UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0247

September Term, 2016

STATE OF MARYLAND

v.

AVERY LITTLE

Graeff,
Friedman,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: August 16, 2016

In this interlocutory appeal, we are asked to determine whether the Circuit Court for Baltimore City erred when it granted Avery Little's motion to suppress a recording of a 911 call. We conclude that the circuit court's grounds for granting the motion to suppress are unclear, and therefore, we are unable to review the court's decision. Thus, we remand to the circuit court to clarify its basis for granting the motion to suppress.

BACKGROUND

Little was indicted for first degree murder; use of a firearm in a crime of violence; and wearing, carrying, or transporting a handgun. The State alleged that Little killed two men by shooting and stabbing them. Prior to trial, Little filed a motion to suppress the recording of a 911 call. The 911 call was made by an anonymous third party while the two men were being shot and stabbed. Little's motion argued that the 911 call should be suppressed on three grounds: (1) because the 911 call violated his right to confrontation under the United States Constitution and Maryland Declaration of Rights; (2) because the 911 call contained inadmissible hearsay statements; and (3) because the 911 call was unfairly prejudicial.

The circuit court held a hearing on Little's motion to suppress. At the hearing, the State played a recording of the 911 call. In the recording, the caller describes the shootings and stabbings, requests emergency services, gives a description and possible name of the suspect, and asks to remain anonymous:

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

CALLER: 5200 block of Denmore Avenue. Guy just shot somebody. Now he's stabbing somebody else. Please hurry.

911 OPERATOR: Where – – where is this at?

CALLER: 5200 block of Denmore Avenue.

911 OPERATOR: Where is the person at that was shot?

CALLER: In front of the apartment building and this guy is still out there stabbing.

911 OPERATOR: Is he on the odd or the even side of the street?

CALLER: The even side of the street.

911 OPERATOR: Okay. Give me a description of the suspect.

CALLER: The suspect is … tall, dark skin – –

911 OPERATOR: Black male?

CALLER: I mean, no. Tall, light skin, and got on black shirt – – I mean, black pants, black jacket. He just ran into the apartment building. I think it was – – I think his name is Avery.

911 OPERATOR: Okay. Possibly named Avery?

CALLER: Yeah. Please (indiscernible).

911 OPERATOR: And you say – – you say he shot one person and stabbed another?

THE CALLER: Yeah. I didn't actually see the shooting but I saw him with a gun and then he ran – – ran in the house with the gun. Then he came back out with a butcher knife and he was over there stabbing the guy.

911 OPERATOR: So, he did not shoot anyone?

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

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

CALLER: He's still shooting.

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

CALLER: He just – –

911 OPERATOR: – – black pants, black jacket.

CALLER: He just ran across – –

911 OPERATOR: Possibly named Avery.

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

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

CALLER: No.

911 OPERATOR: How many people been shot?

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

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

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

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

CALLER: I don't know the name of the street on the other side. But if they comes through Denmore Avenue, they'll see everything.

911 OPERATOR: Okay. So the suspect lives in the building?

CALLER: Yeah. You need to send two ambulances quickly.

911 OPERATOR: Okay. I've told them. They're on their way. We got a lot of people calling.

CALLER: Okay.

911 OPERATOR: So I'm getting this information from you and then someone else is getting the other. Okay?

CALLER: Okay.

911 OPERATOR: Okay. Stay on the line with me. You're giving me good information.

CALLER: Oh, God. And please let this be anonymous. Please.

911 OPERATOR: Yes. He jumped the fence and ran behind the building? Okay. And you say he stabbed one of them?

CALLER: Yeah. First he shot one. Then he was trying to shoot another one. Looked like he ran out of bullets or something. He ran in the house. He got a knife. And he came back out and started stabbing him. Then he ran back and got a gun and came back out with the gun again. It didn't – – the one he was stabbing he shot again.

911 OPERATOR: Okay. Okay. And you say he shot one man?

CALLER: He shot two men.

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

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

911 OPERATOR: Okay. And he run – – ran in the house?

CALLER: Okay. The police is down there now.

911 OPERATOR: Okay. Thank you so much.

CALLER: Yes. Please. Anonymous, okay.

911 OPERATOR: Okay.

The circuit court split the 911 call for purposes of admissibility. It allowed the portions of the call that discussed the emergency and the need for medical and police personnel. The circuit court, however, excluded the portion of the 911 call that included the caller's description of the crime and identification of the suspect:

> Anything related to identification of [the defendant] by name or physical description will be redacted if the State wishes to use the statement. Anything related to the observations of the caller as to the sequence of events, that is also redacted, because you would have the right to cross-examine the witness

> on what the witness saw and the order of the events as the State is going to attribute those … acts to [the defendant] and I'm not satisfied that that does anything other than violate the confrontation clause of the United States Constitution.
>
> It is [the defendant's] right that I must and shall protect, and given the fact that this is a criminal case, I will come down on the side of acknowledging that normally this would be hearsay exception, but in this particular case, it can't be an exception that would be admissible without a live witness to cross-examine.

The State then filed this interlocutory appeal.

DISCUSSION

The State argues that the circuit court erred in excluding the portion of the 911 call that included the description of the crime and identification of the suspect ("911 Call Statements"). The State contends that the circuit court's only basis for suppressing the 911 Call Statements was because they were testimonial and therefore subject to the traditional safeguards of the Confrontation Clause, a conclusion that the State argues was in error. As such, the State contends that the only issue before this Court is whether or not the circuit court erred in concluding that the 911 Call Statements were testimonial. In response, Little argues that the circuit court correctly excluded the 911 Call Statements on three bases, not just because it was testimonial. Little contends that the circuit court correctly excluded the 911 Call Statements because: (1) they were testimonial and therefore their admission would violate the right to confrontation protected by the Sixth Amendment to the United

States Constitution;[1] (2) they were hearsay that did not fall within a hearsay exception; and (3) they were unfairly prejudicial. *First*, we provide the tests for those three bases: Confrontation Clause, hearsay exceptions, and unfair prejudice. *Second,* we review the circuit court's ruling and conclude that the circuit court conflated the three tests and, therefore, we cannot discern the basis for its ruling. Thus, we remand to give the circuit court an opportunity to clearly state the basis on which it suppressed the 911 Call Statements and the test that it applied.

I. Confrontation Clause, Hearsay Exceptions, and Unfair Prejudice

a. Confrontation Clause

Whether statements, such as the 911 Call Statements, violate a defendant's confrontation rights protected by the Sixth Amendment to the United States Constitution[2] requires a determination of whether the statements are testimonial or nontestimonial. *Davis v. Washington*, 547 U.S. 813 (2006); *Crawford v. Washington*, 541 U.S. 36 (2004).

But this was not always the case. Previously, the Supreme Court's Confrontation Clause jurisprudence followed the rule from *Ohio v. Roberts*, which held that "the Confrontation Clause does not bar the admission of statements of an unavailable witness

[1] Although Little moved also on the basis of the State constitution, he made no argument that its reach was different than that of the federal constitution. The circuit court did not mention Article 21 in its ruling.

[2] The Sixth Amendment states, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. Const. amend. VI.

where such statements 'bear adequate indicia of reliability,' and that such reliability is established where the 'evidence falls within a firmly rooted hearsay exception,' or where it bears 'particularized guarantees of trustworthiness.'" *Langley v. State*, 421 Md. 560, 567-68 (2011) (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)). The Court of Appeals has explained, however, that the Supreme Court overruled the *Ohio v. Roberts* rule because "*Roberts*'s reliability test was unpredictable and 'demonstrated [a] capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude'" *Langley*, 421 Md. at 568 (quoting *Crawford*, 541 U.S. at 63).

Establishing a new test in *Crawford v. Washington*, the United States Supreme Court held that "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination" if the statement is "testimonial evidence." *Crawford*, 541 U.S. at 68. The Supreme Court did not provide a comprehensive definition of "testimonial," but listed "various formulations of this core class of 'testimonial' statements":

> ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective

> witness reasonably to believe that the statement would be available for use at a later trial.

Crawford, 541 U.S. at 51–52 (internal quotation marks and citations omitted).

Following *Crawford*, the Supreme Court established the primary purpose test to determine whether a statement is testimonial or nontestimonial. *Davis v. Washington*, 547 U.S. 813 (2006). The *Davis* Court explained that when "the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," statements in response to that interrogation are nontestimonial. *Davis*, 547 U.S. at 822 ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."). On the other hand, when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution," statements in response to the interrogation are testimonial. *Id.* Additionally, the *Davis* Court cautioned that the primary purpose test does not require that a court find an entire conversation to be testimonial or nontestimonial. "This is not to say that a conversation [that] begins as an interrogation to determine the need for emergency assistance cannot … evolve into testimonial statements, once that purpose has been achieved." *Id.* at 828 (internal quotation marks omitted).

One important, but not dispositive, factor in determining the primary purpose of an interrogation—and whether a statement is testimonial—is whether there is an ongoing emergency. *Michigan v. Bryant*, 562 U.S. 344, 366 (2011). "[W]hether an emergency exists

and is ongoing is a highly context-dependent inquiry." *Id.* at 363. The existence of an "ongoing emergency" may depend on the timing of the statements. *Langley*, 421 Md. at 590. It may also depend on the type of dispute involved, and the type of weapon employed. *Bryant*, 562 U.S. at 364, 372. An ongoing emergency, however, is not dispositive of the question of whether a statement is testimonial. "[T]he existence of an 'ongoing emergency' 'should not be taken to imply that the existence ... of an ongoing emergency is dispositive of the testimonial inquiry.'" *Langley*, 421 Md. at 578 (quoting *Bryant*, 562 U.S. at 366).

Another factor in the determination of the primary purpose of an interrogation—and whether a statement is testimonial—is "'*informality* in an encounter between a victim and police.'" *Bryant*, 562 U.S. at 366. A "structured, station-house interview" is more likely to be testimonial than an "informal, harried 911 call." *Langley*, 421 Md. at 578 (quoting *Bryant*, 562 U.S. at 377). This is because "informality suggests that the interrogators' primary purpose [is] simply to address what they perceived to be an ongoing emergency." *Bryant*, 562 U.S. at 377. Formality, on the other hand, alerts a declarant to the possible prosecutorial use of his or her statements. *Id.* ("the circumstances lacked any formality that would have alerted [the declarant] to or focused him on the possible future prosecutorial use of his statements.").

Whether a statement is testimonial or nontestimonial determines the requirements for admitting that statement in court and whether the Confrontation Clause is triggered. "[W]hen an out-of-court statement qualifies as testimonial, the Constitution conditions its admission on the unavailability of the witness and a prior opportunity to cross-examine."

State v. Snowden, 385 Md. 64, 79 (2005); *see also Crawford,* 541 U.S. at 63 (holding that unavailability and a prior opportunity for cross-examination are required for testimonial statements). "If the statement is deemed … nontestimonial, it need only conform to Maryland's rules regarding hearsay." *Marquardt v. State*, 164 Md. App. 95, 120 (2005).[3]

b. Hearsay Exceptions

An out-of-court statement is inadmissible hearsay unless the statement falls within a recognized exception to the hearsay rule. Md. Rule 5-802 ("Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible."). Maryland Rule 5-803(b)(1) provides an exception for hearsay that is a present sense impression, which it defines as, "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or

[3] The parties dispute the standard by which we should review a determination of whether a statement is testimonial or non-testimonial for confrontation purposes. The State, relying on a plain statement by the Court of Appeals in *Langley*, argues that our review is *de novo*. *Langley*, 421 Md. at 567. ("The flagship question presented in the present case queries whether certain statements admitted at trial were admitted in violation of Respondent's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. This is a question of law, which we review under a non-deferential standard of review.") Little, noting that the circuit court made a determination based on its view of the timbre of the 911 caller's voice, argues for an abuse of discretion standard. Because the issue is likely to recur, maybe even in this case, we shall state our view. We think that the correct answer is somewhere in between—*Langley's* apparent statement to the contrary notwithstanding. To the extent that the trial court is evaluating testimony or evidence available to it (and not available to us), we will defer to that fact-finding by applying a deferential, abuse of discretion review. As to facts to which we have equally good access (for example, had the 911 recording been made a part of the record, we could listen and evaluate it just as well as the circuit court could) and to the application of those facts to law, we will give no deference and review the decision *de novo*.

immediately thereafter." Md. Rule 5-803(b)(1). Maryland Rule 5-803(b)(2) provides an exception for hearsay that is an excited utterance, which it defines as, "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." Md. Rule 5-803(b)(2).

The standard of review for hearsay determinations is two-layered, providing deference to a trial court's factual conclusions, but no deference to its legal conclusions:

> [T]he trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review. Accordingly, the trial court's legal conclusions are reviewed de novo, but the trial court's factual findings will not be disturbed absent clear error.

Gordon v. State, 431 Md. 527, 538 (2013) (internal citations omitted). For example, the Court of Appeals has explained the deference an appellate court gives a trial court's determination of whether evidence is admissible under the excited utterance exception:

> 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 (internal citations omitted).[4]

c. Unfair Prejudice

Evidence may also be excluded if a court determines that it is unfairly prejudicial. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. "Evidence is prejudicial when it tends to have some adverse effect ... beyond tending to prove the fact or issue that justified its admission." *Hannah v. State,* 420 Md. 339, 347 (2011) (quoting *King v. State,* 407 Md. 682, 704 (2009)).

The decision of whether the probative value of relevant evidence is outweighed by the danger of unfair prejudice "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 (2003).

[4] We limit our discussion to these two hearsay exceptions because these are the exceptions that the State raised in the circuit court.

II. Trial Court's Discussion

The circuit court's ruling combined the three analyses above and discussed them at the same time and as if they were part of the same test:

> [M]y analysis … goes directly to whether or not the individual that's making the call, that 911 caller's statements of identification are testimonial or non-testimonial. The court in *Davis* has an excellent discussion about that and *Marquardt*, … talks about a 911 call recording an attack between a victim and an appellant to be non-testimonial because the recording was as it was happening and we all know that in the face of present sense impression or excited utterances, many times statements of identity come in under those circumstances.
>
> The Court listened very closely to the tape recording, the 911. There was nothing excited about that. It was not a present sense impression and we're not even sure she actually saw the culprit, because she appeared to be talking to someone else who was present. At one point she turns and says, "Avery, wasn't it?" as if she were inquiring of someone else.
>
> There was and should be an opportunity for the Defendant to confront that accuser, because it would appear from the Court's understanding of the State's case that that is the sole identification witness. And if I were to let that statement in, though it be prejudicial, he has no opportunity to cross-examine the witness, according to the attorneys in this case. The State's not going to call the witness. I don't know if the Defense is going to call the witness or not. And as to – – as it relates to the other victim, I'm not sure whether or not that witness is going to testify or not.
>
> The Supreme Court of the United States has made it clear that the confrontation clause of the United States Constitution is a protected right of the Defendant and that fundamental, constitutional right shall not be abridged without ample opportunity for the defense attorney to cross-examine, that that right is so fundamental that short of him doing something to forfeit that right the court should hold fast that, though there might be exceptions to the hearsay rule, the court should

> always weigh it, keeping in mind the confrontation clause of the United States Constitution.
>
> That comparison, the *weighing* requires that I grant [the] motion to remove anything from the 911 tape that smacks of an identification of [Little]. That would include his name, as well as the physical description. Without the opportunity to have a live witness testify and without there being any other fact witnesses that the State intends to call, that description would be the sole evidence against your client, other than his own statement that he was in that area.
>
> * * *
>
> I'm trying to make the *exception rule under the hearsay exception*. I'm trying to also say why it's *not a present sense exception and an excited utterance*. And even if it were, you still have to take the hearsay exception and put it in the *balance* of the confrontation clause.

(emphasis added)

The circuit court's analysis mixed together all three tests: "weighing" and "balancing" are part of the Rule 5-403 test but not part of the Confrontation Clause or hearsay tests; "excited utterance" and "present sense impression" are hearsay exceptions but are not relevant to the Rule 5-403 test and, since *Crawford*, not relevant to the Confrontation Clause analysis; and whether the "primary purpose" of the statement was "testimonial" or not is the Confrontation Clause analysis but not part of deciding whether a statement is admissible as an exception to the rule against hearsay or because it is more prejudicial than probative pursuant to Rule 5-403.

The next day, the circuit court reiterated its ruling. The circuit court again conflated Confrontation Clause analysis and hearsay exception analysis and appears to have applied the old *Ohio v. Roberts* test of "reliability" and "trustworthiness," which the Supreme Court replaced with *Crawford*'s testimonial and *Davis*'s primary purpose test:

> [B]ut where the … anonymous caller describes the crime itself, the manner in which it occurs, the movement of the Defendant in and out of a building, and then names the Defendant and at the end of that appears to be speaking to someone else about that identity in a – – with a question mark, "Avery, wasn't it?", that, coupled with the Court's review of the actual words used by the caller in describing the crime give rise to this Court that the caller either saw some of what the caller was reporting, much of what the caller was reporting, or none of what the caller was reporting and was rather conveying what someone else told the caller.
>
> It's unclear from the transcript. It's unclear from the caller's statements. And because it is the only evidence against the Defendant and *it does not even move towards reliability or trustworthiness in the weighing of evidence generally and hearsay specifically, which gives rise to the hearsay exception,* but smacks of interfering with a fundamental, constitutional right that the Defendant has to confront his accuser.

(emphasis added)

Because the circuit court's ruling on the suppression of the 911 Call Statements combined Confrontation Clause analysis, hearsay exception analysis, and unfair prejudice analysis, discussing all three at the same time, without clearly applying the rules, we are unable to determine upon which basis the court relied. Thus, we remand this case to the

circuit court to provide it an opportunity to clearly state the basis on which it is suppressing the 911 Call Statements and the test that it is applying to make that ruling.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR A DECISION CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.