Circuit Court for Montgomery County
Case No. 137445-C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2065

September Term, 2022

JEROME JERRELL TIBBS

v.

STATE OF MARYLAND

Berger,
Ripken,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: October 16, 2023

A jury sitting in the Circuit Court for Montgomery County found Jerome Jerrell Tibbs, appellant, guilty of attempted robbery with a dangerous weapon, use of a firearm in the commission of a crime of violence, and assault in the first degree. After the court imposed sentences totaling eleven years of active incarceration and additional suspended time,[1] he noted this appeal, raising a single issue for our review:

> Whether the circuit court erred in admitting recorded statements made by a complaining witness in violation of the Confrontation Clause, where the witness did not testify at trial and appellant did not have an opportunity to cross-examine him.

Because the circuit court did not err in admitting the statements, we affirm.

BACKGROUND

The Crimes

In the late afternoon of December 7, 2018, Eddie Thomas was riding on a Metrorail train (the Red Line), heading from Washington, D.C. to Montgomery County. When the train reached the Shady Grove station in Gaithersburg, Mr. Thomas exited the train, followed by appellant, who also had been on the train. Appellant attempted to take Mr.

[1] The court sentenced appellant to twenty-five years' imprisonment, with all but eleven years suspended, to be followed by five years' supervised probation, for assault in the first degree. It sentenced appellant to a concurrent term of ten years' imprisonment, all suspended except the mandatory five years without possibility of parole, for use of a firearm in the commission of a crime of violence. It sentenced appellant to a consecutive term of twenty years' imprisonment, all suspended, for attempted armed robbery. In total, the sentence was, in the court's words, "45 years, suspend all but 11 years, on five years' supervised probation."

Thomas's satchel,[2] pistol whipping him in the face and head while doing so. Mr. Thomas managed to escape, and appellant fled back to the train station, where he boarded a southbound train headed toward the District of Columbia. Mr. Thomas sought emergency assistance.[3]

Corporal Matthew Langley of the Montgomery County Police Department received a call from his dispatcher concerning a robbery in progress at the Shady Grove Metro station and happened to be nearby, reaching the scene "within probably three minutes." Corporal Langley arrived at the station and "immediately" noticed a Fire and Rescue ambulance with its emergency lights flashing, and he "went straight to it."

After speaking with the ambulance driver, Corporal Langley "went into the ambulance to speak with the victim[,]" who was sitting inside, while emergency medical responders were "attending to his injuries." Corporal Langley identified the victim as Eddie Thomas, "a black male with a dreadlock-style twist[,]" "wearing dark blue jeans" and a "camouflage-color hoodie." Mr. Thomas appeared agitated, with "blood on his face" and hands. Corporal Langley's "impression was" that Mr. Thomas "was still dealing in the moment of the crime itself on an adrenaline rush." Mr. Thomas's "hands were shaking" as he spoke, and his mannerisms were "very descriptive, pointing, prodding, pushing."

[2] Mr. Thomas was carrying cannabis in his satchel. When he was interviewed by a police officer shortly after the attempted robbery, the officer noted that he gave off a "strong odor of marijuana," and Mr. Thomas explained that he had chronic injuries to his hands and had just procured medical marijuana in the District of Columbia.

[3] There is no evidence explaining how Mr. Thomas first interacted with emergency responders.

Mr. Thomas described his assailant as "skinny," "dark skinned," "[s]horter than" himself, and wearing pink Nike "Foamposite" shoes. According to Mr. Thomas, his assailant "pulled a gun on" him and demanded his bag, but Mr. Thomas refused. Corporal Langley "put a lookout for the suspect on the air for surrounding units to circulate."

A Metro Police officer spotted a person matching the suspect's description in the Gallery Place Metro station in Northwest Washington. That police officer approached the suspect, obtained his consent to inspect the backpack he was carrying, and recovered a 9 mm semi-automatic handgun from that backpack. The suspect was placed under arrest and identified as appellant.

Legal Proceedings

An indictment was filed, in the Circuit Court for Montgomery County, charging appellant with attempted robbery with a dangerous weapon, use of a firearm in the commission of a crime of violence, and assault in the first degree. There were numerous delays,[4] and finally, in September 2022, a two-day jury trial was held. By that time, Mr. Thomas was residing in Cobb County, Georgia, in the Atlanta metropolitan area. Montgomery County prosecutors were unable to procure his appearance to testify at appellant's trial.

[4] Although appellant was arrested the night of the crime, in December 2018, and a Statement of Charges was filed in the District Court at that time, his case was not transferred to the circuit court until July 2020. Throughout much of the time after he was indicted in this case, Maryland courts were either closed or operating under restrictions because of the COVID pandemic. No issue has been raised concerning pretrial delay in this case.

On the morning of trial, prior to jury selection, the prosecutor moved in limine to introduce excerpts from Corporal Langley's body-worn camera video, recorded minutes after the robbery, depicting Mr. Thomas, answering questions about the robbery. The prosecutor asserted that the statements at issue were admissible as excited utterances.

Defense counsel countered that the excited utterance hearsay exception did not apply because Mr. Thomas had enough time to "reflect on the situation and think about what he does and doesn't want to tell the police." In addition, defense counsel maintained that admitting the recorded statements violated appellant's rights under the Confrontation Clause, as interpreted in *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny. The prosecutor rebutted that "[t]his is clearly not a testimonial statement" and that it falls "squarely" under the category of statements made during an "ongoing emergency," which are not subject to the Confrontation Clause. The trial court reserved its ruling and turned its attention to jury selection.

After jury selection had concluded, and the trial court availed itself of the opportunity to read pertinent case law, the court heard testimony by Corporal Langley and heard argument by the parties. The trial court found that the circumstances surrounding Mr. Thomas's statements constituted "an ongoing emergency" and that, therefore, the disputed statements were "not testimonial under Crawford." Accordingly, the court granted

the State's motion to admit the excerpts from the body-worn camera video,[5] subject to a continuing defense objection.

At the ensuing trial, the State called ten witnesses: Corporal Langley; Officer Barton Hudson, of the Montgomery County Police Department; Detective Michael Murphy, of the Montgomery County Police Department; Officer Ellyn LaPointe, of the Montgomery County Police Department; Officer John Duviera, of the Metro Transit Police Department; Officer Gregory Channon, of the Metro Transit Police Department; Officer Collin Jackson, of the Metro Transit Police Department; Detective James Lee, of the Montgomery County Police Department; Naomi LoBosco, a forensic scientist at the Montgomery County Police crime laboratory; and Mark Williford, a firearms examiner with the Montgomery County Police Department. Appellant exercised his constitutional right not to testify.

Corporal Langley, the police officer who first interviewed Mr. Thomas while he was receiving emergency medical treatment in an ambulance, shortly after he had been assaulted, testified about his encounter with Mr. Thomas that evening. It was through Corporal Langley's testimony that the recording of Mr. Thomas's statements (the subject matter of this appeal) was admitted into evidence and played before the jury. In addition, Corporal Langley narrated while Metro surveillance video, depicting the events from the evening of the crimes, including the attempted robbery and the assault, was played before the jury.

[5] The trial court offered defense counsel a choice to have certain parts (involving cannabis) redacted, but because defense counsel asked for an "all or nothing" redaction, the excerpts were admitted without redaction.

Officer Hudson testified that, upon responding to the crime scene at the Shady Grove Metro station, he canvassed the area, searching for physical evidence. He found the specific location where the assault occurred, "about halfway between the exit of the tunnel at the east side to the parking garage[,]" which he identified from blood spatter, a BIC lighter, and a broken arm from a pair of eyeglasses. Officer Hudson took photographs depicting those items, which were admitted into evidence through his testimony.

Detective Murphy testified that, on the night in question, he traveled to Suburban Hospital, where Mr. Thomas had been taken for treatment. According to Detective Murphy, Mr. Thomas (who had just arrived and had not yet been "seen by hospital staff") "had injuries to his head[,]" and there was "visible blood on the left side running down his face[.]" Detective Murphy recovered Mr. Thomas's blood-stained satchel, which had a "very strong" odor of cannabis, and it was introduced into evidence through the detective's testimony. He also took photographs of Mr. Thomas, depicting his injuries, which the detective submitted for evidence and shared with Detective Lee, the primary detective.

Officer LaPointe, too, went to Suburban Hospital that night. She collected Mr. Thomas's clothing for submission as evidence and took photographs, depicting his wounds. Those items were introduced into evidence through her testimony.

Officer Duviera testified that, on the night of the crimes, he was on "a special . . . rush hour assignment[,]" at the Gallery Place Metro station, the purpose of which was "to deter any robberies[,]" which increase around the holiday season. He received an alert to be on the lookout for a suspect who had just attempted a robbery at the Shady Grove Metro station. While Officer Duviera was patrolling the station, he noticed directly in front of him

a person matching the description of the suspect, wearing "very distinct" pink "Foamposite" sneakers. Officer Duviera approached the suspect, obtained his consent to look inside his backpack, and recovered a loaded 9 mm handgun and a box of matching ammunition inside that backpack. He placed the suspect, whom he identified in open court as appellant, under arrest. Through Officer Duviera's testimony, the handgun and ammunition recovered from appellant on the night of the crimes were admitted into evidence.

Officer Channon testified that, on the night of the crimes, he was summoned to the Gallery Place Metro station to meet an "officer that had recovered a firearm in a bookbag." Upon arriving there, he met Officer Duviera, who informed him of the handgun he had found in appellant's bookbag. Officer Channon took the handgun, "ejected the magazine, opened the slide to verify the firearm was unloaded, and then . . . photographed it and packaged it." He identified in open court the handgun and ammunition he had recovered on the night of the crimes.

Officer Jackson testified that he responded to the Gallery Place Metro station on the night of the crimes after learning that a weapon had been recovered from a suspect there. He interrogated appellant later that evening, and he also recovered surveillance video from the Shady Grove Metro station "and the pertaining train car video footage." Officer Jackson narrated while the prosecutor played excerpts from that surveillance footage in open court, which depicted appellant following Mr. Thomas and assaulting him.

Detective Lee, the lead detective in this case, testified that, on the night of the crimes, he traveled to Suburban Hospital, where he met Mr. Thomas. According to

Detective Lee, Mr. Thomas "had blood on his clothing" and a bandage on his head. Through his testimony, photographs depicting Mr. Thomas's injuries were admitted into evidence. Detective Lee also testified that he recovered the sweater Mr. Thomas was wearing that evening, and he submitted it for forensic testing. That same evening, Detective Lee traveled to Washington, D.C., where he met Officer Jackson of the Metro Transit Police, who was with appellant. Detective Lee observed suspected blood on appellant's shoes. He recovered appellant's shoes and submitted them for forensic testing. In addition, Detective Lee took a buccal swab from appellant and submitted it for DNA testing. Finally, Detective Lee testified about his unsuccessful attempts to locate Mr. Thomas in Georgia prior to trial.

Ms. LoBosco testified about the results of the forensic analysis she performed for this case. Notably, Mr. Thomas's DNA was detected in the blood found on appellant's shoes.

Mr. Williford testified that the handgun recovered from appellant, a Stallard model 9S, was operable. He further testified as an expert to establish that the weapon in question satisfied the statutory definition of a firearm.

The jury deliberated approximately an hour-and-a-half. It found appellant guilty of assault in the first degree (both modalities), attempted armed robbery, and use of a firearm in the commission of a crime of violence.

The court sentenced appellant to sentences totaling forty-five years, including eleven years of active incarceration, to be followed by five years' supervised probation. This timely appeal ensued.

DISCUSSION

Parties' Contentions

Appellant contends that the trial court erred in admitting excerpts from Corporal Langley's body-worn camera video, depicting Mr. Thomas, making statements accusing him of the crimes, where Mr. Thomas did not appear in court to testify, and appellant had no opportunity to cross-examine him. In doing so, according to appellant, the trial court violated his constitutional right to confront the witnesses against him. Appellant insists that Mr. Thomas's recorded statements were "testimonial" because he "made the statements to Officer Langley after the alleged armed robbery had ended"; any threat to Mr. Thomas had concluded by the time he made the statements; his "statements were not necessary to resolve any present emergency"; and "Corporal Langley's questions were specifically structured" so as to satisfy the formality criterion.

The State counters that Mr. Thomas's statements were admissible under the "ongoing emergency" exception to the Confrontation Clause, as articulated by the United States Supreme Court in *Davis v. Washington*, 547 U.S. 813 (2006), and *Michigan v. Bryant*, 562 U.S. 344 (2011). According to the State, Mr. Thomas's statements conveyed "precisely the information that police would gather if they intended to search for the armed robber: clothes, appearance, complexion, weapons." Because Mr. Thomas made his statements shortly after being assaulted, while his armed assailant was still at large, we should conclude, urges the State, that those statements were made in "response to an ongoing emergency."

Standard of Review

"'We review the ultimate question of whether the admission of evidence violated a defendant's constitutional rights without deference to the trial court's ruling.'" *Rainey v. State*, 246 Md. App. 160, 171 (quoting *Taylor v. State*, 226 Md. App. 317, 332 (2016)), *cert. denied*, 468 Md. 556 (2020).

Analysis

The Confrontation Clause, "Testimonial Hearsay," and the "Primary Purpose" Test

The Sixth Amendment guarantees that, in "all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. That "bedrock procedural guarantee applies to both federal and state prosecutions." *Crawford*, 541 U.S. at 42 (citing *Pointer v. Texas*, 380 U.S. 400, 406 (1965)).

In *Crawford*, the United States Supreme Court held that, "regardless of hearsay rules, the Confrontation Clause generally bars the introduction into evidence, at a criminal trial, of 'testimonial hearsay,' unless the defendant had a prior opportunity to cross-examine the declarant, and the declarant was presently unavailable to testify." *Rainey*, 246 Md. App. at 172 (citing *Crawford*, 541 U.S. at 54). *Crawford* itself, however, did not set forth a precise definition of "testimonial," as it was unnecessary for the Court to do so in resolving the issue before it.[6] *Crawford*, 541 U.S. at 68.

[6] As we observed in *Rainey*, the "statement at issue in *Crawford*, which was recorded during a police interrogation of Crawford's wife (who was unavailable to testify because of the spousal privilege) and played back at his trial, was indisputably a 'testimonial' statement[.]" 246 Md. App. at 172.

Subsequent decisions of the United States Supreme Court further defined the contours of what is a "testimonial" statement by articulating what has become known as the "primary purpose" test. Three United States Supreme Court decisions most pertinent to our analysis are the companion cases, *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813 (2006), and *Michigan v. Bryant*, 562 U.S. 344 (2011).

Davis and *Hammon* illustrate circumstances where the "primary purpose" of a police interrogation of a witness was either to respond to an ongoing emergency (*Davis*) or to investigate whether a crime had been committed (*Hammon*). Accordingly, under the former circumstance, admitting the witness's statements into evidence did not violate the defendant's right to confrontation because the statements were deemed *not* "testimonial," whereas, under the latter circumstance, it did because the statements *were* "testimonial."

To illustrate the point, in *Davis*, the "relevant statements . . . were made to a 911 emergency operator" by a domestic violence victim, Michelle McCottry. *Davis*, 547 U.S. at 817. In determining that Ms. McCottry's statements to the 911 dispatcher were not "testimonial," the Court noted that she "was speaking about events *as they were actually happening*, rather than describing past events[.]" *Id.* at 827 (cleaned up). Furthermore, noted the Court, "any reasonable listener would recognize that" Ms. McCottry "was facing an ongoing emergency" and that the 911 call "was plainly a call for help against bona fide physical threat." *Id.* Moreover, "viewed objectively," it was plain that "the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past." *Id.* "And finally," observed the Court, Ms. McCottry's "frantic answers were provided over the phone, in an environment

that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe."[7] *Id.* Under all these circumstances, the Court concluded that the "primary purpose" of the interrogation (by the 911 dispatcher) of Ms. McCottry "was to enable police assistance to meet an ongoing emergency." *Id.* at 828.

In contrast, in the companion case (*Hammon*), although police officers were responding to a domestic dispute that apparently had recently concluded, they were able to separate the victim and the perpetrator. *Id.* at 819. Then, while the perpetrator was confined in one room (with a police officer present),[8] the victim was in another room, where she gave police a handwritten "affidavit," charging her husband with battery. *Id.* at 820. The Court concluded that it was "entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct[.]" *Id.* at 829. The Court further noted that "[t]here was no emergency in progress" and that "the interrogating officer testified [at the husband's subsequent trial] that he had heard no arguments or crashing and saw no one throw or break anything[.]" *Id.* Thus, according to the Court, when the victim gave her written statement, the police interrogator "was not seeking to determine (as in *Davis*) 'what is happening,' but rather 'what happened.'" *Id.* at 830. "Objectively viewed," the Court declared, "the primary, if not indeed the sole, purpose of the interrogation was to

[7] The Court characterized "the difference in the level of formality between" the interview in *Davis* versus that in *Crawford* as "striking," observing that the interviewee in *Crawford* "was responding calmly, at the station house, to a series of questions[.]" *Davis*, 547 U.S. at 827.

[8] In the Court's characterization, "officers forcibly prevented Hershel [the perpetrator/husband of the victim] from participating in the interrogation." 547 U.S. at 830.

investigate a possible crime—which is, of course, precisely what the officer *should* have done."[9] *Id.*

Synthesizing its holdings in the companion cases, the Supreme Court articulated the following descriptions of "testimonial" and "nontestimonial" in the emergency context:

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

Id. at 822.[10] One important question *Davis* and *Hammon* did not resolve was whose perspective matters in determining the "primary purpose" of an interrogation—the declarant's, the interrogator's, or some combination of the two.

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[9] The Court further noted that, although "the *Crawford* interrogation was more formal[,]" the interrogation in *Hammon* was "formal enough" as to implicate the requirements of the Confrontation Clause. 547 U.S. at 830. The Court summarized what it termed the "'striking resemblance' . . . to civil-law *ex parte* examinations" (one of the primary abuses the Confrontation Clause was designed to prevent) the out-of-court statements in *Hammon* and *Crawford* shared:

> Both declarants were actively separated from the defendant—officers forcibly prevented Hershel [Hammon] from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness* does on direct examination; they are inherently testimonial.

547 U.S. at 830.

[10] In a footnote, the Court cautioned that its holding referred to "interrogations" because the statements at issue in those cases were "the products of interrogations[,]" and it did not mean to suggest "that statements made in the absence of any interrogation are necessarily nontestimonial." *Davis*, 547 U.S. at 822 n.1.

Five years later, in *Michigan v. Bryant*, 562 U.S. 344 (2011), the Court again addressed whether statements given to police interrogators/emergency responders qualified as "testimonial." This time, unlike in *Davis* and *Hammon*, which "arose in the domestic violence context," the Court addressed "a new context: a nondomestic dispute, involving a victim found in a public location, suffering from a fatal gunshot wound, and a perpetrator whose location was unknown at the time the police located the victim." *Bryant*, 562 U.S. at 359.

The Court began its analysis by redefining the "primary purpose" test as requiring an objective evaluation of "the circumstances in which the encounter occurs and the statements and actions of the parties." *Id.* at 359. Thus, according to the Court, "the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Id.* at 360. The Court adopted a "combined inquiry" approach that considers "the statements and actions of *both* the declarant and interrogators[,]" which "provide objective evidence of the primary purpose of the interrogation[,]" rejecting the view of the dissenting justices[11] that a reviewing court should focus on the intent of the declarant in determining the "primary purpose" of an interrogation. *Id.* at 367, 367 n.11 (emphasis added).

[11] *Bryant*, 562 U.S. at 381-82 (Scalia, J., dissenting); *id.* at 395 (Ginsburg, J., dissenting).

The Court noted that "the existence of an 'ongoing emergency' at the time of an encounter between an individual and the police is among the most important circumstances informing the 'primary purpose' of an interrogation . . . because an emergency focuses the participants on something other than 'prov[ing] past events potentially relevant to later criminal prosecution.'" *Id.* at 361 (quoting *Davis*, 547 U.S. at 822). Rejecting the "unduly narrow understanding of 'ongoing emergency'" employed by the state supreme court in the case on review, the *Bryant* Court contrasted the circumstances of domestic violence cases (such as *Davis* and *Hammon*), which "often have a narrower zone of potential victims than cases involving threats to public safety" such as *Bryant*. 562 U.S. at 362-63. The Court emphasized that "[a]n assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue." *Id.* at 363.

Other factors the Court deemed relevant to the inquiry are the "type of weapon employed" and the "medical condition of the victim[.]" *Id.* at 364. The Court contrasted the threat posed by the assailants in *Davis* and *Hammon*, who "used [only] their fists," with that posed by the assailant in *Bryant*, who used a firearm, a factor which inherently expands the zone of danger to both victims and the general public. *Id.* Moreover, the "medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one." *Id.* at 364-65. "The victim's medical state also provides important context for first

responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public." *Id.* at 365.

The Court cautioned that "none of this suggests that an emergency is ongoing in every place or even just surrounding the victim for the entire time that the perpetrator of a violent crime is on the loose." *Id.* "This evolution may occur if, for example, a declarant provides police with information that makes clear that what appeared to be an emergency is not or is no longer an emergency or that what appeared to be a public threat is actually a private dispute." *Id.* "It could also occur if a perpetrator is disarmed, surrenders, is apprehended, or, as in *Davis*, flees with little prospect of posing a threat to the public." *Id.* The Court recognized that trial courts "can determine in the first instance when any transition from nontestimonial to testimonial occurs, and exclude 'the portions of any statement that have become testimonial[.]'" *Id.* at 365-66 (footnote omitted) (quoting *Davis*, 547 U.S. at 829). Finally, "whether an ongoing emergency exists is simply one factor—albeit an important factor—that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Id.* at 366. Formality also is an important factor, although its absence "does not necessarily indicate the presence of an emergency or the lack of testimonial intent." *Id.*

Applying its redefined test to the facts of that case, the Supreme Court concluded that "there was an ongoing emergency . . . where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded Covington [the victim] within a few blocks and a few minutes of the location where the police found Covington." *Id.* at 374. Although the Court conceded that the emergency did not continue indefinitely

("Bryant was arrested in California a year after the shooting"), it was unnecessary to "decide precisely when the emergency ended because Covington's encounter with the police and all of the statements he made during that interaction occurred within the first few minutes of the police officers' arrival and well before they secured the scene of the shooting—the shooter's last known location." *Id.*

Another circumstance the Court thought relevant was Covington's dire medical condition. "His answers to the police officers' questions were punctuated with questions about when emergency medical services would arrive[,]" and he "was obviously in considerable pain and had difficulty breathing and talking." *Id.* at 375. Under those circumstances, the Court was unable to "say that a person in Covington's situation would have had a 'primary purpose' 'to establish or prove past events potentially relevant to later criminal prosecution.'" *Id.* (quoting *Davis*, 547 U.S. at 822).

Furthermore, the questions posed by the responding police officers "were the exact type of questions necessary to allow the police to assess the situation, the threat to their own safety, and possible danger to the potential victim and to the public, including to allow them to ascertain whether they would be encountering a violent felon[.]" *Id.* at 376 (quotation marks and citations omitted). Nor, concluded the Court, did Covington's responses to those questions suggest the absence of an emergency "or that a prior emergency had ended." *Id.* at 377. And finally, the informality of the interrogation suggested "that the interrogators' primary purpose was simply to address what they perceived to be an ongoing emergency" and supported the Court's conclusion that Covington's statements were nontestimonial. *Id.*

Application to the Instant Case

In the present case, the disputed statements were recorded on a responding police officer's body-worn camera video. The declarant, Mr. Thomas (the victim), did not appear in court to testify, and regardless of whether he was available (or not), the defense had no prior opportunity to cross-examine him. Therefore, if his recorded statements on Corporal Langley's body-worn camera video amounted to "testimonial hearsay," their admission into evidence would have been error. Because it is not reasonably disputed that those statements were hearsay,[12] the only issue before us is whether those statements were "testimonial" under the "primary purpose" test.

This might have been a closer case prior to the United States Supreme Court's decision in *Bryant*.[13] That decision, however, vastly expanded the scope of "ongoing emergency" in the context of the Confrontation Clause.[14] What constitutes an "ongoing emergency" is very broad in scope and certainly includes the circumstances of this case.

[12] Mr. Thomas's statements were out-of-court statements introduced for their truth. *See* Md. Rule 5-801(c) (defining "hearsay").

[13] We find it noteworthy that Appellant's Brief does not even cite *Bryant*, the most recent United States Supreme Court decision addressing the scope of the "primary purpose" test in cases involving emergencies.

In the aftermath of *Bryant*, Maryland appellate courts have adopted a similarly broad scope of "ongoing emergency." *See*, *e.g.*, *Langley v. State*, 421 Md. 560 (2011) (holding that statements made in a 911 call by a witness to a shooting that had just happened were nontestimonial because they were made during an "ongoing emergency"); *Brock v. State*, 203 Md. App. 245 (2012) (holding that statements of a witness to a stabbing, which had just occurred in a crowded tavern, were nontestimonial because they were made during an "ongoing emergency").

[14] Indeed, the author of *Crawford* issued a vehement dissent in *Bryant*, complaining that the majority's decision "distort[ed]" . . . Confrontation Clause jurisprudence and le[ft]

(continued…)

Here, as in *Bryant*, when Corporal Langley first encountered Mr. Thomas, it was unknown whether appellant was still in the vicinity. As in *Bryant*, appellant was armed with a firearm, a factor which creates a (spatially) large zone of danger. Moreover, in this case but unlike in *Bryant*, there was good reason to believe that appellant might board another Metrorail train (which he, in fact, did), a factor tending to underline the ongoing risk to the public at large.[15]

Other circumstances further support the circuit court's ruling that Mr. Thomas's statements were nontestimonial. According to Corporal Langley, Mr. Thomas, at the time he made his statements, "was still dealing in the moment of the crime itself on an adrenaline rush"; his "hands were shaking" as he spoke, and his mannerisms were "very descriptive, pointing, prodding, pushing." Moreover, he had a bloody wound to his head. Finally, Corporal Langley's questioning took place in a most informal setting, in the back of an ambulance, while Mr. Thomas was being treated by emergency medical technicians. The circumstances here were entirely unlike those in *Crawford*, 541 U.S. at 53 n.4 (witness's statements made in response to "structured police questioning"), and *Hammon*, 547 U.S.

it in a shambles." *Bryant*, 562 U.S. at 380 (Scalia, J., dissenting). He further declared that, under *Bryant*, an appellate court was left "free to reach the 'fairest' result under the totality of the circumstances" but that such a "malleable approach" all but eviscerated the confrontation right. *Id.* at 383-84. Both dissenting justices agreed that *Bryant* "'create[d] an expansive exception to the Confrontation Clause for violent crimes.'" *Id.* at 395 (Ginsburg, J., dissenting) (quoting *id.* at 388 (Scalia, J., dissenting)).

[15] The likelihood that appellant was still in the Metro also added to the urgency of the situation in the sense that it made his prompt apprehension much more probable because of his spatial and temporal confinement, but that factor does not weigh in the "primary purpose" calculus.

at 830 (witness executed an "affidavit" while the suspect was "forcibly prevented . . . from participating in the interrogation"), cases where the statements were held to be testimonial.

We hold that the circuit court did not violate appellant's confrontation right in admitting Mr. Thomas's nontestimonial statements through Corporal Langley's body-worn camera video.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.