Circuit Court for Baltimore City
Case No.: 116279014

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2010

September Term, 2017

BRYAN JOHNSON

v.

STATE OF MARYLAND

Graeff,
Shaw Geter,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon. J.

Filed: December 20, 2018

A jury in the Circuit Court for Baltimore City convicted appellant, Bryan Johnson, of second-degree assault. The alleged victim of the assault was Carey Mosley ("Mosley"). The trial court sentenced appellant to seven years in prison, after which he filed a timely notice of appeal. He asks us to consider the following questions, which he phrases as follows:

1. Did the trial court err in admitting evidence of the 911 call?

2. Did the trial court err in allowing Detective Bailey to testify that after another detective presented a photo array to Mosley, "I look at the packet and say, okay, he picked the right guy?"

3. Did the trial court err in allowing the prosecutor to question Mosley about statements he made to the prosecutor earlier that day?

4. Did the trial court err in denying a motion to dismiss the charges where it was undisputed that a bail hearing had never been held in the case?

For the reasons that follow, we shall affirm the judgment of the trial court.

FACTS AND LEGAL PROCEEDINGS

At approximately 6:30 p.m. on April 18, 2016, Baltimore City Police Department Officer John Gregorio responded to the Patapsco Avenue light rail station, in response to a 911 call of a "cutting." When he arrived, he observed Mosley sitting on a curb, bleeding from a wound to his back. Mosley told the officer that Bryan Johnson, nicknamed "Gator," had stabbed him.[1] Mosley was transported to University of Maryland Shock Trauma by

[1] There were no witnesses to the stabbing, and no camera at the light rail station captured the incident.

ambulance.[2] In the ambulance, Mosley told Baltimore City Detective William Bailey that "Gator, Gator" stabbed him. Because Mosley required immediate medical assistance, Mosley was unable to provide further details.

The next day, Detective Bailey interviewed Mosley at Shock Trauma. To the detective, Mosley, appearing alert, again identified Bryan Johnson, known as "Gator," as the person who stabbed him.

With the name of the assailant provided by Mosley, Detective Bailey created a photo array, which included a picture of appellant. Detective Frank Mundy, who was not involved in the investigation, presented the array to Mosley so as not to suggest whom to choose. After Mosley identified appellant from the array as the person who stabbed him,[3] Detective Bailey obtained a warrant for appellant's arrest and issued a "be on the lookout" ("BOLO") for appellant.[4]

Mosley testified that on April 18, 2016, he was waiting for a light rail train in downtown Baltimore when he saw appellant, a friend he had known all his life, exit an

[2] Mosley's medical records were admitted into evidence. The records indicated a "problem list" of: stab wounds on right and left side of back; right pneumothorax (principal); history of undifferentiated chronic schizophrenia; cocaine abuse; tobacco use disorder, moderate, dependence.

[3] Under the photo of appellant, Mosley signed his name and wrote, "This is Bryant Johns (sic) follow downtown on train Patapsco. He had deadly weapon and he stab in back."

[4] When appellant had not been located by June 7, 2016, Detective Bailey issued a second BOLO. Appellant was arrested on an unrelated matter on June 17, 2016.

arriving train.[5] The two men walked to a McDonald's to get something to eat, after which they caught a light rail train together. At appellant's suggestion, the two got off the train at Patapsco.

After they exited the train, Mosley and appellant walked by the train tracks. Because Mosley owed appellant some money, he withdrew cash from his pocket. Observing money in Mosley's hand, appellant "might have got a little excited" and asked if he could have more than the $20 Mosley had repaid him. When Mosley refused, appellant tried to take the money from him. Mosley said he then "kind of turned the wrong way and [appellant's] rings rubbed up against my back, whatever he had rubbed up against my back and it put a gash in my back. . .and my back started bleeding." Injured, Mosley returned to the light rail station, where a stranger called 911 on his behalf.[6]

In his trial, Mosley initially denied having been stabbed, despite having suffered a collapsed lung as a result of the attack. Instead, he claimed that appellant had "cut [him] in the back so evidently he must have some—some kind of rings on his hand," but "[i]t was no sharp object or nothing like that[.]"

[5] At trial Mosley acknowledged that he was presently incarcerated on theft charges and had been incarcerated on other theft charges several times over the past 15 years. He further agreed that he had cocaine in his system on the day he was stabbed but had not taken his medication for his bipolar disorder. He denied that the absence of his prescribed medication caused visual or auditory hallucinations and said he was "sober as a baby" at the time of the incident because he had taken the cocaine more than three days before the incident.

[6] A recording of the 911 call was played for the jury, over defense objection. The caller was not identified and apparently died before trial.

When confronted with the recording of the 911 call, in which he can be heard in the background telling the caller that appellant had stabbed him, Mosley said, "Okay. I'll go along with it. Maybe he did have a sharp object and stabbed me. Maybe he did do that, but from my knowledge—I didn't see no knife in his hand like, that (indicating.) Nothing like that."

The prosecutor asked Mosley if he had told him before trial that morning that Bryan Johnson stabbed him. Mosley responded, "I have to—I wouldn't say he—yeah, okay. I'll go along with you. It was a stab. It was a stab, but--." The prosecutor sought to clarify, "It was a stabbing?" and Mosley responded, "Yeah."

Then, although conceding that he had initialled each written instruction on the photo array in acknowledgment of his understanding and written under the photo of appellant, "He did have a deadly weapon at the incident when I was stabbed," Mosley backpedaled and testified: "I must have wrote them, but . . . I must have been tired . . . and almost out of breath by tussling and everything." Stating his desire not to press charges against appellant, Mosley continued to equivocate about whether appellant had actually "stabbed" him or just "cut" him on the back with rings or other shiny objects on his hands.[7]

Appellant elected not to put on any evidence. The jury acquitted appellant of first-degree assault but convicted him of second-degree assault.

[7] In his closing argument, the prosecutor opined that Mosley had "minimize[d] as much as possible the [appellant's] involvement because this is a witness on the stand in Baltimore City afraid of the [appellant] and afraid of [appellant's] brother," who had been present in the courtroom during the trial.

DISCUSSION

I.

Appellant first contends that the trial court erred in admitting into evidence, over objection, the recording of the 911 call made by an unidentified person. In his view, the call contains two layers of inadmissible hearsay: (1) the statement by Mosley to the 911 caller identifying appellant as the person who stabbed him; and (2) the statement by the caller to the 911 operator relaying Mosley's identification of the assailant.[8]

Prior to the start of trial, defense counsel moved in *limine* to preclude the admission of the 911 call recording into evidence, arguing that the testimonial statements contained therein—identifying appellant as the person who inflicted Mosley's wounds—did not comprise either a present sense impression or an excited utterance, particularly as the person making the call was not an eyewitness to the crime and it was not clear that the information he relayed derived *from* Mosley.

The State countered that it was clear from the recording that the caller was talking to Mosley, who relayed the pertinent information. The prosecutor continued, "911 calls are admissible for a slew of reasons," including present sense impression and excited utterance, both of which pertained to the call in question. In the prosecutor's view, the recording of the call, which was properly authenticated, was "not testimonial hearsay. This is somebody calling 911 on behalf of someone else to say what happened."

[8] Appellant does not challenge the trial court's ruling that the statements in the 911 call were non-testimonial—and therefore not subject to the requirements of the Sixth Amendment Confrontation Clause—but admissible if they fell within a hearsay exception.

Based on the proffers by counsel, the court ruled insofar as is here relevant:

> Now, whether is it admissible [sic] when it comes through a third party? Thereby, we would be layering Mr. Mosley's hearsay statement with another layer of hearsay. That being what the caller said.
>
> Now, if, in fact, Mr. Mosley were to testify before the 911 tape is moved, Mr. Mosley would, obviously, be allowed to say, "I was stabbed. I know that the person who stabbed me was Bryan Johnson. I had 911 called and I had 911 told that Bryan Johnson stabbed me."
>
> So the question is whether the person who is broadcasting that statement is actually providing hearsay. It's a statement that is made outside of the courtroom, but is the statement being admitted for the purpose of what is said in the statement? It is clear and, I'm sure you will make it very, very clear, both sides, that this person doesn't know who stabbed Mr. Mosley. So the caller's statement that Bryan Johnson stabbed Mr. Mosley is of no evidentiary value on its own. So it's not being submitted for the truth of that. It is being submitted for the truth of Mr. Mosley says Bryan Johnson stabbed him. That's the layer of hearsay. And if the victim can be heard in the background of the tape talking, I don't see where the level of prejudice would come in from allowing this, so long as Mr. Mosley testifies "This man came up. He had a phone. I told him to get me the police and get me an ambulance. And I told him that Bryan Johnson stabbed me."
>
> The other layer of hearsay is not being submitted for the truth of what is being said. So I will allow that in, so long as the State has laid the proper foundation through the testimony of the victim. If things are different than I am assuming here, we will re-discuss this situation before allowing the 911 tape to come in.
>
> * * *
>
> And I will also be alert to any possibility that the caller is magnifying the information that is coming from Mr. Mosley. So long as Mr. Mosley is the person who knows the name and it's not being provided by the caller, then that is the statement that is being submitted for the purpose of its truth.

The prosecutor then offered to play the recording for the court even though the recording had been transcribed. The transcript reveals that the following exchange occurred:

> 911 OPERATOR: Good evening. 911 operator 1316. What is the emergency?
>
> UNIDENTIFIED SPEAKER: Yes, hello. I need an ambulance at the Patapsco light rail stop. A young man—what's your last name, Carey?
>
> MR. MOSLEY: Mosley.
>
> UNIDENTIFIED SPEAKER: What is it?
>
> MR. MOSLEY: Mosley.
>
> UNIDENTIFIED SPEAKER: His name is Carey Mosley. He's been stabbed in the back. I need an ambulance at the (indiscernible) Patapsco light rail stop and I need the police.
>
> 911 OPERATOR: Okay. Sir, I understand where you are. I need you to work with me. What's your phone number?
>
> UNIDENTIFIED SPEAKER: My telephone number is 443 [4xx-xx44]. Sit down, Carey. Sit down.
>
> 911 OPERATOR: All right. You're with him right now? How old is he?
>
> UNIDENTIFIED SPEAKER: How old are you, Carey?
>
> MR. MOSLEY: 51.
>
> UNIDENTIFIED SPEAKER: How old? He's 51.
>
> 911 OPERATOR: And that was him talking in the background, right?
>
> UNIDENTIFIED SPEAKER: Yeah, yeah. That's him, but he's bleeding.
>
> 911 OPERATOR: Okay. Okay. I'm getting help there soon. And when did this happen?

UNIDENTIFIED SPEAKER: It just happened.

911 OPERATOR: Okay. Where is the person who did this? Where is—

UNIDENTIFIED SPEAKER: I don't know. I don't know because I was already here. He came walking across—the one that attacked him, he's not here.

911 OPERATOR: Okay. Is there any serious bleeding?

UNIDENTIFIED SPEAKER: Yeah, he's bleeding in his back.

911 OPERATOR: Is he completely alert?

UNIDENTIFIED SPEAKER: Well, not really, 'cause he's going in and out.

911 OPERATOR: Okay. All right. Sir, again, the paramedics are already notified. I'm putting in for the police to come as well. Okay?

UNIDENTIFIED SPEAKER: All right. Thank you.

911 OPERATOR: All right. Sir, do you have a clean dry cloth available?

UNIDENTIFIED SPEAKER: Do I what?

911 OPERATOR: Do you have a clean, dry cloth available?

UNIDENTIFIED SPEAKER: (Indiscernible)

911 OPERATOR: I'm asking, do you or someone else—

* * *

UNIDENTIFIED SPEAKER: No, no, no.

911 OPERATOR: Okay.

UNIDENTIFIED SPEAKER: I don't, I don't. But what I'm going to do, I'm going to take the shirt that he's got and I'm (indiscernible). So I'm going to do that.

911 OPERATOR: That's wonderful, sir. Thank you so much. That's what I was going to tell you. And don't look down to look at it. Okay? Just keep an eye on it.

UNIDENTIFIED SPEAKER: I know, I know, I know. I need him—I'm telling him just to keep an elevated arm so he don't go in shock.

911 OPERATOR: Okay. Where exactly are you at the light rail? Are you—

UNIDENTIFIED SPEAKER: We are at the No. 16 bus stop.

* * *

911 OPERATOR: The No. 16 bus stop.

UNIDENTIFIED SPEAKER: Yeah. He said the guy that stabbed him named Gator.

911 OPERATOR: The guy's name is Gator?

UNIDENTIFIED SPEAKER: Yeah, his name Gator.

MR. MOSLEY: And then it's Bryan Johnson.

911 OPERATOR: Okay. What is his first name?

UNIDENTIFIED SPEAKER: His name is Bryan Johnson.

911 OPERATOR: Bryan Johnson?

UNIDENTIFIED SPEAKER: Bryan. B-R-A-I-N [sic] Bryan.

911 OPERATOR: Bryan Johnson.

UNIDENTIFIED SPEAKER: He's from Cherry Hill.

911 OPERATOR: Okay. All right. So we have help on the way. Okay?

UNIDENTIFIED SPEAKER: All right. Thank you.

After listening to the recording, the court added:

> THE COURT: Very well. The—there is a second level of hearsay here. When we get to the first level of hearsay, who says that Bryan Johnson did the stabbing; it is Mr. Mosley. Now, Mr. Mosley saying Bryan Johnson stabbed me is a form of identification and is independently admissible there. But for the purpose of how it came in, this is non-testimonial because it's—it is during dependency [sic] of the police emergency and it is a prompt report to the police of the crime under excited circumstances. I find it to be admissible.
>
> As to the caller, I don't believe that it is technically hearsay, in that, he is saying, not that Bryan Johnson did the stabbing, but rather, the victim says Bryan Johnson did the stabbing, which, to the extent that the State wishes to prove that Mr. Mosley says Bryan Johnson did the stabbing, then it would be hearsay. But after listening to the tape, that caller was certainly in an excited state, so excited he didn't understand what they were talking about addressing the wound. So that I don't believe that that added layer of hearsay would interfere with the admissibility of the statements made. So the motion to exclude the 911 tape is denied. All right?

The recording was later played for the jury, over renewed defense objection.

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 5-801(c). Generally, hearsay is not admissible "[e]xcept as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes[.]" Rule 5-802.

The standard for review of a trial court's admissibility determination regarding hearsay provides deference to the trial court's factual conclusions, but no deference to its legal conclusions:

> [T]he trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review. Accordingly, the trial court's legal conclusions are reviewed *de novo*, but the trial court's factual findings will not be disturbed absent clear error.

Gordon v. State, 431 Md. 527, 538 (2013) (internal citations omitted).

Here, there is no question that Mosley's out-of-court statement that it was appellant who stabbed him and the 911 caller's similar statement that Mosley told him that appellant stabbed him are hearsay. Although hearsay is generally inadmissible, "[a] hearsay statement may be admissible . . . under certain recognized exceptions to the rule if 'circumstances provide the "requisite indicia of trustworthiness concerning the truthfulness of the statement."'" *Parker v. State*, 156 Md. App. 252, 259 (2004) (quoting *State v. Harrell*, 348 Md. 69, 76 (1997), in turn quoting *Ali v. State*, 314 Md. 295, 304-05 (1988)). Maryland law recognizes numerous exceptions to the hearsay rule.

One such exception is the "identification" exception, as set forth in Md. Rule 5-802.1(c). The Rule states that "[a] statement that is one of identification of a person made after perceiving the person" is not excluded by the hearsay rule if it is "previously made by a witness who testifies at the trial . . . and who is subject to cross-examination concerning the statement[.]"

Appellant does not dispute the fact that Mosley's statement to the 911 caller that it was appellant who stabbed him was one of identification of a person made after perceiving the person, or that Mosley, who testified at trial, was subject to cross-examination concerning the statement. He avers that Mosley's statement was nonetheless inadmissible hearsay because "there was no showing that it was made under circumstances precluding suspicion of unfairness or unreliability."

As noted by Professor Lynn McLain in 6A Maryland Evidence, State & Federal §801(3):1 (3d ed. 2013, June 2018 update), if, as here, a claim is made that the prior identification was unfair, unreliable, or unduly suggestive, "[t]he burden is on the opponent of the evidence to make a *prima facie* showing of such suggestivity." *See also Jones v. State*, 395 Md. 97, 109-10 (2006) (citing *Jones v. State*, 310 Md. 569, 578 (1987)) (in the context of a pre-trial photo identification, "unless and until *the defendant establishes* that the identification procedure was in some way suggestive, the reliability of a witness' identification is not relevant for due process purposes") (emphasis added).

The burden was on appellant to make a showing of unfairness, unreliability, or undue suggestiveness in Mosley's statement to the 911 caller in which he identified appellant as the person who stabbed him. Appellant offers no factual support of his claim, and there is nothing in the record to suggest that Mosley's identification of someone he has known his whole life was unfair or unreliable. Therefore, pursuant to Rule 5-802.1(c), Mosley's statement to the 911 caller falls within an exception to the rule against the admission of hearsay, and we find no error in admitting it.

The statement of the unidentified 911 caller also falls within an exception to the hearsay rule, the "excited utterance" exception as set forth in Rule 5-803(b)(2), which defines an excited utterance as a "statement relating to a startling event or condition made

while the declarant was under the stress of excitement caused by the event or condition."[9] The underlying rationale of the exception is that it preserves "the benefit of spontaneity in the narrow span of time before a declarant has an opportunity to reflect and fabricate." *Booth v. State*, 306 Md. 313, 324 (1986).

As we explained in *Marquardt v. State*, 164 Md. App. 95, 123-24 (2005) (quoting *Parker v. State*, 365 Md. 299, 313 (2001)),

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

We examine the "totality of the circumstances" when determining whether a lower court properly characterized a statement as an excited utterance. *State v. Harrell*, 348 Md. 69, 77 (1997).

Appellant argues that the 911 caller's statement that Bryan Johnson, or "Gator," stabbed Mosley, as relayed to him by Mosley, was not an excited utterance because there

[9] During trial, the parties argued for and against the admission of the hearsay based on the exceptions of present sense impression and excited utterance. The court did not specify which exception to the hearsay rule it found applicable, but both appellant and the State address only the applicability of the excited utterance exception in their briefs. Because we agree that the excited utterance exception does apply to render the 911 caller's statement admissible, we have addressed only that exception.

is no indication in the record that the unidentified caller was crying, hysterical or otherwise distraught so as to be incapable of reflective thought. To the contrary, the unidentified caller was able to answer . . . each of the questions asked by the 911 operator and his statement was therefore "indicative of reflective thought rather than spontaneity."

During argument concerning the defense motion in *limine*, the court listened to the recording of the 911 call and heard the unidentified caller ask for an ambulance; an ambulance was requested because Carey Mosley had been stabbed, had "serious bleeding" in his back, and was "going in and out" of consciousness. When asked when the stabbing had occurred, the caller advised the operator, "It just happened." The caller did not know where the perpetrator was and appeared to have some trouble processing the operator's instruction to find a clean cloth to press on Mosley's wound.

The court found that the "caller was certainly in an excited state, so excited he didn't understand what they were talking about" when he was given instructions as to how to stop the bleeding. Our independent review of the recording comports with the trial court's perception. Therefore, the court's admission of the recording as an excited utterance based upon the findings that the call was made just after the stabbing occurred and that the caller was excited was not in error, even if the caller did not appear to be hysterical. The caller was relaying the events, including Mosley's identification of the person who stabbed him, as they occurred, and the court reasonably concluded that a person coming upon another person who had just been stabbed in a public place and was bleeding heavily and fading in

and out of consciousness, with no idea whether the perpetrator was still nearby, would be excited by the startling event when calling 911.

The court's finding that the 911 caller was excited was amply supported by the evidence; therefore the trial judge was not clearly erroneous when he made that finding. *Gordon*, 431 Md. at 538. The statement was admissible under the excited utterance exception to the hearsay rule.

II.

Appellant next argues that the trial court erred in permitting Detective Bailey to testify that, after Detective Mundy presented the photo array to Mosley, Detective Bailey "look[ed] at the packet and [said], okay, he picked the right guy." In appellant's view, the detective's testimony improperly conveyed to the jury his (Detective Bailey's) opinion as to appellant's guilt and therefore the statement should have been excluded.

Detective Bailey interviewed Mosley for the second time on the day after the stabbing. Mosley told the detective that Bryan Johnson, or "Gator," stabbed him and supplied the detective with further information. Detective Bailey then created a photo array containing appellant's photo. Detective Mundy, who was not involved in the investigation, was tasked with presenting the photo array to Mosley, because the detective did not know the target suspect and therefore was unable, even inadvertently, to suggest a photo for Mosley to choose. Mosley chose the photo of appellant and wrote on the back of the array that appellant was the person who stabbed him.

At trial, in response to the prosecutor's question, "After you learned from Detective Mundy what had happened, what did you do?" Detective Bailey answered:

> Well, when I got the photo array from Detective Mundy, I wasn't sure if he picked anybody or not, or who he picked was the correct person because Detective Mundy doesn't know until I get the packet back from him. So I look at the packet and I say, okay, he picked the right guy.

After the court overruled defense counsel's objection to the answer, Detective Bailey continued that, based on the identification and further information before him, he obtained an arrest warrant for appellant.

A trial court has "wide latitude" in its control of the admissibility of evidence. *Ford v. State*, 235 Md. App. 175, 190 (2017), *cert. granted*, 458 Md. 580 (2018). An appellate court reviews such decisions under an abuse of discretion standard. *Id*.

Generally, a witness, particularly a police witness, may not express an opinion about a defendant's guilt. *See, e.g.*, *Cook v. State*, 84 Md. App. 122, 137, 139-40 (1990). That is because if the defendant has elected to be tried by a jury, "'it is the province of that jury to decide the guilt or innocence of the defendant.'" *Joseph v. State*, 190 Md. App. 275, 290 (2010) (quoting *Jefferson–El v. State*, 330 Md. 99, 106 (1993)).

Here, Detective Bailey did state that Mosley "picked the right guy" from the photo array, which, under some circumstances, might be considered as the expression of an opinion by Detective Bailey about appellant's guilt. But, as the Court of Appeals explained in *Brooks v. State*, 439 Md. 698, 734 (2014), we must consider the statement in the context in which the jury heard it and not focus on a single word or phrase. Here, although the detective related that Mosley chose the right suspect from the photo array, in context, it is

clear that the detective did nothing more than confirm that Mosley was able to match a photo to the name he had previously provided to the police as his assailant. The court did not abuse its discretion in overruling appellant's objection.

Even had the trial court abused its discretion in admitting the detective's statement, any such abuse would be harmless beyond a reasonable doubt. The uncontradicted testimony revealed that Mosley identified appellant, as a friend he had known his whole life, by name on at least five occasions: to the person who called 911 on his behalf; to Officer Gregorio when he arrived at the scene; to Detective Bailey, both at the Shock Trauma Center and on the day after the incident; and during Mosley's live trial testimony. In fact, at trial there was no real dispute of the identity of the person who caused Mosley's injuries. Therefore, any statement by the detective that Mosley picked the "right guy" from the photo array, when the jury understood that Mosley knew his assailant, did not contribute to the guilty verdict.

III.

Next, appellant avers that the trial court erred in permitting the prosecutor, when Mosley equivocated about whether appellant had stabbed him or just cut him with some rings, to ask Mosley if he had told the prosecutor that appellant had stabbed him but that he was afraid of appellant's brother, who had been in the courtroom during the trial. In appellant's view, the testimony amounted to prosecutorial vouching and violated the advocate-witness rule.

In its brief, the State concedes that the trial judge erred by overruling appellant's objection to the question at issue. The State maintains that the error was harmless beyond a reasonable doubt. We agree with the State.

Despite his numerous pre-trial assertions by Mosley that appellant had stabbed him, during his direct examination, Mosley testified that when appellant tried to get money from his hand, Mosley "turned the wrong way and [appellant's] rings rubbed up against my back . . . and it put a gash in my back, you know, and my back started bleeding." When the prosecutor asked Mosley if he had been stabbed, the witness stated, "I wouldn't say I was stabbed. Whatever it was, it kind of cut me in the back so evidently he must have some—some kind of rings on his hand, you know, to kind of, you know, as he was touching me, kind of grabbed at my money out I pulled my way from it[.]"

The prosecutor appeared to express disbelief that rings rubbing against a person's back would require a visit to Shock Trauma, but Mosley was steadfast in his assertion that, "It was no sharp object or nothing like that, anything that might have caused it." At that point, the prosecutor asked the court's permission to treat Mosley as a hostile witness. The court permitted the prosecutor "some leeway as far as leading the witness and cross-examining him."

Despite the prosecutor's several efforts to confirm Mosley's report to the 911 caller that appellant had stabbed him, "not rubbed up against [him] with rings, but stabbed [him]," Mosley continued to deny that he was stabbed. The prosecutor then asked, "[I]sn't it true

that as recently as today you said that Bryan Johnson stabbed you, sir?" Over defense objection, the prosecutor continued:

> Q The question is isn't it true that today you told me in the presence—you told me today that Bryan Johnson stabbed you? Isn't that true, sir, yes or no?
>
> A I have to—I wouldn't say he—yeah, okay. I'll go along with you. It was a stab. It was a stab, but—
>
> Q It was a stabbing?
>
> A Yeah.

Shortly thereafter, the prosecutor proffered to the court during a bench conference that he believed that appellant's brother, who was seated in the courtroom, was making Mosley nervous. Declining to have the man removed from the courtroom, the court permitted the prosecutor to ask the witness whether anyone in the courtroom was upsetting him. The prosecutor then asked Mosley, over objection, if he had expressed concern to the prosecutor earlier that day about appellant's brother being in the courtroom. Mosely responded:

> I'm going to tell you the truth, Your Honor. I wasn't—I'm saying, I wasn't taking no chance that who was going to be in the courtroom. I just thought it out. I just thought it out whereas though somebody is going to be in the courtroom for him. You know what I mean? That's all that was. You know, I didn't say his brother (indiscernible) and all that kind of stuff (indiscernible).

He, however, denied being scared.

The "prosecutorial vouching rule" prohibits a prosecutor from expressly vouching for the veracity of a witness and makes it "improper for a prosecutor to make suggestions, insinuations, and assertions of personal knowledge." *Walker v. State*, 373 Md. 360, 396

(2003). Conversely, "reverse prosecutorial vouching" prohibits a prosecutor from asserting or implying that a witness is being untruthful. *Id*. at 404; *Elmer v. State*, 353 Md. 1, 15 (1999). An assertion of such personal knowledge impermissibly brings "the prestige and authority of the prosecutor's office to bear at trial" and can be prejudicial enough to warrant a reversal of a conviction, particularly when the credibility of the witness is crucial, because the defendant is denied his right of confrontation and is unable to cross-examine the prosecutor. *Walker*, 373 Md. at 396-97.

Similarly, the advocate-witness rule is a rule of professional conduct that prevents an attorney from participating as a witness in a case he or she is trying. *Id*. at 397. The rule is particularly important in a criminal case because "'jurors will automatically presume the prosecutor to be credible and will not consider critically any evidence that may suggest otherwise.'" *Id*. (quoting *U.S. v. Edwards*, 154 F.3d 915, 921 (9th Cir.1998)).

There can be no question that the prosecutor, in attempting to induce Mosley to admit that he had told the prosecutor that morning that appellant had stabbed him, improperly asserted his personal knowledge and inserted himself as a witness in the trial; the State concedes as much. Such improper remarks by the prosecutor will only warrant reversal, however, when they unfairly prejudice the defendant by misleading or influencing the jury. *Id*. at 398. Appellant has not demonstrated the requisite prejudice.

We perceive two possible interpretations of Mosley's response to the prosecutor's question of whether the witness had told the prosecutor, earlier that day, that appellant had stabbed him: (1) Mosley was agreeing with the prosecutor that he had told the attorney that

appellant had stabbed him; or (2) Mosley was agreeing that appellant had, indeed, stabbed him. If the jury's interpretation was that Mosley agreed with the prosecutor about the content of their earlier conversation, there was no improper reverse prosecutorial vouching, that is, the prosecutor was not pitting his word against Mosley's with a suggestion that Mosley was lying, because their respective positions were the same. In other words, because the witness and the prosecutor were in agreement, the jury was not required to weigh Mosley's credibility against that of the prosecutor because they were each saying the same thing. If, on the other hand, the jury interpreted Mosley's response as agreement with the prosecutor that appellant had indeed stabbed him, that statement did nothing more than support the evidence already before the jury in the form of Mosley's several pre-trial assertions that he had been stabbed and that the person who stabbed him was appellant.

Moreover, regardless of which interpretation of Mosley's answer to the prosecutor's question was adopted by the jury, there can be no claim of unfair prejudice to appellant. The charges submitted to the jury included first-degree and second-degree assault, with the jury acquitting appellant of first-degree assault and convicting him of the lesser charge of second-degree assault.

A conviction of second-degree assault required a finding only that appellant caused offensive physical contact with Mosley. *Nicolas v. State*, 426 Md. 385, 403 (2012); *see also* Md. Code (2002, 2012 Repl. Vol.), §§3-201 and 3-203 of the Criminal Law Article. Regardless of whether appellant stabbed Mosley, as the State contended, or cut Mosley with rings while trying to take Mosley's money, as Mosley averred, the evidence was

sufficient to prove that appellant committed a second-degree assault upon Mosley. Therefore, any impropriety by the prosecutor in asserting his alleged knowledge that Mosley had previously said that appellant stabbed him could not have affected the jury's verdict to appellant's prejudice, and any error by the trial court in admitting the statement was harmless beyond a reasonable doubt.

Similarly, the prosecutor's questions suggesting that Mosley was downplaying the severity of appellant's actions because he was afraid of appellant's brother, who was in the courtroom during the trial, could not have amounted to reverse prosecutorial vouching because Mosley essentially agreed with the prosecutor that he was concerned over the presence of certain people who were in the courtroom on appellant's behalf. And, whether or not the prosecutor believed appellant was afraid to testify harshly against appellant in light of appellant's brother's presence was immaterial, as the jury was able to view the brother's actions and Mosley's reactions, if any, thereto and make its own determination whether Mosley seemed concerned or afraid. Again, any error in admitting the prosecutor's statement was therefore harmless.

IV.

Finally, appellant claims that the trial court erred when it denied his motion to dismiss the charges against him when it was undisputed that a bail review hearing had never been held in this case. According to appellant, the failure to hold a bond hearing denied him due process.

Prior to the start of trial, defense counsel made a motion to dismiss the charges on due process grounds:

> [DEFENSE COUNSEL]: And—but, Your Honor, before we got to those, Mr. Johnson has asked that I raise an issue. He would move to dismiss the charges based on a failure of receiving due process. Apparently in this case, he was already in DOC [Department of Corrections] custody serving a parole retake when the warrant in this case, I guess, was lodged as a detainer against him. He's never been presented to a commissioner, to a judge. He's never had a bail review in the case. The warrant, in fact, I don't believe was ever served on him.
>
> THE COURT: Oh, my.
>
> [DEFENSE COUNSEL]: And it's an unusual set of circumstances.
>
> THE COURT: Well, we can do all of those things today. We can't do the commissioner, but he's really—the commissioner does two things. Number one, he tells you what your charges are. But you know what your charges are because you reviewed them with [defense counsel]. He sets the bail and he determines—he advises you about your right to have an attorney present—attorney represent you, and can facilitate getting that done. But that part's already been done.
>
> So as far as understanding the charges, he would've told you that attempted murder in the first degree is—carries a life sentence and has a potential sentence of life, and the State would have to prove that you took a substantial step beyond mere preparation toward committing premeditated murder—woeful [sic], deliberate and premeditated murder against someone. Attempted second degree murder is attempted to kill somebody else without excuse or justification and that—well, because of when this happened, the justice reinvests an act [sic] has changed that sentence to 40 years. But when this happened, the sentence was 30 years, so that would be the maximum penalty for that.
>
> Assault in the first degree and assault in the second degree are related. That means, assault in the second degree is an impermissible touching or causing harm to another person without excuse, justification, or mitigation, and without the consent of the person.

> For assault in the first degree, it would have to be done with the intent to inflict serious bodily injury or using a handgun, which wouldn't be appropriate here.
>
> And then the last count you're facing is deadly weapon, wearing and carrying with the intent to injure, but the State's going to abandon that one anyway, I'm sure. But that's a three-year offense and State has to prove that, independent of stabbing somebody, you were carrying a knife around with—in a situation where that was clear that you intended to injury [sic] someone, not just stabbing them, but something independent of that.
>
> So those are the charges he would've—the commissioner would have told you about, he or she. And told you about the possible penalties, would have made sure you had a—understood your right to be represented. So I think we've crossed those thresholds. The only question is that of bail, but are you being held on bail—without bail in this case or in the violation of probation?
>
> [DEFENSE COUNSEL]: He's only held on the violation of probation, Your Honor.
>
> THE COURT: Oh, so you're not even held on this? That's why you never had a bail hearing, because no bail has ever been set. If Judge Williams were to change his no bail status, then another Court could easily set a bail in this case. But if—it's irrelevant so long as you're being held until the violation. And the violation is not going to be heard until the case is finished.
>
> So that's what would have happened and I don't see any lingering damage that you have suffered from the failure to see the commissioner, so your motion to dismiss is going to be denied.

When a person is arrested, he or she must go before a judicial officer for an initial appearance, pursuant to Maryland Rule 4-213(a). At that appearance, the judicial officer must advise the accused of each offense with which he was charged, along with the allowable penalties. The judicial officer must also advise the defendant of his right to counsel.

As the trial court pointed out, appellant's public defender had reviewed with him the charges against him; in addition, the court went through the charges and potential penalties again on the record. The court also noted that the presence of appellant's attorney indicated that he had been made aware of his right to counsel and had been appointed a public defender. As appellant had been made aware of the charges and potential penalties and about his right to counsel, the court found that the mandates of the Rule 4-213(a) had been met, even in the absence of a pre-trial hearing.

As previously mentioned, the trial court learned on the date of the trial that appellant had been held on an unrelated violation of probation charge since June 17, 2016 and that the arrest warrant in this matter was lodged as a detainer against him in the violation of probation case.[10] Because appellant was not held in relation to this matter but remained in jail on the violation of probation at all times relevant to this case, the trial court was correct when it ruled, the lack of bail review hearing was "irrelevant," and appellant suffered no prejudice, denial of due process, or increased pre-trial incarceration in the absence of a bail review hearing.

[10] The trial court indicated that appellant was held on a no-bail status in the violation of probation matter, while the State, in its brief, asserts that the case file in that matter shows that a $100,000 bail had been set. Whether or not bail had been set in that matter is of no moment here, however, because there appears to be no dispute that appellant remained in jail on the violation of probation charge until the trial in this matter. According to the pertinent docket entries, appellant was found guilty of violating his probation on December 17, 2017, approximately one month after the completion of the trial in this matter.

Moreover, as the State points out, the indictment in this case was filed on October 5, 2016, and appellant was arraigned on November 4, 2016, by which time an attorney had entered her appearance and filed a request for a jury trial on appellant's behalf.[11] From November 4, 2016 until the first day of trial on November 14, 2017, appellant never requested a bail review hearing. He cannot be said to have suffered unfair prejudice as a result of his own year-long inaction.[12]

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

[11] The public defender who represented appellant and tried this case entered her appearance on November 9, 2016.

[12] And, even were we to agree that the lack of a bail review hearing might entitle appellant to some remedy, we are aware of no statute or legal precept that would permit dismissal of the charges as a sanction.