Circuit Court for Baltimore City
Case No. 119175008

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2502

September Term, 2019

ADRIAN MAYO

v.

STATE OF MARYLAND

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

JJ.

Opinion by Raker, J.

Filed: April 30, 2021

Appellant Adrian Mayo was convicted by a jury in the Circuit Court for Baltimore City of second-degree assault of Herber Barrientos Ochoa and second-degree assault of Fredy Herrera Alarcon. Appellant presents the following questions for our review:

> "1. Did the [circuit] court err under Md. Rule 4-215(e) by failing to 'actually consider' Mr. Mayo's reasons supporting his request to discharge counsel and by failing to inquire whether he invoked his right to self-representation?
>
> 2. Did the court violate Mr. Mayo's right to testify by failing to ensure that his waiver was knowing and voluntary when the court had clear notice that he did not understand the consequences of his decision?
>
> 3. Did the court err by excluding statements that Mr. Mayo made when he was still in an excited state, just one minute after he was removed from the basement, where he was pepper sprayed and given a severe head injury that required medical attention?
>
> 4. Did the court abuse its discretion by preventing the defense from cross-examining the State's witnesses about their immigration status when their status could have given them a motive to lie about their involvement in the alleged events?"

Because we find that the circuit court erred by excluding appellant's excited utterances and that this error prevented him from receiving a fair trial, we shall reverse. We need not address appellant's remaining questions.

I.

Appellant was indicted by the Grand Jury for Baltimore City for first-degree assault of Mr. Herber Barrientos Ochoa, second-degree assault of Mr. Barrientos Ochoa, second-

degree assault of Mr. Fredy Herrera Alarcon, breaking and entering into a storehouse located at 5223 Ready Avenue, breaking and entering into the same storehouse with the intent to commit a crime of violence, use of a firearm in the commission of a crime of violence, possession of a regulated firearm after having been convicted of robbery, possession of a regulated firearm after having been convicted of second-degree assault, wearing, carrying, or transporting a handgun upon and about his person, possession of a firearm after being convicted of distribution, and possession of a short-barreled rifle. In all, appellant was indicted for eleven charges. The circuit court granted a motion for judgment of acquittal on three counts, including the two counts of breaking and entering a storehouse as well as the count of carrying a handgun. The jury acquitted appellant of all the other charges except the two counts of second-degree assault. The jury convicted him of second-degree assault against Mr. Barrientos Ochoa and Mr. Alarcon. The court sentenced appellant to a term of incarceration of eight years.

On May 28, 2019, the Baltimore Police responded to a 911 call for an alleged assault at a house under construction, a Habitat for Humanity worksite, located at 5223 Ready Avenue. Police found Herber Barrientos Ochoa and Fredy Herrera Alarcon holding appellant down in the basement.[1] Mr. Barrientos Ochoa claimed that appellant had entered the basement, pointed a gun at Mr. Barrientos Ochoa, said he was going to kill him, and then pulled the trigger twice. Both men claimed that they had never met appellant and that

[1] The construction manager for Chesapeake Habitat for Humanity was not at the house but had hired Mr. Barrientos Ochoa to work on the house.

he did not attempt to take property. Police officers found an inoperable gun on the stairs.

Officer Jeremy Foster responded to the scene. Individuals outside the house told him that someone in the basement had a gun. Before going into the basement, he did not know how many suspects there were. Someone called out for help from the basement, as recorded on the officer's body camera. Several times, Officer Foster asked everyone in the basement to come outside, but no one came out. Before proceeding downstairs, Officer Foster observed that Messrs. Barrientos Ochoa and Herrera Alarcon were on top of appellant and holding him down. He saw a gun and a lot of blood on the stairs and on the basement floor. Mr. Barrientos Ochoa accused appellant of entering the basement through a window with a gun. Even after Messrs. Barrientos Ochoa and Herrera Alarcon released their hold on appellant, appellant remained bent down on the floor, coughing.

Officer Foster testified that all three men were injured. Appellant suffered a head laceration and a cut on his right hand. Mr. Barrientos Ochoa had a bite-mark on his arm and swollen knuckles from hitting appellant. The State offered no specifics about Mr. Herrera Alarcon's injuries. Appellant's injuries were the only ones serious enough to require hospital attention.

During Officer Foster's testimony, the State played selections from his body-camera footage. The trial judge admitted selections of the body-camera footage under a hearsay exception for the State but the judge declined to admit other selections of the same footage requested by the defense.

Each of the three men involved in the altercation offered a different story. Of the

three, appellant was the only one whose version did not get before the jury. Appellant's explanation to the police on the body camera was excluded by the trial judge and appellant did not testify at trial.

Mr. Barrientos Ochoa claimed that he was sanding the basement when he felt something or someone behind him, turned around, and saw appellant put a gun in his face and say, "I'm going to kill you right now." Retelling his story, he added that appellant climbed through the basement window then ran toward him with the gun.[2]

Mr. Herrera Alarcon testified that he saw a man with a face covering who came through the window and held a gun against Mr. Barrientos Ochoa's head. Mr. Herrera Alarcon did not testify that the man verbally threatened to kill anyone. Mr. Herrera Alarcon was unable to identify appellant in court.

Appellant's version of events is that he approached Messrs. Barrientos Ochoa and Herrera Alarcon to request money that he was owed for labor he had performed, which prompted the two men to assault him. This version is reflected in appellant's statements recorded in Officer Foster's body-camera footage. Before trial, the defense moved to admit the footage of these statements as excited utterances, and the court watched part of the video. In the video, appellant was covered in dust, bleeding from his head and face, sweating, gasping for breath, and exhibiting pressured speech. He stated as follows:

> "It's a gun. They were going to shoot me when they had the gun. I had that black hammer on the steps. They lie. They know I did the work in there. . . I came back and asked the guy for my money. He

[2] The police and a lab technician processed the alleged point of entry and did not find any fingerprint evidence that appellant had entered through the window.

told me to get the fuck out of here."

Officer Foster asked which person, and appellant continued:

> "The big one. I had the hammer. I swung the hammer. The short one came behind me hit me with the gun. I stopped. I said no one's shooting at you. We started wrestling and they hit me and they took control of me and started beating me with the hammer. They tried attacking me while I was working here. See my boots? See how dirty? I was working in here.…I just want my money. That's all—I came out here for my money."

Officer Foster asked whether it was money for a job. Appellant continued:

> "That floor right there, that floor that I was doing. He said he was going to give me a hand. He did bring my hand. He said he'd come around here. After the holiday, I came. He didn't have my money. I picked up the hammer."

Shortly thereafter in the recording, Officer Foster continued the dialogue with appellant, who remained agitated, bloody, sweaty, and gasping.

> OFFICER FOSTER: So you say you were working?
>
> APPELLANT: Yeah, I was working here. I did that floor.
>
> OFFICER FOSTER: [apparently referring to the gun] Who had that?
>
> APPELLANT: The shooter. He came from behind me with it. I swung the hammer and it knocked it out of his hand. The other one hit me with a stick. I swung the hammer. They overpowered me, jumped on me. I was wrestling with them. They just started beating me. I was already with a—I said I want my goddamned money, I want my fucking money. I got to pay my bills. He tell me get the fuck out of his face.
>
> OFFICER FOSTER: What's your name, man?
>
> APPELLANT: My name Adrian Mayo.
>
> OFFICER FOSTER: So you work for the same guy that hired them?

> APPELLANT: I work for him. He's the one told me to do the floor. I met him at Home Depot.

After some additional dialogue and some moments later, Officer Foster continued to seek appellant's story.

> OFFICER FOSTER: You got hired by them?
>
> APPELLANT: Yeah, he told me to do the floors.
>
> OFFICER FOSTER: —do the floors?
>
> APPELLANT: I'm saying. You see I got my work clothes on. I did that floor. That floor ain't finished. He told me he was going to pay my [indiscernible—possibly 'money']. He didn't pay my [indiscernible]. I came up here today to get my money. Then they had that black hammer that was on the steps. The little one came behind me with a gun. I slapped the gun out his hand with the hammer. So I got hit with a stick. They was in there fighting. All three of them was in there fighting over the money that they owed me. They know what's up. They know what really happened. They—that's some bullshit. They know it's some bullshit.

Before and after the trial judge watched the video, the parties argued about the admissibility of various parts of the video. Eventually those arguments and the discourse with the court reached this point:

> THE COURT: So it's the question of whether or not you're making a claim that Mr. Mayo is also—these are excited utterances in some sense?
>
> THE DEFENSE: Yes.
>
> THE COURT: And what's your response to that?
>
> THE STATE: Well, I—
>
> THE COURT: I mean, boy, he looks kind of a mess. He seems to be

> breathing pretty hard.
>
> THE STATE: Well, Your Honor, I think there is a stark difference from when these statements [earlier in the video] are being shouted out the basement window at the officers who are still trying to gauge what the situation is.
>
> THE COURT: Sure enough.
>
> THE STATE: It's ongoing at that point in time. After they placed him in handcuffs, restrained him, brought him upstairs, several minutes have now gone by since when the situation sort of dissipated. And then the officer, in a calm fashion, says, so what happened. And tries to get his side of the story. I understand that Mr. Mayo is breathing heavily but I don't think that that's directly because he's still under the stress of the event, causing him to make excited utterances. He's trying to carefully explain to the officer his side of the story. I don't think that fits as an excited utterance. I think it's hearsay in this matter, Your Honor.
>
> THE COURT: Okay, all right.
>
> THE DEFENSE: It's uncontroverted that he goes to the hospital. He's got injury to the head, to his hand. I mean—

The court ruled that the portions of the body-camera footage where appellant was speaking were inadmissible. The judge explained as follows:

> "I can also tell you that, based on my review, I am also going to prohibit the playing of his statement as well and I'll put that on the record. Just so you understand, I'm sure, I mean, I looked—there's a very recent case, *Morten v. State*, September 4, 2019. I don't have the actual Westlaw cite but it talks about the essence of the excited utterance exceptions. The inability of the declarant to have reflected on the events about which the statement is concerned. 'It requires a startling event and spontaneous statement which is the result of the declarant's reaction to the occurrence. The rationale for overcoming the inherent untrustworthiness of hearsay is that the situation produced such an effect on the declarant so as to render his reflective capabilities inoperative.'
>
> "I mean, I agree, temporally it is fairly close in time to the

> excited event but all this is just a reflective event about what exactly, why he was there, who these people were, what he was doing at the time. It seems to me an absolute reflective event. It seems to me you have the burden as the proponent of the statement, and I don't fault you for a second in asking that me—for the court to find an exception but I'm going to find that you don't reach, didn't meet your burden based on my observations of that statement.
>
> "So, it seems to me what I will permit is from the time the officers get in the back to when they're engaging people that are downstairs, it seems to me their statements are clearly under the influence of the startling event. I don't—actually, the probative value ultimately is fairly limited, I think. I didn't find too much inculpatory statements in that respect. They come down and they arrest or detain Mr.—the defendant in this case and after they bring him upstairs, they take him up the stairs and the audio will stop. So it's going to be a very short—the video itself will be on but until they get in the backyard and they're engaging those people and once they bring him, take him upstairs—I think actually when they're taking him upstairs the audio should stop. I'll note your exception, [defense counsel]."

Appellant was convicted and sentenced as above, and this timely appeal followed.

II.

Before this Court, appellant argues that the trial court erred in excluding statements he made to police officers immediately after the event which he characterizes as an excited utterance, an exception to the hearsay rule. These statements, he argues, would have supported his claim of self-defense. He emphasizes that he made the statements just *one minute* after police removed him from a situation in which he was pepper-sprayed and suffered a head injury. He argues that he was covered in dust, bleeding from his head and face, out of breath, and gasping for air. He also points out that his injuries were severe enough to require hospital attention and stitches and that his statement was "disjointed,"

representing "difficulty speaking coherently." As a result, his statements recorded on the body camera should have been admitted as excited utterances under Rule 5-803(b)(2) as an exception to the hearsay rule.

The State responds that that trial court's ruling that the statements do not qualify as excited utterances was within the discretion of the trial judge, arguing that appellant's statements were self-serving responses to police inquiries made while he was handcuffed as a suspect in an alleged assault. The State asserts that the trial judge was within his discretion in finding that the statements were the result of thoughtful consideration rather than spontaneous utterances made under the stress of an exciting event.

In addition, the State maintains that several minutes had passed since the police arrived on the scene. Appellant replies, however, that the correct analysis of the timespan would be from the time appellant was released from the hold in the basement by Messrs. Barrientos Ochoa and Herrera Alarcon, or from the time appellant was removed from the basement, which was only moments after the release from the hold. Appellant also replies that the admission of swinging a hammer undermines the State's argument that his utterances to the police were self-servingly made upon "thoughtful consideration."

Because we shall reverse the conviction on the basis of the error as to the admissibility of appellant's statements, we need not summarize the parties' extensive arguments on the other questions presented.

III.

Rule 5-801 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." Hearsay is presumptively inadmissible unless it falls under an exception to the rule against hearsay. Rule 5-802; *Parker v. State*, 156 Md. App. 252, 259 (2004). We review *de novo* whether evidence is hearsay and whether it falls within an exception to the hearsay rule. *Bernadyn v. State*, 390 Md. 1, 7-8 (2005). First level factual findings, however, receive a more deferential review, and will not be disturbed absent clear error. *See Gordon v. State*, 431 Md. 527, 538 (2013).

One exception to the rule against hearsay is the excited utterance, *i.e.*, a statement "relating to a startling event or condition made while the declarant was under the stress of excitement that it caused." Rule 5-803(b)(2); *cf.* Fed. R. Evid. 803(2) (exception for excited utterance under federal law tracks nearly identical language). The rationale behind this 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).

Rule 5-803(b)(2) provides, in pertinent part, as follows:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> "(b)(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition."

The excited utterance exception requires (1) the occurrence of a startling event, (2) a spontaneous statement which is the result of the declarant's reaction to the occurrence, and (3) a nexus between the startling event and the content of the statement. *See Bayne v. State*, 98 Md. App. 149, 177 (1993). Under Maryland law, a statement is "related to" the startling event or condition if it pertains to, is associated with, or concerns the startling event that caused the condition. *Harrell*, 348 Md. at 82. A statement is more likely made under the stress of the excitement caused by the event or condition if the statement is temporally proximate to the startling event. *See id*. at 77. Yet the time between the startling event and the statement is not alone determinative. *Id.* That a statement is made in response to an inquiry is also not controlling. *Id.* Whether an event was sufficiently startling to still the reflective capabilities of the declarant is a factual finding, which we review for clear error. *See Hailes v. State*, 442 Md. 488, 499 n.6 (2015) (noting that "[a] declarant's mental state is a factual matter, not a legal matter."). Overall, in determining whether a statement falls within the excited utterance exception, we consider the totality of the circumstances. *Harrell*, 348 Md. at 77. In the case at bar, we agree with appellant that the circuit court erroneously excluded statements that he made in an excited state, statements that could have supported his claim of self-defense and that qualify as an excited utterance.

The trial court may have embarked down the wrong path in relying on the prosecutor's assertion that appellant's excited statement on the body camera began "several minutes" after the conclusion of the startling event or condition. Specifically, the

prosecutor told the trial judge: "After they placed him in handcuffs, restrained him, brought him upstairs, *several minutes* have now gone by since when the situation sort of dissipated." The video timestamps show that appellant's statements in fact began *only one minute*, not several minutes, after he was removed from the basement floor. The judge, misguided by the prosecutor, qualified his brief analysis of the time factor, acknowledging that the statement was "*fairly* close in time" to the startling condition. This supports our finding of clear error on a key factual detail that was before the trial court. The timing of appellant's statement weighs heavily in favor of our finding that the startling event prompted his statement.

Even though appellant's statements may have been prompted by questions posed by the police officer, the questions were general in nature and non-leading. *See United States v. Frost*, 684 F.3d 963, 974 (10th Cir. 2012) (noting "even if prompted by questioning, a statement may be admissible if the questions are somewhat open-ended"), *overruled on other grounds by United States v. Bustamante-Conchas*, 850 F.3d 1130 (10th Cir. 2017); *United States v. Phelps*, 168 F.3d 1048, 1055 (8th Cir. 1999); *State v. Thorngren*, 149 Idaho 729, 734, 240 P.3d 575 (2010). In addition, while a statement made "in response to an inquiry . . . may be some indication of reflective thought," *Harrell*, 348 Md. at 77, it is not dispositive.

Applying Rule 5-803(b)(2), appellant's statements to Officer Foster and his colleagues were related to the startling event. Those statements pertained exclusively to the startling event and occurred only moments after the startling event ended. As to the

second element, whether appellant was *under the stress of the excitement* caused by the startling event, appellant looked "a mess" and was "breathing hard," as the trial judge mentioned in his own first-blush reaction. To be sure, not all, and perhaps not most, statements made by handcuffed suspects would qualify as excited utterances. Nevertheless, we have here a person who is bleeding, sweating, gasping for air, and exhibiting pressured speech, while discussing a startling event that just occurred moments earlier. The circuit court seemed to emphasize the use of the words "reflect" and "reflective" in *Morten v. State*, 242 Md. App. 537 (2019). Discussion of excitement rendering "reflective capabilities inoperative" has been important to legal analysis of the spontaneity and emotional shock that are hallmarks of excited utterances. Here, appellant appeared incapable of thoughtful consideration. The issue in this case is put into more visible relief, though, when analyzed under the language of Rule 5-803(b)(2) — *i.e.*, whether appellant "was under the stress of excitement caused by the event or condition." Sweating and bleeding are manifestations of bodily stress. Gasping for breath is likewise. Pressured speech is a symptom of psychological disturbance; although it can be a symptom of mania or other conditions, it can be simply caused by psychological stress. *See* "Pressured Speech," GoodTherapy blog (post last updated Mar. 24, 2016), goodtherapy.org/blog/psychpedia/pressured-speech ("In some cases, the speech pattern is due to a temporary bout of anxiety or *extreme stress* and may go away on its own") (emphasis added) (citing American Psychological Ass'n, *APA Concise Dictionary of Pyschology* (2009); Kring, Johnson, Davison & Neale, *Abnormal Psychology* (2010)). The

raised volume and fitful manner of appellant's exclamations on the video also demonstrate that he was under the stress of the excitement caused by the startling events in the basement.

We hold that appellant's statements recorded on Officer Foster's body camera were excited utterances that should have been admitted into evidence. Exclusion was prejudicial to appellant.

JUDGMENTS OF CONVICTION IN THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED; CASE REMANDED TO THAT COURT FOR A NEW TRIAL. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.