Circuit Court for Cecil County
Case No. C-07-CR-23-000152

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1458

September Term, 2023

VINCENT WALLACE

v.

STATE OF MARYLAND

Berger,
Nazarian,
Raker, Irma S.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Raker, J.

Filed: December 12, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant was convicted in the Circuit Court for Cecil County of first-degree assault, reckless endangerment, and second-degree assault for actions on or about January 30, 2023, and second-degree assault for his actions on or about January 28, 2023. Appellant presents the following questions for our review which we have rephrased as follows[1]:

1. Was the evidence sufficient to support the trial judge's verdict of guilty of Counts 1-3, and Count 5?

2. If preserved, did the trial court err in admitting the body camera footage as an excited utterance?

We shall hold that the evidence is sufficient to support appellant's convictions, and that the trial court did not err in admitting into evidence Ms. AB's[2] statements on the body camera footage.

I.

Appellant was indicted by the Grand Jury for Cecil County of first-degree assault on or about January 30, 2023 (Count 1), second-degree assault on or about January 30, 2023 (Count 2), reckless endangerment on or about January 30, 2023 (Count 3), second-degree assault on January 29, 2023 (Count 4), second-degree assault on or about January 28, 2023 (Count 5); and malicious destruction of property in a scheme valued over $1,000

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[1] Appellant presented two questions for review as follows:

> "1. Is the evidence sufficient to support Mr. Wallace's January 28, 2023, Assault [in the second] Degree conviction?
>
> 2. Did the lower court err in admitting Ms. AB's statements on Body Worn Camera testimony?"

[2] For privacy reasons, we shall refer to the victim as Ms. AB.

(Count 6). He waived his right to a jury trial and proceeded to trial before the bench. Appellant was convicted of first-degree assault, second-degree assault and reckless endangerment on or about January 30, and a second count of second-degree assault on or about January 28.

The court imposed a term of incarceration for first-degree assault of twenty-five years, ten years suspended, five years' probation, and for second-degree assault, ten years, five years suspended, five years' probation to be served consecutively. For sentencing purposes, the court merged reckless endangerment and the first count of second-degree assault with first-degree assault.

We glean the following facts from the trial. Ms. AB testified that over the weekend of January 28, 2023, Vincent Wallace, appellant, assaulted her multiple times. On January 30, 2023, she called 911 and officers went to her home. Upon arrival, Officer Michael McGonigle heard "screaming from a female." When the officers entered the home, they found appellant standing over Ms. AB yelling repeatedly, "what's wrong with you?" The officer took appellant into the hallway, separating the two. Officer McGonigle observed bruising on Ms. AB's neck, lower jaw, and arms. Corporal Nussle asked appellant about the events that evening. After observing the bruising on Ms. AB's neck, Officer McGonigle arrested appellant.

In the apartment, Officer McGonigle's body worn camera recorded his conversation with Ms. AB and, in addition, he took photos of her bruises. Ms. AB told the officer she had been "kicked, punched, and choked" all weekend and that she had tried to get away,

but appellant caught her and brought her back. She told him that appellant attempted to strangle her, causing her to see spots and that she was unable to breathe. Ms. AB cried, shouted, and stammered throughout her responses and required many words of assurance from the officer.

At a bench trial, the State called Corporal Nussle, Officer McGonigal, and Ms. AB as witnesses. Corporal Nussle described his encounter with appellant at the apartment. The State offered the footage of Officer McGonigle's body worn camera. Defense counsel objected to the video as inadmissible hearsay, arguing that Ms. AB's statements did not qualify as any exception to the hearsay rule and did not qualify as an excited utterance as the statements were not made under the stress of excitement. The court overruled the objections, finding that Ms. AB "remains distressed" and that many cases support the concept that "statements made even hours after an incident . . . could fall within the umbrella of excited utterance."

Ms. AB explained that appellant punched, kicked, and choked her throughout the weekend of January 28, 2023. The worst incident occurred after leaving a Home Depot on January 30. She testified that appellant struck her in the face, causing a nosebleed and knocking her unconscious. Later that evening, Ms. AB called 911 and the officers arrived.

Following the State's case, appellant moved for Judgment of Acquittal, arguing that the State failed to present sufficient evidence to prove that an assault occurred on January 28. The court denied the motion, stating that its "recollection of the testimony offered by

Ms. AB as to the 28th would be sufficient to survive a judgment of acquittal. She was, I think clear in her testimony about an incident occurring on the 28th."

The defense rested, presenting no evidence. The court imposed sentence and this timely appeal followed.

II.

Before this Court, appellant argues that the evidence was insufficient to support the conviction for second-degree assault on or about January 28, 2023 (Count 5). He argues that there was insufficient evidence to establish that an assault occurred prior to the visit at Home Depot. Second, he argues that the two alleged crimes, one on January 28 and one on January 30, were not separate and distinct crimes and that the State failed to prove that an assault occurred on January 28. As to the second evidentiary question, the admissibility *vel non* of the body camera footage, appellant argues that the evidence was inadmissible hearsay. Appellant maintains that the body camera footage was not admissible as an excited utterance because the statements made by Ms. AB were not made under the stress of the event and even if they were, they were not based on any possible assault that had occurred on January 28, as opposed to an assault on January 30.

The State presents its argument in a different format than appellant. Instead of isolating the events, the State maintains that the evidence was sufficient to show that appellant committed first-degree assault, and that there was sufficient evidence to support the trial judge's verdict of guilty of multiple assaults. As to the specific date in the indictment of January 28, the State points out that the date indicated for a crime in a

charging document "does not tie the hands of the prosecutor," or the judge in finding that the criminal act occurred on that precise date. In other words, according to the State, the State is not limited to the specific date in the charging document in proving the criminal event or in evaluating the sufficiency of the evidence. The State presents an alternative argument --- that on January 30, the evidence was sufficient to establish the crimes of first-degree assault and second-degree assault. Moreover, any argument that the events were a single, continuous event is waived because appellant failed to make that argument below. The State argues that Ms. AB's testimony and the photographs were sufficient to support a series of multiple, distinct assaults, occurring over the course of the weekend of January 28-30, 2023.

As to the hearsay argument, the State presents two arguments: 1) preservation, and 2) the statements to the police qualified as excited utterances because Ms. AB demonstrated behaviors of one in distress and acting under the stress of an event in her home. As to the preservation issue, the State asserts that because appellant failed to provide the transcript of the statements on the body camera footage, appellant did not preserve this issue for our review. *See* Maryland Rule 8-411(a)(3). As to the single event argument, the State maintains that appellant did not argue below that the assaults over the course of the weekend of January 28 were a single, continuous event and therefore, that argument is not preserved for appellate review.

III.

We consider first whether the evidence was sufficient to support the judgment of conviction for Counts 1-3 and Count 5. We review the sufficiency of the evidence to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *Scriber v. State,* 236 Md. App. 332, 344 (2018). As a reviewing court, we do not judge the credibility of witnesses or resolve conflicts in the evidence. *Scriber*, 236 Md. App. at 344. The question before us is "not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Id.* (emphasis in original).

In analyzing the sufficiency of the evidence at a bench trial, we review both the law and the evidence but will not set aside the judgment unless clearly erroneous. Rule 8–131(c). "We review sufficiency of the evidence to determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *White v. State*, 217 Md. App. 709, 713 (2014) (internal quotation marks and citation omitted).

In Maryland, the crime of second-degree assault is statutory. See Md. Code (2002, 2021 Repl. Vol.), § 3-203 of the Criminal Law Article ("Crim. Law").[3] Assault is defined as "the crimes of assault, battery, and assault and battery." Crim. Law § 3-201(b). Second-degree assault has three alternative forms: (1) intentionally frightening the victim; (2)

[3] All subsequent statutory references herein shall be to Md. Code, Criminal Law Article.

battering the victim; and (3) attempting to batter the victim. *See Jones v. State*, 440 Md. 450, 455 (2014). Here, the Court found that appellant battered the victim on January 28, 2023. The battery form of "second-degree assault requires: (1) that the defendant caused offensive physical contact with the victim; (2) that the contact was the result of an intentional *or* reckless act of the defendant and was not accidental; and (3) that the contact was not consented to or legally justified." *Pryor v. State*, 195 Md. App. 311, 335 (2010).

At trial, the State asked Ms. AB to "[w]alk me through what happened *on January 28*." She testified that "there was a lot of punching, choking," and "kicking . . . [by appellant]." The State asked "[what] happened the next day?" Ms. AB responded, "[s]o he – even later that day, he said he was sorry – he didn't want to hurt me, but the same thing would happen again." Ms. AB testified that appellant assaulted her on January 28, and that he intended to cause her physical harm and there was no legal justification for his actions.

In addition to Ms. AB's testimony, the court admitted multiple photographs of Ms. AB's injuries. Some photos were taken by the officers who responded to Ms. AB's apartment on January 30 and showed both new and old bruises. Additionally, the State offered photographs taken by Ms. AB after the weekend. These photographs were dated January 28, 2023, and showed bruising on Ms. AB's arms, neck, and torso.

We hold that the evidence was sufficient to support the judgments of convictions. First, we agree with the State that, absent a bill of particulars limiting the State's evidence, the State's proof of the criminal event is not limited to the date in the charging document. In addition, we agree with the State that the trial court was not clearly erroneous in finding

that the State presented sufficient evidence to support the conviction for second-degree assault on Jan 28. As to the single continuous event argument, that argument is waived because it was not raised below. Assuming *arguendo* that the issue is preserved for our review, as explained below, the evidence was sufficient to support separate convictions for separate events.

Despite appellant's contention in closing at trial to the contrary, Ms. AB stated that she was injured by appellant on January 28, 2023. The court found the testimony of Ms. AB to be credible as to the events of January 28, 2023. This testimony, along with the photographic evidence of extensive bruising to the Ms. AB's body, neck, and head taken by the officers at Ms. AB's home on January 30, 2023, as well as the photographs taken by Ms. AB are sufficient for any rational trier of fact to convict appellant of second-degree assault on January 28, 2023.

We address briefly the argument by appellant that the incidents of assault were not "separate and distinct" and therefore constitute one long assault and not individual events. Under Rule 8-131(a), arguments that are not made or considered at trial are generally waived on appeal. We agree with the State that sufficient evidence was presented to indicate multiple, distinct assaults over the course of the weekend of January 28 from Ms. AB's testimony. As Ms. AB testified, she was "kicked, punched, and choked" throughout the weekend and specifically that appellant struck her on January 28. When determining whether an assault is a single continuous event or separate and distinct crimes, the court considers factors such as the location of the events, whether each act was driven by a fresh

impulse, and if the appellant changed his course of action. *See Johnson v. State*, 477 Md. 673, 690-91 (2022). Ms. AB testified that appellant hit her throughout the weekend, at least in her apartment and car. It appears there were breaks in the beatings. Ms. AB testified that there were no incidents on the day they went to Home Depot until she returned to the car after shopping. This lapse of time between assaults in addition to the multiple locations of the beatings supports the trial court's finding and our conclusion that the trial court did not err.

IV.

We turn to whether the trial court erred in admitting the body camera footage and Ms. AB's statements therein as excited utterances.

At trial, the State offered body camera footage recorded by Officer McGonigle of Ms. AB immediately after responding to her 911 call on January 30. On appeal, appellant argues that "any statement referencing alleged assaults prior to January 30 should be excluded because it does not fall under an exception to the Hearsay rule." Appellant did not include in the record a transcript of the statements alleged to be inadmissible hearsay as required by Rule 8-411(a)(3).[4] Without this transcript, the issue is not preserved for appeal. *See, e.g.*, *Whack v. State*, 94 Md. App. 107, 124-26 (1992) (holding that a failure

[4] Md. Rule 8-411(a)(3) requires appellant "order in writing from the court reporter a transcript containing . . . any audio or audiovisual recording or portion thereof offered or used at a hearing or trial" when there is no "written stipulation by all parties to the contents of the recording."

to include transcripts of the questioned tapes admitted into evidence at trial fails to preserve the issue for appeal).

Even if appellant had preserved this issue for appeal, we would hold that the trial court did not err in admitting the evidence. In determining whether evidence is hearsay as a legal issue, we review the issue *de novo*. *Bernadyn v. State*, 390 Md. 1, 8 (2005). When a trial court is presented with hearsay statements, sometimes the court must make factual findings in determining whether such a statement falls within a hearsay exception which are reviewed under an abuse of discretion standard. *See Gordon v. State*, 431 Md. 527, 536 (2013) (explaining that whether a hearsay statement is nevertheless admissible through an exception can require not only a legal determination, but also a factual one). 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." An excited utterance is an exception to the hearsay rule. Rule 5–803. An excited utterance is "[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." Rule 5–803(b)(2).

To determine whether a statement qualifies as excited utterance, the court considers the totality of the circumstances surrounding the statement. *Morten v. State*, 242 Md. App. 537, 548 (2019). To qualify, the statement must have been made while under the sway of the events and the statement must have been spontaneous, without time for reflection. *Marquardt v. State*, 164 Md. App. 95, 124 (2005). An appellate court will not disturb a

trial court's factual determinations that a statement falls under the excited utterance exception "absent clear error." *Gordon v. State*, 431 Md. 527, 538 (2013).

Even if appellant had preserved the issue for appeal, it is clear that the trial judge did not err in admitting into evidence the nine minutes of video footage under the excited utterance exception. When considering the excited utterance exception, the court considers, but does not limit itself to, the following factors regarding whether the declarant is still excited to the necessary degree: (1) "how much time has passed since the event"; (2) "whether the statement was spontaneous or prompted"; and (3) "the nature of the statement" and "whether it was self-serving." *Id.* at 536-37. These factual determinations receive deference on review. *Id.* at 537.

At trial, appellant objected to the nine minutes of body camera footage. In his initial objection after the first two and a half minutes of footage, appellant indicated that because there were "officers there and he's asking [Ms. AB] questions" that this was indicative that Ms. AB was no longer in an excited state. The trial court disagreed, noting that "multiple cases related to excited utterances made to officers . . . during their contact with victims or witnesses related to the investigation of potential criminal activity." We have held in multiple cases that responding to officer questions is a factor when considering whether a statement falls under the requirements of an excited utterance but is not dispositive. *See e.g.*, *State v. Harrell*, 348 Md. 69, 77 (1997) (explaining that when a "statement [is] made in response to an inquiry, as in the instant case, [that fact] is not controlling"); *Billups v. State*, 135 Md. App. 345, 360–61 (2000) (finding that while relevant, the mere fact that a

statement was elicited in response to an inquiry is not determinative of its admissibility as an excited utterance); *Johnson v. State*, 63 Md. App. 485, 494–95 (1985) (holding it was not an abuse of the trial court's discretion to rule that statements made in response to an officer's questioning were excited utterances). The trial court found that "[g]iven the state in which the declarant is evidently in . . . her demeanor is exhibiting what appears to be a fairly significant level of distress at the time the statements are offered." The trial judge, having reviewed the camera footage at issue, did not err in this determination.

Appellant's second objection came after four and a half minutes of video footage. Appellant asserted that the declarant had now "composed herself and" was "beyond excited utterance stage." The record reflects the trial court carefully considered each of defense counsel's objections. Again, the judge stated that the declarant's "demeanor and presentation at this time in the Court's eyes remains distressed" when deciding to admit the entirety of the nine-minute footage. The court did not err.

Appellant argues that the State's failure to establish a clear timeline of events makes it possible that Ms. AB's statements in the body camera footage were not about the event that created her stress, but rather prior incidents. In *State v. Harrell*, the Supreme Court of Maryland addressed whether the excited utterance exception applied only to statements made by the declarant about the events causing the excitement or whether it encompassed any statements that were related to the event that caused the declarant's excitement. 348 Md. at 81-82. The Court fashioned a rule that, to preserve the inherent trustworthiness of the declarant's statement as an excited utterance, "the declarant's statement must have

some connection with the startling event in order to relate to the startling event within the meaning of Md. Rule 5-803(b)(2). Otherwise, the likelihood that a declarant's statement was a product of reflective thought, and the concomitant likelihood of fabrication, increases.” *Id.*

Although it may be difficult to decipher from the video footage the timeline of the events on the weekend in question, our conclusion is the same. The trial court found Ms. AB to be stressed and excited when she spoke with the police officers, and the court did not err or abuse its discretion in admitting the camera video footage discussing the immediate event as well as the earlier beatings.

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