Circuit Court for Baltimore City
Case No. 117262008

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 676

September Term, 2018

MARCUS JERROD JONES

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Berger,

JJ.

Opinion by Kehoe, J.

Filed: December 3, 2019

*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.

In the Circuit Court for Baltimore City, a jury found Marcus Jerrod Jones guilty of assault in the second degree, burglary in the fourth degree, and malicious destruction of property less than $1,000. Jones was sentenced to thirteen years in prison. Jones raises two issues on appeal:

> 1. Whether the evidence was legally sufficient for a jury to convict Marcus Jones of malicious destruction of property of less than $1,000?
>
> 2. Whether the circuit court erred in allowing Officer Verga to testify to Georgio Frederick's out-of-court statements?

We hold that there is sufficient evidence upon which the jury could convict Jones of malicious destruction of property. We also hold that the circuit court did not err in allowing Officer Verga to testify as to Frederick's statements, and moreover, that any suppositional error on the court's part was harmless. Therefore, we affirm.

Background

During the early morning hours of August 24, 2017, Marquea Braxton and her friend, Georgio Frederick, were asleep at her home in Baltimore City. Just before 2:00 a.m., Braxton awoke to banging, knocking, and shouting noises at her front door. Braxton dialed 9-1-1 at 1:59 a.m. The source of this noise was later identified as Marcus Jerrod Jones, Braxton's former intimate partner. In the days and hours leading up to the incident, Jones had been threatening to kill Braxton for spurning his romantic advances.

As the noise grew louder, Braxton left her bedroom. Hearing a noise coming from the second floor, Braxton entered her daughter's unoccupied bedroom and saw Jones's head protruding through the bedroom window. In order to prevent Jones from coming in,

Braxton removed an air conditioning unit from the window and closed it shut. Braxton again called 9-1-1.

Jones decided to try his luck elsewhere. Still outside the house, he climbed down to the lower level of Braxton's home, and opened a living room window located at the front of the house. Sensing Jones's entry below, Braxton proceeded downstairs into the living room. What ensued was a brief struggle between the two through the open window, during which Jones seized Braxton's cellular phone and retreated outside. When Braxton ran out the front door of her house to retrieve her phone, another scuffle ensued. Braxton succeeded in regaining her phone from Jones, but in her haste, she had left the front door open and unguarded. Jones seized the opportunity, ran into Braxton's house, and closed the door behind him, locking Braxton out. Braxton reentered her home through the same living room window that Jones had just attempted to enter. Once inside her home, Braxton called 9-1-1 a third time. At the same time, Jones called 9-1-1 himself and told the emergency dispatchers that Braxton had stabbed him.

In the living room, Braxton and Jones continued their altercation. At this point, Georgio Frederick, who had been hiding in a closet since Jones first arrived at the house, entered the room. As Jones and Braxton struggled, Jones was stabbed in the back. Who stabbed him isn't clear. Jones then fled the house through the front door. Seconds later, several shots were fired into the living room window where Braxton and Frederick were still standing. The two retreated to the back of the home for safety. At 2:14 a.m., fifteen minutes after Braxton's initial 9-1-1 call, the police arrived on the scene.

Because 9-1-1 calls were placed by both Braxton and Jones, there were two responses by police officers. Responding to *Jones's* 9-1-1 call was an ambulance and Baltimore City Police Officer Matthew Verga. When Officer Verga arrived, Jones was already being treated for his stab wound in the ambulance. He spoke to Braxton first, who appeared to him to be "frustrated, upset, almost panicked." That conversation was captured on his body camera footage. Next, Officer Verga entered the ambulance and spoke to Jones. According to Officer Verga, Jones told him that he was stabbed by "a black male" with "long braids or dreads" as he was retrieving his personal items from Braxton's home.[1] Finally, he spoke with Frederick, who was brought to Officer Verga's location by officers from another district who had responded to *Braxton's* 9-1-1 call. Officer Verga's brief conversation with Frederick was also captured on camera. The police inspected the property and observed bullet holes in Braxton's living room window. No firearm was recovered from the scene, nor was one recovered from Jones. Subsequently, the police arrested Jones.

While in jail awaiting trial, Jones made a series of phone calls to his sister. In those calls, Jones discussed the incident, explaining that he was upset with Braxton because she refused to sleep with him. He stated that he took Braxton's phone and punched her, and that Frederick stabbed him in the living room. When asked by his sister if the police "found a gun," Jones stated, "Naw, they ain't find that, I threw that bitch . . . I threw that bitch."

[1] Officer Verga's conversation with Jones was not recorded by his body camera. As Officer Verga explained, he shut off his camera while interviewing Jones in order to avoid a potential HIPPA violation, as Jones was receiving medical treatment.

Jones also mentioned the fact that no gunshot residue analysis was conducted by the police, and, in fact, "thank[ed] God" that they did not do so.

Jones also implored his sister to intimidate Braxton in the hopes that Braxton would not testify against him in court. As part of his scare tactics, Jones provided to his sister Braxton's home address, phone number, place of employment, and the vehicle she drove. Additionally, Jones also described the time Braxton normally left work and arrived home, as well as the address of Braxton's friend where she might be staying. Jones's sister offered that she knew someone willing to harm or even kill Braxton. When Jones's sister asked him if he wanted to follow through, Jones replied, "bum that bitch." These telephone calls were played for the jury.

Jones was charged with attempted murder in the second degree and assault in the second degree as to both Braxton and Frederick. He was also charged with burglary in the fourth degree and malicious destruction of property less than $1,000 as to Braxton only. A five-day jury trial began on April 4, 2018. Braxton and Officer Verga testified for the State. Pertinently, the 9-1-1 calls, Officer Verga's body camera footage depicting his conversations with Braxton and Frederick, and Jones's jail calls were entered into evidence. Jones presented no evidence on his behalf. The jury found Jones guilty of assault in the second degree, burglary in the fourth degree, and malicious destruction of property less than $1,000 as to Braxton, and not guilty as to any charges stemming from his actions towards Frederick. The court sentenced Jones to ten years' imprisonment for assault in the

second degree, a consecutive three-year term for burglary in the fourth degree, and time-served for malicious destruction. Jones then filed a timely notice of appeal to this Court.

Analysis

1.

Jones argues that the State's evidence at trial was legally insufficient to convict him of malicious destruction of property.[2] First, he brings our attention to the *lack* of evidence against him. He indicates that no one witnessed him fire a gun, no gun was found on him when the police arrived, and that no gun was found at the scene. Second, Jones attacks the sufficiency of the evidence against him, contending that the testimonies of Officer Verga and Braxton cannot link him as the shooter, and that the evidence Jones was the shooter was "entirely" dependent on Frederick's statements, which should not have been admitted. [3] Thus, in Jones's view, the State could prove only that Jones was present at Braxton's home when the shots were fired. We are unpersuaded by these arguments.

When reviewing a criminal defendant's conviction based on the sufficiency of evidence, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Holmes v. State*, 209 Md. App. 427,

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[2] Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("Crim."), § 6-301(a), provides: "A person may not willfully and maliciously destroy, injure, or deface the real or personal property of another."

[3] Jones challenges the admission of Frederick's statements into evidence, a contention we address separately below.

437-38 (2013) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in *Jackson*)). The fact finder has "the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony." *Bible v. State*, 411 Md. 138, 156 (2009) (citing *State v. Mayers*, 417 Md. 449, 466, 10 A.3d 782 (2010)). It is not our role to retry cases in their entirety when reviewing the record. *Holmes*, 209 Md. App. at 437-38. Rather, our concern is "whether the verdicts were supported with sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Riley v. State*, 227 Md. App. 249, 255-56 (2016) (citing *State v. Albrecht*, 336 Md. 475, 478-79 (1994)). As long as the evidence meets that threshold, we will affirm the conviction. *Bible*, 411 Md. at 156 (2009).

We conclude that there was legally-sufficient evidence from which the jury could fairly find that Jones was the person who fired bullets into Braxton's home. Braxton testified at trial that she heard gunshots "a couple seconds" after Jones ran from the house through the front door, and that these gunshots entered through the front living room window. As depicted in the body camera footage, Braxton showed Officer Verga a series of threatening text messages she had received from Jones just hours prior to the incident. Additionally, it was uncontroverted that Jones appeared at Braxton's home in the early morning, attempted to break in, threatened Braxton, stole her cell phone, and physically assaulted her several times. From this evidence, the jury could reasonable conclude that Jones's purpose that

night had been to harm, and even possibly kill, Braxton. Moreover, the jury could infer that Jones was the shooter in light of the fact that bullets were fired from the front lawn just seconds after Jones had fled in that direction.

There was additional evidence of Jones's culpability in the form of his statements to his sister in the recorded jail calls. In these calls, which were played to the jury, Jones all but admits that he carried a firearm the night of the incident. When asked by his sister if the police found any firearm, Jones responded: "Naw, they ain't find that, I threw that bitch . . . I threw that bitch." He also "thank[ed] God" that the police did not conduct a gunshot residue analysis after his arrest. The jury did not need to take a Herculean leap in logic to conclude that Jones had a gun in his possession on the night of the shooting and that he fired it.[4]

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[4] Jones likens this case to two cases in which an appellate court has found the evidence insufficient to convict a defendant of the crime charged. In *Robinson v. State*, 5 Md. App. 723 (1969), Lothes was convicted as an accessory after the fact stemming from a bank robbery committed by two other defendants. 5 Md. App. at 725. We found that there was insufficient evidence to prove that Lothes was guilty of accessory after the fact where (1) the eye-witness's description of the culprit differed greatly from that of Lothes, and (2) the only other evidence linking Lothes to the bank robbery was that she was apprehended in a car with the other defendants three days after the robbery occurred. *Id*. at 728. We observed that "'[n]o matter how sordid the case and how suspicious the circumstances, we cannot permit a person charged with crime to be convicted without evidence.'" *Id*. at 729 (quoting *Estep v. State*, 199 Md. 308, 86 (1952)).

In *Wilson v. State*, 319 Md. 530 (1990), the Court of Appeals overturned a defendant's conviction for theft. At trial, the State alleged that Wilson, a housecleaner, stole jewelry from a master bedroom in a house in which he worked. 319 Md. at 533. Although he was not found with the stolen jewelry, evidence was presented that he was present the day the jewelry was stolen and had access to the master bedroom in which the jewelry was last seen. *Id*. at 537. The Court held that evidence insufficient to support the

Thus, based on the evidence and the inferences that could reasonably be drawn from it, a finder of fact could have concluded that Jones caused the destruction to Braxton's property by firing a handgun into her living room window. We conclude that the evidence was sufficient to convict Jones of malicious destruction of property.

2.

Next, Jones argues that the circuit court erred in admitting into evidence statements made by Frederick through the testimony of Officer Frederick as well as body camera footage. Some additional information will assist in placing the parties' contentions in context.

While Officer Verga was on the stand, the prosecution sought to admit into evidence Officer Verga's body camera footage of his discussion with Frederick the morning of August 24, 2017.

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conviction, in light of the fact that five others, who also had access to the master bedroom, were also present the day the jewelry went missing. *Id.* at 538.

Both cases are distinguishable. In *Robinson*, we based our holding on the lack of the identification of the defendant at the crime scene. Here, there is no such issue. At trial, Braxton identified Jones as the person who broke into her home. She also identified Jones as the intruder in her conversation with Officer Verga, as well as to the 9-1-1 dispatchers in two of her calls that night. Jones himself does not deny that he was at Braxton's home that night, nor could he given his own 9-1-1 call, in which he stated he was at Braxton's address. Along that same vein, this case is unlike *Wilson*, in which there were numerous other possible culprits to the crime. Here, however, only three persons were present at Braxton's home that night. Of those three, one fled the house through the front door, and two remained in the living room. The one who fled (Jones) later admitted to disposing of a firearm before the police arrived.

The video depicts Frederick, who had just been returned to the scene by officers from another district, standing in front of Braxton's home. Frederick is shirtless and smoking a cigarette. Officer Verga asks Frederick series of questions to understand the incident. The following ensued:

> Officer Verga: "So what's going on? We got a whole bunch of mess."
>
> Frederick: "We were asleep, we heard him [Jones] coming through the door. [indiscernible] yelling 'Bitch, get out here before I kill you.' She [Braxton] called y'all to try to keep him from coming through the door. I come down to assist her, he starts shooting.
>
> Officer Verga: "He starts shooting?"
>
> Frederick: [No response given.]
>
> Officer Verga: "Okay. You alright? You hit?"
>
> Frederick: "Nahh, I think I'm good."
>
> Officer Verga: "Okay, so he starts shooting."

The entire conversation with Frederick lasts between 30-40 seconds.

Before attempting to move this footage into evidence, the prosecutor asked for a bench conference. At the bench, the prosecutor asked that Frederick's statements in the video be admitted under the present sense impression exception to the hearsay rule. Defense counsel disagreed. The court, at least initially, accepted the prosecutor's argument, but the court then focused counsels' attention to whether admission of the body camera footage violated Jones's rights under the Confrontation Clause. *See Crawford v. Washington*, 541 U.S. 36, 42 (2004). After a brief discussion between counsel and the court, the court concluded that

Frederick's statements were not testimonial, that the Confrontation Clause was not offended, and that the present sense impression exception applied. The body camera recording was admitted into evidence and played to the jury.

After the State rested, the court excused the jury and asked counsel to approach the bench. The court did so "to make sure my ruling is clear for the record as to what I ruled for Mr. Frederick's statements that were made on the body worn camera." The court provided three reasons for admitting Frederick's statements in the body camera footage: that they were relevant, that they were more probative than prejudicial, and that the excited utterance exception, and not the present sense impression exception, applied. The court reasoned that the statements are:

> still part of the excited utterance in that he was unsure—shirtless, had—ran from the scene and flagged down officers to tell officers that he had been shot at the house. I don't find it be testimon[ial], I find it still part of the police's ongoing investigation as they arrived on the scene[.[5]]

The trial court then noted that defense counsel had already objected to the admission of the body camera recording.

Jones also takes issue with another statement made by Officer Verga during his testimony. On redirect examination, the State questioned the officer about the circumstances in which Frederick was returned to the scene. The colloquy went as follows:

> [PROSECUTOR]: And then you had indicated—counsel had asked you about the circumstances about Mr. Frederick being brought to the scene, what were those circumstances?

[5] The court's factual finding may have been directed to another statement made by Frederick in a different context, discussed next.

> [OFFICER VERGA]: For actually being shot at.
>
> [PROSECUTOR]: For –
>
> [OFFICER VERGA]: He ran and actually waved down –
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE COURT]: Overruled.
>
> [DEFENSE COUNSEL]: Can we approach?
>
> [THE COURT]: No. Go ahead, Officer. He ran and what?
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> [OFFICER VERGA]: Ran from the house and actually waved down an officer, said he was being shot at, at [Braxton's address].
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE COURT]: Overruled.

To this Court, Jones presents two arguments as to why the court erred by admitting Frederick's statements into evidence. First, Jones contends that the statements made by Frederick, who did not testify at trial, violated the Confrontation Clause of the Sixth Amendment. Jones points to two videos, taken by police body cameras, of Frederick speaking with law enforcement. One video is the footage discussed above, in which Frederick speaks with Officer Verga after being transported back to Braxton's home. The second video was recorded on another officer's body camera while that officer transported Frederick to the police station, after Frederick spoke with Officer Verga.[6] Jones claims that

[6] This second video was accidentally included in State's Exhibit 4, which contained Officer Verga's recorded conversation with Frederick, at trial. The State made the trial

the questions eliciting Frederick's statements were made primarily for investigative purposes rather than to resolve an ongoing emergency. Jones highlights the fact that, at the time Frederick spoke with Officer Verga, up to half an hour had elapsed since the shooting, and that Frederick was relaxed and calmly smoking a cigarette in the video. Jones also maintains that the defense had no prior opportunity to cross-examination Frederick. Thus, according to Jones, Frederick's statements were testimonial and their admission in his absence at trial violated the Confrontation Clause. *See Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

Second, Jones contends that the admission of Frederick's statements violated the rule against hearsay testimony and that no exception to that rule applies. Looking at the totality of the circumstances, *see State v. Harrell*, 348 Md. 69, 77 (1997), Jones argues that Frederick's statements were incorrectly admitted as excited utterances because Frederick appears calm and relaxed in the video and because substantial time had elapsed between the shooting and when the statements were made. Jones alleges that, by the time the police arrived and spoke with the parties, there was no longer an ongoing emergency. Jones also

judge aware of this mistake prior to submitting its evidence to the jury. To accommodate, the court ordered that the video not be provided to the jury.

Because this video was not entered into evidence, it is not properly before this Court. *See* Md. Rule 8-131(a); *see also Harmon v. State*, 227 Md. 602, at 606 (1962) (Holding that a newspaper article not offered into evidence at trial was not properly before the Court on appeal.). Therefore, it must be excluded from our review of this case. *See Doye v. State*, 16 Md. App. 511, 521 (1973) (holding that we would not address arguments based on evidence not in the record).

attests that the State's only evidence of stress or excitement was that Frederick not wearing a shirt while outside speaking with the police.

Jones asserts that the admission of Frederick's statements prejudiced him because they suggested that Jones was the shooter, which led to his guilty verdict concerning malicious destruction of property. Thus, Jones maintains that there is no harmless error here. Although we agree with Jones that the excited utterance exception does not apply, ultimately, we find Jones's arguments to be unconvincing.

A.

The Confrontation Clause of the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, provides "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI; *see Crawford v. Washington*, 541 U.S. 36, 42 (2004); *Langley v. State*, 421 Md. 560, 567 (2011). The purpose of the Confrontation Clause is "'to protect a defendant from the complexities of the legal system and his or her lack of understanding of the law.'" *Langley*, 421 Md. at 567 (quoting *Brye v. State*, 410 Md. 623, 634 (2009)). Whether a witness's statement offends the Confrontation Clause depends upon the circumstances in which the statement was uttered, *i.e.*, if the statement is testimonial or non-testimonial. *See Crawford*, 541 U.S. at 53-54; *Derr v. State*, 434 Md. 88, 106 (2013) ("the Confrontation Clause only applies when an out-of-court statement constitutes testimonial hearsay.").

Testimonial statements are those made with "the primary purpose of accusing a targeted individual of engaging in criminal conduct" for later use in a criminal prosecution

and include "formalized statements such as affidavits, depositions, prior testimony, or confessions." *Derr v. State*, 434 Md. 88, 114 (2013) (internal quotation marks and citations omitted); *see also Crawford*, 541 U.S. at 52 ("[S]tatements taken by police officers in the course of interrogations are also testimonial.").

In contrast, statements made to a police officer are nontestimonial when the officer's objective, primary purpose for the interrogation is to assist and resolve an ongoing emergency. *See Langley*, 421 Md. at 571 (citing *Davis*, 547 U.S. at 822) Whether an emergency exists is a "highly context-dependent inquiry." *Langley*, 421 Md. 575 (citing *Michigan v. Bryant*, 562 U.S. 344, 363 (2011)). In *Bryant*, the Supreme Court explained:

> The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than proving past events potentially relevant to later criminal prosecution. Rather, it focuses them on ending a threatening situation.

Bryant, 562 U.S. at 361 (cleaned up). Further, "when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the 'primary purpose of the interrogation' by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs." *Id*. at 370.

However, the mere absence of an ongoing emergency is not dispositive that a statement is testimonial. *Langley*, 421 Md. at 578 (citing *Bryant*, 562 U.S. at 374). In *Lucas v. State*, 407 Md. 307 (2009), the Court of Appeals identified a number of factors a court must consider when analyzing the primary purpose of an interrogation, including:

> (1) the timing of the statements, *i.e.* whether the declarant was speaking about actually happening or past events; (2) whether the reasonable listener would recognize that the declarant . . . was facing an ongoing emergency; (3) the nature of what was asked and answered, *i.e.* whether the statements were necessary to resolve the present emergency or simply to learn what had happened in the past; and (4) the interview's level of formality.

407 Md. at 323 (cleaned up). To assess the formality of the interrogation, we look to several other factors, such as "the interview's location; whether the declarant was actively separated from the defendant; whether "the officer received the declarant's replies for use in his investigation; and whether the statements "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed." *Id.* (cleaned up) (citing *Davis*, 547 U.S. at 830).

Reviewing the facts of the case before us in light of the factors and considerations discussed in the previous paragraphs, we conclude that Frederick's statements to Officer Verga were nontestimonial because Officer Verga's primary purpose in speaking with Frederick was to resolve an ongoing emergency, not to collect testimonial evidence against Jones.

When Officer Verga arrived at Braxton's home in the early morning, he did so to a confusing—indeed, a chaotic— scene. He was responding to Jones's 9-1-1 call, in which Jones stated he was stabbed while retrieving his belongings from his girlfriend's house. At that point, from Officer Verga's perspective, Jones was the victim of a domestic dispute. Indeed, Officer Verga knew someone was being treated in the ambulance (which also responded to Jones's 9-1-1 call) when he arrived. At this point, Officer Verga's purpose

was to determine who had stabbed Jones and if this person was still armed. Importantly, Officer Verga was not aware that a shooting had taken place at the residence.

Officer Verga first spoke with Braxton, who was then hysterical. She informed him that Jones had broken into her home and that he was stabbed. Braxton told Verga that she did not know who stabbed Jones. Thus, the person who stabbed Jones was, from Officer Verga's perspective, still at large.

Next, Officer Verga spoke with Jones, who also informed him that he was stabbed by a man "with braids or dreads," who was no longer present at the scene.

It wasn't until Frederick was brought back to the scene that Officer Verga learned that a shooting had occurred. Officer Verga asked Frederick a few questions to understand what was going on, not to collect information against Jones at trial. Nor could he have, since Jones had not been arrested. For instance, Officer Verga opened with, "So, what's going on? We got a whole bunch of mess." Frederick responded that Jones was yelling that he was going to kill Braxton, that he came downstairs to help Braxton remove Jones from the house, and that Jones "started shooting." When Officer Verga asked again if Jones shot at them, Frederick did not respond. Officer Verga asked some follow-up questions to Frederick, such as "You alright? You hit?" That concluded their brief conversation. Now Officer Verga had to contend with both a stabbing and shooting. Whether Jones was still armed was an uncertainty to Officer Verga because, as he testified to at trial, no one had searched Jones up until that point.

Based on this series of events, we conclude that Officer Verga's brief conversation with Frederick was an attempt to bring clarity to a chaotic situation and not to gather evidence for use against Jones at a future trial. Indeed, Officer Verga never read Frederick his *Miranda* rights. Additionally, Frederick did not fill out any documents that are testimonial in nature, such as a domestic violence report or a battery affidavit. *See Davis*, 547 U.S. at 820, 834 (an affidavit signed by a battered spouse in her home after experiencing domestic violence was considered testimonial and therefore violated the Sixth Amendment); *see Lucas*, 407 Md. at 309, 326 (the domestic violence form filled out by the victim was testimonial and violated the Sixth Amendment). Furthermore, Officer Verga did not ask follow-up questions or try to clarify Frederick's version of events, which would have been reasonable steps to taken if the officer had been attempting to build a case against Jones.

In his brief, Jones solely relies on the lack of an ongoing emergency to support his Confrontation Clause argument. There are two problems with this argument.

First, although it is easy for us to say that there was no longer an ongoing emergency, we have the benefit of Jones's recorded admission to his sister that he had thrown his gun away before the police arrived at the scene. But we must consider whether there was an ongoing emergency from the perspective of Officer Verga. When he spoke to Frederick, he was aware only that *someone* had fired shots and that the police had not searched Jones because, up to that point, they had viewed him solely as a victim. Identifying the possible shooter was necessary for the safety of the police, Braxton, and any bystanders. We have

no hesitation in concluding that Officer Verga's assumption that he was dealing with an emergency was both reasonable and prudent.

Second, the existence of an ongoing emergency is only one factor to consider. *See Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015) (quoting *Bryant*, 562 U.S. at 366). The other primary purpose factors weigh in favor of admitting Frederick's statements to Officer Verga. These include "statements and actions of both the declarant and interrogators," and the "informality of the situation and the interrogation." *Bryant*, 562 U.S. at 367, 377. Frederick's statements manifested no solemn or formal qualities. The footage of Officer Verga conversation with Frederick lasted a mere thirty seconds, during which Frederick made one brief statement that Jones shot at him and Braxton. Frederick's brief statement to Officer Verga helped him evaluate the situation. Therefore, his statement to Officer Verga did not violate the Confrontation Clause when admitted at trial.

B.

We next turn to Jones's argument that the admission of Frederick's statements into evidence violated the rule against hearsay testimony and did not fall under the excited utterance exception to that rule. For this analysis, we focus only on those statements made by Frederick in Officer Verga's body camera footage because that was the only footage actually admitted into evidence.

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." defined under Md. Rule 5-801(c). Generally, hearsay is not admissible at trial. Md. Rule 5-802; *Mouzone*

v. State, 294 Md. 692, 696 (1982). There are exceptions to the hearsay rule. An excited utterance is defined 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." Md. Rule 5-803(b)(2). "'It requires a startling event and a spontaneous statement which is the result of the declarant's reaction to the occurrence.'" *Cooper v. State*, 163 Md. App. 70, 97 (2005) (quoting *Parker v. State*, 365 Md. 299, 313 (2001)). The crux of the excited utterance exception is "the inability of the declarant to have reflected on the events about which the statement is concerned." *Parker*, 365 Md. at 313. The excited declarant's trustworthiness is not an issue, as the excited or impulsive declarant is not likely to have time to reflect on or thoughtfully consider the unexpected occurrence to fabricate the statement. *Id*. (citing *Wright v. State*, 88 Md. 705 (1898)). Nevertheless, the declarant must still have personal knowledge of the startling event. *Id*.

When considering whether to apply the excited utterance exception:

> [W]e look at the totality of the circumstances to determine whether the foundation for its admissibility has been established. The adequacy of the foundation is 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."

Cooper, 163 Md. App. at 97 (quoting *Parker*, 365 Md. at 313). Considerations include the amount of time that passed between the startling event and the declarant's excited utterance and whether the excited utterance actually relates to the startling event itself. *West v. State*, 124 Md. App. 147, 162-63 (1998). While there is no upper time limit, the more time that passes between the startling event and the outburst, the less likely it will be considered an

excited utterance. *West*, 124 Md. App. at 163 (citing *Stanley v. State*, 118 Md. App. 45, 54 (1997)).

Additionally, the fact that the excited utterance was made in response to an inquiry from law enforcement does not alone suggest the declaration's recent fabrication. *See State v. Harrell*, 348 Md. 69, 77 (1997). If the declarant was "in the throes of the 'exciting event,'" the out-of-court statement will remain admissible. *West*, 124 Md. App. at 164 (citing *Harmony v. State*, 88 Md. App. 306, 320 (1991)). "It is up to the proponent of a statement claimed to be an excited utterance to establish that the statement was spontaneous rather than a result of reflection." *Marquardt v. State*, 164 Md. App. 95, 124 (2005) (citing *Parker*, 365 Md. at 313). "'It must also be established that the exciting influence has not lost its sway or been dissipated by meditation.'" *Marquardt*, 164 Md. App. at 124 (quoting *Harmony v. State*, 88 Md. App. 306, 320 (1991)). Finally, we will not "reverse a trial court's decision on the admissibility of an excited utterance absent an abuse of discretion." *West*, 124 Md. App. at 163 (citing *Stanley v. State*, 118 Md. App. 45, 53 (1997), *cert. granted*, 349 Md. 105, 707 A.2d 90 (1998).

After reviewing the body camera footage of Officer Verga's conversation with Frederick, the court concluded that Frederick's statements were admissible as a present sense impression to the hearsay rule. Later, the court changed and clarified its ruling, reasoning that the excited utterance exception applied. The court did so after a thorough assessment of video and Frederick's demeanor therein. Although this Court may differ with the circuit court on its findings, we are nevertheless bound by those findings. *See Ryan v.*

Thurston, 276 Md. 390, 392 (1975) (Holding that appellate courts must "accept and be bound by findings of fact of the lower court unless they are clearly erroneous[, and] should not substitute its judgment for that of the trial court on its findings of fact but will only determine whether those findings are clearly erroneous in light of the total evidence.").

Assuming for purposes of analysis that the court's finding was erroneous, any suppositional error was harmless. Under the harmless error test:

> When an appellant, in a criminal case, establishes error, unless 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, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

Dionas v. State, 436 Md. 97, 108 (2013) (cleaned up) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). Thus, a reviewing court will not order a new trial merely because the trial court committed an error in admitting or excluding evidence. *See Conyers v. State*, 354 Md. 132, 160-61 (1999). A critical consideration is the accumulation of other evidence indicating guilt. For example:

> [I]f the State can show beyond a reasonable doubt that the violation was technical in nature, as well as that the erroneously admitted evidence was merely cumulative, and that there was other overwhelming and largely uncontroverted evidence properly before the trier of fact, then the error would be harmless.

Dorsey, 276 Md. at 655-56 (1976) (citing *Brown v. United States*, 411 U.S. 223, 232 (1973)).

The evidence in the record demonstrates that Frederick's statements were cumulative to other evidence properly admitted in the case. In particular, Braxton testified at trial that shots were fired through her living room in window just seconds after Jones fled from the house. Equally, if not more inculpatory, however, were Jones's own statements made in jail calls to his sister. In response to his sister's question, "Did they [the police] find a gun?", Jones stated that he "threw that bitch." Moreover, Jones then expressed relief that the police did not conduct a gunshot residue analysis on him. "[T]hrowing that bitch" certainly strongly implies that Jones *carried* a gun and disposed of it before the police arrived. His expression of relief that no GRA was conducted on him indicates even more strongly that he *fired* that gun shortly before disposing of it. Moreover, Jones's plans to intimidate, or even kill, Braxton so that she would not testify is also suggestive of guilt. Thus, for all practical purposes, Jones confessed to the shooting in the calls.

Assuming for the purposes of analysis that the trial court erred in admitting Frederick's statement to Officer Verga regarding the shooting, we conclude that any error was harmless beyond a reasonable doubt. *See Brown*, 411 U.S. at 231-32 (holding that confession of defendant implicating a co-defendant was harmless because it "was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury.").

C.

Finally, we consider Jones's assertion that Officer Verga's statements made during redirect examination concerning Frederick's whereabouts during the night of the shooting constitute impermissible hearsay evidence. We disagree.

On re-direct examination, the State asked Officer Verga "about the circumstances [in which] Mr. Frederick [was] brought to the scene." Officer Verga responded that Frederick was returned to the scene because he "ran from the house and actually waved down an officer, said he was being shot." Counsel for Jones objected, but was overruled. Officer Verga continued that Jones "[r]an from the house and actually waved down an officer, said he was being shot at . . . ."

There are, in effect, two parts to this testimony. First is Officer Verga's direct answer to the State's question. The only statement that was needed to fully answer the State's question was that "Frederick ran from the house and actually waved down an officer . . . ." This statement is not hearsay because it was not offered for the proof of the matter asserted, *i.e.*, that Jones discharged a firearm at Braxton's house. Rather, as the State's phrasing of the question demonstrates, Officer Verga was prompted to explain why Frederick had left the scene and returned.

Officer Verga's testimony is akin to Deputy Bragunier's testimony in *Frobouck v. State*, 212 Md. App. 262 (2013). In *Frobouck*, the following conversation transpired between the deputy and the prosecutor:

> [PROSECUTOR]: Okay. And did you have occasion to respond to 18020 Maugans Avenue in Maugansville, Maryland?
>
> [DEPUTY BRAGUNIER]: Yes. . . .
>
> [PROSECUTOR]: And why did you respond to that location?
>
> [DEPUTY BRAGUNIER]: I was dispatched there for a suspected marijuana grow.
>
> [DEFENSE COUNSEL]: Objection.
>
> [COURT]: Grounds?
>
> [DEFENSE COUNSEL]: Hearsay.
>
> [COURT]: This is, ladies and gentlemen, a non-hearsay purpose. It's not offered for the truth of the matter asserted, but only a statement or assertion that the deputy received to take some further action. So with that non-hearsay purpose, it's . . . admissible.

212 Md. App. at 280-81 (cleaned up). This Court found that "the objected-to statements of Deputy Bragunier . . . were not offered to prove the truth of the matter asserted—that there was a "marijuana grow"—but, rather, to explain briefly what brought the officers to the scene in the first place." *Id*. at 283. Although the court below did not provide a similar limiting instruction to the jury, the context of the State's question makes clear the purpose of Frederick's statements in that they were being used to explain why Frederick had left, and was brought back, to the scene. Similar to *Frobouck*, we conclude that Officer Verga's narrative of Frederick waiving down a police officer and being brought to Verga's location did not constitute inadmissible hearsay. *See Frobouck*, 212 Md. App. at 282 (2013) ("A statement that 'is not offered for the truth of the matter asserted . . . is not hearsay and it

will not be excluded under Rule 5-802.'") (quoting *Stoddard v. State*, 389 Md. 681, 689 (2005)).

The remainder of Officer's Verga's testimony—that Frederick told police he was "being shot at"—was hearsay. However, in this circumstance, the excited utterance exception applies. The statement was made within minutes after Jones fired the shots as the police were arriving on the scene. Thus, the effects of being shot at were still fresh to Frederick when he made that statement. Because the excited utterance exception applies, we hold that the court did not err in admitting Frederick's statements to the responding police officers into evidence.[7] Moreover, as we have explained, any error on the trial court's part in permitting the introduction of Frederick's hearsay statement was harmless in light of the other evidence against Jones.

THE JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY ARE AFFIRMED. APPELLANT TO PAY COSTS.

[7] The trial court did not provide an explanation for overruling defense counsel's objection and admitting the evidence. Regardless, we may "affirm the circuit court's ruling 'on any ground adequately shown by the record, even one upon which the circuit court has not relied or one that the parties have not raised.'" *Harris v. McKenzie*, 214 Md. App. 672, 678 (2019) (quoting *Monarc Constr., v. Aris Corp.*, 188 Md. App. 377, 385 (2009)).