Circuit Court for Montgomery County
Case No. 124430

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 839

September Term, 2018

RICARDO CUNNINGHAM

v.

STATE OF MARYLAND

Shaw Geter,
Meredith,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Adkins, Sally D., J.

Filed: October 17, 2019

After a bench trial, Appellant Ricardo Cunningham was found guilty of armed robbery, use of a handgun in the commission of a crime of violence or felony, and first-degree assault.[1] The Court of Special Appeals vacated the convictions in an unreported opinion, *Cunningham v. State*, No. 2395, Sept. Term 2014, 2016 WL 4398676 (Md. App. 2016) ("*Cunningham I*"). A second trial resulted in a mistrial. After a third trial, a Montgomery County jury found Cunningham guilty of all charges. He was sentenced to twenty years' incarceration for armed robbery, a concurrent twenty years for the use of a firearm in the commission of a crime of violence, and a concurrent twenty-five-year term for the first-degree assault.

Cunningham appeals those convictions and presents the following questions for our review:

> 1. Did the trial court err in reversing the ruling of the suppression court?
>
> 2. Did the trial court err in allowing the prior testimony of Appellant to be read to the jury where Appellant's prior decision to testify was not made knowingly and intelligently?
>
> 3. Did the circuit court err in denying the defense request for a *Frye-Reed* hearing on the admissibility of cell phone data that was copied by an unknown individual at Apple, using an unknown process, who was not called to testify?
>
> 4. Did the circuit court abuse its discretion by improperly admitting unauthenticated cell phone data copied by an unknown individual at Apple who was not called to testify?

[1] Cunningham's associate, Sterling Hollis, was tried separately, and was convicted.

5. Did the trial court err in admitting the entire recording of a 911 call?

For reasons discussed below, we do not reach question one, and answer in the negative for questions two through five.

FACTUAL OVERVIEW AND PROCEDURAL POSTURE

Byron Clarke was home alone on the morning of June 21, 2013, in his girlfriend Todzja Williams's apartment, located on Quince Orchard Road in Gaithersburg, Maryland. He heard a knock on the door and a look through the peephole revealed a man wearing a fluorescent workman's vest. Clarke opened the door, assuming the man "worked for the community." The man asked if "T" was home, which Clarke assumed meant Todzja. Clarke said she was not, and then the man asked if Clarke had "3.5," which Clarke understood to mean marijuana. Clarke said there was no marijuana in the house and began to close the door when it was kicked open, and the man in the vest and a man with dreadlocks wearing a ski mask barged into the apartment.

The man in the vest produced a handgun, aimed it at Clarke's face, then gave it to the masked man. They produced a bag of zip ties, and demanded Clarke get on the floor. Clarke refused, and the masked man "hit [Clarke] like four or five times in the face with the gun." Fearing he was about to be executed, Clarke fought back, hit the masked man in the face, and knocked him to the floor before escaping out of the apartment. Realizing he left his cell phone, Clarke ran back into the apartment, grabbed it, and ran right back out.

Clarke waited outside for the two men to leave, then called his girlfriend to tell her what happened. At trial, Williams described the phone call as follows:

> [BY THE STATE]: Did there come a time that you got a call from Byron Clarke?
>
> [BY MS. WILLIAMS]: Yes, there was.
>
> Q. Do you know approximately around when that was? Morning, afternoon, evening—
>
> A. It was in the morning.
>
> Q. Okay, and what was his tone of voice when he called you?
>
> A. Like panicked. He was like in hysterics. He was worried.
>
> Q. What did he say happened?
>
> A. He said oh my god, oh my god I've been robbed.
>
> Q. And what did you do when he called you?
>
> A. I answered the phone and I told him that he was playing. ["]Stop playing with me,["] you know, I didn't believe him. ["]You didn't get robbed["] because he's at my house.
>
> Q. Okay, and then did there come a point where your opinion changed?
>
> A. Yes, when I went home and walked up the sidewalk and saw him bleeding in my backyard.
>
> * * *
>
> Q. What was his demeanor like when you arrived at the house?
>
> A. He was, he was like I don't know. He was beaten up. He was scared. He was trying to tell me over and over again that he got robbed and oh my gosh, like he was just all over the place. I'm trying to get him to calm down and sit down because there's

> blood everywhere and I could not decipher where the blood was coming from because it was so much, all over his face, his head, him in general.

After arriving home, Williams called 911. The recording of the call was played for the jury, over Cunningham's objection.

Officer Daniel McCarthy, of the Gaithersburg City Police, responded to the apartment. He stated Clarke "seemed like he was in shock," and "became more animated and more excited and more frustrated and upset" as he described the robbery. McCarthy saw that the apartment was in disarray, and noted a plastic bag of zip ties on the floor of the bedroom. Clarke described the assailants to McCarthy, and McCarthy broadcast the description of the suspects over the police radio. Clarke was transported to the hospital for treatment.

Detective John Gallagher, of the Montgomery County Police Department's Major Crimes Unit, interviewed Clarke in the emergency room. Clarke described the vest-wearing assailant as an African–American man wearing a green vest with reflective tape on it, a gray t-shirt, a red and black baseball cap, and jeans. The vest-wearing man also had a silver semi-automatic type handgun with gold accents. Clarke described the masked suspect as an African–American man with shoulder-length dreadlocks, wearing a black v-neck shirt and jeans.

The lead detective assigned to this case was Detective Brian Dyer, of the Major Crimes Unit. Dyer arrived at Williams' apartment at around 11:30 a.m. While at the apartment, Dyer learned that there had been a high-speed chase culminating in a bail-out

and the abandonment of the vehicle at a Silver Spring parking garage. Two men were seen on surveillance video running away from the vehicle and leaving the vehicle—a tan Ford Explorer with DC tags—at the gate of the garage. The presence of a "lime green safety traffic vest" in the Explorer connected the two events. Dyer ran the plates of the abandoned Explorer, and learned that the vehicle was registered to a Sterling Hollis.

During Williams's testimony, she recounted that on June 20, 2013, the day before the incident giving rise to this case, she was in her apartment when there was a knock on the door at about 9 a.m.[2] Clarke remained in their bedroom, while Williams went to answer the door. It was Hollis (whom Williams knew as Bishop) alone and "looking for weed." Williams told him that she did not have any, and did not know anyone who had any, but she had money, and she, too, was interested in acquiring some weed. She knew Bishop to be the boyfriend of a friend of hers named Bella. She told Bishop that Bella owed her $10, and he gave Williams the money. Later, Bella called Williams, and informed her that she was upset that Williams had aired her business.

When the police searched the Explorer, they found a gray t-shirt and a yellow traffic vest on the floor of the passenger side. Upon analysis, Clarke's blood was found on the exterior left sleeve of the gray t-shirt, and a DNA profile was extracted from the neck area of the t-shirt that belonged to neither Clarke nor Hollis. It was not until January 2014 that

[2] Williams was unavailable for this trial, and so her testimony from the first trial was read to the jury verbatim.

the police had a sample of Cunningham's DNA to compare with the profile from the neck of the gray t-shirt.[3] It was a match. Cunningham was arrested on January 21, 2014.

Cunningham exercised his constitutional right not to testify at this trial. The State, however, read his first-trial testimony into evidence. In that testimony Cunningham claimed that on the morning of the robbery he arrived at the house of his friend Hollis, driving Hollis's truck. Hollis and an unidentified man (never mentioned by Cunningham to investigators before trial) in a yellow construction-type vest came outside. Hollis got in the driver's seat of the truck, a tan Ford Explorer, the unidentified man got into the passenger seat, and Cunningham got in the back. Hollis then drove them to Williams's apartment complex. According to Cunningham, Hollis and the unidentified man went inside, while Cunningham stayed in the back seat and played a game on his phone. He explained that he also called his girlfriend while he was sitting in the Explorer, which is why his phone records would have placed him there at the time the home invasion was occurring. He testified that, after about ten minutes, he heard some yelling, and saw Hollis, who was "real angry," being pushed down the sidewalk away from the apartment by Hollis's other associate. Hollis was shirtless and bleeding.

Cunningham testified that Hollis then drove them away from the apartment complex. When police later tried to stop the vehicle, a high-speed chase commenced during which Cunningham claims he asked to be let out of the vehicle. Cunningham claimed that

[3] Cunningham was arrested pursuant to an arrest warrant that was issued after Clarke identified him as the vest-wearing assailant. It was upon Cunningham's arrest that his DNA was collected.

he jumped out of the vehicle while it was still moving at some unknown location. He admitted the gray shirt found in the Explorer with Clarke's blood on it was his, but claimed that he did not have it on that day, and he did not see anyone else wearing it.

DISCUSSION

I. Cunningham's Testimony

This appeal stems from Cunningham's third trial. He was convicted of all charges, and timely appealed to this Court. During his first trial, Cunningham testified, and the Circuit Court allowed the State to impeach him with certified copies of convictions that had not been provided to the defense. Because of this discovery violation under Maryland Rule 4-263(d)(9), we vacated the convictions. *Cunningham I* at *15.

Before the second trial, Cunningham filed a Motion *In Limine* to Exclude Testimony from Previous Trial, arguing that the State should be precluded from introducing Cunningham's first-trial testimony in its case-in-chief. The trial judge, Judge Dugan, granted the motion, concluding that "what the Court of Special Appeals has said in their opinion" dictated the result. All parties were in agreement that the testimony could be used for impeachment purposes.

The second trial resulted in a mistrial when the jury was unable to reach a unanimous verdict. Soon after, Judge Dugan retired, and the case was reassigned to Judge McGann for a third trial. During opening statements, Cunningham's defense counsel displayed a slide that stated, "[n]o testimony that he [Cunningham] was at the scene. Not at robbery scene." The State objected, and asked the court to allow in Cunningham's first-trial

testimony (in which Cunningham had admitted being present at the scene of the robbery), on the basis that the defense had opened the door. Judge McGann reversed Judge Dugan's earlier ruling and allowed the State to read to the jury excerpts of Cunningham's prior testimony, with all mentions of prior convictions redacted.

We first address two issues surrounding the State's use of Cunningham's first-trial testimony: (1) whether Judge McGann erred in modifying Judge Dugan's exclusion of Cunningham's testimony; and (2) whether Cunningham gave said testimony knowingly and intelligently.

Motion In Limine To Exclude Testimony From Previous Trial

During Cunningham's opening statement, the State objected to a slide that said, "no identification testimony. No testimony that he was at the scene. Not at robbery scene." The State requested to be able to use Cunningham's first-trial testimony because it was inconsistent with what defense's counsel's slide was stating. The parties addressed the admissibility of the previous testimony, and the court ruled that if the testimony about the prior convictions was redacted, then Cunningham would receive what he thought he was going to be able to do in the first trial—testify with no mention of convictions. Judge McGann explained his reasoning at the bench:

> So if you remove [Cunningham's] prior convictions [from the testimony], he's right back to where he was, the bargain he thought he was getting for testifying. His bargain is, I'll testify, I can tell the jury what I want, but no one's going to mention my convictions.

The convictions were redacted, and the jury heard excerpts from Cunningham's previous testimony.

Cunningham argues that his first-trial testimony was rightfully excluded by Judge Dugan, and Judge McGann's reversal violates Maryland Rule 4-252(h)(2), which governs the suppression of evidence. He contends Judge Dugan's exclusion of the first-trial testimony was a ruling on a motion to suppress evidence, and Rule 4-252(h)(2) specifically precluded Judge McGann from revisiting the ruling. The State counters that this claim was not preserved.

Maryland appellate courts "will not consider ordinarily any issue 'unless it plainly appears by the record to have been raised in or decided by the trial court.'" *King v. State*, 434 Md. 472, 479 (2013) (quoting Md. Rule 8-131(a)). "[T]he animating policy behind Rule 8-131(a) is to ensure fairness for the parties involved and to promote orderly judicial administration." *Jones v. State*, 379 Md. 704, 714 (2004).

Despite lengthy discussions at the bench between counsel and Judge McGann, Cunningham never cited Rule 4-252(h)[4] to the court, nor argued the court was prohibited—

[4] Maryland Rule 4-252(h) governs the effect of determination of certain motions in circuit court. It reads in relevant part:

> (2) Suppression of Evidence.
> (A) If the court grants a motion to suppress evidence, the evidence shall not be offered by the State at trial, except that suppressed evidence may be used in accordance with law for impeachment purposes. The court may not reconsider its grant of a motion to suppress evidence unless before trial the State files a motion for reconsideration based on (i) newly discovered evidence that could not have been discovered by

pursuant to Rule 4-252(h)—from revisiting Judge Dugan's ruling. His statement that he was acting on the "understanding" that Judge Dugan's rulings would not be reconsidered cannot be construed as arguing a violation of Rule 4-252(h). *Cf. Green v. State*, 231 Md. App. 53, 68 (2016) ("The State's . . . preservation argument . . . has merit. Appellant's argument below did not specifically mention Rule 4-263, and in no way can it be construed as arguing below as arguing a violation of Rule 4-263(d)(3), (6), or (9)."), *rev'd on other grounds*, 456 Md. 97 (2017). During a bench discussion Judge McGann stated, "because these are evidentiary things as opposed to pre-trial legal motions . . . I don't think I am bound by what Judge Dugan ruled on that." The ruling was characterized as a motion *in limine* by Judge McGann, and Cunningham never challenged that characterization until

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> due diligence in time to present it to the court before the court's ruling on the motion to suppress evidence, (ii) an error of law made by the court in granting the motion to suppress evidence, or (iii) a change in law. The court may hold a hearing on the motion to reconsider. Hearings held before trial shall, whenever practicable, be held before the judge who granted the motion to suppress. If the court reverses or modifies its grant of a motion to suppress, the judge shall prepare and file or dictate into the record a statement of the reasons for the action taken.
>
> ***
>
> (C) If the court denies a motion to suppress evidence, the ruling is binding at the trial unless the court, on the motion of a defendant and in the exercise of its discretion, grants a supplemental hearing or a hearing de novo and rules otherwise. A pretrial ruling denying the motion to suppress is reviewable on a motion for a new trial or on appeal of a conviction.

this appeal. We conclude that Cunningham's argument about Rule 4-252(h) is not preserved, and we will not address it further.

Testimony Given Knowingly and Intelligently

Cunningham contends the court erred in allowing his first-trial testimony because it had not been given knowingly and intelligently in the first place. He argues that a defendant's right to testify can only be waived knowingly and intelligently, and here, since he did not have all the necessary information before he testified at his first trial—that the State would impeach him with certified copies of his prior convictions—he could not have made the decision to testify knowingly and intelligently. The State responds that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings, and this case does not fall under any exceptions to that rule.

The Fifth, Sixth, and Fourteenth Amendments guarantee the accused in a criminal case the right to testify. *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987). In *Tilghman v. State*, 117 Md. App. 542, 553 (1997), this court held that because the right is essential to due process, it can "only be waived knowingly and intelligently . . . ." "For the waiver of a fundamental right to be made knowingly and intelligently, the accused must have a 'sufficient awareness of the relevant circumstances and likely consequences' that forfeiting his right entails." *Id.* (quoting *Brady v. U.S.*, 397 U.S. 742, 748 (1970)).

In *Harrison v. United States*, the Supreme Court recognized the "general evidentiary rule that a defendant's testimony at a former trial is admissible in evidence against him in

later proceedings." 392 U.S. 219, 222 (1968). There, the Court recognized an exception to that rule—when the prior testimony is "impelled" by the improper introduction of "wrongfully obtained" evidence. *Id.* Before Harrison chose to testify in his first trial, the prosecution introduced "three confessions, all wrongfully obtained." *Id*. The defendant's necessary testimony in response to that evidence was found to be "fruit of the poisonous tree." *Id.* The Supreme Court held the prosecution could not use his testimony in a subsequent trial unless it could "show that its illegal action did not induce his testimony" to refute the confessions. *Id*. at 225.

Cunningham seeks protection under the *Harrison* exception. He reasons that since the certified copies of convictions used to impeach him had not been disclosed prior to him taking the stand, he could not factor them into his decision to take the stand. Without having that "necessary and pertinent information," the argument goes, his decision to testify could not have been made knowingly and intelligently. This "lack of a knowing and intelligent decision to testify," he argues, is akin to the State impelling him to testify, and as such, the State should not be allowed to use that testimony, as in *Harrison*.

In *Brown v. State*, 153 Md. App. 544, 583 (2003), this Court held the *Harrison* exception is only applicable where the prosecution's admitted evidence "impelling the defendant's prior testimony is illegal in the sense that it infringes . . . upon the defendant's right to a fair trial." No admitted evidence by the prosecution impelled Cunningham to testify. He chose to, albeit without knowledge that the State would use certified copies of his convictions for impeachment of this testimony. Judge Dugan, prior to the second trial,

stated, "[i]t should also be clear that the court finds that [defense counsel] doesn't contest the voluntariness of the testimony." Moreover, the State's improper evidence was not introduced before Cunningham's testimony, like in *Harrison*, but during it. Judge McGann addressed this specific issue in explaining his reasoning to allow the testimony:

> So the asking of the prior record was something he [Cunningham] didn't bargain for, and that's what the jury shouldn't have heard, and [he] shouldn't have been asked about it. But everything else that he wanted to do, he was able to do, and he wasn't influenced—he wasn't boxed in to testify because he heard they weren't going to use his record . . . .

We agree with Judge McGann's reasoning that Cunningham got what he originally bargained for. Thus, when Judge McGann allowed the prior testimony but excluded any mention of the convictions in that testimony, there was no error, and Cunningham's decision to testify was a knowing and intelligent one.

II. Evidence Obtained from Apple iPhone

Upon the arrest of Cunningham's associate, Hollis, his phone was seized by police officers. Sergeant Michael Yu, then a member of the Electronic Crimes Unit of the Montgomery County Police Department, testified as an expert in "digital forensics examination and cell phone data recovery," with no objection. He testified that he received the phone from Dyer, along with a request to extract the contents of the Apple iPhone. Yu could not access the contents of the phone because it was protected with a passcode.

Yu explained the next step was to send the phone to Apple, along with search authority and a thumb drive, and Apple would unlock the phone and send the data back.[5] A few months later, Apple sent back a thumb drive with the phone's data on it, and two e-mails: one with instructions on how to decrypt the data, and a second with the decryption password. Yu testified that, following those instructions, he decrypted the data using the password Apple gave him and GPG, which Yu called "open source encryption." Yu next described how he ran that data through a Cellebrite analyzer, to make the data viewable and understandable to Dyer. The Cellebrite program created a report of the data that was admitted at trial. The report, and data, according to Yu's expert testimony, matched Apple's typical file and folder naming conventions, and metadata protocol. When the State attempted to admit this data into evidence, Cunningham objected. The court overruled the objection, finding:

> [Yu has] indicated how he extracts information from the phone. I can take judicial notice in this day and age that information [is] on phones. People that have cellphones, everybody keeps cellphones and they have contacts on those. It's not a revolutionary area of science. It's not the first cellphone that's ever been displayed to the world. And he's indicated, the expert, how he obtained, gets that information out of there. So, I don't think it . . . need to be examined under the scrutiny of Frye/Reed. I think it's . . . an accepted practice

[5] The phone in question was an iPhone 5, running iOS 7. Apple has adopted a policy that it will not perform iOS data extractions on any iPhone running iOS 8 and higher, stating that it does not possess the encryption key. "As of January 4, 2017, approximately ninety-four percent of all iOS devices currently in use run iOS 9 and higher." Kristen M. Jacobsen, Note, *Game Of Phones, Data Isn't Coming: Modern Mobile Operating System Encryption And Its Chilling Effect On Law Enforcement*, 85 Geo. Wash. L. Rev. 566, 575 (2017).

> to basically find what information is on the phone and he . . . testified how he got it out.

Among the contacts on Hollis's phone was an entry for a contact listed as "Ric," with a specified phone number. Carlette Tillman, the mother of Cunningham's son, testified (reluctantly, pursuant to subpoena) that this was Cunningham's phone number.

Cunningham makes two arguments regarding evidence obtained from Hollis's cell phone. First, we discuss whether the evidence was subject to a *Frye-Reed* analysis; and second, we analyze its authenticity.

Frye-Reed Hearing

Prior to trial, Cunningham filed a Motion for *Frye-Reed* Hearing regarding the iPhone 'data extraction' because, according to Cunningham, in order for Apple to have extracted information from the iPhone, a mobile extraction tool must have been utilized. Cunningham argued Yu's prior testimony proves his assertion:

> [BY CUNNINGHAM]: Can you tell the jury what the forensic tool was that Apple used to extract this information from the iPhone 5 that's in question?
>
> [BY YU]: I don't know.
>
> Q. And forensic tools need to be tested to make sure they're accurate, right?
>
> A. Yes, sir.
>
> ***

> Q. But you don't even know that the tool is that Apple used. How do you know it's reliable?
>
> A. It's proprietary, sir. I can't speak to what I don't know.
>
> Q. So my question for you is how do we know, since you don't know what it is, how do we know it's a reliable tool?
>
> A. I don't, I would, I don't know what Apple does . . .

His motion was procedurally correct in that a *Frye-Reed* analysis, if applicable, should be conducted as a threshold question before the court weighs admissibility under Maryland Rule 5-702. *See Reed v. State*, 283 Md. 374, 389 (1978). The circuit court denied the request, concluding that issue involved an authenticity question, not a *Frye-Reed* issue in which scientific methodology was in dispute.

Cunningham contends that without knowing Apple's technique, "it [is] impossible to determine the reliability of the process used by Apple," and without the benefit of a *Frye-Reed* hearing, it was impossible for the court to properly assess the admissibility of the extraction processes. The State contends that the notion that data—such as the list of "contacts" or photographs—can be downloaded from a cell phone by the company that manufactures it is not a "novel scientific theory."

We start with the law governing the admissibility of expert testimony. Maryland Rule 5-702 provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education,

> (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

"A trial judge has wide latitude in determining whether expert testimony is sufficiently reliable to be admitted into evidence, and his sound discretion will not be disturbed on appeal unless the decision to admit the expert testimony was clearly erroneous or constituted an abuse of discretion." *Montgomery Mut. Ins. Co. v. Chesson*, 399 Md. 314, 327 (2007).

The *Frye-Reed* standard is used to assess the admissibility of "expert testimony based on the application of new scientific techniques." *Wilson v. State*, 370 Md. 191, 201 (2002). The analysis is required "when the proposed expert testimony involves a **novel** scientific method, in which event there must be some assurance that the novel method has gained general acceptance within the relevant scientific community . . . ." *Dixon v. Ford Motor Co.*, 433 Md. 137, 149-50 (2013) (cleaned up). The Court of Appeals, in adopting this standard, held, "before the results of a [s]cientific process can be used against [a litigant], he is entitled to a [s]cientific judgment on the reliability of that process." *Reed v. State*, 283 Md. 374, 385 (1978). The court may take judicial notice of the reliability of techniques and processes that are widely accepted within the scientific community, and it may also take notice that certain theories are unreliable. *Id.* at 380. As the Court of Appeals explained in *Savage v. State*, 455 Md. 138, 171 (2017),

> The fact that an expert's opinion is not contradicted does not require its admission. To so hold would abrogate the gatekeeping obligation of the trial court, which must inquire into the admissibility under *Frye–Reed* of even uncontradicted

> evidence. We also remind Petitioner that in *Frye* itself, the sole evidence at issue was the "uncontradicted" systolic blood pressure deception test. The *Frye* court was not troubled by the fact that the United States failed to submit conflicting scientific evidence. Nor is this Court bound by Dr. Garmoe's opinion because the State failed to respond with science and argument that contradicts his conclusions. It is the proponent's burden of satisfying *Frye–Reed* by a preponderance of the evidence, and to do so at the initial pre-trial stage.

In his brief, Cunningham states he had an expert on cellular technology analysis who would have testified that the cell phone extraction technology used by Apple is unknown, had not been validated in the digital forensics scientific community, and had not been subjected to peer review. Although Cunningham's proposed expert may have testified that Apple's techniques are unknown, Cunningham does not assert that he would testify that Apple's techniques are novel.

Apple has published a white paper on the technology behind its encryption methods.[6] The company publishes guidelines to be used by law enforcement agencies when seeking information from Apple about user's devices.[7] Twice a year it releases transparency reports on government requests.[8] In 2018 Apple received 5,066 requests

[6] *iOS Security: iOS 12.3*, APPLE (May 2019), https://www.apple.com/business/docs/site/iOS_Security_Guide.pdf [https://perma.cc/32XZ-6EV6].

[7] *Legal Process Guidelines: U.S. Law Enforcement*, APPLE (September 2017), https://images.apple.com/br/privacy/docs/legal-process-guidelines-us.pdf [https://perma.cc/CQ8Q-FZH3].

[8] *Privacy – Transparency Report*, APPLE (October 2019), https://www.apple.com/legal/transparency/ [https://perma.cc/AEY3-854N].

similar to the one at issue here, and provided data in 4,432 of those instances, fulfilling 87% of the requests.

Apple has stated it cannot retrieve data off any iPhone running an operating system higher than iOS 7, but it can perform data extractions for devices running iOS 4 through iOS 7 (Hollis's phone was an iPhone 5 running iOS 6). Cunningham has provided no case law supporting his contention that Apple's capacity to do so is unreliable. In contrast, in *United States v. Blake*, 868 F.3d 960 (11th Cir., 2017), the Eleventh Circuit accepted the contents of an iPad in a case where Apple assisted law enforcement in unlocking the device. No expert from Apple testified as to how Apple downloaded the data, but the court explained, "Apple simply had to have an employee plug the iPad into a special computer and then transfer the iPad's data to a thumb drive." *Id.* at 973.

In *Goldstein v. State*, 339 Md. 563, 573 (1995), the Court of Appeals explained the *Frye-Reed* test "was designed to apply to **scientific theories and processes, not to brand-name products**." (Emphasis added.) If the underlying scientific process is generally accepted (in *Goldstein* it was the use of lasers to measure speed), then the court does not need to focus on the specific product used to achieve the process (a LTI 20-20 in *Goldstein*). The Court stated the "ordinary truth-seeking methods of the adversarial process will suffice to expose design flaws in the devices used to gather evidence, without requiring the courts to place a '*Frye-Reed* Seal of Approval' on individual brands." *Id.* at 576.

The underlying **scientific theory and process** here—extracting data from computers (including cell phones)—is generally accepted. In *State v. Pratt*, 200 Vt. 64

(2015), the Supreme Court of Vermont affirmed there was no abuse of discretion when the trial court admitted a forensic expert's testimony regarding his use of the Cellebrite software for retrieving the contents of the defendant's cell phone. In *Pratt*, the expert testified that "numerous agencies use the software," and—similar to Yu here—he conceded he would not be able to speak about the underlying programming. *Id.* at 79. The *Pratt* Court held, "[f]orensic investigation increasingly requires the use of computer software or other technological devices for the extraction of data. While an investigator must have specialized knowledge in the use of the particular software or device, it is not required—nor is it practical—for an investigator to have expertise in or knowledge about the underlying programming, mathematical formulas, or other innerworkings of the software." *Id*. at 77-78.

Courts throughout the country have affirmed expert testimony regarding the use of software and hardware where the expert cannot attest to the exact proprietary method or programming. *See, e.g.*, *Krause v. State*, 243 S.W.3d 95 (Tex. App. 2007) (forensic examiner's exact copy of the defendant's hard drive accepted, despite the examiner conceding he was "not sure exactly how the formula or algorithm works" in the copying software); *United States v. Chiaradio*, 684 F.3d 265 (1st Cir. 2012) (affirming trial court's accepting testimony of an FBI agent, who was not a programmer and have never seen the program's source code, regarding how he used a peer-to-peer file sharing program to identify IP addresses where child pornography had been downloaded); *United States v. Springstead*, 520 F. App'x 168, 169-70 (4th Cir. 2013) (approving admission of computer

forensic examination software over defendant's objection that agent "lacked the requisite knowledge and training to explain how the [forensic] software used in this case was designed and functioned").

Yu was specifically recognized as an expert in cellphone data recovery. He is certified by the International Association of Computer Investigative Specialists, and has over 800 hours of training in digital forensics. He testified that he is a federally deputized member of the Secret Service, Washington Metro Area Electronic Crimes Task Force; is on the National Institutes of Standards and Technology, Computer Forensic Tool Testing Committee; and has contributed to multiple published papers on digital forensics. He testified about the **process** of extracting data from cell phones. Yu stated he processed the data received from Apple in the Cellebrite program, which Cunningham concedes has been tested and shown to be accurate. Cellebrite search reports of cell phones have been accepted at the federal and state level. *See, e.g., United States v. Escamilla*, 852 F.3d 474 (5th Cir. 2017) (denial of a suppression motion regarding law enforcement using Cellebrite to download contacts, pictures, and videos from a cell phone affirmed); *State v. Haley*, 222 So.3d 153, 163-64 (La. Ct. App. 2017) (affirming admittance of a Cellebrite-generated report, and the testimony of a forensic examiner explaining the shortcomings of the program, leaving it to the jury to weigh the evidence's credibility).

With the underlying theory of cell phone data recovery being generally accepted, we do not need to focus on the **specific product** used to achieve the process (here Apple's proprietary software), as Cunningham seems to request. The "ordinary truth-seeking

methods of the adversarial process" were available to Cunningham, and no flaws were exposed in the process of transferring information from Hollis's phone. *See Goldstein*, 339 Md. at 576. We see no need to place a '*Frye-Reed* Seal of Approval' on the Apple iPhone. *Id.*

In *Stevenson v. State*, 222 Md. App. 118 (2015), we held that cell phone location evidence was not **novel** scientific evidence, and so *Frye-Reed* was not applicable. There, we recognized cellular phone technology had become generally understood, and the use of cell phone location records has been widely accepted by numerous federal courts. *Id.* at 134. Similarly, today we recognize cell phone extraction technology has become generally understood.

Based on our review of the trial court's discretion and these authorities, we hold that data being retrieved from a cell phone is not "novel." The trial court's denial of a *Frye-Reed* hearing was not an abuse of discretion.

Authentication

Our next issue is whether the Circuit Court abused its discretion by finding the cell phone data was properly authenticated. In order to introduce the data at trial, the State relied primarily on Yu. Cunningham contends that because Yu neither performed the data extraction, nor knew the individual who had, the data was not properly authenticated pursuant to Maryland Rule 5-901. Cunningham did not make a 6th Amendment Confrontation Clause argument in regard to the data.

The State avers that authentication is a low burden that it has satisfied it in this case. *Sublet v. State*, 442 Md. 632, 666 (2015) ("[T]he bar for authentication of evidence is not particularly high."). The testimony of Yu and Dyer, as well as the contents of the phone itself, satisfy Rule 5-901 according to the State, and thus the reliability of the cell phone evidence is a jury question, rather than the court.

The Court of Appeals has recognized "one of the more helpful pronouncements on the contours of the abuse of discretion standard comes from Judge Wilner's opinion in *North v. North*." *King v. State*, 407 Md. 682, 697 (2009) (cleaned up). Judge Wilner explained a court's decision is an abuse of discretion when it is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *North v. North*, 102 Md. App. 1, 13-14 (1994).

Maryland Rule 5-901 provides that, for evidence to be admissible at trial, it must be "sufficient to support a finding that the matter in question is what its proponent claims." Md. Rule 5-901(a). The Rule states acceptable ways to authenticate evidence, including "testimony of a witness with knowledge that the offered evidence is what it is claims to be," "circumstantial evidence, such as appearance, contents . . ." and "evidence describing a process or system used to produce the proffered exhibit . . . ." Md. Rule 5-901(b)(1), (4), (9).

Cunningham contends this situation is analogous to *Washington v. State*, 406 Md. 642 (2008). There, the defendant was charged with crimes stemming from a shooting outside of a bar. The State, to prove the defendant was present at the time of the shooting,

sought to introduce surveillance video footage that had been downloaded from multiple cameras onto a CD. The owner of the bar testified that he had a technician 'print' a CD with surveillance footage compiled from various cameras, but the technician never testified. The Court of Appeals held the video was not properly authenticated because there was no testimony about the "process used, the manner of operation of the cameras, the reliability or authenticity of the images, or the chain of custody of the pictures." *Id.* at 655.

Cunningham contrasts *Washington* with *Department of Public Safety and Correctional Services v. Cole*, 342 Md. 12, 27 (1996), in which the Court of Appeals held a videotape was properly authenticated because the witness "explained that the videotapes are kept in an individual envelope and are stored in a security vault at the institution where they may be viewed only by signing in and out of a chain of custody form."

Yu spoke of the process and chain of custody by which the phone was sent to and returned from Apple. Unlike the witness in *Washington*, he was able to testify in technical detail about the purported evidence, including the metadata in photographs extracted from the phone. Yu's testimony also included reports of all the data extracted from the phone. On cross-examination, Yu made clear he did not know the actual process Apple used to extract the evidence recovered from the phone. This does not mean the evidence is not authentic. Rather, it goes to reliability, a question the circuit court rightfully left for the jury. His testimony about the process of sending the phone to and from Apple, his communication with Apple, using the Cellebrite machine to unlock what Apple sent back,

and the reports produced about the extracted evidence falls within the Rule's acceptable authentication methods of 5-901(b)(1) ("testimony of a witness with knowledge that the offered evidence is what it claims to be,") and 5-901(b)(9) ("evidence describing a process or system used to produce the proffered exhibit.")

The photographs of Hollis, and a contact for "Ric"—that Ricardo Cunningham admitted was his phone number—extracted from the cell phone are circumstantial evidence that help to support admission under Md. Rule 5-901(b)(4), because they support a reasonable inference that the data on the thumb drive received from Apple was extracted from Hollis's iPhone. The circuit court's decision to admit the cell phone data is not 'beyond the fringe' of what we deem acceptable, and thus we hold it did not abuse its discretion in finding the State met its authentication burden regarding the cell phone evidence.

III. The 911 Call

Double Hearsay

The jury heard a 911 call made by Williams to report the robbery and injuries sustained by Clarke. Before trial, Cunningham filed a motion to exclude the call, which the circuit court denied, as it had in the first two trials. We consider whether the call is barred as double hearsay, or if instead, both levels of hearsay fall within an exception to the rule. The evidentiary record here regarding Williams's testimony and the 911 call is

identical to that in *Cunningham I* because Williams was unavailable for this trial, and her testimony from the first trial was read to the jury verbatim.

Cunningham acknowledges that in *Cunningham I* we found Williams's statements on the call were excited utterance exceptions to hearsay, but maintains we never reached another level of hearsay—Clarke's statements to Williams. Despite this acknowledgement, Cunningham objected to the call as double hearsay in the second trial, and again here. He again asserts there are two levels of hearsay, neither of which are within an exception to the rule. The State responds that both the Clarke-to-Williams communication on the call, as well as Williams-to-dispatcher are excited utterances, and contends this is what we held in *Cunningham I*.

Ordinarily, we review a trial court's decision on the admissibility of evidence for abuse of discretion. *Gordon v. State*, 431 Md. 527, 533 (2013). Whether a statement is hearsay, however, is conducted without deference to the trial court. *See Bernadyn v. State*, 390 Md. 1, 8 (2005) (trial court has no discretion to admit hearsay in the absence of a provision providing for its admissibility).

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." Maryland Rule 5-802. If a statement is recognized as hearsay, the question becomes: whether it falls within one of the enumerated exceptions to the rule. When there are multiple levels of hearsay, each level must satisfy a hearsay exception. Md. Rule 5-805; *Bernadyn v. State*,

390 Md. 1, 19, n.6 (2005) ("[U]nder the common law and the Maryland Rules, each level of hearsay must satisfy an exception to the rule of exclusion before it is admissible.").

The excited utterance exception applies to "[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). "[A]ll agree on two basic requirements [of an excited utterance.] First, there must be an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of the observer. Second, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought." 2 Kenneth S. Broun et al., *McCormick on Evidence* § 272 (7th ed. 2016).

This Court held in *Cunningham I* that Williams's statements of her own perception were admissible under the excited utterance exception. She can be heard on the call telling the dispatcher that Clarke was conscious but "bleeding badly from his head," "bleeding a lot," and "need[s] somebody here fast." She testified that "she was '[s]cared, upset and extremely frustrated' while making the 911 call 'because all I wanted was somebody to hurry up and figure out why he's bleeding and where he's bleeding from and [are] there internal injuries.'" This satisfies both elements of the exception, and we reiterate our holding in *Cunningham I* that Williams's comments were excited utterances.

We now turn to the Clarke-to-Williams hearsay—the information Williams learned from Clarke that she relayed to the dispatcher—which Cunningham contends we did not

rule on in *Cunningham I*.[9] The issue is whether Clarke's statements to Williams satisfy the second element of an excited utterance as laid out by McCormick—a spontaneous reaction to the startling event.

The jury heard Williams tell the dispatcher that while her boyfriend was sleeping, there was a knock at the door, then a robbery when Clarke opened the door. The two men who robbed Clarke had a gun, hit him with it, and took money from the apartment. Williams also recites Clarke's description of the alleged perpetrators to the dispatcher. Williams can be heard asking Clarke questions on the call, and Clarke's mumbled voice can be heard in the background responding.

As in *Cunningham I*, we look to *Cooper v. State*, 434 Md. 209 (2013), and *Harmony v. State*, 88 Md. App. 306 (1991). In *Cooper*, the Court of Appeals held there that "it was not a legal error or an abuse of discretion for the trial judge to admit statements made by [the] [v]ictim as excited utterances when she had been sexually assaulted approximately one hour earlier." *Id.* at 244. In *Harmony*, the victim made the statement three hours after the exciting event, and we concluded even that passage of time did not preclude the testimony from being introduced. We found that "so long as the declarant, at the time of the utterance, [is] still in the throes of the 'exciting event' and therefore not capable of reflective thought . . . the statement is admissible." *Id.* at 320.

[9] We believe the Court of Special Appeals did previously address this issue in *Cunningham I*, but we address it anew here.

Here, the victim Clarke's statements come one hour after a home invasion and assault. In accord with *Cooper* and *Harmony*, the victim's statements here were excited utterances, despite the delay between the startling event and the statements. As noted above, McCarthy testified that when he got to the apartment, Clarke was "kind of in shock," not "quick to respond to my questions," and "all over the place." This was *after* the 911 call was made. Evidence that Clarke was still shocked shortly *following* the 911 call, necessarily means that he was shocked or excited *during* the 911 call, and therefore the excited utterance exception applies.

The Confrontation Clause

We also address the Confrontation Clause, even though Cunningham does not make a Confrontation Clause argument on appeal. The Confrontation Clause of the Sixth Amendment, which applies to states through the Fourteenth Amendment, requires "that in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. In *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), the Supreme Court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination."

The critical issue here is what statements are considered "testimonial." At trial, Cunningham objected to the 911 call on the grounds that Clarke's statements—the parts in which Williams relays what Clarke tells her—are testimonial, and thus barred by the

Confrontation Clause. He conceded at trial that Williams's statements regarding her own perceptions are non-testimonial.

In *Davis v. Washington*, 547 U.S. 813 (2006), the Supreme Court considered whether the interrogation of a victim that took place during a 911 call produced testimonial statements. The Court held the victim's 911 call statement was not testimonial, because its primary purpose was not to testify as a witness, but to "enable police assistance to meet an ongoing emergency" by speaking about events as they were actually happening, rather than describing past events. *Id.* at 828 (cleaned up). Williams's statements of her own perception, like the victim in *Davis*, were to enable police assistance, and thus, under *Davis*, are not testimonial.

We now move to Clarke's statements on the 911 call, which described events that happened in the past, i.e. the robbery, his beating, and his perception of what the perpetrators looked like. The Court of Appeals addressed this issue in *Langley v. State*, 421 Md. 560 (2011).

In *Langley*, the 911 caller had just witnessed a shooting, and relayed what he saw, including the tag number of the getaway vehicle, and what the assailant was wearing. *Id.* at 565. The Court, applying the Supreme Court's analysis from *Michigan v. Bryant*, 562 U.S. 344 (2011), held that the *Langley* caller's statements were non-testimonial. They were made to "allow the police to assess the situation, the threat to their own safety, and possible danger to the potential victim and to the public." *Id.* at 580 (internal quotation omitted). The Court held a court should not "review a purported ongoing emergency with the benefit

of hindsight; statements must be reviewed objectively—at the time they were made—as to whether a reasonable person would believe there was an emergency . . . ." *Id.*

Here, Clarke's 911 statements—reviewed objectively—would lead a reasonable person to believe there was an ongoing emergency. Two masked men beating a man with a gun is information that allows the police to assess the situation, the threat to their own safety, and possible danger to the public. Therefore, Clarke's statements also are non-testimonial, and thus do not run afoul of the Confrontation Clause.

CONCLUSION

For these reasons, we affirm the judgment**s** of the Circuit Court for Montgomery County.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.