UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1910

September Term, 2016

STATE OF MARYLAND

v.

AVERY LITTLE

Beachley,
Shaw Geter,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: March 15, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On August 16, 2016, a panel of this Court issued an unreported opinion vacating and remanding a decision from the Circuit Court for Baltimore City that excluded identification and description statements in appellee Avery Little's criminal trial. The opinion instructed the trial court to "clearly state the basis on which it is suppressing the 911 Call Statements and the test that it is applying to make that ruling." *State v. Little*, No. 0247, Sept. Term 2016, slip op. at 17 (filed Aug. 16, 2016).

Following that instruction, on September 27, 2016, the trial court issued a "Memorandum of Law and Order" (the "Memorandum") in which it attempted to explain why it excluded the statements made in the 911 call relating to the identification and description of the perpetrator. The State appeals that decision and asks us: Did the trial judge err when she ruled that a 911 call violated Little's Sixth Amendment right to confront witnesses against him, and suppressed that evidence?

We hold that the trial court erred when it concluded that the Confrontation Clause barred the admission of the identification and description statements. Accordingly, we vacate and remand.

FACTUAL AND PROCEDURAL BACKGROUND

After the State indicted Little for first degree murder, use of a firearm in a crime of violence, and wearing, carrying, or transporting a handgun, Little moved *in limine* to exclude statements made in a 911 call. *Id*., slip op. at 1. The 911 call consists of an anonymous caller describing events as witnessed to an emergency dispatcher:

> [911 OPERATOR]: Baltimore City 911. What is the address of the emergency?

[CALLER]:	5200 block of Denmore Avenue. Guy just shot somebody. Now he's stabbing somebody else. Please hurry.
[911 OPERATOR]:	Where -- where is this at?
[CALLER]:	5200 block of Denmore Avenue.
[911 OPERATOR]:	Where is the person at that was shot?
[CALLER]:	In front of the apartment building and this guy is still out there stabbing.
[911 OPERATOR]:	Is he on the odd or the even side of the street?
[CALLER]:	The even side of the street.
[911 OPERATOR]:	Okay. Give me a description of the suspect.
[CALLER]:	The suspect is … tall, dark skin --
[911 OPERATOR]:	Black male?
[CALLER]:	I mean, no. Tall, light skin, and got on black shirt -- I mean, black pants, black jacket. He just ran into the apartment building. I think it was -- I think his name is Avery.
[911 OPERATOR]:	Okay. Possibly named Avery?
[CALLER]:	Yeah. Please (indiscernible).
[911 OPERATOR]:	And you say -- you say he shot one person and stabbed another?
[CALLER]:	Yeah. I didn't actually see the shooting but I saw him with a gun and then he ran -- ran in the house with the gun. Then he came back out with a butcher knife and he was over there stabbing the guy.

[911 OPERATOR]: So, he did not shoot anyone?

[CALLER]: He's out there with the gun in his hand. He's still shooting.

[911 OPERATOR]: Okay. We're on the way.

[CALLER]: He's still shooting.

[911 OPERATOR]: All right. We're on the way. Discharging a firearm at 5200 block of Denmore Avenue. Discharging a firearm at 5200 block of Denmore Avenue. Suspect is a black male, light skinned --

[CALLER]: He just --

[911 OPERATOR]: -- black pants, black jacket.

[CALLER]: He just ran across --

[911 OPERATOR]: Possibly named Avery.

[CALLER]: Yeah. And he just jumped the fence and ran through the back.

[911 OPERATOR]: Okay. Do you know Avery's last name?

[CALLER]: No.

[911 OPERATOR]: How many people been shot?

[CALLER]: Two. You need to send at least two ambulances.

[911 OPERATOR]: Okay. Does Avery live in that building?

[CALLER]: Yes. Well, he -- he just jumped over the fence and ran to the back.

[911 OPERATOR]: Okay. And the back of what -- what's the name of the street in the back?

[CALLER]:	I don't know the name of the street on the other side. But if they comes through Denmore Avenue, they'll see everything.
[911 OPERATOR]:	Okay. So the suspect lives in the building?
[CALLER]:	Yeah. You need to send two ambulances quickly.
[911 OPERATOR]:	Okay. I've told them. They're on their way. We got a lot of people calling.
[CALLER]:	Okay.
[911 OPERATOR]:	So I'm getting this information from you and then someone else is getting the other. Okay?
[CALLER]:	Okay.
[911 OPERATOR]:	Okay. Stay on the line with me. You're giving me good information.
[CALLER]:	Oh, God. And please let this be anonymous. Please.
[911 OPERATOR]:	Yes. He jumped the fence and ran behind the building? Okay. And you say he stabbed one of them?
[CALLER]:	Yeah. First he shot one. Then he was trying to shoot another one. Looked like he ran out of bullets or something. He ran in the house. He got a knife. And he came back out and started stabbing him. Then he ran back and got a gun and came back out with the gun again. It didn't -- the one he was stabbing he shot again.
[911 OPERATOR]:	Okay. Okay. And you say he shot one man?
[CALLER]:	He shot two men.

[911 OPERATOR]: No, at first. Tell me what happened. You say he shot --

[CALLER]: First I heard these gunshots. I went outside and looked. And it was a guy down on the street and a guy beside the house that was down. And it looked like he was trying to shoot him. Then he ran in the house and got a butcher knife and started stabbing the one that was down. Then he -- he went back in the house and got the gun again and started the one he was stabbing. Hey it was Avery, wasn't it? He was shooting -- he shot that guy and another guy and stabbed him and he shot him.

[911 OPERATOR]: Okay. And he run -- ran in the house?

[CALLER]: Okay. The police is down there now.

[911 OPERATOR]: Okay. Thank you so much.

[CALLER]: Yes. Please. Anonymous, okay.

[911 OPERATOR]: Okay.

The trial court "split the 911 call for purposes of admissibility. It allowed the portions of the call that discussed the emergency and the need for medical and police personnel." *Id*., slip op. at 5. However, it "excluded the portion of the 911 call that included the caller's description of the crime and identification of the suspect." *Id*.

In the unreported opinion, the panel vacated and remanded the trial court's decision, stating, "Because the circuit court's ruling on the suppression of the 911 Call Statements combined Confrontation Clause analysis, hearsay exception analysis, and unfair prejudice analysis, discussing all three at the same time, without clearly applying the rules, we are unable to determine upon which basis the court relied." *Id*., slip op. at 16.

Following our instructions on remand, the trial court issued the Memorandum which is the subject of this appeal. In the Memorandum, the court attempted to explain the legal justification for its decision to exclude from the 911 call only "the identity, description of the suspect and name 'Avery.'" The State appealed pursuant to Md. Code (1973, 2013 Repl. Vol., 2016 Supp.), § 12-302 of the Courts and Judicial Proceedings Article ("CJP"), arguing that the trial court incorrectly applied the Confrontation Clause in its analysis.

STANDARD OF REVIEW AND CONFRONTATION CLAUSE ROADMAP

The trial court's Memorandum provided three separate explanations to justify excluding the description and identification of the assailant from the 911 call. It titled them: 1) Confrontation Clause – The Supreme Court's "primary purpose test" and 911 calls; 2) Hearsay & Excited Utterances Exceptions Meet the Confrontation Clause, and 3) Prejudice Outweighs Any Probative Value. Before stating the applicable standards of review for each basis, we explain the process by which such an analysis should proceed.

The Court of Appeals has stated that,

> Under the framework established by *Crawford* and its progeny, the Confrontation Clause only applies when an out-of-court statement constitutes testimonial hearsay. In other words, there are two limitations on the reach of the right to confront witnesses. First, the right only applies if a statement is testimonial . . . . Second, *the Confrontation Clause only applies to hearsay, or out-of-court statements offered and received to establish the truth of the matter asserted*.

Derr v. State, 434 Md. 88, 106-7 (2013) (emphasis added) (citations omitted) (citing *Crawford v. Washington*, 541 U.S. 36, 59-60 n. 9 (2004)). As a threshold issue, then, a court must determine whether a statement constitutes hearsay to even trigger a

Confrontation Clause analysis. While an appellate court reviews a trial court's rulings on the admissibility of evidence under an abuse of discretion standard, "[w]hether evidence is hearsay is an issue of law reviewed *de novo*." *Gordon v. State*, 431 Md. 527, 533 (2013) (internal citation and quotation marks omitted).

Once a court determines that the evidence at issue constitutes hearsay, it may decide not to exclude it pursuant to a hearsay exception found in Md. Rules 5-803 and 5-804. However, the trial court could still exclude admissible hearsay pursuant to another rule of evidence such as Md. Rule 5-403. This Rule permits a trial court to exclude otherwise admissible evidence on the basis that its unfair prejudice substantially outweighs its probative value. A trial court's decision to exclude evidence as unfairly prejudicial under Md. Rule 5-403 is reviewed for abuse of discretion. *Malik v. State*, 152 Md. App. 305, 324 (2003).

If evidentiary rules do not exclude the evidence at issue, the trial court should consider whether the Confrontation Clause bars its admission. "We . . . apply the *de novo* standard of review to the issue of whether the Confrontation Clause was violated in this case." *Langley v. State*, 421 Md. 560, 567 (2011) (internal citation and quotation marks omitted).

Lastly, the trial court may consider whether admission of unreliable evidence violates a defendant's due process rights. *Armstead v. State*, 342 Md. 38, 84-85 (1996).

DISCUSSION

I. The State's Right to Appeal

As a preliminary matter, Little moves to dismiss the State's appeal. He argues that the trial court, in its Memorandum, excluded the identification and description from the 911 call on non-constitutional evidentiary bases independent of any constitutional basis. Little correctly states that if the trial court provided any non-constitutional basis for excluding statements from the 911 call, the State would not have standing to appeal.

CJP § 12-302(c)(4)(i) provides the State's right to appeal. That section provides that, in criminal cases, the State may appeal:

> (4)(i) In a case involving a crime of violence as defined in § 14-101 of the Criminal Law Article, and in cases under §§ 5-602 through 5-609 and §§ 5-612 through 5-614 of the Criminal Law Article, the State may appeal from a decision of a trial court that excludes evidence offered by the State or requires the return of property alleged to have been seized in violation of the Constitution of the United States, the Maryland Constitution, or the Maryland Declaration of Rights.

In *Hailes v. State*, 442 Md. 488, 498 (2015) the Court of Appeals held that,

> the State may appeal from a trial court's exclusion of intangible evidence based on a determination that the evidence's admission would be a constitutional violation. Thus, here, the State may appeal from the circuit court's grant of the motion to suppress [the] identification of Hailes based on a determination that admission of the same would violate the Confrontation Clause.

Id. at 498. Accordingly, the State may appeal the trial court's exclusion of evidence provided that the exclusion is based on a constitutional violation—here, the Confrontation Clause. Little argues, however, that the trial court provided independent and non-

constitutional bases for its decision to exclude the statements in its Memorandum. We disagree with this characterization.

A constitutional analysis permeates all three discussion sections of the Memorandum such that we cannot glean a separate, non-constitutional basis that would preclude the State's appeal. The first section: Confrontation Clause – The Supreme Court's "primary purpose test" and 911 calls, clearly provides a constitutional analysis. In that section, the trial court concludes that it "cannot admit the 911 caller's identification-related statements into evidence without abridging Defendant's confrontation right and his right to a presumption of innocence."

The second section—Hearsay & Excited Utterances Exceptions Meet the Confrontation Clause—also includes and relies upon the Confrontation Clause rather than an independent and non-constitutional basis for excluding the statements. Although the trial court discusses excited utterances and whether they are reliable under Maryland law, the court does not find the statements inadmissible based purely on a hearsay analysis. Instead the trial court concludes this section by stating,

> Without a sufficient basis of personal knowledge, this Court simply cannot make a finding that the 911 caller's statements relating to the suspect's description were *given for the primary purpose of assisting in an ongoing emergency*. . . .
>
> *Therefore, this Court cannot hold that the 911 caller's identification-related statements are nontestimonial for the purposes of the Confrontation Clause. The Confrontation Clause thus compels the 911 caller's in court testimony as to the description and identification of Defendant*.

(Emphasis added). This language demonstrates that the court interwove its hearsay analysis with the Confrontation Clause and therefore did not exclude the evidence pursuant to Maryland's hearsay rules.

Finally, the third section of the Memorandum—Prejudice Outweighs Any Probative Value—also hinges upon the trial court's understanding of the Confrontation Clause. In this section, the trial court notes that the 911 call is the only evidence that identifies and describes Little. In weighing probative value against the potential for prejudice, the trial court states,

> This Court cannot allow the evidence to be admitted. Clearly, the 911 caller's identification-related statements are nothing more than testimonial statements for the purposes of identification. Highly prejudicial evidence, with great probative value.
>
> However, under *Crawford*, this identification is testimonial hearsay which may only be admitted at trial where the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 68.

The trial court concludes that, "It is therefore, in the face of the Defendant's significant constitution [sic] right to confront, that this Court holds that the probative value of the 911 call is *substantially* outweighed by the undue prejudice caused by the full body of the statement's admission." (Emphasis in original). By incorporating a constitutional analysis here, the trial court appears to misunderstand the test pursuant to Rule 5-403 in weighing probative value against unfair prejudice.

Because the trial court failed to find an independent and non-constitutional basis for excluding the evidence, we deny Little's motion to dismiss the State's appeal.

II. Admissibility of the Statements

As explained above, the only issue before us is whether the trial court incorrectly found the identification and description statements inadmissible pursuant to the Confrontation Clause. Before reaching that issue, however, a trial court must make two threshold determinations: 1) whether the evidence is hearsay and, if so, whether an exception permits admission of the hearsay evidence; and 2) whether any other Maryland evidentiary rule precludes admission of the evidence. A hearsay statement must be otherwise admissible before the trial court begins its constitutional analysis.

A. Hearsay

The Court of Appeals has stated that "hearsay is generally inadmissible at trial because of its inherent untrustworthiness. Exceptions to the rule usually involve those situations where circumstances lend credibility to the statement, thus vitiating the reason for the rule." *Parker v. State*, 365 Md. 299, 312-13 (2001) (quoting *Mouzone v. State*, 294 Md. 692, 696 (1982). By admitting the portions of the 911 call not related to the identification or description of the assailant, the trial court implicitly found that a hearsay exception applied to the rest of the 911 call.[1] In other words, because the trial court ruled that all other portions of the call are admissible, the trial court must have already found that at least one hearsay exception applied to the non-description and non-identification

[1] At oral argument, appellee's counsel argued that the 911 call was not admitted for the truth of the matter asserted, but to explain why police arrived on the scene. We find nothing in the trial court's Memorandum to support this contention.

statements. The portions that the trial court excluded, however, were excluded on constitutional grounds, not hearsay grounds. The Memorandum does not state that the excepted portions are inadmissible pursuant to Maryland's hearsay rules. Rather, the trial court relied on the Confrontation Clause to exclude the identification and description because, in the trial court's view, those statements were "testimonial" and therefore inadmissible.

Whether the Constitution bars the admission of these statements becomes relevant only after the state law issues have been fully resolved. The fact that the statements could be considered "testimonial" should not impact the trial court's determination that the statements are admissible solely in terms of hearsay.

In our review of the 911 call, we see two likely hearsay exceptions that may explain why the trial court admitted the majority of the 911 call: the excited utterance exception, and the present sense impression exception.[2] Although the Memorandum captions the hearsay discussion as "Hearsay & Excited Utterances Exceptions Meet the Confrontation Clause," no reasonable reading of the Memorandum can be interpreted as a clear ruling that the 911 call actually constituted an excited utterance.

[2] We do not mean to limit the trial court to only these two exceptions. Rather, we hope to provide useful examples of what appear to be the two most applicable exceptions for the court's consideration on remand.

1. Excited Utterances

Maryland recognizes the excited utterance hearsay exception in Rule 5-803(b)(2), for "[a] statement relating to the startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Maryland courts can find excited utterances to be admissible hearsay because,

> The 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 of the product of the exciting event.

Parker, 365 Md. at 313 (internal citations and quotation marks omitted). In seeking admission of an excited utterance, the proponent of the statement must establish two things: the speaker's personal knowledge, and the spontaneity of the statement. *Id*. We note that, here, "where the hearsay declarant is unidentified, heightened scrutiny of the purported excited utterance is appropriate." *Id*. at 315.

In *Parker*, two women made statements to police officers about a shooting. *Id*. The police officers were able to observe their emotional states, and spoke in person to the two women. *Id*. The Court of Appeals noted that,

> This is hardly the situation of an anonymous, unknown bystander making a statement from a crowd. *See, e.g. State v. Hill*, 331 S.C. 94, 501 (1998) (hearsay statement of unidentified bystander in a crowd was inadmissible because it could not be demonstrated that the declarant witnessed the shooting or that the declarant was under the stress of the excitement when the statement was made); *State v. Harris*, 207 W.Va. 275 (2000) (hearsay

> statement of "unavailable, anonymous, unknown" declarant who shouted from a crowd that defendant had beaten the victim was inadmissible where it was not accompanied by requisite indicia of reliability).

Id. (citations omitted). Here, although the caller remained anonymous, the trial court is able to listen to the recording. "When the statement itself, or other circumstantial evidence demonstrates the percipiency of a declarant, whether identified or unidentified, this condition of competency [personal knowledge] is met." *Id*. at 315 (quotation marks omitted) (quoting *Booth v. State*, 306 Md. 313, 325 (1986)). The trial court should review the call for indications that the caller perceived the events she spoke of. For example, the caller says, "I didn't actually see the shooting, *but I saw* him with a gun and then he ran -- ran in the house with a gun. Then he came back out with a butcher knife and he was over there stabbing the guy." Other likely relevant statements include:

> He's out there with the gun in his hand. *He's still shooting* . . . . *He's still shooting*. . . . Well, he -- *he just jumped over the fence* and ran to the back . . . . First he shot one. Then he was trying to shoot another one. *Looked like he ran out of bullets or something*. He ran in the house. He got a knife. And he came back out and started stabbing him. Then he ran back and got a gun and came back with the gun again. It didn't -- the one he was stabbing he shot again.

(Emphasis added). The trial court, on remand, must determine whether statements such as these demonstrate the caller's personal knowledge.

In deciding the second factor, the spontaneity of the statement, the trial court should "examin[e] the surrounding circumstances for an indication that the startling event dominated the declarant's thought process when the statement was made." *Id*. at 317. "[W]hether the declarant's statement is exclaimed impulsively or is the result of the inquiry

of another party is not dispositive but, instead, is only one factor to be considered in the admissibility of an excited utterance." *Id*. at 316.

To determine whether the description and identification statements should be admitted pursuant to the excited utterance hearsay exception, the trial court must make findings related to the caller's personal knowledge and the spontaneity of the statements. *Id*. at 313. This will exclusively consist of an application of state law and trial court fact finding. The court should consider neither the Constitution nor the Confrontation Clause in this analysis, nor should it weigh probative value against unfair prejudice.

2. Present Sense Impression

Perhaps the more applicable hearsay exception in this case is the present sense impression exception. Maryland Rule 5-803(b)(1) defines a present sense impression as "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." The Court of Appeals has explained that the first issue in applying the present sense impression is,

> the question of requisite spontaneity. Although statements offered under this exception will usually be those made at the time an event is being perceived, we recognize that precise contemporaneity is not always possible, and at times there may be a slight delay in converting observations into speech. However, because the presumed reliability of a statement of present sense impression flows from the fact of spontaneity, the time interval between observation and utterance must be very short. The appropriate inquiry is whether, considering the surrounding circumstances, sufficient time elapsed to have permitted reflective thought. In the words of Professor Jon Waltz, "absent some special corroborative circumstance, there should be no delay beyond an acceptable hiatus between perception and the cerebellum's construction of an uncalculated verbal description."

Booth, 306 Md. at 324 (citations omitted). The trial court must determine whether the 911 caller described the events with sufficient spontaneity as defined in *Booth*.

The next issue is the "extent to which there must be proof that the declarant is speaking from personal knowledge before the statement may be admitted." *Id*. As explained above, the trial court must also determine whether the caller spoke from personal knowledge.

The final issue for the trial court to resolve is whether the declarant has expressed opinion as opposed to fact. *Id*. at 325. The Court of Appeals explained in *Booth* that,

> A statement that at first blush appears to represent the opinion of the speaker may prove upon more careful analysis to be non-judgmental in character, or it may represent a shorthand rendition of facts. Additionally, we recognize that evidence which enjoys a significant presumption of reliability, and which may be of significant assistance to the trier of fact in arriving at the truth of the matter may be lost if it is excluded because perceptions are cast in opinion form.

Id. In helping to explain this concept, the Court stated, "If the out-of-court declaration is not the sort of conscious deduction which the conditions attaching to the present sense impression exception would themselves prohibit, it should be received as shorthand fact description." *Id*. at 327 (citation omitted).

This final issue may pose a challenge when the caller identifies Avery. The caller first identifies Avery as follows. "The suspect is … tall, dark skin -- . . . I mean, no. Tall, light skin, and got on black shirt -- I mean, black pants, black jacket. He just ran into the apartment building. I think it was -- I think his name is Avery." Later in the call, the caller states "Hey it was Avery, wasn't it?" while apparently speaking to someone else while still

on the phone with the 911 operator. It is indeed possible for the trial court to admit one statement and not the other. Whereas the first time the caller identifies Avery she could be speaking contemporaneously while describing the person she observes—including his physical build and his clothing—the second identification could be a judgment or opinion seeking confirmation from someone else. We note, however, that for the second identification, the caller did not try to identify Avery in response to a request from the 911 operator, but instead appeared to state aloud the name of the person she thought she recognized. The trial court must determine whether, each time the caller says "Avery," she does so as a shorthand description of the person she recognizes, or that she does so as an opinion based on her reflected judgment.

Again, in analyzing the present sense impression exception, we note that the analysis should not include any mention of the Constitution, the Confrontation Clause, or any other evidentiary rule not related to hearsay. As noted above, because the trial court found the majority of the 911 call admissible, it has apparently found that at least one hearsay exception applies to the call.

B. Unfair Prejudice

If the trial court concludes that hearsay exceptions do not apply to the identification and description of the perpetrator, the analysis ends there, and the statements are not admissible. However, if the trial court permits those statements as hearsay exceptions, it must then consider whether any other rule of evidence bars admission. One such rule which

the court attempted to consider below was unfair prejudice pursuant to Rule 5-403. That Rule provides that,

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The Court of Appeals has explained that, "the fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in Rule 5–403." *Odum v. State*, 412 Md. 593, 615 (2010) (quoting Lynn McLain, *Maryland Evidence: State and Federal* § 403.1 (b) (2d ed. 2001)) (citing Joseph F. Murphy Jr., *Maryland Criminal Evidence Handbook* § 506(B) (3d ed. 1993 & Supp. 2007)). "Rather, evidence is considered unfairly prejudicial when 'it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged.'" *Burris v. State*, 435 Md. 370, 392 (2013) (quoting *Odum*, 412 Md. at 615. The Court of Appeals has explained that,

> "[p]robative value is outweighed by the danger of '*unfair*' prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case." Murphy, *supra,* § 506(B) (emphasis in original).

Odum, 412 Md. at 615.

In *Odum*, the defendant sought to exclude evidence of his involvement with a murder and other criminal activity during his trial for kidnapping. *Id*. at 614. This is the type of evidence that the Rule was meant to filter—evidence that casts the defendant in a negative light without being relevant to the alleged crime. The trial court must determine

whether the identification and description would trigger an emotional response or influence the jury to disregard the evidence—that is the test here.

C. The Confrontation Clause

Assuming that the identification and description statements from the 911 call are admissible pursuant to Maryland rules of evidence, we hold that their admission does not violate the Confrontation Clause. Whether statements admitted at trial violate a defendant's constitutional rights pursuant to the Confrontation Clause is a question of law, which we review *de novo*. *Langley*, 421 Md. at 567 (citing *Snowden v. State*, 156 Md. App. 139, 143 n. 4 (2004), *aff'd*, 385 Md. 64 (2005).

The Confrontation Clause of the Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In its landmark decision in *Crawford*, the Supreme Court held that "only with respect to 'testimonial evidence' does the 'Sixth Amendment demand[] what the common law required: unavailability and a prior opportunity for cross-examination.'" *Langley*, 421 Md. 568-69 (quoting *Crawford*, 541 U.S. at 63). Although the Supreme Court provided several examples of "testimonial" statements in *Crawford*, it "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Crawford*, 541 U.S. at 68.

Two years later, in *Davis v. Washington*, 547 U.S. 813 (2006), the Supreme Court provided the following guidance regarding testimonial statements for purposes of the Confrontation Clause:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822. In *Davis*, the Supreme Court held that a 911 call for help during an attack was "plainly a call for help against a bona fide physical threat" and that the call was made so that police could "resolve the present emergency, rather than simply [] learn (as in *Crawford*) what had happened in the past."[3] *Id*. at 827.

In *Michigan v. Bryant*, 562 U.S. 344 (2011), the Supreme Court returned to the Confrontation Clause to explain what it meant by an "ongoing emergency" as discussed in *Davis*. In *Bryant*, the trial court admitted statements that a mortally wounded victim made to police officers in a gas station parking lot. *Id*. at 348. The victim told police that Bryant had shot him, but the victim died within hours of arriving at the hospital. *Id*. at 349. On appeal, the Supreme Court of Michigan concluded that "the circumstances clearly indicate that the 'primary purpose' of the questioning was to establish the facts of an event that had already occurred; the 'primary purpose' was not to enable police assistance to meet an ongoing emergency." *Id*. at 351 (internal quotation marks omitted) (citations omitted).

[3] *Davis* stated that 911 operators "may at least be agents of law enforcement when they conduct interrogations of 911 callers," and "consider[ed] their acts to be acts of police." 547 U.S. at 823 n. 2. For the purposes of our analysis, we assume that the 911 operator here was a law enforcement agent.

The Supreme Court reversed the Supreme Court of Michigan, and expanded the ongoing emergency concept beyond that which it had previously considered in *Davis*.

The Supreme Court explained that "[t]he existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than "prov[ing] past events potentially relevant to later criminal prosecution." *Id*. at 361. The Court further noted that determining whether an ongoing emergency exists is a "highly context-dependent inquiry." *Id*. at 363. Comparing *Davis* to *Bryant*, the Court noted that because "*Davis* . . . [was a] domestic violence case, [the Court] focused only on the threat to the victims and assessed the ongoing emergency from the perspective of whether there was a continuing threat *to them*." *Id*. In *Bryant*, however, where a shooter was on the loose, the Supreme Court held that "An assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue." *Id*. Further, the Court stated that "the duration and scope of an emergency may depend in part on the type of weapon employed." *Id*. at 364. Ultimately, the Supreme Court concluded that

> The existence of an ongoing emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation.

Id. at 370.

The Supreme Court then applied its expanded concept of an ongoing emergency in *Bryant*. First, the Court examined how and when the interrogation occurred. "No shots were being fired, no one was seen in possession of a firearm, nor were any witnesses seen cowering in fear or running from the scene." *Id*. at 371. However, when the police arrived, "they did not know who [the victim] was, whether the shooting had occurred at the gas station or at a different location, who the assailant was, or whether the assailant posed a continuing threat to [the victim] or others." *Id*. (internal quotation marks omitted) (citations omitted). The Court next noted that this was the first post-*Crawford* case to involve a gun, and explained that "An emergency does not last only for the time between when the assailant pulls the trigger and the bullet hits the victim." *Id*. at 373. Finally, the Court considered the informality of the interrogation, finding it more akin to a harried 911 call than a structured interrogation. *Id*. at 377. Based on these factors, the Supreme Court concluded that the victim's statements in *Bryant* were not testimonial because their primary purpose was "to enable police assistance to meet an ongoing emergency." *Id*. at 378 (quoting Davis, 547 U.S. at 822).

The Court of Appeals applied *Bryant* to a 911 call in *Langley*, 421 Md. 560. There, in addition to other eyewitnesses, the State sought to introduce a phone call made to a 911 dispatcher describing Langley, who had moments before the call shot the owner of a store. *Id*. at 563. In the call, which took place after the shooting had occurred and the suspect had driven away, the caller described Langley's escape vehicle and the license plate number. *Id*. at 564-565.

The Court of Appeals explained that *Langley* "call[ed] for a relatively straightforward application of *Bryant*." *Id*. at 562. It noted the similarities to *Bryant*, stating,

> In the present case, an individual walked into the carry-out store and killed the store's owner with a gunshot to the head. The caller relayed to the 9–1–1 dispatcher that a *shooting* had "*just occurred.*" (Emphasis added.) After waiting for the 9–1–1 dispatcher to give the caller another number to call, the caller exclaims, "Hurry up. It just happening." The caller informs the dispatcher that he had "seen the guy" and that he knew the color and the tag number of the getaway vehicle, and approximately what the assailant was wearing. The facts of this case, then, are similar to those with which the Supreme Court in *Bryant* dealt, as both involve assailants inflicting wounds with a firearm, and the declarant relaying identifying information to law enforcement personnel. After *Bryant,* it is of little matter that the purpose of the call was not to stop the immediate shooting or get medial [sic] assistance; all that matters for purposes of the "ongoing emergency" analysis is that the caller in the present case was reporting a shooting that was "just happening," and that the shooter was fleeing, thus remaining potentially a threat to responding authorities and the public at large.

Id. at 577-78 (footnotes omitted).

This analysis applies here. As in *Langley*, the caller informed a 911 dispatcher that a shooting had just occurred, that she had observed a man "stabbing somebody else" and that, at the time of the call, the man was "still out there with a gun in his hand. He's still shooting. . . . He's still shooting." Whether the call was meant to stop the immediate shooting or to seek medical assistance does not control the primary purpose of the call. Rather, in the parlance of *Langley*, "all that matters for the purpose of the 'ongoing emergency' analysis is that the caller in the present case was reporting a shooting that was 'just happening,' and that the shooter was fleeing, thus remaining potentially a threat to

responding authorities and the public at large."[4] *Id*. Although the caller does not make clear whether the suspect had fled the scene when she stated that "he just jumped the fence and ran through the back," the contemporaneousness of the call describing the suspect's actions, coupled with the use of deadly weapons, the caller's inability to locate the suspect, and the fact that police had not yet detained the suspect, persuade us that the suspect still potentially remained a threat to responding authorities and the public at large. The primary purpose of the call was to enable law enforcement to address this extant potential threat. The identification and description of the suspect, then, are nontestimonial.

We recognize that "a conversation which begins as an interrogation to determine the need for emergency assistance" can "evolve into testimonial statements." *Davis*, 547 U.S. at 828 (internal quotations and citations omitted). In fact, in its Memorandum, the trial court found that the statements regarding the shooting, the condition of the victims, and that the suspect was fleeing the scene, were given for the primary purpose of assisting in an ongoing emergency and were therefore nontestimonial. Only the description and identification of the suspect were testimonial, according to the trial court.

The following footnote in *Langley* provides useful guidance that the entire call is nontestimonial:

> We foresee an argument that the 9–1–1 call in the present case is not associated with a call seeking police assistance, as the only information the caller relates concerns the identification of the alleged shooter—i.e., his car

[4] We do not think that whether a suspect flees carries conclusive weight in this analysis. For example, in *Bryant*, the shooter was not "fleeing" but rather had not been yet detained or located by law enforcement. 562 U.S. at 363.

> tag number and his physical appearance. Perhaps such identifying information is not associated with a call seeking police assistance *to help the shot victim,* but it is certainly information that is associated with a call seeking police assistance *to help capture the fleeing suspect* who remains a potential threat to responding authorities and the public at large. After *Bryant,* the "ongoing emergency" analysis focuses on the latter, not the former.

Id. at 578, n. 8 (emphasis in original). The focus of the primary purpose test, even in describing and identifying a suspect, hinges upon whether the information from the call can help the police capture the suspect who remains a threat. Early in the call, when the declarant describes and identifies the suspect as, "Tall, light skin, and got on black shirt -- I mean, black pants, black jacket. He just ran into the apartment building. I think it was -- I think his name is Avery[,]" she is describing an individual as he commits both shootings and stabbings. Even the second identifying statement, "Hey it was Avery, wasn't it?" "is certainly information that is associated with a call seeking police assistance to help capture the fleeing suspect who remains a potential threat to responding authorities and the public at large."[5] *Id*. Under *Langley*, this statement meets the primary purpose of addressing an ongoing emergency. By identifying a then violent individual, the caller's objective primary purpose was to help police capture the suspect who remained a threat to the authorities and public at large.

[5] We do not mean to imply that the statement, "Hey it was Avery, wasn't it?" is otherwise admissible. We simply hold that the Confrontation Clause does not bar its admission pursuant to *Langley*.

At oral argument, appellee's counsel argued that the primary purpose of the call changed when the dispatcher told the caller that she was giving "good information." We disagree that this language changed the primary purpose of the call. "An emergency does not last only for the time between when the assailant pulls the trigger and the bullet hits the victim." *Bryant*, 562 U.S. at 373. Here, although the call ended when police arrived on the scene, the ongoing emergency did not. In *Bryant*, the Supreme Court held that statements made after police officers had arrived on the scene were nontestimonial because they were given for the primary purpose of addressing an ongoing emergency where the shooter was on the loose. *Id*. at 349. When the dispatcher told the caller that she was providing useful information, the suspect was still on the loose. The primary purpose of the call, then, remained to address the ongoing emergency.

Little's counsel also argued that, though not apparent from the transcript, there could be significant pauses in the call that would impact its primary purpose.[6] We disagree. As we explained, the ongoing emergency persisted past the point in time when the police arrived on the scene—all of which is encompassed in the duration of the phone call. We do note, however, that if there are any substantial pauses in the call itself, this may potentially impact a hearsay analysis. For example, if after describing the suspect's clothing and appearance, the caller does not identify him for another twenty seconds, this could affect whether the caller's excited utterance had requisite spontaneity, or whether the

[6] The actual audio recording of the 911 call was not included in the record.

caller's present sense impression constituted an opinion rather than a shorthand description (as well as whether it had the requisite spontaneity). Even if we assume that significant pauses in the call exist, this would only inform the application of evidentiary law, not constitutional law.

For these reasons, we hold that the caller's identification and description of the suspect were nontestimonial, and therefore admissible pursuant to the Confrontation Clause.[7]

III. Due Process

When the Confrontation Clause does not exclude hearsay because that evidence is not testimonial, the final constitutional safeguard available to a criminal defendant is the Due Process Clause of the Fourteenth Amendment. In *Armstead v. State*, the Court of Appeals embraced the Supreme Court's holding that "the due process standard only bars admission of evidence that is so extremely unfair that its admission violates fundamental conceptions of justice." 342 Md. 38, 84 (1996) (citing *Dowling v. United States*, 493 U.S. 342, 352-53 (1990) (internal quotations omitted) (citations omitted). In *Lisenba v. California*, 314 U.S. 219, 236 (1941), the Supreme Court explained that,

> The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false. . . . In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.

[7] In its Memorandum, the trial court takes issue with the fact that the State appears to know the identity of the caller. This issue is immaterial to whether the statements are testimonial under *Crawford* and its progeny.

Maryland courts have considered due process in a variety of contexts to ensure the fundamental fairness of a criminal defendant's trial. *See Armstead*, 342 Md. at 88 (holding that DNA testing techniques were sufficiently reliable such that they did not violate defendant's due process rights); *Hook v. State*, 315 Md. 25, 41-42 (1989) (holding that the State's *nol pros* of second degree murder deprived defendant of fundamental fairness where evidence warranted a jury instruction); *Crawford v. State*, 285 Md. 431, 453 (1979) (holding that interrogation questions violated concepts of fundamental fairness and fatally infected trial despite court's curative instructions to jury).

The Supreme Court "defined the category of infractions that violate 'fundamental fairness' very narrowly." *Dowling*, 493 U.S. at 352. The Court of Appeals has done the same. *Armstead*, 342 Md. at 84. In determining whether due process precludes admission of the evidence here, we note that,

> Judges are not free, in defining due process, to impose on law enforcement officials [their] personal and private notions of fairness and to disregard the limits that bind judges in their judicial function. . . . [They] are to determine only whether the action complained of . . . violates those fundamental conceptions of justice which lie at the base of our civil and political institutions . . . and which define the community's sense of fair play and decency.

Dowling, 493 U.S. at 353 (internal quotations and citations omitted) (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)). The Court of Appeals has "distill[ed] the principle that the essence of the due process 'fundamental fairness' inquiry is whether there was a balanced, fully explored presentation of the evidence. This balance in turn depends on the jury's ability to weigh the evidence, and the defendant's opportunity to challenge the

evidence." *Armstead*, 342 Md. at 87 (citing *Dowling*, 493 U.S. at 353). We leave this determination to the trial court on remand.

CONCLUSION

The trial court must make specific determinations as to whether the statements describing and identifying the assailant are admissible based purely on hearsay rules. If the court finds that hearsay exceptions permit the admission of that evidence, it must next determine if any other Maryland evidentiary rules preclude admission of that evidence. If it cannot find any reason grounded in Maryland law to preclude admission, we hold that the statements are admissible pursuant to the Confrontation Clause. Finally, before the statements can be admitted, the court must determine whether admission of the statements violates appellant's constitutional due process rights. On remand, the trial court should hold a hearing to consider the Maryland evidentiary issues as well as the Due Process Clause.

APPELLEE'S MOTION TO DISMISS APPEAL DENIED. JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED AND REMANDED TO THAT COURT FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.