial court's legal conclusions are reviewed de novo ... but the trial court's factual findings will not be disturbed absent clear error." *Id.* (citations omitted).

Maryland Rule 5-803 provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not "excluded by the hearsay rule, even though the declarant is available as a witness." "The rationale behind the excited utterance exception is that the startling event suspends the declarant's process of reflective thought, thus reducing the likelihood of fabrication." *State v. Harrell*, 348 Md. 69, 77 (1997).

We have little difficulty determining that the trial court neither erred nor abused its discretion in admitting the recording of the victim's 911 call into evidence under the excited utterance exception to the ban on the use of hearsay. While "[t]ime alone is not the sole criterion" for determining whether a statement is an excited utterance, *Davis v. State*, 125 Md. App. 713, 716 (1999), it is evident from the record that the call was made shortly after appellant's assault on the victim. By the time the victim had called, other 911 calls had already been made and the police were already on their way. When the police arrived, the victim was covered in mud on one side of her body, had the imprint of a shovel on her leg, and was hysterically crying. It is obvious from the recording itself, that the victim is crying during the 911 call. Thus, it is clear that, when the victim made the 911 call, she made statements relating to a startling event and was still experiencing significant stress from the event.

Consequently, we affirm the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR KENT COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.