Circuit Court for Worcester County
Case No. C-23-CR-18-356

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 395

September Term, 2020

JAMES TROY DURHAM

v.

STATE OF MARYLAND

Kehoe,
Friedman,
Ripken,

JJ.

Opinion by Kehoe, J.

Filed: July 21, 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. *See* Md. Rule 1-104.

After a jury trial in the Circuit Court for Worcester County, James Troy Durham was convicted of second-degree assault and sentenced to seven years in prison. He raises a single question on appeal:

> Did the trial court err in excluding as hearsay a defense witness's testimony about statements made over the phone by declarants who were contemporaneously witnessing or participating in the fight?

We conclude that the trial court erred when it excluded evidence about two of the out-of-court statements at issue in this appeal. Because the errors were not harmless, we reverse the conviction.

Background

At the time relevant to this case, Ken Stachowski, Jr. owned Ken-Do's R.V. Repair in Worcester County. Stachowski had two full-time employees: Durham and Wayne Williams. He also subcontracted work to Walter "Pops" Collins.

On September 25, 2018, Stachowski found out that Collins was starting his own R.V. repair business. Stachowski first told Durham about this and then confronted Collins about the issue. After he spoke with Collins, Stachowski left Ken-Do's for a service call. This was around 5:30 p.m. About an hour later, Stachowski received two calls on his mobile phone, one from Williams and one from Durham. The issues in this appeal involve limitations on Stachowski's testimony about what he heard during these calls.

In the first call, Williams told Stachowski that Collins was "on top of [Durham] trying to kill him." In response, Stachowski told Williams to immediately call 9-1-1, which he did.[1]

Very soon after Williams hung up, Stachowski received a call from Durham. He told Stachowski that "he was being beat by" Collins. Stachowski could also hear Collins shouting very angrily in the background. But before anything else could be said, the call ended abruptly.

Officer Christopher Larmore responded to Williams's 9-1-1 call and arrived at Ken-Do's at around 7:00 p.m. Officer Larmore did not find Durham at the scene, but he did rencounter Williams, who was hesitant about discussing the fight in detail. Officer Larmore also found Collins, who was severely beaten and was having trouble breathing. Officer Larmore called emergency services who transported Collins to the hospital. Collins was eventually transferred to a shock trauma unit for treatment. He was diagnosed with multiple fractures to his jaw as well as fractured ribs. The hospital records disclosed that he was in possession of a knife when he was admitted.

Officer Larmore arrested Williams at the scene on an unrelated warrant. When he arrived at the police station, Detective Kyle Hayes interviewed him. Williams told the

[1] In his call to the 9-1-1 center, Williams told the 9-1-1 operator that there were "two guys fighting out here," that they were "gonna kill each other," and that "one guy" had a knife. Portions of the recording of this call were admitted into evidence.

detective that before the fight broke out, he saw Collins chase Durham and heard the two men arguing about something. He said that the fight lasted about twenty minutes. He saw Durham hit Collins and the two men wrestling on the ground. Williams also said that Durham was "very violent" during the fight and that Durham was doing most of the damage, but he noted that "obviously [Durham acted] in self-defense" because both were very violent. Based on this information, Detective Hayes obtained an arrest warrant for Durham. When Durham learned about the warrant, he turned himself in.

Durham was originally indicted on six separate charges arising out of the fight with Collins. Only two of them, first and second-degree assault, survived pre-trial maneuvering, and eventually, the case proceeded to trial on those charges.

In his first trial, Durham was acquitted of first-degree assault but the jury could not reach a verdict on the second-degree assault charge. The court declared a mistrial. The second trial also ended in a mistrial, not because of a deadlocked jury but because of Durham's courtroom misbehavior in the presence of the jury.

Durham's third trial occurred in January 2020. In his opening statement to the jury, defense counsel noted that during the fight Durham was on the phone with Stachowski and that what happened on that phone call, along with other evidence, would show that Durham acted in self-defense.

During the trial, Detective Hayes testified that he interviewed Durham when he turned himself in. According to Detective Hayes, Durham told him that Collins had hurled homophobic slurs at him, punched him, and held him to the ground. Durham said he eventually

broke free and retreated to his car where he managed to take a picture of Collins standing upright. According to Durham, that stopped the attack. Detective Hayes also took pictures of Durham's black eyes.

Williams also testified, but he said he could not remember any of the details of the fight because he was drunk during it. Eventually, the court found that Williams was feigning memory loss, so the trial court admitted portions of Williams's interview with Detective Hayes and his 9-1-1 call.

Collins testified too. He said that Durham had followed him into Ken-Do's garage and told him that he was "going to find out what you—who you are, what you're about." He then said that he pushed Durham and that Durham then punched him in the face. After that, they fell to the ground wrestling, and Durham started to punch and kick him in his face and body.

Durham testified and disputed Collins's account of things. According to Durham, Collins told him that he would "f-----g kill you, mother f----r." Then Collins hit him. Durham said he retreated, and that Collins followed him saying that he was going to "f---k [Durham] up and kill [him]." Collins then pinned Durham to a wall, threw him to the ground, and smashed his face against the ground. Durham said that he got away and called Stachowski. During that call, he told Stachowski that Collins was attacking him, and "beating on [him]." Durham also stated that Collins screamed at him, called him a "faggot," said that he was going to "f-----g kill [Durham]," and said he had "something for [him]" while reaching into his pocket. Durham said too that Collins cut his call to Stachowski short by punching him

again. And he admitted that he fought back using his body, hands, and feet to keep Collins off him.

Finally, Stachowski testified. As we have related, the issues in this appeal revolve around defense counsel's efforts to elicit testimony from Stachowski concerning what he had heard when he was on the phone with Williams and Durham. The court excluded all of the statements. We are concerned with three separate exchanges between the court, counsel, and the witness and we will discuss them later.

ANALYSIS

Durham argues that the trial court erred when it excluded parts of Stachowski's statements as hearsay. The State asserts that the trial court did not err, any error was not preserved for appellate review and any error was harmless.

Maryland 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." Rule 5-801(c). Hearsay is inadmissible "unless it is otherwise admissible under a constitutional provision, statute, or another evidentiary rule." *Wallace-Bey v. State*, 234 Md. App. 501, 536 (2017). But a witness's testimony is not hearsay "merely because the witness testifies about words spoken by another person outside of court." *Id*. For example, "[a]n out of court statement is admissible, if it is not being offered for the truth of the matter asserted." *Handy v. State*, 201 Md. App. 521, 539 (2011). If a statement "is not offered for

the truth of the matter asserted, it is not hearsay and it will not be excluded under the hearsay rule." *Wallace-Bey*, 234 Md. App. at 536. Whether a statement is admissible under an exception to the hearsay rule is a legal issue that we review *de novo*. *Id.*

1. Williams's statement to Stachowski that "[Collins] is on top of [Durham] trying to kill him."

The first exchange between counsel, the court, and Stachowski that is at issue in this appeal was (emphasis added):

> DEFENSE COUNSEL: Okay. And did you, in fact, get on the road to begin to make that service call?
>
> STACHOWSKI: I did in time, yes.
>
> DEFENSE COUNSEL: And did there come a point in that—did you get to your service call without incident?
>
> STACHOWSKI: No.
>
> DEFENSE COUNSEL: What incident or incidents occurred on your way down to the service call?
>
> STACHOWSKI: Just prior to making the turn into where I had to go, my cell phone rang.
>
> DEFENSE COUNSEL: Who called you?
>
> STACHOWSKI: Wayne Williams.
>
> *DEFENSE COUNSEL: Ultimately, did you—at the conclusion of the call, did you direct Wayne to do something?*
>
> *STACHOWSKI: Yes.*
>
> *DEFENSE COUNSEL: What did you direct him to do?*
>
> *STACHOWSKI: I told him to call 911.*

> DEFENSE COUNSEL: Why did you tell him to call 911?
>
> STACHOWSKI: He said, turn around and get back, Pops is on top of Troy trying to kill him.
>
> PROSECUTOR: Objection
>
> THE COURT: All right. Sustained. Ignore that answer. Go ahead. Ask another question.
>
> DEFENSE COUNSEL: May we approach, Your Honor?
>
> THE COURT: No. I've made my ruling. Isn't that hearsay?
>
> DEFENSE COUNSEL: *Note an objection for the record.*
>
> THE COURT: Hearsay. *Go ahead and ask another question*.
>
> DEFENSE COUNSEL: *It is not hearsay, Your Honor. It is not for the truth of the matter asserted. It is for the effect on the listener*. The foundation—
>
> THE COURT: I have made my ruling . . . . Ask another question.
>
> DEFENSE COUNSEL: Just for the record, Your Honor, I've laid my foundation that he directed him to call 911, and then I asked why.
>
> THE COURT: Are you going to ask another question or not?
>
> DEFENSE COUNSEL: I will.

Durham argues that the trial court erred in excluding Williams's statement to Stachowski that "[Collins] is on top of [Durham] trying to kill him" as inadmissible hearsay because the statement was not offered to prove the truth of the matter asserted. Rather, he asserts, it was offered to show the effect it had on Stachowski.

This was certainly the contention that was made to the trial court. The problem with the argument is that defense counsel had just established the effect that Williams's statement had on Stachowski—it caused Stachowski to tell Williams to call 9-1-1. Having accomplished his purported purpose, defense counsel's follow-up question was superfluous. The trial court did not err when it sustained the prosecutor's objection.

Alternatively, Durham argues that even if the statement were offered to prove the truth of the matter asserted the trial court should have admitted it under either the excited utterance or present sense impression exceptions to the hearsay rule. But, as Durham concedes, defense counsel proffered to the trial court that Williams's statement was offered, not for its truth, but only to show the effect it had on Stachowski. "When a party specifies particular grounds for an objection, it is deemed to have waived all other grounds not mentioned." *Pitt v. State*, 152 Md. App. 442, 463 (2003). Recognizing this, Durham asks us to conduct plain error review. We decline to do so.

As to evidentiary issues, the doctrine of plain error review is limited to appellate contentions that were forfeited because of a failure by the defendant to raise the issue at trial, typically by means of an objection or a proffer. But in the present case, we aren't dealing with forfeiture but with waiver. By affirmatively representing to the trial court that the information was not intended to be admitted for the truth of the matter asserted, Durham waived the right to ask an appellate court to engage in plain error review on any other ground. *See Carroll v. State*, 202 Md. App. 487, 509 (2011), *aff'd*, 428 Md. 679 (2012)

(discussing the distinctions between waiver and forfeiture of an issue for plain error review purposes).

2. Durham's statement to Stachowski that "he was being beat by [Collins]."

Next, defense counsel asked Stachowski if he had received a phone call from Durham and what, if anything, Durham said to him on that call (emphasis added):

> DEFENSE COUNSEL: Did you receive any other calls?
>
> STACHOWSKI: Yes.
>
> DEFENSE COUNSEL: Who did you receive a phone call from?
>
> STACHOWSKI: From [Durham], 30-some seconds later.
>
> DEFENSE COUNSEL: *Okay. What was—what did [Durham] tell you?*
>
> PROSECUTOR: *Objection.*
>
> THE COURT: *Sustained.*
>
> DEFENSE COUNSEL: Your Honor—
>
> THE COURT: *Would you ask another question? Don't you understand I've made my ruling?*
>
> * * *
>
> DEFENSE COUNSEL: What did you tell [Durham] to do at the conclusion of that call?
>
> STACHOWSKI: Call the police.
>
> DEFENSE COUNSEL: Why?
>
> PROSECUTOR: Objection.
>
> STACHOWSKI: *Because he was being beat by [Collins].*

THE COURT: *Sustained*.

DEFENSE COUNSEL: Again, continue—

PROSECUTOR: *Ask to strike, Your Honor*.

THE COURT: *All right. Ignore his answer.* Ask another question.

DEFENSE COUNSEL: Your Honor, *may we approach*?

* * *

THE COURT: *No. Ask a question*.

Durham asserts that his statement that "he was being beat by [Collins]" to Stachowski was, among other things, an excited utterance, and the trial court erred in excluding it. The State, however, contends that Durham did not lay a proper foundation for the excited utterance hearsay exception, with the result that Durham failed to preserve this issue for appeal. Alternatively, the State argues that the evidence is cumulative, so it would not have affected the verdict either way. The State's arguments are not persuasive.

An excited utterance is admissible despite being hearsay and is 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." Md. Rule 5-803(b)(2). The party that introduces a hearsay statement as an excited utterance "must establish the foundation for admissibility, namely personal knowledge and spontaneity." *Cooper v. State*, 434 Md. 209, 242 (2013) (citation omitted).

Returning to the case before us, Durham had personal knowledge because he made the statement during his altercation with Collins. Thus, Durham met the first part of the test.

As to the requirement of spontaneity, we examine the "totality of the circumstances." *Cooper*, 434 Md. at 242. Generally, a statement is spontaneous when made as an "instinctive reaction" by a "declarant who is still emotionally engulfed by the situation." *Id.*; *Parker v. State*, 365 Md. 299, 317 (2001) (stressing the importance of examining the circumstances for an indication that the startling event dominated the declarant's thought process when the statement was made); *Davis v. State*, 125 Md. App. 713, 716–17 (1999) (holding that the victim's statement to a police officer while she was still agitated after being assaulted by the defendant was admissible as an excited utterance even though it was made fifteen minutes after the assault).

We conclude that Durham adequately laid a foundation showing that his statement to Stachowski was an excited utterance. Prior to Stachowski's taking the stand, Durham had testified that Collins was "attacking [and] beating on" him while he was speaking to Stachowski. Durham also testified that Collins punched him again cutting his phone call with Stachowski short. This is sufficient to show that Durham "was under the stress of excitement caused by the event or condition." Md. Rule 5-803(b)(2).

The State also argues that Durham's statement to Stachowski was cumulative because Durham had already testified that he told Stachowski Collins was attacking him. We do not agree. "Evidence is cumulative when, beyond a reasonable doubt, we are convinced that there was sufficient evidence, independent of the evidence complained of, to support the appellant's conviction." *Dove v. State*, 415 Md. 727, 743–44 (2010) (cleaned up). Because Williams, the only eyewitness to the fight, feigned ignorance at trial and gave conflicting

statements to Detective Hayes, the outcome of this case depends in large part on whether the jury believed Durham's version or Collins's version as to what occurred. Stachowski's testimony confirmed Durham's story that Collins was the aggressor but the jury was not allowed to consider it. We cannot say beyond a reasonable doubt that Stachowski's testimony would not have affected the ultimate verdict.

3. Stachowski's testimony as to what he heard Collins say while he was on the phone with Durham

In the final exchange, defense counsel asked Stachowski whether he had heard Collins talking in the background of his call with Durham:

> DEFENSE COUNSEL At any point during the call with Mr. Durham did you hear Mr. Collins's voice?
>
> STACHOWSKI: Yes.
>
> DEFENSE COUNSEL: Was he angry?
>
> PROSECUTOR: Objection—
>
> STACHOWSKI: Very.
>
> THE COURT: All right. Did I hear an objection or not?
>
> DEFENSE COUNSEL: Yes.
>
> PROSECUTOR: No, Your Honor. I'll withdraw.
>
> THE COURT: All right. Go ahead.
>
> DEFENSE COUNSEL: Was he yelling?
>
> STACHOWSKI: Yes.
>
> DEFENSE COUNSEL: What did he say?

PROSECUTOR: Objection.

THE COURT: Sustained.

Durham argues that the trial court erred by excluding Stachowski's testimony about what he heard Collins yell at Durham while they were on the phone with each other because it was admissible to show Collins's state of mind during the fight. In response, the State argues that the issue is not preserved because Durham never proffered why the testimony was relevant. We disagree with the State for two reasons.

The first is that, where, as in the present case, the trial court has made it very clear that it will not permit counsel to make a proffer or to approach the bench, counsel is not obligated risk either contempt or the more likely consequence of a reprimand from the bench to preserve an issue for appellate review. *See, e.g., Johnson v. State*, 352 Md. 374, 390–91 (1999).

Second, a proffer was unnecessary here. Generally, when a court excludes evidence, the aggrieved party can preserve the issue for appeal by making a proffer to the court "the substance and relevance of the excluded evidence." *See Devincentz v. State*, 460 Md. 518, 535 (2018); Md. Rule 5-103(a)(2). "But a proffer is not an absolute requirement for preservation." *Devincentz*, 460 Md. at 535. An issue will be preserved if, through her questions, the examiner has "clearly generate[d] the issue." *Jorgensen v. State*, 80 Md. App. 595, 601 (1989) (holding that appellant had preserved an issue for appeal, even with no proffer, because "the issue was clearly presented by the questions and the opening statement") (citation omitted).

As noted above, defense counsel said in his opening statement that Durham's call to Stachowski was a critical piece of evidence that would show that Durham acted in self-defense. Durham also testified that Collins was yelling at him while Durham was on the phone with Stachowski. Durham said that Collins called him a homophobic slur and said that he was going to "f-----g kill [him]," and that he had "something for [him]" while reaching into his pocket. And Stachowski testified that he heard Collins yelling in the background of his phone call with Durham and that Collins sounded "very" angry. Finally, by this time in the proceeding, it was clear that Stachowski was testifying to events happening during the fight between Durham and Collins and that Durham was pursuing a self-defense claim, which meant Collins's state of mind was a critical piece of evidence. Given all of this, we hold that no proffer was necessary under these circumstances.

We also agree with Durham that Collins's statements were admissible under the then existing state of mind hearsay exception. Under Rule 5-803(b)(3), a declarant's statement of his "then existing state of mind" is admissible if offered to show, among other things, his "intent, plan, or motive." "Under this exception, forward-looking statements of intent are admissible in order to prove that the declarant subsequently took a later action in accordance with that stated intent." *Nat'l Soc. of Daughters of Am. Revolution v. Goodman*, 128 Md. App. 232, 238 (1999).

As for acting in self-defense, a defendant must, among other things, have "actually and reasonably believed that he was in imminent or immediate danger at the time he took his defensive action." *Porter v. State*, 455 Md. 220, 235 (2017) (citation omitted). And the

force he used to defend himself "must not have been more force than the exigency demanded." *Id*. (citation omitted).

Stachowski's testimony of what he heard Collins say while he was on the phone with Durham would highlight Collins's state of mind at the time of the fight. These statements suggest that Collins intended to kill Durham. And Collins's state of mind during the fight is relevant because it goes directly to whether Durham reasonably feared for his life and used reasonable force to defend it. Thus, the trial court erred in excluding Stachowski's testimony on what he heard while he was on the phone with Durham.

The State's final argument is that any error by the trial court was harmless. A trial error is harmless if "a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *Simpson v. State*, 442 Md. 446, 457 (2015) (citation omitted). We are unable to say that the State has met its burden of persuading us beyond a reasonable doubt that the errors in this case were harmless. In our assessment, the case was a close one and the excluded testimony might have tipped the balance in Durham's favor.

THE JUDGMENT OF THE CIRCUIT COURT FOR WORCESTER COUNTY IS REVERSED. COSTS TO BE PAID BY WORCESTER COUNTY.