Circuit Court for Baltimore City
Case No. 24C15000767

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0298

September Term, 2017

ALVIN P. NORRIS

v.

VERNON S. DAVIS

Kehoe,
Beachley,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: July 8, 2018

*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.

Appellant, Alvin P. Norris, filed suit in the Circuit Court for Baltimore City against Appellees, Baltimore City Police Sergeant Keenan Murphy, Detective Carmine Vignola, and Officer Vernon Davis (collectively, the "Officers"), on theories of tortious conduct. Norris sought compensatory and punitive damages. He filed a motion for summary judgment on all claims against the Officers. The circuit court granted his motion as to liability only. A trial proceeded to determine damages. After a three-day trial, a jury awarded Norris $10,000.00 in compensatory damages. Dissatisfied with the verdict, Norris moved for a new trial. That motion was denied. This appeal followed.

Norris presents the following questions for our consideration:

I. Did the trial court abuse its discretion in admitting the unedited audio recording of the police and 9-1-1 communications ("KGA") transmissions?

II. Did the trial court abuse its discretion in admitting the testimony of the Officers?

III. Did the trial court abuse its discretion in excluding the testimony of Sharon Black as improper character evidence?

We shall address them in reverse order.

Relevant Additional History

On 29 March 2012, Sergeant Murphy and Detective Vignola, in a marked police vehicle, were patrolling in the area of 3300 Arydale Avenue, in the City of Baltimore. Detective Vignola initiated a traffic stop of a vehicle for making a left-hand turn without first signaling the turn. Sergeant Murphy and Detective Vignola exited their car and approached the stopped vehicle. They identified its driver as Alvin P. Norris. Sergeant

Murphy requested that Norris exit the vehicle. He complied. Officer Davis arrived at the scene shortly after Norris was stopped. Then, all Hell broke loose. A violent altercation (referred to hereafter as either the "incident" or "altercation") occurred between Norris and the Officers. The parties contest the details of the altercation, which differences we shall relate in due course.

Norris was arrested and taken to Sinai Hospital to receive treatment for injuries sustained during the incident. A subsequent search of Norris' person and his vehicle revealed $3,900.00 in cash, an empty Oxycodone bottle, and a key and address to an apartment. Baltimore City police officers, after obtaining a warrant, searched the apartment, recovering suspected cocaine, suspected heroin, and suspected marijuana. The State's Attorney charged Norris with various criminal violations. Norris filed a motion to suppress the items obtained from his vehicle and the apartment.

During a hearing on Norris' motion to suppress, the suppression court ruled that Sergeant Murphy's and Detective Vignola's traffic stop was pre-textual and lacked probable cause. The court suppressed, as "fruit of the poisonous tree," the items seized from Norris' vehicle and the apartment. The prosecution *nol-prossed* the charges against Norris.

On 18 February 2015, Norris sued the Officers civilly "alleging claims that included false imprisonment, battery, and violations of constitutional rights, as well as seeking both compensatory and punitive damages." Norris filed a motion for summary judgment. The

circuit court granted Norris' motion as to liability only. The case proceeded to trial to determine damages.

During the trial on damages,[1] Norris[2] and the Officers[3] testified as to their respective accounts of the events of 29 March 2012. Norris objected to the admission of the Officers' testimony on the grounds that it would erode the circuit court's earlier grant to him of summary judgment as to liability. The trial judge overruled his objection. The Officers offered as evidence the unedited audio recording of relevant police and 9-1-1 communications occurring on 29 March 2012, i.e., the so-called KGA transmission. Sergeant Murphy explained "that 'KGA' is the radio term used for the district dispatchers that pass information, including 9-1-1 call information, to police officers over the radio,

[1] A different circuit court judge granted Norris' motion for summary judgment than presided over the damages trial.

[2] Norris testified that the Officers attacked him after he obeyed their order to exit the vehicle. He indicated the Officers punched, kicked and beat him continuously for approximately thirty minutes. He stated he was tased also, even though he did not attempt to defend himself at any point during the incident. None of the Officers said anything to him during the altercation after they ordered him out of the vehicle.

[3] The Officers testified that "Norris was acting extremely nervous when they approached his truck, moving his hand toward [] the gear shift, as though he might speed off, so they asked him to exit the vehicle, and began a pat-down to make sure that he was unarmed." During the pat-down search, Norris elbowed Sergeant Murphy in the chest and tried to escape, but fell, with Sergeant Murphy, to the ground. Sergeant Murphy and Detective Vignola attempted to place Norris in handcuffs, but Norris assaulted them and screamed for them to let him go. Officer Davis arrived at the scene and offered assistance. The Officers testified that they struck Norris in self-defense, attempting to subdue him with a taser multiple times. Detective Vignola called a "signal 13" to dispatch, which is a radio code that an officer is in distress and needs immediate assistance. A signal 13 is relayed to the entire complement of City police and every officer that is available responds immediately. A number of police arrived within moments. Norris was subdued. The Officers testified that the altercation took approximately four minutes.

and that all [] communications with KGA, including 9-1-1 calls, are recorded, unedited, in real time all in a single recording." He testified further that

> he had listened to the KGA tape from []Norris'[] arrest, that the tape accurately reflected what was occurring, that it was in real time, that his was one of the voices speaking on the recording, and that the description in the 9-1-1 call on the tape of 'a big, big man' fighting with the police was consistent with what he was experiencing at the time with []Norris.

Included among the KGA transmissions was a 9-1-1 call from an unidentified woman reporting an altercation occurring contemporaneously between police officers and a large man on the street outside of her window. Norris objected to the admission of the KGA transmission on a variety of grounds. *See infra* n. 10. The circuit court overruled Norris' objections and admitted into evidence the KGA transmissions.

Norris called Sharon Black, a member of the People's Power Assembly,[4] as a plaintiff's witness "to support [Norris'] testimony as being honest" and "[t]o say how long she's known him and what her opinion is" of him. The Officers objected, arguing that Black contacted Norris "at or around the time of the criminal case" and is unable to formulate adequately an opinion as to Norris' character before or at the time of the incident. The trial judge sustained the objection.

Norris did not offer as evidence any medical testimony, medical records, or medical bills. He testified as to his injuries suffered and treatments received, and admitted photographic evidence of his bruises, bloody mouth, and scraped knees from the

[4] The People's Power Assembly represents that it is a civil rights protest group that aims to organize and empower workers and oppressed peoples to demand jobs, education, and healthcare, while fighting against racism, police terror, sexism & LGBT bigotry.

altercation. The jury awarded Norris $10,000.00 in compensatory damages, but declined his request for punitive damages.

Standard of Review

A trial court's rulings on the admissibility of evidence, and whether to admit or exclude a witness, are reviewed for "abuse of discretion." *Matthews v. Md.-Nat'l Capital Park & Planning Comm'n*, 368 Md. 71, 91, 792 A.2d 288, 300 (2002); *see also Figgins v. Cochrane*, 403 Md. 392, 419, 942 A.2d 736, 752 (2008). Such rulings are "left to the sound discretion of the trial court" and will not be reversed on appeal "absent a showing of abuse of that discretion." *Matthews*, 368 Md. at 91, 792 A.2d at 300 (quoting *Farley v. Allstate Ins. Co*., 355 Md. 34, 42, 733 A.2d 1014, 1018 (1999)). The abuse of discretion standard explains that:

> a ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling. The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.

King v. State, 407 Md. 682, 697, 967 A.2d 790, 799 (2009). An

> [a]pplication of [the abuse of discretion] standard [ ] depends on whether the trial judge's ruling under review was based on a discretionary weighing of relevance in relation to other factors or on a pure conclusion of law. When the trial judge's ruling involves a weighing, we apply the more deferential standard. On the other hand, when the trial judge's ruling involves a legal question, we review the trial court's ruling *de novo*.

Figgins, 403 Md. at 419, 942 A.2d at 752 (emphasis omitted) (quoting *Hall v. Univ. of Md. Med. Sys. Corp*., 398 Md. 67, 82–83, 919 A.2d 1177, 1186 (2007)).

Analysis

I. The Character Witness.

Norris argues that the circuit court prohibited erroneously Black's testimony to bolster his character for truthfulness under Md. Rule 5-608(a)(2).[5] Specifically, Md. Rule 5-404(a)(3),[6] permitting the admission of character evidence under Md. Rule 5-608, entitles him to have admitted her testimony because the Officers' conflicting testimony attacked his credibility, specifically relating to the duration of the assault.

In response, the Officers assert that we should decline to review the merits of this challenge because it was not raised in, or decided by, the trial court. *See* Md. Rule 8-131(a). Norris "did not argue that the witness was admissible under [Md.] Rule 5-608 when he offered her testimony . . . but rather tried to argue that [Md.] Rule 5-404 allowed the [the testimony of the] witness." Alternatively, the Officers argue that "Norris was not entitled to rehabilitate his character with testimony about his truthfulness because the [] Officers[] [] had not attacked his character for truthfulness." Moreover, Black knew Norris only for a brief period following his arrest and then only in the limited context of collaborating with him on certain societal issues arising from the incident.

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[5] Md. Rule 5-608 provides, in relevant part, that "[a]fter the character for truthfulness of a witness has been attacked, a character witness may testify (A) that the witness has a good reputation for truthfulness or (B) that, in the character witness's opinion, the witness is a truthful person."

[6] Md. Rule 5-404(a) explains that "evidence of a person's character or character trait is not admissible to prove that the person acted in accordance with the character or trait *on a particular occasion.*" (emphasis added). The Rule, however, notes in subsection (a)(3) that evidence "of the character of a witness with regard to credibility may be admitted under [Md. Rule 5-608]."

Maryland Rule 8–131(a) states that "[o]rdinarily [] the appellate court will not decide any [ ] issue unless it plainly appears by the record to have been raised in or decided by the trial court . . . ." Rule 8–131(a) requires a party to make "'timely objections in the lower court,'" or "'he[/she] will be considered to have waived them[,] and he[/she] cannot now raise such objections on appeal.'" *Breakfield v. State*, 195 Md. App. 377, 390, 6 A.3d 381, 388 (2010) (quoting *Caviness v. State*, 244 Md. 575, 578, 224 A.2d 417, 418 (1966)). The Court of Appeals explains, however, that

> M[d.] Rule 4-323, applicable to criminal cases,[7 Md.] Rule 2-517(a), applicable to civil cases,[8] and [Md.] Rule 5-103(a)(1), applicable to cases generally,[9] reflect the long established Maryland practice that a contemporaneous general objection to the admission of evidence ordinarily preserves for appellate review all grounds which may exist for the inadmissibility of the evidence . . . the only exceptions to the principle that a general objection is sufficient are where a rule requires the ground to be stated, where the trial court requests that the ground be stated, and "where

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[7] Md. Rule 4-323(a) provides in pertinent part

[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs.

[8] Md. Rule 2-517(a) provides in pertinent part

[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs.

[9] Md. Rule 5-103(a)(1) provides that

[e]rror may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling, and (1) [] [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was requested by the court or required by rule[.]

> the objector, although not requested by the court, voluntarily offers specific reasons for objecting to certain evidence."

Boyd v. State, 399 Md. 457, 475–76, 924 A.2d 1112, 1122–23 (2007) (citations omitted).

During the trial, the following colloquy occurred pertaining to the present issue:

> THE COURT: Okay. Do you have a witness today?
> [NORRIS' COUNSEL]: I do but it's a character witness.
> THE COURT: For [Norris]?
> [NORRIS' COUNSEL]: For [Norris], yes.
> THE COURT: Um-hum.
> [THE OFFICERS' COUNSEL]: Your honor, my objection [is to the] character witness.
> [NORRIS' COUNSEL]: And it was in my discovery as far as experts.
> THE COURT: Is it a person who was on your *voir dire* list?
> [NORRIS' COUNSEL]: Yes, ma'am.
>
> * * *
>
> [NORRIS' COUNSEL]: [Her name is] Sharon Black.
>
> * * *
>
> THE COURT: Does she work with [Norris] or something?
> [NORRIS' COUNSEL]: Yes, she's had many contacts with him.
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> * * *
>
> [NORRIS' COUNSEL]: . . . . She started contacting him at or around the time of the criminal case. . . .
>
> * * *
>
> THE COURT: And her testimony's being offered for what purpose?
> [NORRIS' COUNSEL]: For, to support [Norris'] testimony as being honest. . . . [She is going to say how long she's known him] and what her opinion is and that sort of thing.
> THE COURT: But you're indicating that she's only known him since this [incident] happened.
> [NORRIS' COUNSEL]: Since - -
> THE COURT: And in what context; that's what I'm trying to figure out. . . .
>
> * * *
>
> [THE OFFICERS' COUNSEL]: Then this is a civil case and the admission of character evidence, it's not admissible to call a witness to say that he's a nice guy or he's an honest guy. It's simply not admissible, period. But even if it were that the evidence, which it's not that a person who's known him for a short period of time that knows him. . . .
>
> * * *

> [NORRIS' COUNSEL]: Your Honor, [she came to know Norris] as a result of these cases, so the first matter in 2012.
> [THE OFFICERS' COUNSEL]: So it's a very short period of knowing somebody. It's based on this case.
> THE COURT: What rule says that character evidence can't come in in a civil case?
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> * * *
>
> [THE OFFICERS' COUNSEL]: It's, well, [Md. Rule] 5-404.
>
> (The Court then read aloud Md. Rule 5-404)
>
> THE COURT: . . . . So since she didn't know [Norris] until after this event, she wouldn't be able to testify to that. And then [Md. Rule 5-404] talks about [exceptions for the admissibility of character evidence in] criminal or delinquency cases.
> [NORRIS' COUNSEL]: Your honor, we would say it's neither of the exceptions for a criminal delinquent case or a character . . . .
>
> * * *
>
> THE COURT: But [Norris'] issue [falls] under Md. Rule 5-404(a)(1), right, and it says prohibited uses. . . .
> [NORRIS' COUNSEL]: But Judge, she has known him since 2012, 2013.
> THE COURT: When did this incident happen?
> [NORRIS' COUNSEL]: It was [29 March 2012].
>
> * * *
>
> THE COURT: Yes, but [her initial contact with Norris] was related to this incident, right? Right. So that's why it's not admissible.
>
> * * *
>
> [NORRIS' COUNSEL]: No, [her testimony] may be admissible under [Md. Rule 5-404(b),] other purposes such as proof of motive, opportunity, intent.
> THE COURT: Right, but you know [Md. Rule 5-404(b),] is associated with criminal not civil. All right, so do you have any other witnesses besides her?
> [NORRIS' COUNSEL]: No, Judge. Not ready for today.
>
> * * *
>
> [*NORRIS' COUNSEL*]*: And you honor, I'll just take exception to that.*

(emphasis added).

Norris' general exception regarding the admissibility of Black's testimony preserved his appellate challenge for our review. *See* Md. Rule 2-517(a). On the merits, Norris avers that the trial judge, when denying the admission of Black's testimony, failed

to consider Md. Rule 5-608 despite the explicit reference to it in Md. Rule 5-404(a)(3) ("Evidence of the character of a witness with regard to credibility may be admitted under Md. Rules 5-607, 5-608, and 5-609.").

Maryland Rule 5-608(a)(2) provides that evidence of a person's character may be admissible *only after* "the character for truthfulness of a witness has been attacked." Norris suggests that the Officers' cross-examination of him as to "the duration of assault," a point on which the parties disagree, sufficed to justify Black's testimony to bolster his credibility. We disagree. "The mere fact that a witness's testimony is contradicted by opposing testimony does not warrant the introduction of evidence as to his reputation for truth and veracity." *Hallengren v. State*, 14 Md. App. 43, n.2, 50, 286 A.2d 213, n.2 217 (1972) (citing *Vernon v. Tucker*, 30 Md. 456, 462 (1869) ("Contradictory testimony of different witnesses may proceed from want of equal knowledge or observation, not involving the moral character of either; but such conflict does not authorize the admission of evidence as to the general character of the witness for truth.")). The record reflects no such attack on Norris' character for truthfulness. Maryland Rule 5-608(a)(2) does not allow for the admission of Black's testimony for the reason for which Norris offered it.

Moreover, Black became acquainted with Norris only after the incident. She possessed no knowledge regarding Norris' character for truthfulness or veracity during or preceding the incident. The circuit court deduced correctly that Black's testimony would be largely irrelevant. The court did not abuse its discretion in excluding the admission of Black's testimony.

II. The Officers' Testimony.

Norris contends that the trial court abused its discretion by admitting the testimony of the Officers as evidence relevant to the issue of damages. As his argument goes, the Officers' testimony rendered a nullity the trial court's grant of summary judgment to Norris as to liability. The Officers respond that they have the right to testify at the trial to determine what damages might be due Norris. Notably, Norris sought punitive damages, which put in play whether the Officers exhibited malice in their conduct toward Norris. The Officers' testimony was relevant because they "had to be allowed the opportunity to explain to the jury that they did not hold any ill will towards [] Norris, that they did not know [him] before his arrest, and that they were [] trying to protect themselves and effectuate" Norris' arrest.

Norris sought compensatory damages *and* punitive damages from the Officers. Malice is a prerequisite to recovery for punitive damages. *Drug Fair v. Smith*, 263 Md. 341, 283 A.2d 392 (1971); *Galusca v. Dodd*, 189 Md. 666, 670, 57 A.2d 313, 315 (1948) (explaining that if injuries are "inflicted maliciously and wantonly, the jury is not restricted to actual or compensatory damages but may give in addition thereto such punitive or exemplary damages as the circumstances of the case will warrant."). Malice, whether actual or express, is the "performance of an unlawful act, intentionally or wantonly, without legal justification or excuse but with an evil or rancorous motive influenced by hate; the purpose being to deliberately and willfully injure the plaintiff." *Smith*, 263 Md. at 352, 283 A.2d at 398. Punitive damages are available generally in "situations [where] the

defendant's conduct is characterized by knowing and deliberate wrongdoing." *Ellerin v. Fairfax Sav., F.S.B.*, 337 Md. 216, 228, 652 A.2d 1117, 1123 (1995). Thus, all relevant evidence, i.e., evidence that tends to establish or refute a fact at issue in the case, is generally admissible. *See* Md. Rules 5-402, 5-403.

It is an eccentric suggestion that the Officers should be prevented from testifying as they did at a trial determining whether punitive damages may be awarded. The Officers' cited testimony was relevant to the issue of malice. We find no abuse of discretion or error of law by the trial court in admitting the Officers' testimony.

III. The KGA Transmission.

Norris avers that the trial judge abused her discretion in admitting the KGA transmission without sufficient authentication under Md. Rules 5-901 and 5-902(b) as required by the business record hearsay exception of Md. Rule 5-803(6). He contends that Sergeant Murphy's testimony in that regard was insufficient as portions of the KGA transmission were distinct from his first-hand knowledge. Moreover, Norris argues that the 9-1-1 citizen call, nested within the KGA transmission, is inadmissible hearsay.

The Officers respond that the challenges to the authentication of the KGA transmission (in the context of Md. Rules 5-901 & 5-902 and under the business record hearsay exception of Md. Rule 5-803(6)) are not preserved for appellate review. *See* Md. Rule 8-131. Norris "argued against the introduction of the KGA tape on many meritless grounds, but [] never raised the issue of authentication under [Md.] Rule 5-901."

Moreover, the nested 9-1-1 call within the KGA transmission satisfies the present sense impression and the excited utterance hearsay exceptions to Md. Rule 5-802.

Maryland Rule 5-801 defines hearsay as "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." Hearsay is "inadmissible as evidence because of its inherent untrustworthiness." *Marquardt v. State*, 164 Md. App. 95, 123, 882 A.2d 900, 916 (2005); Md. Rule 5–802 ("Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible."). "If a nontestimonial out-of-court statement made by an unavailable declarant contains hearsay, the hearsay must fall within an exception to the hearsay rule or bear particularized guarantees of trustworthiness in order to be admitted into evidence." *Marquardt*, 164 Md. App. at 123, 882 A.2d at 916 (internal quotation marks omitted).

In *Parker v. State*, 408 Md. 428, 436, 970 A.2d 320, 325 (2009) (quoting *Bernadyn v. State*, 390 Md. 1, 7–8, 887 A.2d 602, 606 (2005)), the Court of Appeals discussed the standard of review for hearsay rulings:

> We review rulings on the admissibility of evidence ordinarily on an abuse of discretion standard. Review of the admissibility of evidence which is hearsay is different. Hearsay, under our rules, must be excluded as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence or is "permitted by applicable constitutional provisions or statutes." Md. Rule 5–802. Thus, a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility. Whether evidence is hearsay is an issue of law reviewed *de novo*.

a. Authentication and the Business Record Hearsay Exception.

As we explained earlier, Md. Rule 8–131(a) requires a party to make "'timely objections in the lower court,'" or "'he[/she] will be considered to have waived them and he[/she] cannot now raise such objections on appeal.'" *Breakfield*, 195 Md. App. at 390, 6 A.3d at 388 (quoting *Caviness*, 244 Md. at 578, 224 A.2d at 418). It is well established that "when an objector sets forth the specific grounds for his objection . . . the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified." *Gutierrez v. State*, 423 Md. 476, 488, 32 A.3d 2, 9 (2011) (quoting *Sifrit v. State*, 383 Md. 116, 136, 857 A.2d 88, 99 (2004)). We do not engage in the interpretation of an appellate theory as a more detailed version of the theory advanced at trial because to do so would "require trial courts to imagine all reasonable offshoots of the argument actually presented to them before making a ruling on admissibility." *Sifrit*, 383 Md. at 136, 857 A.2d at 100.

Here, Norris, during the trial, objected to the admission of the KGA tape on a litany of grounds.[10] Norris' objections, however, were not "general" such as to garnish

[10]Norris' appellate counsel is different than his trial counsel. Norris objected to the admission of the KGA transmission in the following forms:

> [THE OFFICERS' COUNSEL]: I also intend to introduce a portion of the KGA tape through Sergeant Murphy.
> [THE COURT]: Do you have an objection?
> [NORRIS' COUNSEL]: Yes, Judge?
> [THE OFFICERS' COUNSEL]: Okay. The basis?
> [NORRIS' COUNSEL]: And the basis is that that led to the stop and the beating, all of which was found to be illegal by both Judge Doory [(judge presiding over the suppression hearing)] and by Judge Nance [(judge presiding over Norris' motion for summary judgment)].

preservation protection under Md. Rule 2-517. Rather, Norris articulated a specific basis for each exception to the admission of the KGA transmission. The closest objection from Norris, appearing to go to the issue of authentication as it relates to the business record hearsay exception, is as follows:

> [NORRIS' COUNSEL]: Uh-huh. And, Your Honor, I object. Also – anyone could have called in the 9-1-1 tape and according to this it happened so quickly this date is fictitious as you hear it. And it wouldn't have allowed time for the beating. They made this tape up. I'm not talking about the [Officers], but on their behalf someone ordered that tape made up and it only cites two people beating him when the other people arrive.

The context of this objection followed the parties' argument regarding the reliability and inconsistency of statements made on the KGA transmission and Norris' testimony, but did not relate to authenticity. Norris waived his appellate challenge to the admission of the

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* * *

> [THE OFFICERS' COUNSEL]: No, [the KGA transmission comes in] under the exception 5-803, declarant unavailability is not required. Subsection (b), a present sense impression, a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter. There's a second aspect to this. There is an excited utterance from a 9-1-1 caller saying, [Norris] is beating up these officers.
> NORRIS' COUNSEL]: I object, Judge.

* * *

> [NORRIS' COUNSEL]: . . . In this particular case, [the KGA transmission] is completely contrary to Judge Nance's amended order for the motion for summary judgment.

* * *

> [NORRIS' COUNSEL]: . . . I'm not saying, Judge, that they didn't send me a tape. I'm just saying I never got it in a condition that I could play it. But even if I got it in a condition that I could play it, its irrelevant because of Judge Nance's findings. . . And also there are several – there are a large number of people speaking and it really is not relevant to the – in light of Judge Nance's rulings that applied to all counts. It's not relevant.

KGA transmission on the grounds of improper authentication under Md. Rules 5-901 and 5-902(b)(2).

In any event (had the appellate question been preserved), Md. Rule 5-902(b) states, in the context of a certified record of a regularly conducted business activity, that "[t]estimony of authenticity as a condition precedent to admissibility *is not required* as to the original . . . record of regularly conducted business activity, within the scope of [Md.] Rule 5-803(b)(6) *that has been certified* pursuant to subsection (b)(2) of this Rule." (emphasis added). Although the record reflects that the Officers did not provide certification for the admission of the KGA transmission, it was unnecessary in light of Sergeant Murphy's testimony. "[T]he burden of proof for authentication is slight, and the court 'need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so.'" *Winston v. State*, 235 Md. App. 540, 565–66, 178 A.3d 643, 657 (2018) (quoting *Dickens v. State*, 175 Md. App. 231, 239, 927 A.2d 32 (2007)). Maryland Rule 5-901 notes that the following suffices for authentication: "(1) Testimony of a witness with knowledge that the offered evidence is what it is claimed to be . . . (3) Circumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be."

Sergeant Murphy testified as follows:

> [THE OFFICERS' COUNSEL]: All right. And you've described what a 10-15 is. What's KGA?
> [SERGEANT MURPHY]: KGA is a term that we use for communications. So anything that has to do with communications, if I were to call the

> dispatcher I would say, my current unit number is 7060. I would say, 7060 to KGA. And then the dispatcher would respond to me. What they do is they take 9-1-1 calls, deal with dispatching and they record all the radio traffic.
> [THE OFFICERS' COUNSEL]: So they – in addition to talking with officer they do take 9-1-1 and – take and record –
> [SERGEANT MURPHY]: Yeah, and It's all --
> [THE OFFICERS' COUNSEL]: -- 9-1-1 calls?
> [SERGEANT MURPHY]: -- under the same umbrella.
> [THE OFFICERS' COUNSEL]: When a KGA recording is made, based on your experience, it is recorded in real time?
> [SERGEANT MURPHY]: Yes.
> [THE OFFICERS' COUNSEL]: It's not compressed or edited out.
> [SERGEANT MURPHY]: No.
> [THE OFFICERS' COUNSEL]: Have you listened to the KGA recording regarding this incident, which has been marked for identification, the disk, as Defendant's Exhibit 1?
> [SERGEANT MURPHY]: I have.
> [THE OFFICERS' COUNSEL]: And is that KGA recording in real time from what you've heard?
> [SERGEANT MURPHY]: Yes.
> [THE OFFICERS' COUNSEL]: And did that recording at – or is that recording consistent with your recollection of this incident?
> [SERGEANT MURPHY]: Yes.

The circuit court then directed that the KGA transmission be played in its entirety for the jury. The Officers presented sufficient evidence, direct and circumstantial,[11] from which the jury could infer that the KGA transmission is what the Officers' claimed. Had this

[11] As the Officers point-out,

> the circumstantial evidence from the [KGA transmission] itself that the tape was what [the Officers] said it was included multiple references to the location of the arrest, the 9-1-1 operator identifying himself as such, the call-out of "a 13" signal (officers in distress), and multiple minor items consistent with the quotidian minutia of police activity (e.g. locating a transport wagon after arrest; running []Norris' plates; giving directions on how best to reach the location). Such circumstantial evidence can give enough detail to allow a jury to conclude the tape is real, and when it is considered in combination with [Sergeant] Murphy's testimony, it is indisputable that the slight requirement for authentication was met.

issue been preserved for our review, we would find no abuse of discretion by the circuit court.

b. The 9-1-1 Call.

Under Md. Rule 5-805, "[i]f one or more hearsay statements are contained within another hearsay statement, each must fall within an exception to the hearsay rule in order not to be excluded by that rule." The KGA tape contained a 9-1-1 call. The out-of-court 9-1-1 caller's statements fall within hearsay. The Officers produced the statements to prove that they "were defending themselves from the beating that was being inflicted by [Norris]," i.e., reflecting on the malice element of importance to Norris' punitive damages claim. The 9-1-1 caller's iterations, as hearsay, must fall within a recognized hearsay exception to be admissible. *See* Md. Rules 5-803, 5-805. The hearsay statements made on the 9-1-1 call fall arguably within two exceptions to Md. Rule 5-802 – present sense impression, Md. Rule 5-803(b)(1), and excited utterance, Md. Rule 5-803(b)(2).

The 9-1-1 call exchange on the KGA tape, as it pertains to this appeal, is as follows:

> MALE VOICE: Baltimore City 9-1-1, Operator (inaudible), can you please (inaudible).
> FEMALE VOICE: The police, they need help.
> MALE VOICE: (Inaudible) location?
> FEMALE VOICE: (Inaudible). (Inaudible) Norfolk Avenue (inaudible) Granada. (Inaudible). Help the policemen.
> MALE VOICE: Okay, what happened, ma'am?
> FEMALE VOICE: They – there's a man who's fighting with them. (Inaudible)
> MALE VOICE: (Inaudible).
> FEMALE VOICE: Yes.
> MALE VOICE: Okay. Any weapon involved you see?
> FEMALE VOICE: I can't - I have to go back to the window but they're - they need help.

> MALE VOICE: Okay. And there's two males fighting?
> FEMALE VOICE: No. A man fighting two policemen.
> MALE VOICE: Oh two - a - two men fighting two policemen. Okay.
> FEMALE VOICE: No. No. A man is fighting two policemen, but he's so big. He's a big, big man.
> MALE VOICE: Okay. All right. We'll have someone (inaudible) -
> FEMALE VOICE: Send some police to help them.
> MALE VOICE: -- *get on the – we're getting someone out there ma'am, okay? Just calm down, all right?* They are 45 - 4300 block of Norfolk. They're in the (inaudible) on the side of the house (inaudible).
> FEMALE VOICE: On the side of the house.
> MALE VOICE: On the side of the house. Near Granada?
> FEMALE VOICE: Yes.
> MALE VOICE: Okay. We'll have someone out there.
> FEMALE VOICE: Yeah. (Inaudible).

(emphasis added).

Md. Rule 5-803(b)(2) defines an excited utterance as "[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." We iterated in *Marquardt v. State*, 164 Md. App. 95, 123, 882 A.2d 900, 917 (2005) (quoting *Parker v. State*, 365 Md. 299, 313, 778 A.2d 1096, 1104 (2001)), that

> [t]he essence of the excited utterance exception is the inability of the declarant to have reflected on the events about which the statement is concerned. It requires a startling event and a spontaneous statement which is the result of the declarant's reaction to the occurrence. The rationale for overcoming the inherent untrustworthiness of hearsay is that the situation produced such an effect on the declarant as to render his reflective capabilities inoperative. The admissibility of evidence under this exception is, therefore, judged by the spontaneity of the declarant's statement and an analysis of whether it was the result of thoughtful consideration or the product of the exciting event.

The burden rests with the party asserting that the statement falls within the excited utterance hearsay exception to prove the statement was the result of spontaneity, rather

than of reflection or meditation. *Marquardt*, 164 Md. App. at 124, 882 A.2d at 917 (quoting *Harmony v. State*, 88 Md. App. 306, 320, 594 A.2d 1182, 1188 (1991)) (internal quotation marks and brackets omitted). We examine the "totality of the circumstances" when determining whether a lower court characterized properly a statement as an excited utterance. *Gordon v. State*, 431 Md. 527, 536, 66 A.3d 647, 652 (2013). A determination by a trial court whether a hearsay statement is an excited utterance is deserving of deference from appellate courts and will not be reversed absent a showing of an abuse of discretion. *Id.*; *Marquardt*, 164 Md. App. at 124, 882 A.2d at 917.

A present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Md. Rule 5-803(b)(1). Present sense impressions possess reliability because of their spontaneity, so "the time interval between observation and utterance must be very short," *Booth v. State*, 306 Md. 313, 324, 508 A.2d 976, 981 (1986), to reduce "the chance of premeditated prevarication or loss of memory." *Booth*, 306 Md. at 323, 508 A.2d at 976, 980. The appropriate inquiry is whether, considering the surrounding circumstances, sufficient time elapsed to have permitted reflective thought. *Id.*

The statement also should be devoid essentially of all reflection of opinion, *Booth*, 306 Md. at 324, 508 A.2d at 981, and be "receivable as a shorthand fact description." *Booth*, 306 Md. at 327, 508 A.2d at 982. The declarant's impression need not be corroborated by an "independent and equally percipient observer," *Booth*, 306 Md. at 327, 508 A.2d at 982,

so long as the declarant renders his or her recollection of the events perceived. *Booth*, 306 Md. at 327, 508 A.2d at 983.

Given these principles, the "excited utterance and present sense impression exceptions overlap, though based on somewhat different theories. The underlying rationale of the two exceptions are similar, i.e., both preserve the benefit of spontaniety [sic] in the narrow span of time before a declarant has an opportunity to reflect and fabricate." *Booth*, 306 Md. at 324, 508 A.2d at 981.

As noted earlier, the trial court "allow[ed] the [Officers] to play [the] entire tape" to the jury. The court affirmed implicitly that the 9-1-1 call nested within the KGA transmission was admissible under *either* the present sense impression or the excited utterance hearsay exceptions. We agree. It is undisputed that the statements by the unidentified woman on the 9-1-1 call appeared "excited." Notably, the 9-1-1 operator requested the woman to "calm down." Nor is it disputed that Sergeant Murphy confirmed that the statements made and recorded on the KGA transmission are in "real time," reflecting no delay, alterations, or edits. Indeed, Sergeant Murphy testified that the 9-1-1 call and the altercation occurred concurrently (or shortly thereafter). Moreover, the unidentified woman on the 9-1-1 call uses the present tense, rather than "language [indicating] a conscious deduction." *Booth*, 306 Md. at 324-25, 508 A.2d at 981. She states, *inter alia*, that "the police need help," "there's a man who's fighting with them," "[a] man [is] fighting two policemen." Nowhere in the 9-1-1 call exchange does the caller utilize the past tense or verbiage indicating a conscious deliberation.

Following the 9-1-1 call, the male voice on the KGA transmission called in a "signal 13" to dispatch. Sergeant Murphy testified that a "signal 13" is a code for an officer in *present* distress. Sergeant Murphy's testimony evinces that the 9-1-1 caller was "serving as a testimonial conduit" for her present perception of the altercation. Although Norris advances arguments challenging the reliability of the unidentified 9-1-1 caller's statements, he offered no evidence rebutting meaningfully the uncontroverted testimony showing that the 9-1-1 call and the altercation occurred simultaneously. The circuit court did not abuse its discretion in admitting the KGA transmission and the nested 9-1-1 call.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.