UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2693

September Term, 2013

JAMES LEWIS

v.

STATE OF MARYLAND

Krauser, C.J.,
Zarnoch,
Reed,

JJ.

Opinion by Reed, J.

Filed: August 18, 2015

Following a jury trial in the Circuit Court for Montgomery County, James Lewis, appellant, was convicted of attempted first-degree murder, first-degree burglary, first-degree assault, and use of a firearm in the commission of a felony or a crime of violence. He was sentenced to incarceration for a term of 30 years for attempted first-degree murder, a concurrent term of 20 years for first-degree burglary, a concurrent term of 20 years for first-degree assault, and a consecutive term of five years for the handgun charge. This timely appeal followed.

QUESTIONS PRESENTED

Appellant presents the following questions for our consideration:

> I. Did the trial court err by permitting a recorded 911 call to be played before the jury?
>
> II. Did the court below err by ruling that appellant's statement to Detective Followell was admissible?
>
> III. Is the evidence legally insufficient to sustain appellant's convictions?

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

At all times relevant to this appeal, Russell Lewis, who is also known as Rusty, owned a single family home located at 350 Ednor Road in Silver Spring. According to Russell, that property had been transferred to him by his grandmother in 2010. In 2011, Russell lived in the home with his aunt, Margaret Charlene Lewis, whom he called "Aunt Char." Russell's aunt lived in the basement and Russell slept in the living room because

items were being stored in the bedrooms while home improvements were being made. Russell testified that he had a "distant" relationship with appellant, who is his father.

Appellant had "issues" with the fact that Russell owned the property because he had anticipated owning it himself. On one occasion, when Russell and appellant were discussing ownership of the property, Russell observed that appellant had a gun. Russell told appellant that he was not afraid of the gun, and, according to Russell, appellant replied "that [Russell] needed to fear him because [Russell] didn't have a clue what he was capable of." Russell believed that this was an "idle threat[]."

On September 19, 2011, Russell returned home from a long trip and went to sleep in the living room. The following morning, he thought he heard a noise at the door to the basement. He said, "good morning" because he thought his aunt was coming up the steps. Russell heard appellant say, "this is for you," and then he was shot in the arm. Another shot was fired and Russell was hit in the head. Russell stood up and wrestled the gun away from appellant and knocked him to the floor. Russell looked at the gun and realized that appellant owned another one. Russell saw that appellant was trying to reach in his pants and thought that he might be reaching for another gun. Russell hit appellant in the head a few times with his fists and appellant fell down to the floor. Russell testified that appellant did not have permission to be inside the home.

Russell went upstairs and got some pants, his keys and his cell phone. As he was leaving the house, he saw appellant try to get up again, so he kicked him. Russell took the

handgun, got in his truck, called 911, and told them what had happened. A recording of the 911 call was played for the jury.

Russell stayed on the phone with the 911 operator until the police arrived. After the police arrived, Russell started to get out of his truck and the handgun that had been on his lap fell out onto the ground. Three unfired bullets and two spent shell casings fell out of the handgun, which was old, rusted and missing parts from the handle. Police handcuffed Russell and recovered the weapon and the other items. Montgomery County Police Officer Sherif Almiggabber observed that Russell was bleeding from his hand, forearm, and head. Russell was soon released and transported to the hospital, where he had surgery to remove a bullet from his arm.

In an attempt to locate any individual who might still be inside the house, police used a camera mounted onto a pole to observe the interior of the house. They observed an elderly white man, later identified as appellant, on some stairs in the house. They ordered appellant to leave the house. When he eventually exited the house, appellant appeared to be "in a fog or daze." He had an abrasion on the right side of his forehead with a little blood coming out of it. He was not wearing a shirt and had a clear plastic glove on his right hand.

Officer Almiggabber found appellant's red Dodge Dakota pick-up truck in a nearby church parking lot. According to Officer Almiggabber, the license plate had a red covering over it. Montgomery County Police Detective Robert Grims testified that the red bag had been found on the ground, and he speculated that it had been used to cover the license plate.

Margaret Charlene Lewis was aware that there had been arguments between Russell and appellant concerning ownership of the property. About a week before the shooting, appellant had come to the house and Margaret heard him tell Russell that the property was "really his" and that he should have it. Margaret had left for work at about 7:30 a.m. and was not at home at the time of the shooting. While at work, she received a telephone call from appellant asking if Russell was at home. Margaret told appellant that Russell was at home sleeping. When Margaret returned home from work, she saw appellant's shoes on the porch.

There had been no forced entry into the house. Margaret had given appellant a key to the house about three years prior to the shooting, at a time when her husband was suffering from Parkinson's disease, and appellant was stopping by to visit him. She had forgotten that she had given appellant the key, and testified that he did not have permission to enter the house on the day of the shooting. Forensic testing on the key appellant used to enter the house on the day of the shooting did not reveal any fingerprints.

Montgomery County Police Detective Darrel Followell interviewed appellant in the emergency room. Appellant was able to hold a conversation, appeared to hear and understand the detective's questions and respond to them. Detective Followell reviewed an advice of rights form with appellant and signed the form for him because one of appellant's hands was handcuffed to the side of the bed and the detective "didn't know the condition of his other hand or his body." The interview was audio recorded and that recording was played for the jury.

Appellant testified in his own defense. At the time of the shooting, he was 78 years old and lived with his wife in Pennsylvania. He acknowledged that he was upset that his son had become the owner of the home. On the morning of September 20, 2011, he drove to Maryland in his red pick-up truck. He carried a gun with him but did not intend to assault his son with it. He explained that he was going to an auction and had $1,800 in his truck. In addition, if Russell was home, he "was going to stop at the [house] to tell him that [he] was contesting the deed to the property for the house[.]" He denied calling Margaret to ask if Russell was at home that morning. Appellant acknowledged that he parked his pick-up truck in the church parking lot so that his son would not be able to see his license plate, that he took his shoes off when he entered the house, that he did not knock or announce himself before entering the house, that he was wearing gloves while in the house, and that he used the key he possessed to open the door.

As appellant opened the door from the basement, he heard Russell yell three to four times, "what's happening[?]" and when he walked through the door, he saw Russell standing there. Appellant told Russell they needed to talk, and Russell started cussing and hollering. Russell pulled out a gun and it misfired. Appellant then drew his gun and, fearing that Russell would shoot him, fired his gun one time. Appellant thought he hit Russell's gun, which dropped onto the floor. Russell then turned his back to appellant. Appellant said, "I'm gone[,]" and at that point, Russell grabbed a pillow and charged toward appellant. Russell threw him to the ground and then struck and kicked him in the head. Russell left the room, but then returned and kicked appellant in the head again. Appellant

did not recall talking to the police or giving a statement. In rebuttal, the State played a recording of the statement appellant gave to police.

We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

I.

A. Parties' Contentions

Appellant first contends that the trial court erred in permitting a recording of the 911 call to be played before the jury. Appellant contends that once Russell was informed that help was on the way and a paramedic was on the telephone line, he appeared to calm down and the excitement of the shooting incident dissipated. He maintains, therefore, that not all of the recording fell within the hearsay exception for an excited utterance. In addition, appellant contends that the recording was erroneously admitted because it contained the out-of-court statements of others including Russell, a 911 operator, and a paramedic, all of which constituted hearsay that did not fall within any exception.

The State counters that Russell's statements in the 911 call are admissible under the excited utterance exception to the hearsay rule, because his statements were "spontaneous and instinctive reaction" to having been shot by appellant, his father. *Cooper v. State*, 434 Md. 209, 242 (2013).

The State also counters that appellant failed to preserve his argument that the 911 operator's and paramedic's statements in call were inadmissible hearsay, because appellant

had not objected to the admission of these statements. In addition, appellant specified his objection was only to Russell's statements. Even if preserved, the State argues the statements were admissible as there were no factual assertions in their statements, thus, they were not offered for the truth of the matter asserted. The State also argues that if the trial court erred it was harmless because the operator's and paramedic's statements were merely cumulative.

B. Standard of Review

Ordinarily, "'[w]e review rulings on the admissibility of evidence . . . on an abuse of discretion standard.'" *Gordon v. State*, 431 Md. 527, 535 (2013) (quoting *Bernadyn v. State*, 390 Md. 1, 7-8 (2005)). A trial court, however, has no discretion to admit hearsay in the absence of a provision providing for its admissibility. *Id.* at 535-36 (citation omitted). Hearsay must be excluded unless it falls within an exception to the hearsay rule. *Id.* at 536. "Whether evidence [constitutes] hearsay is an issue of law we review[] *de novo*." *Id.* (citation and internal quotation marks omitted). In *Gordon*, we recognized that not all aspects of a hearsay ruling need be purely legal, stating:

> A hearsay ruling may involve several layers of analysis. Proponents of the evidence challenged on hearsay grounds usually argue (1) that the evidence at issue is not hearsay, and even if it is, (2) that it is nevertheless admissible. The first inquiry is legal in nature. But the second issue may require the trial court to make both factual and legal findings. For instance, in determining whether evidence is admissible under the excited utterance exception to the hearsay rule, . . . the trial court looks into 'the declarant's subjective state of mind' to determine whether 'under all the circumstances, [he is] still excited or upset to that degree.' It considers such factors, as, for example, how much time has passed since the event,

> whether the statement was spontaneous or prompted, and the nature of the statement, such as whether it was self-serving. Such factual determinations require deference from appellate courts.

Id. at 536-37 (citations omitted).

C. Analysis

With these standards in mind, we turn to the case at hand. Appellant contends that once Russell was informed that help was on the way and a paramedic was on the telephone line, he appeared to calm down and the excitement of the shooting incident dissipated. He maintains, therefore, that not all of the recording fell within the hearsay exception for an excited utterance. In addition, appellant contends that the recording was erroneously admitted because it contained the out-of-court statements of others including Russell, a 911 operator, and a paramedic, all of which constituted hearsay that did not fall within any exception. We disagree and explain.

At the start of the trial, appellant objected to having Russell's recorded call to 911 played for the jury. After hearing the recording out of the presence of the jury, the trial judge stated that, "based upon what I just heard, it clearly appears to be an excited utterance." The following colloquy occurred:

> [DEFENSE COUNSEL]: I understand. I'd ask the court, then, to limit it until they start making this a, you know, question-and-answer thing. On his first call to him, I understand the court's ruling without waiving my objection that it's excited. He's in pain, but on[c]e they started inquiring –
>
> THE COURT: Yeah, and he's in pain, he's breathing heavy, he's excited, he's gasping for air, he's talking about just having been shot, he's still in the yard.

[DEFENSE COUNSEL]: Yeah, but once they start asking him questions then, judge, that's when it should stop. That's my objection.

THE COURT: Okay. Well, the very first question is "what's your name."

[DEFENSE COUNSEL]: No. I mean about the event is what I'm talking about.

THE COURT: Okay, so I'm not sure I understand what the objection is.

[DEFENSE COUNSEL]: Well, it's a prior consistent statement of his.

THE COURT: Well, the – I mean the reason for the hearsay exception is because the person is under the traumatic event that caused the injury, and therefore, that's the reliability of it. That's why it's a hearsay exception.

[DEFENSE COUNSEL]: Yeah, but when such should become a question and answer, it diminishes the actual stress of the situation. He's actually calm enough to respond to these question[s], and if at that point in time he's decided what story to tell, he's telling them that story. That's a prior consistent statement, so I'm asking you to preclude it up to the point of – they actually start going into details about the event.

THE COURT: All right. Well, I'm not aware of any case that limits the content of an excited utterance to the first minute, or the first two minutes, or the first three means [sic], so – my recollection is that it's only if the conversation is made after the influence of the traumatic event has ceased that it's no longer an excited utterance. I mean, if this statement went on for 24 hours, well then, at the end, it might reach that point, but at this point, it doesn't seem as though it's reached that point, so unless you have some case that talks about question-and-answer format precludes the use of an excited utterance, I mean, that's the way excited utterance normally goes.

> [DEFENSE COUNSEL]: I know most of those cases are from the Crawford line of confrontation cases, so under that theory.

The trial court determined that the recording of the 911 call would be admissible, stating:

> Well, at this point, the 911 appears to be an excited utterance. Primarily – well, when you listen to the voice of the speaker, who is the person that was shot, he's breathing heavy, he definitely appears to be excited, he's talking about needing to go to the hospital, he's gasping for breath, and he's – according to his description, he just left the house where the shooting occurred. He's in the yard – he's still in the yard of the house, and he's in the truck, attempted to flee the area because he's concerned about what might happened [sic], so he – it sounds like, from what he's sayings [sic], that the shooting just occurred, so I would rule that that 911 tape is an excited utterance. If counsel has some case that you want me to look at dealing with the format of it, then I would be glad to do that.

Hearsay is defined as "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." Md. Rule 5-801(c). Maryland Rule 5-803(b)(2) provides an exception to the hearsay rule for excited utterances, which are defined as "[a] statement relat[ed] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The rationale for the excited utterance exception was explained by the Court of Appeals in *Mouzone v. State*, 294 Md. 692 (1993), *rev'd on other grounds*, *Nance v. State*, 331 Md. 549, 569 (1993) as follows:

> 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 or the product of the exciting event.

Id. at 697 (citations omitted),

"The proponent of a statement purporting to fall within the excited utterance exception must establish the foundation for admissibility, namely personal knowledge and spontaneity." *Parker v. State*, 365 Md. 299, 313 (2001). In the case at hand, appellant challenges only the spontaneity of Russell's statements. The record, however, supports the trial court's conclusion that Russell's statements were spontaneous. The 911 call was placed moments after the shooting occurred and lasted less than 10 minutes. Russell advised the 911 operator that he had been shot and needed to go to the hospital, expressed frustration that help had not arrived, and was concerned that appellant had another gun and would try to shoot him again. These statements were clearly spontaneous and were made after appellant was shot. Appellant endured a major physical trauma including a gunshot to his arm, and a bullet that grazed his head. Appellant called the police moments after he was shot to get police assistance and medical treatment. It was entirely reasonable for the trial court to conclude that Russell was "excited" as he had just been shot and he "gasp[ed] for breath" in the taped 911 call. Appellant was still in the yard of the house when he made the 911 call, and attempted to flee the area because appellant was still in the house and he was concerned about whether appellant had another gun. *See Billups v. State*, 135 Md. App.

345, 360 (2000) (holding deceased victim's statement was an excited utterance when made "within ten minutes" after intruders shot and robbed him while in his apartment, and police officers testified the victim appeared "scared and nervous"); *Johnson v. State*, 63 Md. App. 485, 494-95 (1985) (holding the statement of a victim of a robbery and assault, made shortly after the crime, to be an excited utterance); *Long v. State*, 3 Md. App. 638, 640-41 (1968) (holding that a shooting victim's statement that he had been in an argument with his son and that his son had shot him was admissible even though given in response to a police officer's question two hours after the shooting). Accordingly, the trial court did not abuse its discretion in admitting Russell's statements under the excited utterance exception.

As for appellant's contention that the statements of the 911 operator and the paramedic should have been excluded, we agree with the State, that no objection was lodged to the admission of those statements. Appellant's objection at trial was limited to Russell's statements. As a result, that issue was not properly preserved for our consideration. Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

Even if that issue had been preserved, appellant would fare no better. The statements of the 911 operator and the paramedic were not factual assertions and were not offered for the truth of the matter asserted. In *Holland v. State*, we recognized that in order to qualify as hearsay, "the words recounted in court must, for starters, constitute an assertion or statement of fact." *Holland v. State*, 122 Md. App. 532, 543 (1998). Here, the

statements of the 911 operator and paramedic were neither assertions nor statements of fact but were made for the purpose of allowing emergency personnel to deal with an ongoing emergency situation by locating Russell and to determine the extent of his injuries. Accordingly, the court did not err in admitting them.

II.

A. Parties' Contentions

Appellant next contends that the trial court erred in denying his motion to suppress the recorded statement he gave to Detective Followell because he invoked his right to counsel and because his statement was not voluntary. The State counters that appellant never requested counsel, and therefore, voluntarily gave the statement to counsel. We agree and explain.

B. Standard of Review

In considering the denial of a motion to suppress, we are limited to the record of the suppression hearing and do not consider the trial record. *Lee v. State*, 418 Md. 136, 148 (2011) (citing *Longshore v. State*, 399 Md. 486, 498 (2007)). We extend great deference to the fact finding of the suppression judge and accept the facts as found, unless clearly erroneous. *Myers v. State*, 395 Md. 261, 274 (2006); *State v. Green*, 375 Md. 595, 607 (2003) (citing *Dashiell v. State*, 374 Md. 85, 93 (2003)). In addition, we review the evidence in the light most favorable to the prevailing party, in this case, the State. *Lee*, 418 Md. at 148-49; *Myers*, 395 Md. at 274; *Green*, 375 Md. at 607. We make our "own independent constitutional appraisal" by reviewing the law and applying it to the facts of

the case. *State v. Luckett*, 413 Md. 360, 375 n.3 (2010) (citation and internal quotation marks omitted).

C. Analysis

At the suppression hearing, appellant argued that he had invoked his right to counsel and that his statement was not voluntary. The trial judge listened to the recorded statement, read the transcript of it, and then held a hearing outside the presence of the jury. At that hearing, Detective Followell testified that he interviewed appellant in the emergency room of Montgomery General Hospital. He described appellant's demeanor as "somewhat talkative, really wanted to just get things over with. Kind of abrupt, I would say." Appellant's responses led Detective Followell to believe that he understood the questions that were asked of him.

Detective Followell reviewed an advice of rights form with appellant. When Detective Followell asked appellant if he would verbally accept the form, appellant responded, "I don't have any other choice. I mean, I don't know." The transcript of the interview shows that Detective Followell responded, "Well no, sir. You do." Appellant then stated, "I would like to talk to a, depending upon the charges, whether I need an attorney or not." Detective Followell did not interpret that statement as a request for an attorney. Detective Followell repeated that appellant had the right to remain silent, that any statements may be used against him, and that he had a right to an attorney. Subsequently, appellant stated that he understood the explanation of rights and Detective Followell signed the form for him because he was unable to do so himself. Appellant was

in pain and, at times, said that his head hurt, but he continued with the interview. According to Detective Followell, appellant did not ask for an attorney and did not ask to stop the interview.

The court denied appellant's motion to suppress the recorded statement. The court found that, on a number of occasions during the interview, appellant stated that he understood his rights and he agreed to have Detective Followell sign the advice of rights form for him because his hands were numb. The court also found that appellant never indicated that he did not want to talk to the police and that his actions indicated that he did not wish to assert his right to remain silent.

As for appellant's statement that he would like "to talk to a, depending upon the charges, whether I need an attorney or not[,]" the court found that was an ambiguous statement that depended upon charges that had not yet been filed. The court held that appellant "never made an unambiguous, clear articulation of a desire to have counsel present" during the interview and, therefore, did not invoke his right to counsel. The court concluded that appellant's statement "was voluntarily made." In reaching that conclusion, the court noted that there was no indication that the detective made any threats, promises, or inducements; there was no indication of a medical situation or treatment that prevented appellant from understanding the questions or interfered with his ability to communicate; and his answers to the detective's questions were responsive.

A. Invocation of the Right to Counsel

Appellant first contends that his statement, "I would like to talk to a, depending upon the charges, whether I need an attorney or not[,]" constituted an invocation of his right to counsel. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court announced that in order to counter the coercive pressures of custodial interrogation, police officers must warn suspects prior to questioning that they have a right to remain silent, that any statements made may be used against them, and that they have a right to the presence of an attorney. Id. at 444. After the warnings are given, if a suspect indicates that he or she wishes to remain silent, the interrogation must cease. *Id.* at 473-74. Similarly, if a suspect states that he or she wants an attorney, the interrogation must cease until an attorney is present. *Id.* at 474. A suspect may, however, waive his or her rights. *Id.* at 475. Once a suspect effectively waives the right to counsel after receiving the warnings required by *Miranda*, law enforcement officers are free to question him or her. *Davis v. United States*, 512 U.S. 452, 458 (1994). Officers may question the suspect until he or she makes an unambiguous request "that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *Id.* at 459 (citation and internal quotation mark omitted). When a "suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect

might be invoking the right to counsel," the suspect has not invoked his or her right to counsel and the questioning may continue. *Id.* (emphasis in original) (citations omitted).

In the case at hand, appellant's statement conveyed only that he thought he might want to speak with an attorney and that wish was contingent upon the charges that might be filed against him. *See Davis v. United States*, 512 U.S. at 462 (holding "Maybe I should talk to a lawyer" was not a request for counsel). Such a contingent thought was insufficient to invoke the right to counsel. Appellant's reliance on *Ballard v. State*, 420 Md. 480 (2011), does not convince us otherwise. In that case, the suspect's statement, "[y]ou mind if I not say no more and just talk to an attorney about this," was not contingent because the preface, "you mind if" was a mere colloquialism. Ballard's statement unambiguously expressed a *desire* for the assistance of an attorney. *Id.* at 491-93 (emphasis added). Here, appellant's desire for an attorney was ambiguous and contingent upon the charges he might face. His statement contained no language that can be construed as an unambiguous expression of his desire for the assistance of an attorney, such that a reasonable police officer under the circumstances presented would not have interpreted appellant's response to be a request for an attorney. Accordingly, the trial court did not err in concluding that appellant had not invoked his right to counsel.

B. Voluntariness of Appellant's Statement to the Police

Appellant further contends that his statement to the police was not voluntary because his physical and mental condition was "fuzzy" and because he expressed that he had no choice, was not able to sign his own name, and was in handcuffs. He asserts that

notwithstanding those factors, the detective "just plodd[ed] ahead" with the interview. We disagree.

The trial court's assessment of whether a statement is voluntary is a mixed question of law and fact. *Winder v. State*, 362 Md. 275, 310 (2001) (citations omitted). We undertake a *de novo* review of the trial court's ultimate determination on the issue of voluntariness and look to the record of the suppression hearing. *Id.* (citation omitted). We do not look, however, at the trial record for additional information, nor do we engage in *de novo* fact-finding. *Id.* (citation omitted).

In order to be deemed voluntary, a confession must satisfy the mandates of the State and United States Constitutional provisions, the Maryland Constitution and Declaration of Rights, the United States Supreme Court's decision in *Miranda*, and Maryland non-constitutional law. *Knight v. State*, 381 Md. 517, 531-32 (2004) (citation omitted). "The totality of the circumstances test . . . governs the analysis of voluntariness under the State and Federal Constitutional provisions." *Griner v. State*, 168 Md. App. 714, 734 (2006) (citations and internal quotation marks omitted). That test requires us to

> look to all of the elements of the interrogation to determine whether a suspect's confession was given freely to the police through the exercise of free will or was coerced through the use of improper means. On the non-exhaustive list of factors we consider are the length of the interrogation, the manner in which it was conducted, the number of police officers present throughout the interrogation, and the age, education and experience of the suspect.

Harper v. State, 162 Md. App. 55, 72-73 (2005) (quoting *Winder*, 362 Md. at 307). Thus, "[o]rdinarily, the voluntariness of the defendant's inculpatory statement is determined based on a totality of the circumstances test[.]" *Id.* at 72.

Maryland non-constitutional law requires that "'no confession or other significantly incriminating remark allegedly made by an accused be used as evidence against him, unless it first be shown to be free of any coercive barnacles that may have attached by improper means to prevent the expression from being voluntary.'" *Id.* at 73 (quoting *Winder*, 362 Md. at 307). Under Maryland non-constitutional law, "a confession is only involuntary" when a defendant "is so mentally impaired that he does not know or understand what he is saying[,]" or when the confession "is induced by force, undue influence, improper promises, or threats." *Hoey v. State*, 311 Md. 473, 482-83 (1988) (citation omitted).

Our review of the record of the suppression hearing, and our consideration of the totality of the circumstances, convince us that the trial court did not err in finding appellant's statement to be voluntary. There was no evidence of force, threats, improper promises, or coercion of any kind. After being informed of his *Miranda* rights, appellant verbally waived them. There is nothing in the record to suggest that he was coerced into waiving his rights or giving a statement. Although appellant was clearly experiencing pain, he was talkative and his responses to the detective's questions indicate that he understood them. There was nothing to indicate that he was taking any type of medication. He articulated his version of what happened at the time of the shooting. Furthermore, when

appellant expressed the idea that he did not have any choice, Detective Followell clarified that appellant could refuse to speak with him if he wished.

When considering the totality of the circumstances under the State and Federal Constitutional provisions, we also conclude that appellant's statements were voluntary. Appellant answered the questions posed in a way that demonstrated he understood the questions. There is nothing in the record to indicate that Detective Followell was forceful or intimidating in any way. In fact, the detective addressed appellant's concern and clarified that he did, in fact, have a choice as to how to proceed. Based on the totality of the circumstances, we are convinced that appellant freely and voluntarily gave his statement to Detective Followell. For all these reasons, we conclude that the trial court did not err in denying appellant's motion to suppress.

III.

A. Parties' Contentions

Appellant's final contention is that the evidence was insufficient to support his convictions because the State failed to prove the breaking element of burglary, and, with respect to his other convictions, the evidence was insufficient because he acted in self-defense after he was attacked by his son, Russell. We shall first address appellant's contention that the evidence was insufficient to establish the breaking element of burglary.

The State counters that appellant failed to preserve this argument because he did not argue with particularity during his motion for judgment of acquittal. Even if preserved, the State argues that the evidence was sufficient to sustain appellant's burglary conviction,

because he gained entry to Russell's home without permission. Furthermore, the State argues that even if the jury was presented with appellant's claim that he acted in self-defense, it could have credited Russell's testimony that appellant was the aggressor.

B. Analysis

Section 6-202(a) of the Criminal Law Article ("C.L."), Md. Code (2002, 2012 Repl. Vol., 2013 Supp.), provides that "[a] person may not break and enter the dwelling of another with the intent to commit theft or a crime of violence."[1] It is well established in Maryland that gaining unauthorized access into a home through the use of a key is sufficient evidence of a breaking for purposes of burglary. *Hobby v. State*, 436 Md. 526, 558 (2014) ("An actual breaking can occur by turning a key or knob[.]" (alteration in original) (citation and internal quotation marks omitted)). *Pryor v. State*, 195 Md. App. 311, 332 (2010) (holding a breaking occurred when defendant gained unauthorized entry to a home using a key to the kitchen door, and thus evidence was sufficient to sustain conviction under C.L. § 6-202(a)).

[1] C.L. § 6-202(a) was amended in October 2014, after appellant's conviction, which provides:

> (a) A person may not break and enter the dwelling of another with the intent to commit theft.
>
> (b) A person may not break and enter the dwelling of another with the intent to commit a crime of violence.

In the case at hand, there was no dispute that appellant used a key to enter the house. Both Russell and Margaret testified that appellant was not permitted to be in the house. That was sufficient evidence from which the jury could conclude that appellant gained unauthorized access to the home using the key, thereby establishing the required breaking element of burglary.

As for appellant's contention that there was insufficient evidence to support his other convictions because he acted in self-defense, that argument was not preserved for our consideration. Maryland Rule 4-324(a) requires a defendant moving for judgment of acquittal to "state with particularity all the reasons why the motion should be granted." *See also Harrison v. State,* 382 Md. 477, 487 n.12 (2004) (quoting Md. Rule 4–324(a)). At the close of the State's case, defense counsel made the following argument in support of appellant's motion for judgment of acquittal:

> Yeah, the entry into this house was with a key that he had had. And he had had permission, even though there's been some testimony that the permission at times was limited. There was testimony that he had been in that house within the last week or so. And I think that they need to prove more than just – it's not a surreptitious – it's using a key that he had been given by the actual occupant other than the victim in this case to enter that house. And I think the burglary falls short on that.

The court denied the motion for judgment of acquittal.

At the close of all the evidence, defense counsel renewed the motion for judgment of acquittal, stating, "I'll renew my motions and ask the court to consider them and the different standard – especially the burglary." The court again denied the motion. By failing to argue with particularity his motion for judgment of acquittal as to self-defense and the

attempted murder, assault, and use of a handgun charges, appellant waived his right to appeal on those grounds.

Even if appellant had preserved his self-defense argument, the evidence was more than sufficient to support the jury's conclusion that appellant did not act in self-defense. The elements of self-defense are:

> (1) The accused must have had reasonable grounds to believe himself in apparent imminent or immediate danger or serious bodily harm from his assailant or potential assailant;
>
> (2) The accused must have in fact believed himself in this danger;
>
> (3) The accused claiming the right of self-defense must not have been the aggressor or provoked the conflict; and
>
> (4) The force used must not have been unreasonable and excessive, that is, the force must not have been more force than the exigency demanded.

State v. Faulkner, 301 Md. 482, 485-86 (1984).

The jury was free to discount or disregard totally appellant's account of the incident and credit Russell's testimony. *See Turner v. State*, 192 Md. App. 45, 81 (2010). Based on Russell's testimony and the 911 call, the jury could have determined that appellant was the aggressor and that he provoked the conflict by breaking into Russell's house and shooting him. The jury could have concluded that appellant did not believe himself to be in danger and did not have reasonable grounds to believe himself to be in apparent imminent or immediate danger or serious bodily harm from Russell. Finally, the jury could have concluded that in shooting Russell, appellant was not defending himself with only

necessary force. Clearly, this case involved the jury's assessment of Russell's and appellant's credibility, and we defer to that assessment in reviewing the sufficiency of the evidence. *Id.* Thus, even if this issue had been preserved for our consideration, we would hold that there was sufficient evidence to sustain appellant's convictions. A rational trier of fact could have rejected appellant's claim that he acted in self-defense and credited Russell's testimony that appellant was the aggressor.

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