Circuit Court for Prince George's County
Case No. CT170201B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 188

September Term, 2018

TREYVON ALONTA MILLER

v.

STATE OF MARYLAND

Nazarian,
Friedman,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Friedman, J.

Filed: November 6, 2019

In January 2017, David Neal, an inmate at the Upper Marlboro County Jail, was attacked and stabbed by fellow inmate Adrian Duncan. Neal's cell mate, Appellant Treyvon Miller, was convicted of first-degree assault, second-degree assault, and reckless endangerment for allegedly participating in the attack. For the reasons that follow, we hold that the trial court erred by allowing inadmissible hearsay evidence to be submitted to the jury. Because we further conclude that the error was not harmless, we will reverse the verdict against Miller and remand the case to the trial court.[1]

BACKGROUND

Inmates David Neal, Treyvon Miller and Adrian Duncan had all known each other both in and out of jail. While Miller was friends with both Neal and Duncan, Neal and Duncan had a "shaky" relationship. On January 3, 2017, the men were playing cards in the common area of the jail. Neal and Miller were partners in a game of Spades against Duncan and another inmate. During the game, Neal left the table briefly, and when he returned, he noticed that the tone of the game changed dramatically. Although Miller was a skilled player who almost never lost, suddenly Duncan was winning over and over. Eventually, Neal suspected that he was being cheated and Miller was helping Duncan win. Neal ended

[1] Miller raises four issues in his brief: (1) that his convictions for assault are not proper lesser-included offenses of the crimes in the indictment; (2) that the trial court erred in allowing the State to cross-examine Adrian Duncan on his previous convictions and other prior bad acts; (3) that the trial court erred in allowing the State to argue to the jury that Miller knew Duncan historically did not give authorities information about any accomplices; and (4) the trial court erred in allowing inadmissible hearsay to be admitted as evidence. Because we consider the fourth issue on inadmissible hearsay to be dispositive, we do not address the remaining issues.

the game, but not before Duncan had won 15 hands in a row and was asking for payment of about $175 in winnings. Miller left the table, but Neal started a different card game with Duncan to try to win back what he'd lost. When Duncan started to lose at the new game, he stopped playing and demanded that Neal pay the remaining debt. Neal refused and told Duncan that he would "have to get it in blood," meaning they would fight for it instead. Duncan responded by threatening that he doesn't fight, he "blow[s] things up." Miller was present for the exchange, but only threw his hands in the air, indicating that he wouldn't pick sides.

Neal left the cell area for a short time and when he returned, both Duncan and Miller were packing up their belongings.[2] Miller told Neal that he would have nothing to do with the dispute, but that Neal should "fix his rights." During their conversation, Duncan came up to Neal and looked as if he was holding something and wanted to fight.

Neal decided that he didn't feel safe and needed to have his location changed. He went to the observation desk to ask the officer on duty, Corporal Tajamal Mustafa, about being reassigned to a different cell. While Neal was at the desk, he overheard Miller say "he telling" to someone nearby. Miller then began calling to Neal and repeatedly motioning for Neal to come over, away from the desk. Neal ignored him. Moments later, Duncan came up behind Neal and attacked him with a shank, stabbing Neal 17 times in his head and chest. During the assault, Duncan told Neal "you should have given me the money." Following the attack, Duncan discarded the shank by throwing it into a nearby cell. Neal

[2] While Miller and Neal were housed in a cell, Duncan was housed in the open bunk area.

spent three days in the hospital being treated for his injuries. When he was returned to jail, he spent two weeks in the medical unit and was then moved to an isolation cell just outside the medical unit.

Miller was indicted on charges of attempted first-degree murder, carrying a dangerous weapon, and conspiracy to commit attempted first-degree murder. At the jury trial, in addition to the above facts, the State presented the testimony of Corporal Mustafa, who had been working the observation desk on January 3, 2017. Mustafa described that when Neal approached the desk, he had looked scared and said that he was worried something was about to happen to him, that his cell mate was going to harm him in some way. Although the defense objected that Neal's statement was inadmissible hearsay, the trial court ruled that it was admissible as an excited utterance.

The State also presented evidence that almost a year after the attack, in November 2017, Miller and Neal happened to be transported together, and while in the van, Miller told Neal that he was sorry for what had happened. Miller was ultimately convicted as an accomplice to the lesser-included offenses of first- and second-degree assault, and reckless endangerment.

DISCUSSION

On appeal, Miller argues that the trial court erred in admitting Neal's statement to Mustafa as an excited utterance.[3] We agree.

[3] The State asserts that Miller failed to preserve his hearsay objection, but we disagree. When the defense objected, Mustafa was midsentence, about to recite Neal's statement. The defense's objection was then discussed and overruled at a bench conference. The State insists that the prosecutor then asked intervening questions about Neal's

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. Because it is inherently untrustworthy, hearsay is inadmissible at trial unless subject to a specific exception. MD. RULE 5-802; *see also Parker v. State*, 365 Md. 299, 312 (2001); *Mouzone v. State*, 294 Md. 692, 696 (1982). Unlike most evidentiary rulings, which are reviewed for an abuse of discretion, a trial court has no discretion to admit hearsay. *Gordon v. State*, 431 Md. 527, 538 (2013). Thus, the trial court's conclusions about whether a statement constitutes hearsay and whether it is admissible under an exception, are legal questions reviewed without deference. *Gordon*, 431 Md. at 538. Factual findings that may underpin the trial court's ruling on hearsay are, however, reviewed for clear error. *Id*. We will only reverse a trial court's decision to admit a statement as an excited utterance if it was an abuse of discretion. *West v. State*, 124 Md. App. 147, 163 (1998).

Exceptions to the rule against hearsay have been established where other circumstances "lend credibility to the statement, thus vitiating the reason for the rule." *Cooper v. State*, 434 Md. 209, 242 (2013) (internal quotations omitted). The "excited utterance" is a well-established exception, defined as "[a] statement relating to a startling

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appearance and demeanor before returning to the hearsay statement, thus requiring the defense to renew the objection to preserve it. We interpret the record differently. Following the trial court's ruling at the bench conference, the prosecutor backtracked briefly and had Mustafa repeat his description of Neal's demeanor at the time of the statement before having Mustafa recite the statement. We are not persuaded that the State's predicate questions resetting the context of the hearsay statement before offering it required the defense to renew its objection to preserve it. The hearsay testimony came immediately after the bench conference and no other line of questioning interrupted. Miller's objection was sufficiently contemporaneous to preserve the issue for review. MD. RULE 4-323(c).

event or condition made while the declarant was under the stress of excitement caused by the event or condition." MD. RULE 5-803(b)(2). The rationale behind the exception is that "the situation produced such an effect on the declarant as to render his reflective capabilities inoperative." *Parker*, 365 Md. at 313 (citing *Wright v. State*, 88 Md. 705 (1898)). A statement based on spontaneous instinct, rather than deliberate intent, is considered less likely to be fabricated. *West*, 124 Md. App. at 163.

Whether a hearsay statement can be characterized as an "excited utterance" is determined by reviewing "the totality of the circumstances." *West*, 124 Md. App. at 162 (quoting *State v. Harrell*, 348 Md. 69, 77 (1997)). The party offering the statement bears the burden of establishing its admissibility under the exception. *Cooper*, 434 Md. at 242 (citing *Parker*, 365 Md. at 313). The two main elements that must be proven are that the declarant had personal knowledge of the events and that the statement was spontaneous. *Cooper*, 434 Md. at 242; *Parker*, 365 Md. at 313. Spontaneity is not determined merely by calculating the time between the event and the statement. *Mouzone*, 294 Md. at 698-99; *Cooper*, 434 Md. at 243; *West*, 124 Md. App. at 163. Rather, the circumstances as a whole are reviewed to determine "whether the statement was the result of reasoning and reflection or a spontaneous response to the exciting event." *Mouzone*, 294 Md. at 698. To be an excited utterance, the circumstances must be such that the "the exciting event still dominates the declarant's thought processes" and the statement could not have been the result of premeditation and consideration. *Id*. at 699. If the declarant has overcome the shock of the event and "begun a course of rational and thoughtful conduct," statements are no longer excited utterances and are once again subject to exclusion as hearsay. *Id*. at 699.

As an initial matter, we note that for a statement to be the product of the stress of excitement caused by a startling event, there must be a startling event that has preceded or accompanied the statement. *Billups v. State*, 135 Md. App. 345, 359 (2000). Here, however, Neal's statement to Mustafa preceded the attack. While there are no explicit rules limiting how much time may elapse before a statement is no longer considered an excited utterance, *Cooper*, 434 Md. at 244, we consider this sequence of events to preclude the possibility that Neal's statement could be considered an excited utterance caused by the attack.

Moreover, even if we were to allow that the threatening exchanges between Neal and Duncan could have been considered exciting or startling events, the evidence in the record does not support the conclusion that Neal was incapable of reflective thought at the time of his statement. To the contrary, Neal approached Mustafa as the result of a deliberate decision to request that he be moved to a different cell. Although Mustafa described Neal's demeanor as "shaken up" and fearful, "the essence of the excited utterance exception is the inability of the declarant to have reflected on the events about which the statement is concerned." *Marquardt v. State*, 164 Md. App. 95, 128 (2005); *Mouzone*, 294 Md. at 701. Neal's statement to Mustafa was not impulsive or spontaneous but was part of a calculated course of conduct in response to his assessment of the situation.

After reviewing the totality of the circumstance, we hold that Neal's statement was not an excited utterance, but inadmissible hearsay. The trial court therefore erred in admitting Neal's statement.

Even though we have concluded that the trial court erred, the error is not reversible if it was harmless. An error is considered harmless if an independent review of the record

establishes, beyond a reasonable doubt, that the error in no way influenced the finding of guilt or contributed to the verdict. *Marquardt*, 164 Md. App. at 129 (quoting *Weitzel v. State*, 384 Md. 451, 461 (2004)); *Rosenberg v. State*, 129 Md. App. 221, 253–54 (1999). In reviewing the record, we weigh "the importance of the tainted evidence; whether the evidence was cumulative or unique; the presence or absence of corroborating evidence; the extent of the error; and the overall strength of the State's case." *Rosenberg*, 129 Md. App. at 254 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

The State's theory of the case was that Miller harbored some grudge against Neal and enlisted Duncan to attack him, or, in the alternative, that Duncan wanted to attack Neal and Miller provided assistance. To prove that Duncan and Miller were accomplices, the State presented evidence that Miller and Duncan had known each other outside of jail and may have been friends, that Neal suspected Miller had helped Duncan cheat him at cards, that Miller was present in the common area during the attack, and that right before the attack Miller had been trying to get Neal's attention and was gesturing for Neal to come towards him and away from the desk. The State also presented evidence that there were rumors that Miller had a shank, and that following the attack Duncan disposed of the shank in a nearby cell that may or may not have been Miller's. Finally, the State presented evidence of Miller's apology for what had happened to Neal.

After reviewing the State's case, we are not persuaded that the error was harmless. The case against Miller was largely circumstantial and relied heavily on the jury making inferences in favor of guilt. *Benton v State*, 224 Md. App. 612, 629-30 (2015). Evidence that Miller was present at the scene and had a friendship with Duncan doesn't prove that

Miller participated in Duncan's crime. *Fleming v. State*, 373 Md. 426, 433 (2003); *Johnson v. State*, 227 Md. 159, 163 (1961). A prison rumor that Miller may have had a shank is not evidence that he provided Duncan with the weapon used in the assault. There was no evidence suggesting why Miller had tried to get Neal's attention prior to the attack, whether to lure him or to warn him. Similarly, Miller's apology to Neal in the van could be interpreted to suggest a guilty conscience for assisting Duncan or regret for having not assisted Neal.

The State contends that even if the admission was error, it was harmless because the hearsay statement was merely cumulative of Neal's own testimony. We do not agree. Although Neal testified about his conversation with Mustafa, Neal specifically denied that he had implicated Miller, or anyone, by name. Mustafa's testimony was therefore the only piece of substantive evidence specifically identifying Miller and connecting him to the assault. Without it, the inferences necessary to support Miller's conviction are no more or less likely than inferences that would require acquittal.

The hearsay statement was a unique piece of evidence that played a significant role in the State's case. As a result, we cannot conclude beyond a reasonable doubt that the trial court's error was harmless.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED. CASE REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.