Circuit Court for Carroll County
Case No. C-06-CR-19-000447

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 338

September Term, 2022

ANDRE LANE

v.

STATE OF MARYLAND

Berger,
Reed,
McDonald, Robert N.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: June 8, 2023

*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.

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

In October 2021, a jury in the Circuit Court for Carroll County convicted Appellant, Andre Lane, of second-degree assault, robbery, robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, theft of at least $1,500, and false imprisonment. The jury acquitted Appellant of first-degree assault, use of a firearm in the commission of a felony, firearm possession with a felony conviction, and theft of less than $1,500. The court sentenced Appellant to 25 years' incarceration for the robbery with a dangerous weapon conviction, 20 years' incarceration (concurrent) for the conspiracy to commit robbery with a dangerous weapon conviction, and 15 years' incarceration (concurrent) for the false imprisonment conviction, with credit for time served. Appellant presents two questions for our review:

> I. Whether the trial court erred in granting the State's motion in limine to admit evidence that Appellant "possessed" ammunition two months prior to the date of the offense for which Appellant was on trial.
>
> II. Whether the trial court erred in allowing into evidence multiple out-of-court statements by the alleged victim.

For the reasons to follow, we shall affirm the judgment of the circuit court.

BACKGROUND

Appellant shared a house in Westminster with his wife, Beth Lane,[1] their two children, and their 77-year-old housemate, Robert Litwin. Mr. Litwin died of natural causes before the trial.

[1] Pursuant to an agreement with the State, Ms. Lane testified in exchange for receiving a sentence of 10 years' incarceration, with all but 5 years suspended.

Ms. Lane met Mr. Litwin around the year 2000 when she was a prostitute. According to Ms. Lane, she and Mr. Litwin never had sexual relations "[o]ther than him touching [her] feet[.]" Ms. Lane testified that Mr. Litwin "became like a father-figure to [her], and that's how the relationship progressed." Around "2011 or 2012[,]" Ms. Lane and Mr. Litwin moved to a house on West Green Street in Westminster. Mr. Litwin paid all the living expenses.

Ms. Lane was in a methadone program between 2003 and 2019. She relapsed and started using cocaine in 2018. In February 2019 she married Appellant, whom she had first met years earlier when she was 17 or 18 years old and with whom she had had a child. Ms. Lane had one child with Appellant and one child with her previous husband. She testified about the course of her relationship with Appellant as follows:

> We were together for a short while. We separated. He moved out of state. He moved back to Maryland in 2010 and we reconnected. Got pregnant with our son in 2011. Then he was born. We had been together off and on and then we separated and stayed separated from, I would say, 2012 until 2019. . . .
>
> Well, we had always been in each other lives because of [our son]. We just had -- we were co-parenting and we were just friends. We began a romantic relationship, again, the end of 2018. And then when Mr. Litwin got sick in January [2019], [Appellant] came to help me with the kids and him, when he came back from the hospital, and he just came and just ended up staying.

After Appellant moved into the West Green Street house, "Mr. Litwin was still paying the bills." Ms. Lane and Appellant obtained money for drugs from Mr. Litwin.

In April 2019, Ms. Lane, Appellant and the two children traveled to Florida. Ms. Lane and Appellant left the children in Florida with Ms. Lane's father before returning to

Maryland. Ms. Lane testified about her observations of the West Green Street house upon their return from Florida:

> Came back and the night we came back I had noticed that everything in the house had been gone through kind of. Everything was thrown around. It looked like -- it almost looked like there had been a robbery but only upstairs. In my room, [and the children's rooms]. Nothing else had been touched . . . .
>
> We left. We thought Mr. Litwin had done it or had somebody do it just to look through our things or we weren't really sure what was going on but we just felt it was better to leave.

Ms. Lane and Appellant then stayed at Appellant's parents' house in Baltimore for about two weeks. At that time, Mr. Litwin stopped giving money to Ms. Lane and Appellant and obtained a protective order against them. Ms. Lane testified that she "didn't understand . . . why he would have gotten a protective order."

On April 25, 2019, Ms. Lane and Appellant went to Mr. Litwin's house to ask for money. Soon after they arrived, Appellant tied Mr. Litwin to a chair in the basement. Ms. Lane testified that she "saw Mr. Litwin strapped to the chair with the [z]ip [t]ies and a Bungee cord and a strap and [Appellant] was holding a gun." Appellant put a sock in Mr. Litwin's mouth, taped his mouth, hit him "on the side of the face with the gun[,]" and "put the gun in his mouth[.]" According to Ms. Lane, Appellant told Mr. Litwin: "I hope you feel the pain. I want you to feel the pain before you die." Ms. Lane further testified:

> I called the bank and I tried to use the PIN number that I knew and it did not work. So [Appellant] ended up, at some point, hitting Mr. Litwin with the gun, trying to get him to give the right PIN number. At this point I also started to get angry and

> was asking him for the PIN number. He swore that it was the right PIN number.
>
> After that I, in the past, had Western Union myself money so [Appellant] said just Western Union it. So I Western Union myself $1,500 and put Mr. Litwin's information in.

Appellant and Ms. Lane left the house with Mr. Litwin still tied to the chair.

Around 10:51 p.m. that evening, Mr. Litwin knocked on the door of his neighbor, Gordon Johnson. Mr. Johnson answered the door and observed Mr. Litwin's appearance: "He was bleeding. He was -- had on his wrists, zip ties that were tightened so tightly that his wrists were swollen. And his appearance was disturbing . . . . He complained that he may have lost a tooth." According to Mr. Johnson, Mr. Litwin said that [Appellant] and Ms. Lane tied him to a chair in the basement of his house and "coerced him into disclosing the PIN number to a credit card and that they had taken money out of his account." Mr. Johnson testified that Mr. Litwin was in a "heightened, excited state of mind" and Mr. Johnson's "focus was to help him out, to get a police car there, and if necessary, emergency medical attention[.]"

Ms. Lane testified that she did not see where Appellant obtained the gun that he used during the robbery. She stated that she did not own a gun and she never knew Appellant to possess a "real" gun. Mr. Litwin had a gun that he previously kept in the trunk of his car. Ms. Lane testified as follows about the nature of the weapon that Appellant had used during the robbery:

> [DEFENSE COUNSEL]: And that that weapon that you described about him allegedly pulling on Mr. Litwin was, in fact, a pellet gun? Aerosol pellet gun?

> [MS. LANE]: Yes. I -- it was one of my son's missing guns. I don't know if it was pellet, if it was BB, if it was air rifle. I don't know. I don't know guns.

We shall supply additional facts below as needed.

DISCUSSION

I. The court did not err in admitting evidence that Appellant possessed ammunition.

Appellant contends that the trial court erred in admitting evidence that Appellant "was driving a vehicle that contained ammunition approximately 60 days before the events for which he was on trial." According to Appellant, the "ammunition bore no relevance to the case and was highly prejudicial." Appellant also claims that the trial court allowed the State to introduce the evidence of ammunition possession without engaging in the necessary three-step process for admitting other crimes evidence under Maryland Rule 5-404(b).

The State responds that the evidence was relevant to a determination about whether Appellant had access to a firearm. The State further asserts that the court properly exercised its discretion in balancing the probative value of the evidence against the danger of unfair prejudice. According to the State, the evidence did not implicate Maryland Rule 5-404(b) because the evidence did not amount to a "bad act" within the meaning of the Rule.

A. Background

At the outset of trial, the State moved *in limine* to introduce evidence that Appellant had possessed ammunition two months before the robbery. For purposes of the motion,

the parties stipulated that Corporal Jesse Clagett would testify that on February 20, 2019, he conducted a lawful traffic stop on a Ford Escape driven by Appellant. The stipulation further described the factual background of the incident:

> And, eventually, there was a lawful entry into the vehicle by Corporal Clagett who found ammunition. Upon inspection of the vehicle, he observed a clear plastic bag which was tied in a knot at one end and had a whole [sic] in the other end, which he believed to be consistent with bags that controlled dangerous substances are commonly packaged in.
>
> Upon inspection of that bag, he found that the plastic contained seven live rounds of 38 special ammunition. He then conducted a search of the vehicle, but he did not locate a firearm. [Appellant] denied ownership of the ammunition and denied ownership of the vehicle. He stated it belonged to his wife. The registration is actually in the name of Robert Litwin for that vehicle.

The State argued as to the admissibility of the evidence:

> The State is seeking to introduce this evidence because we feel it is legally relevant. It is material and highly probative to the charges in this case. The possession of ammunition approximately eight weeks before the incident in this case makes the existence of a fact that [Appellant] possessed a firearm more probable than it would be without that evidence. It possess [sic] a strong connection to the possession of a firearm on April 25th and goes towards the proof of opportunity to possess a firearm.
>
> The State is not offering the prior possession of ammunition to prove the character of [Appellant] in order to show action and conformity therewith. We are entering it to show that [Appellant] recently had ammunition in his possession, which is relevant to whether he possessed and/or had access to a real firearm. Possessing -- again, possessing an actual firearm and not a pellet gun or some other type of gun that is not a firearm, by definition, is an element of at least one of the firearm charges in this case.

* * *

> Whether it is a prior bad act under 5-404(b), I guess that is a determination for Your Honor because [Appellant] is not legally eligible to possess ammunition, but that is not something that the jury would know in this case. They would only know, if this testimony was allowed, that he possessed ammunition on that time, which is ---- the State feels, first of all, that it is a legally relevant argument under 5-401 and 402.
>
> And secondly, if Your Honor feels it is a prior bad act, I think we meet the elements of that rule, too, because we are not offering it to show action and conformity there within his character. We are entering it to show that he had ammunition in his possession, which is relevant to possessing a real firearm. And that is substantially relevant to the issue of whether he, in fact, did possess that firearm.

Appellant's trial counsel argued that the evidence was "more prejudicial than probative[.]" Defense counsel stated that "[t]here is no stipulation that [the ammunition] was in plain view, that [Appellant] would have known about the ammunition." Defense counsel also contended that the proposed evidence was highly prejudicial because Appellant denied knowledge of the presence of the ammunition and "given the amount of time that had passed between these events and the events that are alleged here as part of this case."

The trial court allowed the State to introduce the evidence, ruling that the evidence was not a prior bad act and that its probative value outweighed any prejudice to Appellant:

> All right, well, first of all I don't see this as a prior bad act, but I do see the fact that the Defendant was driving a vehicle with ammunition in it, ammunition which is really only useful in the use of a firearm. To be probative of the contention that he had a firearm 60 days later in the use, allegedly, of this offense. I don't find that the passing of 60 days is attenuated to the point where the inference that it can be drawn from the

> ammunition. As to the existence of a gun, even though it wasn't found in the car, it doesn't degrade that inference.
>
> It is true that I have to weigh the probative value of it versus the prejudice to the Defendant. And on that scale, the probative value of this to the State's case, I think, is significant to the existence of a gun. It is . . . consistent with the existence of a gun later used and somewhat corroborates it.
>
> In my view, it outweighs the prejudice, particularly, since the Court will instruct the jury on the limited purpose of letting in this evidence and that the jury is not to hold it for any other reason other than any inference it may choose to draw with respect to the likelihood of the existence of the gun, again, corroborating other testimony in the case at the time of this offense.

Corporal Clagett's trial testimony established that Appellant was driving Mr. Litwin's vehicle on February 20, 2019 which contained "seven live rounds of .38 Special ammunition" inside a plastic bag in "the map compartment on the driver's side door[.]"

On cross-examination, Appellant's counsel inquired as follows:

> [DEFENSE COUNSEL]: You found items that certainly could be of a potential crime, right?
>
> [CORPORAL CLAGETT]: Yes.
>
> * * *
>
> [DEFENSE COUNSEL]: Okay. And I guess you didn't do or feel the need to do any further investigation regarding that ammunition?
>
> [CORPORAL CLAGETT]: No. So, I mean, he was in constructive possession, he was in sole custody of the vehicle, he was operating the vehicle, he was the only one in the vehicle and then within the driver's arm span of where the ammunition was located.

> [DEFENSE COUNSEL]: So he certainly could be subject to arrest for that, correct?
>
> [CORPORAL CLAGETT]: That is correct.
>
> [DEFENSE COUNSEL]: And did he -- was he arrested?
>
> [CORPORAL CLAGETT]: Yes, he was.
>
> * * *
>
> [DEFENSE COUNSEL]: And do you know what, subsequently, happened to that charge?
>
> [THE STATE]: Objection.
>
> THE COURT: Sustained.

Appellant was charged with two offenses that required the State to prove that he possessed a firearm: firearm use in the commission of a felony and firearm possession with a felony conviction. The jury acquitted Appellant on both charges.

B. Analysis

1. The evidence was relevant to whether Appellant possessed a firearm, and the court properly exercised its discretion in concluding that the probative value was not substantially outweighed by the danger of unfair prejudice.

Evidence is relevant if it makes "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Relevant evidence is generally admissible while irrelevant evidence is inadmissible. Md. Rule 5-402. We review the court's determination of relevance under a *de novo* standard of review. *State v. Simms*, 420 Md. 705, 725 (2011).

Even if legally relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Md. Rule 5-403. "We determine whether a particular piece of evidence is unfairly prejudicial by balancing the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case." *Smith v. State*, 218 Md. App. 689, 705 (2014). "This inquiry is left to the sound discretion of the trial judge and will be reversed only upon a clear showing of abuse of discretion." *Malik v. State*, 152 Md. App. 305, 324 (2003).

Appellant was charged with committing multiple offenses related to possession of a firearm. A central issue at trial was whether Appellant possessed a regulated firearm during the robbery instead of some other type of gun. Under these circumstances, Appellant's operation of a vehicle containing ammunition in a compartment on the driver's side door made it more probable that he possessed a firearm during the robbery.[2] We agree

[2] On appeal, Appellant again claims that "[t]here was no evidence that the ammunition was in plain view." Nevertheless, Corporal Clagett testified at trial as follows:

> [DEFENSE COUNSEL]: Certainly if the items are in plain view then certainly you would have indicated that in a report. That the items were visible or in plain view, correct?
>
> [CORPORAL CLAGETT]: They were -- it was visible, in plain view, when I opened the door to get his cell phone that he asked me to retrieve from the vehicle.
>
> [DEFENSE COUNSEL]: The bag?
>
> [CORPORAL CLAGETT]: The cell -- he asked me to retrieve the cell phone from the vehicle. When I opened the driver's side door, the ammunition was in the, I guess, map

with the trial court's determination that the temporal gap between the traffic stop and the robbery did not attenuate the evidence to the point that it became irrelevant. *See Williams v. State*, 457 Md. 551, 564 (2018) (noting that threshold of relevance "is a very low bar to meet.").

Next, the court properly exercised its discretion when it determined that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under Maryland Rule 5-403. Indeed, the court recognized the utility of the evidence within the State's case: "the probative value of this to the State's case, I think, is significant to the existence of a gun. It is . . . consistent with the existence of a gun later used and somewhat corroborates it." Moreover, "'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. 594, 615 (2010) (quoting 5 Lynn McLain, *Maryland Evidence: State and Federal* § 403:1(b), at 554 (2d ed. 2001)).

The Appellant relies on *Smith v. State*, 218 Md. App. 689 (2014) in contending that the evidence was prejudicial. In *Smith*, the appellant was charged with the shooting death of his roommate. *Id*. at 696. The central issue at trial was whether the death was a homicide

> compartment or the side compartment of the door, in plain view, when I opened the door.
>
> [DEFENSE COUNSEL]: Okay. In the map door? In the map compartment?
>
> [CORPORAL CLAGETT]: Whatever you call the bottom compartment of the driver's side . . . door. The map compartment or the storage compartment.

or a suicide involving Mr. Smith's handgun. *Id.* at 697. The court admitted evidence that Mr. Smith owned ammunition and eight other firearms. *Id*. at 703. The jury convicted him of involuntary manslaughter and a handgun offense. *Id.* at 697–98. After reversing the convictions because of an error in *voir dire,* this Court provided guidance on remand about the admissibility of evidence concerning the other weapons and ammunition:

> Although there was nothing illegal about Mr. Smith owning guns and ammunition, the evidence the court admitted regarding Mr. Smith's ownership of unrelated firearms and ammunition was minimally relevant, at best, and highly prejudicial, and should have been excluded from the trial of these charges. Neither the State nor the trial judge articulated how this evidence was relevant to whether Mr. Smith committed the alleged crimes. The fact that Mr. Smith legally possessed guns and ammunition does not make the weapons relevant to the victim's death, and we cannot see from this record how the inclusion of this evidence would help prove the offense charged. Without a more direct or tangible connection to the events surrounding this shooting, the evidence of the other weapons and ammunition owned by Mr. Smith failed the probativity/prejudice balancing test, and the trial court erred by admitting it.

Id. at 705-06.

Smith is distinguishable and instructive for at least two notable reasons. First, in *Smith,* "[n]either the State nor the trial judge articulated how [the evidence of other firearms and ammunition] was relevant to whether Mr. Smith committed the alleged crimes." *Id.* at 705. Here, the State articulated how the ammunition was relevant to the charges related to firearm possession. The State represented to the trial court that:

> The State is not offering the prior possession of ammunition to prove the character of [Appellant] in order to show action and conformity therewith. We are entering it to show that [Appellant] recently had ammunition in his possession, which

> is relevant to whether he possessed and/or had access to a real firearm. Possessing -- again, possessing an actual firearm and not a pellet gun or some other type of gun that is not a firearm, by definition, is an element of at least one of the firearm charges in this case.

Thus, the State maintained that the ammunition was relevant to show that Appellant possessed a firearm, instead of "a pellet gun or some other type of gun that is not a firearm[.]"

Second, in *Smith*, the primary issue at trial was whether Mr. Smith had shot the decedent or whether the decedent had committed suicide with Mr. Smith's handgun. *Id.* at 697. Under those circumstances, we held that it was unfairly prejudicial to introduce irrelevant evidence of other firearms and ammunition. *Id*. at 705-06. *See also* 5 Lynn McLain, *Maryland Evidence: State and Federal* § 403:1(b), at 651 (3d ed. 2013) ("Unfairly prejudicial evidence is likely to arouse an emotional reaction—either negative or positive—that might unfairly influence the fact-finder's decision."). Unlike the introduction of a laundry list of unrelated firearms and ammunition owned by Mr. Smith, the State's introduction of evidence here was limited in scope: an incident with a specified temporal proximity (approximately 60 days before the robbery) that helped to establish Appellant's access to a firearm.[3] In addition, whether Appellant possessed a firearm -- instead of some other type of gun -- was a significant issue addressed at trial.

[3] Although this Court's opinion in *Smith* does not reference the other firearms that Mr. Smith possessed, one of the briefs filed by Mr. Smith in this Court reveals that those firearms included military-style weapons, such as "a Romanian AK-47 assault rifle, a Romanian Draganoff sniper rifle, a Kel–Tech [nine-millimeter] subrifle (with stock and gunsight), and [a] H & K .45 USP tactical handgun." Appellant's Brief, *Smith v. State*, 218 Md. App. 689 (2014), CSA-REG-1852-2012, 2013 WL 6004017, at *49.

For all these reasons, the court did not err in balancing the probative value against the danger of unfair prejudice and then concluding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to the Appellant.

2. The court properly engaged in the three-step analysis required for admitting the evidence under Maryland Rule 5-404(b).

"Maryland Rule 5-404(b) governs admissibility of evidence concerning culpable conduct other than that for which a defendant is on trial." *Vaise v. State*, 246 Md. App. 188, 207 (2020). The Rule expressly provides as follows:

> Evidence of other crimes, wrongs, or other acts . . . is not admissible to prove the character of a person in order to show action in the conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, [or] absence of mistake or accident[.]

"The primary concern underlying the Rule is a 'fear that jurors will conclude from evidence of other bad acts that the defendant is a "bad person" and should therefore be convicted, or deserves punishment for other bad conduct and so may be convicted even though the evidence is lacking.'" *Hurst v. State*, 400 Md. 397, 407 (2007) (quoting *Harris v. State*, 324 Md. 490, 496 (1991)).

Here, the State preliminarily argues that "there was no bad act offered, so the Rule did not apply." We disagree. Indeed, "the acts contemplated by" Maryland Rule 5-404(b) "need not be bad." *Klauenberg v. State*, 355 Md. 528, 547 n.3 (1999). Accordingly, within the context of the Rule, "[w]hether evidence is of 'bad' acts rather than 'good' or neutral ones will be relevant only to whether prejudice is likely to result from its admission."

McLain, *supra*, § 404:5, at 754-55 (3d ed. 2013). We shall assume, without deciding, that Maryland Rule 5-404(b) applies to the possession of ammunition in this case.

To admit evidence of other acts under Maryland Rule 5-404(b), the court must follow a three-part process:

> First, the court must determine whether the evidence fits into one or more of the exceptions in Rule 5-404(b). This is a legal determination. Second, it must be shown by clear and convincing evidence that the defendant engaged in the alleged . . . acts. In this regard, we review the trial court's decision to determine if there is sufficient evidence to support its finding. Third, the court must find that the probative value of the evidence outweighs any unfair prejudice. This determination involves the exercise of discretion by the trial court.

Vaise, 246 Md. App. at 207–08 (cleaned up). To begin this analysis, we first recognize that the ammunition evidence here fits within one of the exceptions in Maryland Rule 5-404(b), namely, that the evidence was relevant to whether Appellant possessed or had access to a firearm, and therefore, had the *opportunity* to commit the offenses involving possession of a firearm. Secondly, the record reflects that there was clear and convincing evidence that Appellant had operated a vehicle containing ammunition in a compartment on the driver's side door.[4] Third, as we outlined above, the court properly exercised its discretion in determining that the probative value of the ammunition evidence outweighed the danger of unfair prejudice.

[4] At the hearing on the motion *in limine*, the State noted that defense counsel "stipulate[d] to the testimony that I expect from Corporal Clagett for motions hearing purposes."

For all these reasons, the court properly engaged in the three-step analysis required for admitting the evidence of ammunition under Maryland Rule 5-404(b).

II. The court did not err in admitting Mr. Litwin's out-of-court statements as excited utterances.

Next, Appellant argues that the trial court admitted inadmissible hearsay in the form of multiple witnesses' testimony as to Mr. Litwin's statements. Although we agree that the evidence constitutes hearsay, we hold that the testimony was otherwise admissible as an excited utterance.

A. Background

Mr. Johnson, Corporal Ashley Stahlman, Ms. Briana Seymour, and Ms. Lane all testified as to Mr. Litwin's statements that he made shortly after he escaped from his basement.

1. Mr. Johnson's testimony

At about 10:51 p.m. on April 25, 2019, Mr. Litwin knocked on Mr. Johnson's door. Mr. Johnson testified:

> Mr. Litwin was upset. He was scared. . . .
>
> He was bleeding. He was -- had on his wrists, zip ties that were tightened so tightly that his wrists were swollen. And his appearance was disturbing. . . .

Mr. Litwin "initially requested that [Mr. Johnson] cut the zip ties that were on his wrists." Mr. Johnson described his response: "The swelling was so significant that I told him I could not do that for fear that I might cut him and make things even worse. I told him that I would call the police and they would bring help."

Mr. Johnson testified as to Mr. Litwin's emotional state: "[Mr. Litwin] was shaking and as he spoke and told me what had transpired, he was in a heightened state of anxiousness about what he had experienced." Mr. Johnson described Mr. Litwin's communication:

> He was speaking very rapidly like someone who was upset and it was hard for me to keep up because he just had this stream of things that he was saying that had occurred to him. And, you know, I could not vouch for the veracity in anything he said other than I was listening to him. My biggest concern was that he get medical attention and that whatever the cause of his condition be investigated by the police.

After the parties elicited this testimony, the court held a bench conference regarding whether to allow Mr. Johnson to testify to Mr. Litwin's statements as excited utterances. The court ruled as follows:

> Well, the excited utterance is not so much a time issue, although there -- I guess there are limits. The issue is when is the person making the statement -- or is the person making the statement still under the influence of the excitable event. And here, what Mr. Johnson has described is kind of a textbook case of an excited utterance. He described him as being -- as looking scared, shaking, either crying then or recently having been crying, his rapid speech, his request -- well, his arms being swollen by virtue of the zip ties would put him under some pain as well.

Mr. Johnson then testified as to Mr. Litwin's statements:

> He said that Beth and Andre had coerced him into disclosing the PIN number to a credit card and that they had taken money out of his account. He said that they had tied him to a -- or bound him, supposedly, with the zip ties to a chair in the basement of his house and were, I guess, were trying to coerce him to disclose other PIN numbers. . . .

> Well, he said that they had hurt him and he had, what appeared to be, you know, maybe a loose tooth, or a broken tooth, or something -- some kind of a dental injury.

Mr. Johnson testified that Mr. Litwin remained in a "in a heightened, excited state of mind."

2. Corporal Stahlman's testimony

At about 10:56 p.m., Corporal Stahlman arrived at Mr. Johnson's residence. Corporal Stahlman observed that Mr. Litwin was "highly upset" and "very nervous." A zip tie was still on Mr. Litwin's left arm. Mr. Litwin's speech "was rushed[,]" and "he was stuttering over his words."

Over Appellant's counsel's objection, Corporal Stahlman testified as to Mr. Litwin's statements. According to Corporal Stahlman, Mr. Litwin said that he had attended a final protective order hearing against Ms. Lane and Appellant on the morning of the robbery, and he "arrived back home at approximately 2 p.m." Corporal Stahlman testified in more detail regarding Mr. Litwin's statements:

> Mr. Litwin then advised that a short time later he -- [Appellant] and Ms. Lane arrived at his house. He advised that they began arguing about him not giving them money and supporting their drug habits and that they were upset with him.
>
> At that point he said that [Appellant] brandished a black handgun and told him to go downstairs. [Appellant] advised that he resisted a little bit at which point [Appellant] struck him in the left cheekbone with that handgun.
>
> At that point he went downstairs, per [Appellant]'s demand, and [Appellant] began tying him to a black chair in the back portion, unfinished portion, of the basement with a ratchet strap, Bungee cords and more [z]ip [t]ies.
>
> Mr. Litwin then advised that while he was being tied to the chair by [Appellant], Beth stated to him that -- she stated

> that, "You thought they were going to take my kids and now I want you dead." While [Appellant] was tying him to the chair, she took Mr. Litwin's debit card out of his pocket and left to go to the ATM.
>
> Mr. Litwin then told us that he -- while [Appellant] was tying him to the chair, Beth arrived a short time later, back at the house, and she -- while he was being held at gunpoint.
>
> She then -- Beth began smacking him in the right side of the face demanding money at which time she took $600, in U.S. currency, out of his pocket and she stated, "I hope you starve to death downstairs."
>
> At that point Mr. Litwin said that [Appellant] and Ms. Lane left the residence or left the basement in an unknown direction and he tried to get out of the chair.

3. Ms. Seymour's testimony

Ms. Seymour, a paramedic/firefighter with the Westminster Fire Department, was dispatched to Mr. Johnson's residence at 11:02 p.m. and arrived at 11:07 p.m. Ms. Seymour observed that Mr. Litwin "was upset[,]" and "[h]e was very, obviously, in distress and extremely upset about, you know, what had taken place prior to us arriving." Mr. Litwin had "a [z]ip [t]ie that was tied around his forearm which had caused a lot of swelling and blistering to his forearm just because it was so tight." Ms. Seymour "also noted that he had a swollen lip and he had some marks on the left side of his face from where he had been hit by something."

Ms. Seymour recounted what Mr. Litwin had told her at that time: "He was stating that he had been assaulted by two individuals and, basically, held hostage in his basement. He had been [z]ip [t]ied and Bungee corded to a chair down there and assaulted and threatened to be killed." Mr. Litwin recounted these events "within the first couple of

minutes" of Ms. Seymour's arrival, shortly after he had cut off the zip tie on his arm against Ms. Seymour's recommendation.[5] Mr. Litwin estimated that he had been "held down in the basement" for "at least four to five hours[.]"

Ms. Seymour eventually convinced Mr. Litwin to seek medical treatment. Although Ms. Seymour wanted to transport Mr. Litwin to the Shock Trauma Center at the University of Maryland Medical Center, Mr. Litwin agreed to go to the "closest facility[,]" which was Carroll Hospital.

4. Ms. Lane's testimony

For context, we briefly summarize Ms. Lane's testimony. On the morning of the robbery, Appellant and Ms. Lane used crack cocaine. Ms. Lane further testified that she also used heroin. They drove to Mr. Litwin's West Green Street residence. Mr. Litwin then returned home. Ms. Lane went "through the backdoor to go to the car and get [her] phone."

When Ms. Lane returned to the house, she "went downstairs and in the back of the basement . . . where [Appellant] had Mr. Litwin tied to a chair." She "saw Mr. Litwin strapped to the chair with the [z]ip [t]ies and a Bungee cord and a strap and [Appellant] was holding a gun." Ms. Lane called the bank and tried to use Mr. Litwin's PIN. When

[5] Ms. Seymour explained that she had told Mr. Litwin not to cut off the zip tie "because of the injuries that [the zip tie] had caused, it had cut off blood circulation to his arm, like a tourniquet would, so all the swelling and the blistering and everything that had been created on his forearm was a result of how tight that [z]ip [t]ie was on his arm." Moreover, removal of the zip tie could have caused complications: "that blood flow could go -- like be shot back to the heart. It could cause all kinds of different issues and, potentially, death."

that did not work, Appellant hit Mr. Litwin with the gun. Ms. Lane then used her phone to send herself $1,500 from Mr. Litwin's account. Over a defense objection, Ms. Lane testified that Mr. Litwin said: "Please don't do this." Ms. Lane then recounted more details about Mr. Litwin's statements while "[h]e was visibly upset, pleading:"

> Obviously, he asked, you know, us not to do this. He said he would take us to the bank, give us any money that we wanted. He, at one time, said you can come back, we can all live here again.

B. Analysis

Maryland Rule 5-801(c) defines hearsay 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." "Maryland Rule 5-802 prohibits the admission of hearsay, unless it is otherwise admissible under a constitutional provision, statute, or another evidentiary rule." *Wallace-Bey v. State*, 234 Md. App. 501, 536 (2017). "Whether evidence is hearsay is an issue of law reviewed *de novo*." *Bernadyn v. State*, 390 Md. 1, 8 (2005). There are "aspects of a hearsay ruling," however, that are not "purely legal," such as a trial court's factual findings relative to the foundation that must be laid under the excited utterance exception. *Gordon v. State*, 431 Md. 527, 536 (2013). We review those findings for clear error. *Id*. at 538.

Maryland Rule 5-803(b)(2) contains an exception to the rule against hearsay known as the excited utterance exception: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not "excluded by the hearsay rule[.]" "The rationale behind the excited

utterance exception is that the startling event suspends the declarant's process of reflective thought, thus reducing the likelihood of fabrication." *State v. Harrell*, 348 Md. 69, 77 (1997). A statement is admissible as an excited utterance if "'made at such a time and under such circumstances that the exciting influence of the occurrence clearly produced a spontaneous and instinctive reaction on the part of the declarant . . . [who is] still emotionally engulfed by the situation.'" *Id*. at 77 (alteration in original) (quoting *Deloso v. State*, 37 Md. App. 101, 106 (1977)). A trial court assessing whether this exception has been satisfied must examine the totality of the circumstances, including "the time between the startling event and the declarant's statement" and whether the "statement was made in response to an inquiry[.]" *Id*. A statement made closer in time to the startling event and spontaneously is more likely to be an excited utterance, but neither factor is dispositive. *Id*.

Here, the evidence established that Mr. Litwin experienced a startling event. Indeed, he was robbed while tied to a chair with zip ties, a bungee cord, and a strap. Appellant hit Mr. Litwin on the side of the face with a weapon. According to Ms. Lane, Appellant told Mr. Litwin: "'I hope you feel the pain. I want you to feel the pain before you die.'" Mr. Litwin escaped his confinement after several hours of effort and then went to Mr. Johnson's residence for assistance.

Mr. Johnson testified about Mr. Litwin's demeanor: "He was speaking very rapidly like someone who was upset and it was hard for me to keep up because he just had this stream of things that he was saying that had occurred to him." About five minutes after Mr. Litwin arrived at Mr. Johnson's house, Corporal Stahlman observed that Mr. Litwin

was "highly upset" and "very nervous." Zip ties were still on Mr. Litwin's left arm. Mr. Litwin's speech "was rushed[.]"

Just a few minutes later, Ms. Seymour arrived. Ms. Seymour observed that Mr. Litwin "was upset[,]" and "[h]e was very, obviously, in distress and extremely upset about, you know, what had taken place prior to us arriving." Mr. Litwin had "a [z]ip [t]ie that was tied around his forearm which had caused a lot of swelling and blistering to his forearm just because it was so tight." Mr. Litwin was clearly experiencing a startling event that unfolded over a period of time. As such, the trial court did not err in determining that Mr. Litwin "was under the stress of excitement caused by the" startling event during the time that the challenged statements were made. Md. Rule 5-803(b)(2).

Appellant contends that Mr. Litwin was responding to questions asked by those on the scene as to what happened and utilized his reflective faculties. He, therefore, contends that his statements to Mr. Johnson, Ms. Seymour, and Corporal Stahlman do not constitute excited utterances. The record is unclear as to when Appellant was responding to their inquiries. Nevertheless, the fact that a statement was made in response to an inquiry is not dispositive. *See Parker v. State*, 365 Md. 299, 317 (2001) ("[a]ssuming *arguendo* that the statements were made in response to police questioning, this would not necessarily bar their admission" under the excited utterance exception).

Appellant relies on *Marquardt v. State*, 164 Md. App. 95 (2005), *overruled in part on other grounds by Kazadi v. State*, 467 Md. 1 (2020), in contending that the statements admitted do not constitute excited utterances. In *Marquardt*, the appellant abducted and assaulted his wife. *Id*. at 114. Thirty minutes after his wife escaped, she gave a detailed

statement to a police officer at the hospital, where she was being treated for her injuries. *Id*. at 113-14. We held that although Mr. Marquardt's wife was "still a little upset" and "crying," "there [was] nothing in [the officer's] description of [the wife's] mental or emotional state to suggest that she was reacting without deliberation." *Id*. at 128. By contrast, the witnesses' descriptions of Mr. Litwin's mental and emotional condition were as follows:

- Mr. Gordon's description:
    - Mr. Litwin was "shaking and as he spoke and told me what had transpired, he was in a heightened state of anxiousness about what he had experienced[,]" he was "speaking very rapidly like someone who was upset" and he was "in a heightened, excited state of mind."
- Corporal Stahlman's description:
    - Mr. Litwin was "highly upset[,]" "very nervous" with "rushed" speech and a zip tie still on his arm.
- Ms. Seymour's description:
    - Mr. Litwin was "very upset[,]" and "[h]e was very, obviously, in distress and extremely upset about, you know, what had taken place prior to us arriving." He had "a [z]ip [t]ie that was tied around his forearm which had caused a lot of swelling and blistering to his forearm just because it was so tight[,]" and he cut off the zip tie against the paramedic's instruction.
- Ms. Lane's description:
    - Mr. Litwin "was visibly upset, pleading" while tied to a chair in his basement.

The testimony at Appellant's trial was far more descriptive and extensive than the testimony presented in *Marquardt*. The testimonies of Mr. Gordon, Corporal Stahlman, Ms. Seymour, and Ms. Lane clearly demonstrated that Mr. Litwin remained in a heightened, excited state of mind when he made the statements that were admitted into evidence at the trial. Accordingly, the trial court did not err in finding that Mr. Litwin's statements fell within the excited utterance exception to the hearsay rule.

JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.