UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2409

September Term, 2015

CHARLES POORE

v.

STATE OF MARYLAND

Berger,
Friedman,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: November 16, 2016

The appellant, Charles Poore, was charged with one-count of second-degree assault, in connection with events which took place on January 2, 2015, at the apartment home of Ms. F., the victim. The appellant and Ms. F. have a minor daughter, M., who was also in the apartment at the time. M. ran out of the apartment when Ms. F. told her to call the police. On October 9, 2015, the appellant was convicted by a jury in the Circuit Court for Anne Arundel County. On November 23, 2015, he was sentenced to ten years' incarceration.[1] He presents a single question for review:

"Did the court err in admitting [M.]'s out-of-court statement?"

We find no error, and affirm.

The Out-of-Court Statement

The out-of-court statement at issue is an audio-recording of a conversation between M. and a 911 operator on the night of January 2, 2015. The transcript of that recording, which was played in its entirety at trial, reads as follows:

> "OPERATOR: Anne Arundel 911. Do you need police, fire, or ambulance?
>
> "[M.]: Can you – can you please get the police to [Apartment Address]?
>
> "OPERATOR: Okay. Can you repeat that for me?
>
> "[M.]: [Apartment Address]. Please.
>
> "OPERATOR: Okay. What happened?

[1]This term of incarceration, which represents an upward departure from the maximum guideline range of 5 years, was explained on the appellants' sentencing guideline sheet as follows: "6th assault on this victim[,] 3rd conviction; minor child present; length of criminal history, lack of treatment viability."

"[M.]: *My dad, he's hitting my mom. He's hitting my mom and he – he pushed me down. Please, just get someone here. Please. Quick, please.*

"OPERATOR: Okay. How old are you, sweetie?

"[M.]: I'm only – *I'm only 11 years old.* My mom told me to run out because my dad, he was – he was trying to catch me and I – I ran out. Bye.

"(Phone ringing).

"[M.]: Hello.

"OPERATOR: Hi, *this is Anne Arundel County 911. Is everything okay*?

"[M.]: *Please, can you please just get somebody here? Please.*

"OPERATOR: Is your mom and dad still in the apartment?

"[M.]: *My dad, he ran out looking for me because my mom told me to call the police.*

"OPERATOR: Okay. Where – where are you right now?

"[M.]: I'm at – I'm in – I'm at [Apartment Address]. Please.

"OPERATOR: Are you outside or are you in the apartment?

"[M.]: No, I'm outside. *I'm outside in the parking lot. I'm hiding from my dad. Please, just get somebody here quick.*

"OPERATOR: Okay. Stay on the phone with me. Don't hang up. Okay. The police –

"[M.]: Okay.

"OPERATOR: -- are on their way.

"[M.]: *I was just afraid my dad was going to catch me so I hung up.*

"OPERATOR: Okay. Okay. Are you – are you hiding in the parking lot?

"[M.]: Yes, I'm hiding in the parking lot.

"OPERATOR: Okay. Okay. What is your name?

"[M.]: My name is [M.]

"OPERATOR: Okay. We're on the – we're on the way. Just stay on the line with me. Okay.

"[M.]: Okay. Please. *Just get them – get them to come really, really quick. Please.*

"OPERATOR: They're on the way.

"[M.]: Okay.

"OPERATOR: Okay. Has anyone been – has your mom or dad been drinking?

"[M.]: No, neither one. My dad he's just –

"OPERATOR: Okay.

"[M.]: – he's just really, really violent and mean.

"OPERATOR: Okay. Okay. Does your dad have any weapons? Does your mom or dad have any weapons?

"[M.]: No, neither one of them has. *My dad, he's just been putting his hands on my mom really, really badly and smacking her* and –

"OPERATOR: Okay.

"[M.]: *He pushed me down.*

"OPERATOR: Are you okay? Do you need an ambulance?

"[M.]: No. They both – we're all perfectly fine. *Just please get the police here now. I want him gone.*

"OPERATOR: Okay. Does your mom need an ambulance?

"[M.]: I don't think so. I didn't – I don't know. All I know is that he ran out looking for me.

"OPERATOR: Okay. All right. Are they taking any drugs?

"[M.]: No.

"OPERATOR: Okay. Okay. Where in the parking lot are you? Can you tell me?

"[M.]: Yeah. I'm near where the trash cans are.

"OPERATOR: Okay.

"[M.]: There's like this – there's like this like kind like – it's kind of like a van and it's like silver or blue, something like that.

"OPERATOR: Okay. Okay. Stay on the line with me. The police are on the way. Okay.

"[M.]: Okay. *I just need them here like now.*

"OPERATOR: Yeah. It's – is your dad – *is your dad still looking for you or is he back in the apartment*?

"[M.]: No. He's still – *he's still looking for me.* I never saw him come back, *so please just come now.*

"OPERATOR: Okay.

"[M.]: *I'm like – I'm really scared.*

"OPERATOR: I know. Sweetie, what is your dad's name?

"[M.]: Charles Poore."

(Emphasis added).

The Trial

On October 8, 2015, the first day of the appellant's trial, Ms. F. and her daughter M. were both called by the State to testify. During opening statement, the State alerted the

jury to the possibility that both witnesses might testify that they could not remember what happened:

> "[THE STATE]: … It's – you're – when you hear from [M.]'s mother, [Ms. F.], *she's probably going to tell you that she doesn't remember too much about what happened.* Well, that's okay because she wrote down what happened on that night in question.
>
> "*You're probably going to hear from [M.] herself that when she's up there today she doesn't really remember what happened*. Well, that's okay, too, because fortunately she was giving a literal play by play to the 9-1-1 operator. You're going to hear that, when you listen to the 9-1-1, right from [M.]'s mouth, my dad, he's hitting my mom. Well, if she doesn't remember that happening today, again, that's okay because plain as day she told it right to the 9-1-1 operator what was going on."

(Emphasis added).

Ms. F., who was the first of the two to testify, confirmed that she was in her apartment on the night of January 2, 2015, when the appellant came over and the two of them "had words." Beyond that, however, she claimed to remember very little about the evening. When asked, for instance, if she remembered whether or not "anyone put their hands on [her] neck that night," Ms. F. replied, "I don't recall."

Ms. F. did remember telling M. to call the police, and "vaguely" remembered speaking with a police officer. The State presented her with a copy of a domestic violence report, which Ms. F. confirmed bore her signature. The report sets forth the following handwritten statement:

> "He came over waiting [sic] to see his daughter. I told him she wasn't here. He said he was staying until she arrived. My parents dropped her off[.] He then became nasty stating that he wasn't leaving until I gave him my keys[.] My daughter ran outside and called the police.

"*While he was here he grabbed me [by] my neck and pushed me*[.]"

(Emphasis added).

The prosecutor inquired whether, after reading the domestic violence report, Ms. F. remembered having a physical altercation with the appellant. Ms. F. replied, "No." The report was then admitted as substantive evidence, over defense objection.

The State's direct examination of Ms. F. concluded with a series of questions relating to what, if any, continued involvement she had with the appellant after the incident. Ms. F. testified that the appellant had been living with her and M. in the apartment since September 20, 2015, and that the three of them had in fact travelled to the courthouse together that morning. Ms. F. admitted that she had previously discussed the case, and her testimony, with the appellant:

> "[PROSECUTOR]: Since January 2, 2015, *have you discussed this case or your testimony with [appellant]*?
>
> "[MS. F.]: *Very vaguely*.
>
> "[PROSECUTOR]: And since he returned to stay with you and your daughter have you discussed this case with him?
>
> "[MS. F.]: Yes.
>
> "[PROSECUTOR]: *Today have you discussed this case with him*?
>
> "[F.]: *Yes.*
>
> "[PROSECUTOR]: *What did you discuss*?
>
> "[DEFENSE COUNSEL]: Objection.
>
> "THE COURT: Overruled.

"[MS. F.]: *Just that, you know, I want this to be over with. It's – it was very – I don't feel that I need to discuss with you –*

"[PROSECUTOR]: He's the father of your daughter [*i.e.*, M.], right?

"[MS. F.]: That's correct.

"[PROSECUTOR]: *Fair to say you wouldn't want to see anything bad happen to the father of your child*?

"[MS. F.]: *That would be correct.*"

(Emphasis added).

Without any cross-examination by defense counsel, Ms. F. was excused from the witness stand but remained in the courtroom. The State then called M. to testify. Her recollection of the evening was similarly incomplete.

"[PROSECUTOR]: Back in January 2015 was your dad living at the house then?

"[M.]: *I don't know*.

"[PROSECUTOR]: You don't know. Okay. *Do you remember calling – calling the police that day*?

"[M.]: *Not exactly*.

"[PROSECUTOR]: You don't?

"[M.]: No.

"[PROSECUTOR]: *Do you remember what happened on January 2*, that evening?

"[M.]: *All I know is my mom said, call the police, and I ran up the street and called the police*."

(Emphasis added).

M. testified that she and her mother were in the living room when her mother told her to call the police, but that she could not remember which room her father was in. She remembered being scared, but claimed not to remember why.

> "[PROSECUTOR]: *Do you remember how you felt that night* at the time that she asked you to call the police?
>
> "[M.]: *I guess you could say I was scared*.
>
> "[PROSECUTOR]: *Do you remember why you were scared*?
>
> "[DEFENSE COUNSEL]: Objection.
>
> "THE COURT: Overruled.
>
> "[M.]: *Not really*."

(Emphasis added).

M. testified that she did not know why she had run outside, and that she had not seen the appellant assault her mother.

> "[PROSECUTOR]: *Why did you run outside*?
>
> "[M.]: Because I just – *I don't know*.
>
> "[PROSECUTOR]: You don't know?
>
> "[M.]: No.
>
> "[PROSECUTOR]: I think you said earlier that they were – you were scared.
>
> "[M.]: Yeah.
>
> "[PROSECUTOR]: Were you scared at the time that you ran outside?
>
> "[M.]: Maybe just a little bit.
>
> "[PROSECUTOR]: A little bit. *What were you scared of*?

"[M.]: *I don't know*. I wasn't – I'm not really used to calling the police on my father like –

"[PROSECUTOR]: Well, *you're saying today that you don't really remember seeing anything. At the time you ran outside what were you going to tell the police –*

"[M.]: I was going –

"[PROSECUTOR]: – on the phone when you got them on the phone as to what was happening?

"[M.]: *I guess I suspected that he hit her*, I guess. I don't – like –

"[PROSECUTOR]: You suspected it?

"[M.]: Yeah, I guess.

"[PROSECUTOR]: *When you say he hit her you mean your dad hit your mom*?

"[M.]: *Yeah, but I didn't see it.*"

(Emphasis added).

The State eventually moved to admit the audio recording of the 911 call as substantive evidence, pursuant to three potentially applicable hearsay exceptions, including, specifically, Maryland Rule 5-802.1(a). It provides:

"*The following statements previously made by a witness* who testifies at the trial or hearing and who is subject to cross-examination concerning the statement *are not excluded by the hearsay rule*:

"(a) *A statement that is inconsistent with the declarant's testimony, if the statement was* (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and was signed by the declarant; or *(3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement*."

(Emphasis added).

The jury was excused in order for the trial court to listen to the audio-tape of the recording and to hear argument on its admission. Defense counsel objected to the admission of the recording under any of the three proposed hearsay exceptions and provided the following explanation for the objection:

> "[DEFENSE COUNSEL]: Your Honor, the second call is extremely troubling because [M.] says he's mean and violent, and that's referencing, I can only surmise, to other days and not this night. And even if it were it's a characterization that includes her basically name-calling [the appellant]. She doesn't talk – it's not about the actual event.
>
> "So that is – *I believe the second call I think should be completely stricken because it's* basically the sum and substance of the first call except longer and she calls him mean and violent which is *not relevant as to whether or not this actually occurred,* what she thinks of her dad. *It's not relevant that she thinks her dad is mean and violent*.
>
> "*What's relevant is whether she saw what happened*. And *I would like the Court to take* judicial notice of the application for statement of charges as well as take *into consideration her testimony that she didn't see what happened*. And when you look [at] that police report it doesn't say she saw what happened. It says that [Ms. F.] asked her to call the police. And that's what she testified to.
>
> "THE COURT: Right.
>
> "[DEFENSE COUNSEL]: Now her saying that he was pushing her mom around doesn't – on the 9-1-1 you can't assume that she even saw it from that. So *it's more prejudicial than probative* because you cannot – the jury can't tell if she actually saw it from that.
>
> "Now today she said she remembers calling the police. *I don't think they've laid the foundation for an excited utterance* because she said she ran out and you can tell she's out of breath, for one thing. So I don't – I strongly feel *they haven't laid the foundation for an excited utterance*. They didn't ask her any of those questions to lay the foundation for an excited utterance.
>
> "Now she did say she may have been a little scared, because she – but she said because she wasn't used to calling the police on her dad is what she

> said under oath – on the witness stand. So *I don't think she – they've laid the foundation to show she was actually excited when she made the phone call*.
>
> "*You cannot surmise from the phone call whether she has personal knowledge of the event*. And in that case, in that respect it's almost like double hearsay because she said her mother yelled at her to call the police. She testified here today she suspected he may have touched her. *I don't think that's inconsistent*. I don't see how that's inconsistent with the phone call that she didn't actually see it.
>
> "She said he was looking for her. *I think that's more prejudicial than probative*, that fact that [the appellant] may have been looking for her after she ran out of the house I don't think cuts either way as to whether or not guilt or innocence. So *I don't see how any of that, that he was looking for her, is relevant*. I think it just makes him look – the State's going to try to make it look bad, try to make it look like [M.] was scared of him when he's not alleged to have assaulted her."

(Emphasis added).

The State reiterated its position that "both these calls come under – come under a variety of hearsay exceptions. Present sense expression [sic], excited utterance, prior statement of a witness[.]" The trial court ultimately ruled in favor of the State, without expressly stating the basis for its ruling:

> "THE COURT: … All right. Thank you very much. *Based on the testimony that's been provided by the young lady to date, M., and having had the opportunity to listen to the tape I'm going to allow the tape in*, both phone call one and phone call two. Phone call two is merely the follow up as a result of the obvious hang up that you hear and happens immediately thereafter."

(Emphasis added).

No clarification of the ruling was requested. Prior to playing the recording for the jury, the trial judge asked the parties to approach the bench where the following took place:

> "THE COURT: I just want to make you all aware. The bailiff just came to me and indicated that before the trial started – of course the victim

> came in wanting to speak to the defendant. I don't have any problem with that. But *the bailiff also indicated to me that during [M.]'s testimony that she was observing the victim attempting to communicate with [M.] either by motion or verbalization*.
>
> "[THE STATE]: Oh, while sitting – while sitting in here?
>
> "THE COURT: While sitting in here. So I'm just bringing it to the attention of all parties. I am going to schooch (sic) my chair a little bit so that I can keep a little visual on that. But *obviously someone is trying to prevent this young lady from testifying and I have a problem with that*. Okay."

(Emphasis added).

The recording of the 911 call was then played for the jury, over a contemporaneous objection by defense counsel. After a brief cross-examination of M. by defense counsel, the State's case concluded.

The appellant testified in his own defense. He stated that on the night of January 2, 2015, Ms. F. was "questioning me about people I was dealing with and my relationship with other women and stuff," and that the two had a confrontation "on and off for a few hours." At one point Ms. F. tried to take his cell phone away from him. He claimed that he never touched Ms. F. nor threatened her in any way.

The jury convicted the appellant of second-degree assault, the sole offense with which he was charged. This appeal followed.

Discussion

The single focus of this appeal is the trial court's admission of the 911 recording. The appellant contends that the trial court erred in admitting the recording and offers three arguments in support of that contention. We shall address each argument in turn.

I

The appellant's first argument asserts that the State, with full knowledge that she would not provide helpful testimony, called M. solely for the purpose of impeaching her with the 911 recording in order to expose the jury to what would otherwise have been inadmissible hearsay evidence. The argument relies primarily upon the Court of Appeals' decision in *Spence v. State*, 321 Md. 526, 530, 583 A.2d 715, 717 (1991), which held that "[t]he State cannot, over objection, have a witness called who it knows will contribute nothing to its case, as a subterfuge to admit, as impeaching evidence, otherwise inadmissible hearsay evidence."

Spence had been charged in connection with a burglary. Vincent Cole, an alleged accomplice, was called at Spence's trial. The prosecutor indicated that he expected Cole to testify Spence had no involvement in the burglary, "but that his purpose for calling Cole was to get before the jury prior out-of-court statements Cole had made to police officers that, in fact, Spence was one of the perpetrators." *Id*. at 528, 583 A.2d at 716.

After testifying, as predicted, that Spence had no involvement, Cole was impeached by the prosecutor who questioned him by reading from a police detective's typed notes of an oral statement allegedly given by Cole in which he acknowledged committing the burglary with Spence. When Cole denied the veracity of the notes, the detective was called to testify regarding the conversations on which the notes were based. The Court of Appeals rejected this manner of impeachment as a subterfuge, designed to "circumvent the hearsay rule and parade inadmissible evidence before the jury." *Id.* at 530, 583 A.2d at 717 (emphasis added). *See also Bradley v. State*, 333 Md. 593, 606, 636 A.2d 999, 1006 (1994)

(noting that the "State is still entitled to impeach a witness with a prior inconsistent statement if the witness's testimony comes as a surprise," or "if the State did not create the need to impeach"); *Walker v. State*, 373 Md. 360, 385-87, 818 A.2d 1078, 1093-94 (2003); *Jones v. State*, 178 Md. App. 123, 141-42, 941 A.2d 498, 507-08 (2008).

The appellant suggests that the State employed a similar subterfuge here, and points to the prosecutor's opening statement as clearly showing that the State had no motive for calling M. other than to impeach her with the 911 recording.

> "In the instant case, the State was not surprised by the unfavorable testimony of [M.]. In fact, the State told the jury in its opening statement to expect unfavorable testimony from her, but that such testimony was 'okay' because the State would offer out-of-court statements. The State's opening demonstrates that the State knew full well that [M.] would give testimony unsupportive of its trial theory, and, thus, the testimony came as no 'surprise.' *See*, *Jones*, 178 Md. App. at 14[2, 941 A.2d at 508]. *The State's own words clearly show that the State called [M.] in order to impeach her. The court erred in allowing the State to do so*."

Appellant's Brief at 9 (emphasis added).

The first flaw in this argument is that it has not been preserved for appellate review. As the State notes in its brief, "[a]lthough the grounds for an objection to the admission of evidence generally need not be stated, when specific grounds for an objection are stated, any other argument not presented by a defendant to the trial court are deemed waived." Appellee's Brief at 8. In *Klauenberg v. State*, 355 Md. 528, 735 A.2d 1061 (1999), the Court of Appeals characterized this preservation principle as "well-settled":

> "It is well-settled that *when specific grounds are given at trial for an objection, the party objecting* will be held to those grounds and ordinarily *waives any grounds not specified that are later raised on appeal*."

Id. at 541, 735 A.2d at 1068 (emphasis added).

Defense counsel articulated several grounds in the course of explaining her objection to the admission of the 911 recording. It was not remotely argued that the recording should not have been admitted because the State was somehow prohibited from impeaching its own witness. Accordingly, the present argument has been waived.

Even if this argument had been preserved, however, it is without merit. The fact of the matter is that the State did not use the recording for impeachment purposes, but rather offered it as substantive evidence pursuant to three potentially applicable hearsay exceptions, including Maryland Rule 5-802.1(a). In *Stewart v. State*, 342 Md. 230, 674 A.2d 944 (1996), the Court of Appeals described this distinction as "vital," before rejecting a similar argument to the one now made by the appellant:

> "[T]he *Spence* rationale applies when a witness's prior inconsistent statements are admitted only for purposes of *impeachment*, not as substantive evidence. This distinction is vital to the resolution of this case."

Id. at 242, 674 A.2d at 950 (citation omitted).

The Court went on to explain:

> "*The evil that Spence and Bradley sought to guard against was the misuse of impeachment testimony*. The admission of prior inconsistent statements for impeachment creates the danger that the jury will misuse the statements as substantive evidence, despite instructions to the contrary. *This danger does not exist where, as here, the prior statements are admitted as substantive evidence of guilt*."

Id. at 242-43, 674 A.2d at 950 (emphasis added).

Because the 911 recording was offered as substantive evidence of guilt rather than used for impeachment purposes, *Spence* and its caselaw progeny are inapposite in the context of this appeal.

II

The appellant's second argument spans just half a page of his appellate brief. It challenges whether the 911 recording was, in fact, an inconsistent statement for purposes of the Rule 5-802.1(a) hearsay exception. Specifically, the appellant takes issue with the lack of an express finding by the trial court that M.'s inability to remember certain details was feigned, rather than actual. We do not find the argument persuasive, and explain.

Generally speaking, inconsistency between a witness's trial testimony and a prior statement can arise in one of two ways: either as the result of positive contradiction (direct inconsistency) or when a witness falsely professes an inability to remember the facts or events at issue (implied inconsistency). *Nance v. State*, 331 Md. 549, 564 n.5, 629 A.2d 633, 640 n.5 (1993). Identifying direct inconsistency is a straightforward exercise. If a witness denies at trial facts which he or she previously asserted to be true, or offers a version of events that conflicts with a previously offered version of the same events, the resulting inconsistency is self-evident. Implicit inconsistency, on the other hand, resulting from a witness's feigned inability to remember the event is more nuanced. In *Corbett v. State*, 130 Md. App. 408, 746 A.2d 954 (2000), this Court articulated the underlying logic of the phenomenon:

> "A witness who professes not to remember an event in an effort to avoid testifying about it in fact remembers it. He is able to testify about the event, but is unwilling to do so. *Logic dictates that inconsistency may be implied in that testimony because by claiming that he does not remember an event that he does remember, the witness is denying, albeit indirectly, that the events occurred*."

Id. at 425, 746 A.2d at 963 (emphasis added). *See also Nance*, 331 Md. at 572, 629 A.2d at 645 ("The tendency of unwilling or untruthful witnesses to seek refuge in forgetfulness is well recognized. 2 MCCORMICK ON EVIDENCE, § 251, at 121 [(4th ed. 1992)]. When witnesses display such selective loss of memory, a court may appropriately admit their prior statements.").

From that logic, it follows that only false claims of memory loss by a witness will give rise to implied inconsistency.

> "By contrast, a witness who truly is devoid of memory of an event lacks the *ability* to testify fully and accurately about it, not the willingness to do so. *His avowal of no memory of the event is not an implied denial; rather, it is a true statement of lack of memory*."

Corbett, 130 Md. App. at 426, 746 A.2d at 963 (emphasis added).

The task of determining whether a witness's claim of memory loss is feigned or actual" is a demeanor-based credibility finding within the sound discretion of the trial court to make." *Id.* In *Corbett*, we held that if a witness's prior statement depends upon this demeanor-based credibility finding for its admissibility (*i.e.*, the statement is not otherwise inconsistent), it is error for a court to admit the statement before such a finding has been made. 130 Md. App. 408, 746 A.2d 954. *But see McClain v. State*, 425 Md. 238, 252, 40 A.3d 396, 404 (2012) ("Nowhere, however, does the *Corbett* Court require that such a finding be made on the record.").

In the course of his three sentences of argument on this issue, the appellant asserts that the trial court was required to make a preliminary finding that M.'s inability to remember certain details was feigned before admitting the recording as a prior inconsistent

statement and concludes that the court's failure to do so amounts to an abuse of discretion. The short answer to the appellant's argument is that no such finding was necessary, because the recording was otherwise inconsistent by virtue of positive contradictions with M.'s trial testimony. The recording's admissibility as a prior inconsistent statement did not, therefore, depend upon a preliminary demeanor-based credibility finding, as was true in *Corbett*.

The central issue in this case was the appellant's assault of M.'s mother. When M. testified that she did not see the appellant assault her mother that was not a claim of memory loss, feigned or otherwise. It was, rather, directly inconsistent with her repeated declarations to the 911 operator, that "My dad, he's hitting my mom. He's hitting my mom," and "My dad, he's been putting his hands on my mom really, really badly and smacking her[.]" The inconsistency there established is self-evident. The trial court was not required to make explicit on-the-record findings that the recording satisfied the requirements of Maryland Rule 5-802.1(a) before admitting the recording as substantive evidence. *McClain*, 425 Md. at 252, 40 A.3d at 404 ("Rule 5-802.1, unlike some other Rules, does not require explicitly that findings be placed on the record, and we decline to read into the Rule such a requirement.").

III

The appellant's final argument is that the trial court erred in admitting the recording because the statements contained therein were not made on the basis of M.'s personal knowledge.

> "There is no basis to conclude that [M.] observed Mr. Poore assault [Ms. F.], especially where [M.] testified that she 'didn't see' Mr. Poore assault

> [Ms. F.], and provided no further details as to how this conclusion was the result of her own personal knowledge.
>
> "The State did not and could not demonstrate that [M.] had personal knowledge that Mr. Poore hit [Ms. F.]. Without a proper foundation of personal knowledge, the court erred in admitting [M.'s] out-of-court statement."

Appellant's Brief at 13.

The State responds that the appellant's argument "disregards the 9-1-1 recording itself." We agree. Maryland Rule 5-602, "Lack of Personal Knowledge," provides,

> "[A] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony."

The record establishes beyond meaningful dispute that M. was present at a time and location such that she would have had an opportunity personally to perceive the events described in the recording. Although M. testified at trial that she did not actually witness the assault, M.'s prior statements to the 911 operator coupled with evidence of opportunity provided sufficient support for a contrary ruling that she did witness the assault. *See Stouffer v. State*, 118 Md. App. 590, 629, 703 A.3d 861, 880 (1997) (Where personal knowledge requirement put into doubt by testimony of reluctant witness which conflicted with prior statement to police, "the jury was more than entitled to believe the statement given to the police. We hold that there was no error."), *aff'd in part and on other grounds rev'd in part*, 352 Md. 97, 721 A.2d 207 (1998). *See also* 6 L. McLain, *Maryland Evidence*, § 602:1 (2015) ("Generally … the proponent of hearsay falling within an exception to the hearsay rule must provide a sufficient basis for the fact-finder to reasonably find that the

declarant had first-hand knowledge [which] 'may appear from [the declarant's] statement or be inferable from the circumstances.'" (Citation and footnote omitted).).

For these reasons, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.