Circuit Court for Wicomico County
Case No. C-22-CR-23-000119

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 51

September Term, 2024

BRIAN NIGEL FITCHETT

v.

STATE OF MARYLAND

Berger,
Friedman,
Hotten, Michele D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.
Dissenting Opinion by Friedman, J.

Filed: December 23, 2025

* 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).

This case arises from the conviction of appellant, Brian Nigel Fitchett ("Fitchett"), in the Circuit Court for Wicomico County. Fitchett was arrested following a domestic incident involving his then-girlfriend, S.C., and her daughter, M.C. Fitchett was charged with first-degree assault, second-degree assault, and reckless endangerment against S.C., and first-degree assault, second-degree assault, reckless endangerment, and second-degree child abuse against M.C. After a trial on September 20, 2023, a jury found Fitchett guilty of both second-degree assaults, not guilty of first-degree assault against M.C. and was unable to reach a verdict on the remaining counts. The State nol prossed the reckless endangerment charges, and on January 17, 2024, a jury found Fitchett guilty of first-degree assault against S.C. and second-degree child abuse against M.C. Fitchett was sentenced to 25 years for the first-degree assault and 15 years, all but 10 suspended for the second-degree child abuse. This appeal followed.

QUESTIONS PRESENTED

Fitchett presents two questions for our review, which we have recast and rephrased as follows:[1]

> I. Whether the circuit court erred when, during closing argument, it permitted the State to mention that it was unable to go into Fitchett's mind and ask him questions.

[1] Fitchett phrased the questions as follows:

> 1. Did the prosecutor improperly comment on Mr. Fitchett's right not to testify in closing argument, by repeatedly pointing out that she could not ask him questions?
>
> 2. Did the trial court err by admitting hearsay testimony under the guise of an excited utterance?

II. Whether the circuit court erred by admitting a statement regarding the cause of M.C.'s injuries under the excited utterance exception to hearsay.

For the following reasons, we affirm.

BACKGROUND

This case stems from a domestic assault on February 9, 2023. At the time of the incident, Fitchett and S.C. had been in a relationship for approximately two-and-a-half years. Fitchett was residing at S.C.'s home with S.C. and her 11-year-old daughter M.C. Following the incident, Fitchett was charged with first-degree assault, second-degree assault, and reckless endangerment against S.C., and first-degree assault, second-degree assault, reckless endangerment, and second-degree child abuse against M.C. Fitchett raised a voluntary intoxication defense and exercised his Fifth Amendment right not to testify.

A trial was held on September 20, 2023. S.C., M.C., S.C.'s neighbor Edith Hayhurst, and two responding officers from the Wicomico County Sheriff's Department all testified. The jury found Fitchett guilty of both second-degree assaults, not guilty of first-degree assault against M.C., and was hung on the remaining counts. The State moved forward with a second trial on January 17, 2024 on the charges of first-degree assault against S.C. and second-degree child abuse against M.C. Following testimony from the same five witnesses, the jury convicted Fitchett on both charges. For the purpose of sentencing, the second-degree assault convictions merged into the first-degree assault and second-degree child abuse convictions. The evidence presented during the first trial was similar to the evidence presented at the second trial. Inasmuch as Fitchett's sentences stem

from the convictions of the second trial, we only discuss the specific facts adduced at the second trial below.

S.C. offered testimony as to the events of February 9, 2023. S.C. testified that on February 9, 2023, she came home and found Fitchett "completely intoxicated" despite previous conversations that she had had with Fitchett about his alcohol consumption. Fitchett was laying on the bed in their second-floor bedroom, and there was an empty bottle of alcohol in the bathroom. [2] S.C. testified that she was already planning to ask Fitchett to move out of her home the following weekend. S.C. went to take a bath, and when she exited the bathroom, Fitchett admitted that he drank the bottle of alcohol in the bathroom. Fitchett then retrieved a second bottle from the room that S.C. used to hide alcohol, began drinking from that bottle, and said he was going to drink the second bottle as well. S.C. testified that she asked Fitchett to leave.

At this point, S.C. testified, Fitchett became angry, ripped a television off of the wall, came over to where S.C. was sitting on the bed in a towel from her bath, and began strangling her, repeatedly saying "you want me to leave?" S.C. testified that she was struggling to breath, but was able to pull Fitchett's hands from her neck enough that she could call out for M.C. S.C. testified that she never lost consciousness.

S.C. testified that M.C. came running into the room and attempted to get S.C.'s phone from the bed. Fitchett grabbed M.C. by the hair with one of his hands and threw her

[2] It is not clear from the record how large the bottle of alcohol was or what kind of alcohol Fitchett was drinking.

into the window in the bedroom while maintaining his hold on S.C. with his other hand. S.C. testified that she told M.C. to run to the neighbor's house and call 911, and M.C. ran out of the house. Fitchett attempted to follow M.C. and ran down the stairs.

S.C. exited the bedroom into the hallway as Fitchett came back up the stairs. Fitchett then grabbed S.C.'s head and slammed it against the stairway banister several times, saying "you're going to leave me." Fitchett then bit S.C.'s face "as hard as he could." S.C. testified that she could not pull away because she realized the action would pull her skin off. S.C. testified that he eventually lost his grip, spat skin and blood in her face, and said he was going to jail. Fitchett then went downstairs, while S.C. went to another bedroom and called 911.

Two officers from the Wicomico County Sherriff's Department and an ambulance arrived at S.C.'s home. S.C. testified that she was transported via ambulance to the hospital. She did not tell 911 or emergency responders that Fitchett had tried to strangle her, and only told responders that Fitchett had bitten her. S.C. testified that she received two staples in the back of her skull from where Fitchett grabbed her, and 37 stitches in her face from the bite. She had received one corrective surgery as of January 17, 2024, and was waiting until swelling went down to see if more were necessary. Photographs taken the night of the incident showing the laceration on S.C.'s face and marks on other parts of her body were admitted into evidence. Photographs showing the stitched area of S.C.'s face sometime after the incident were also admitted. S.C. testified that M.C. was also

evaluated at the hospital and had some bruising "[o]n her rib area, on the side . . . . [k]ind of towards the back."

M.C., who was twelve years old at the time of the trial, testified that on February 9, 2023, she saw Fitchett attack her mother, S.C., in their bedroom. M.C. testified that she went into the bedroom after hearing S.C. scream her name, and she saw Fitchett choking S.C. with both hands. M.C. testified that S.C. had tossed her cell phone to M.C. so that she could call 911. M.C. testified that Fitchett grabbed her by the hair and tossed her into the window. M.C. testified that at some point Fitchett also grabbed her neck. After Fitchett threw her into the window, M.C. ran to her neighbor's house and had her call 911. M.C. also went to the hospital but was not treated. M.C. testified that she had a scar on the side of her rib cage and a mark on her neck. Photographs taken the night of the incident showing both a scar on M.C.'s side and a mark on her neck were admitted into evidence.

S.C.'s neighbor, Edith Hayhurst testified that the night of February 9, 2023, she was at home when M.C. began banging on her door and screaming "he's trying to kill my mommy." Ms. Hayhurst let M.C. inside and called 911. Regarding M.C.'s behavior, Ms. Hayhurst testified as follows:

> [THE STATE:] How would you describe her demeanor when you first saw her?
>
> [MS. HAYHURST]: She was -- she was a young kid in distress. She was so upset that -- that -- she was concerned about her mother, but she wanted to help her mother at the same time.
>
> [THE STATE:] What, if anything, did you notice about her appearance at that time?

> [MS. HAYHURST]: I know that her neck was red. And then as I got off the phone with the Sheriff's Department, she was complaining about her side because I saw her holding her side but I had my arm around side because I was using the phone this way and holding on to her.
>
> And she said, her side, and I looked at her side, and it was all -- all red. And I said, what happened? I said, why is your side hurting, and she said that he had pushed her into the window sill.
>
> [COUNSEL FOR FITCHETT]: Objection, Your Honor. To what Miss --
>
> THE COURT: What's the basis for your objection?
>
> [COUNSEL FOR FITCHETT]: Hearsay.
>
> THE COURT: Who[se] hearsay is it?
>
> [COUNSEL FOR FITCHETT]: [M.C.'s].
>
> THE COURT: Do you want to respond to that?
>
> [THE STATE]: Your Honor, it's an excited utterance.
>
> THE COURT: All right. Overruled.

Both responding officers offered testimony that S.C. was covered in blood. Body camera footage showing S.C. and photographs of blood spatters within the house were admitted into evidence. Sheriff's Deputy Bobbi Jo Landing testified that she observed lacerations on the back of S.C.'s head and the injury to her face, and S.C. appeared to be upset. Sergeant Shelly Lewis testified that at the hospital, M.C. showed Sergeant Lewis a scrape on her side.

Fitchett presented a defense of voluntary intoxication, arguing that he was so intoxicated that he could not form the requisite intent for first-degree assault. Fitchett exercised his right not to testify and offered no witnesses on his behalf. Notably, during cross-examination of S.C., counsel elicited testimony in which S.C. affirmed that Fitchett was "completely intoxicated" the night of the assault.

The trial court provided the jury with instructions on the presumption of innocence of Fitchett and the State's burden of proof, stating:

> The defendant is presumed to be innocent of the charges. The presumption remains with him throughout every stage of the trial. It's not overcome unless you're convinced beyond a reasonable doubt that he is guilty.
>
> . . . [T]he State has the burden of proving his guilt beyond a reasonable doubt. It means the State has a burden [to prove] beyond a reasonable doubt each and every element of the crimes charged, and the elements of a crime are its component parts.

The trial court emphasized that "[t]he burden stays with the State throughout the trial. The defendant is not required to prove his innocence." Describing intent, the court stated: "Intent is a state of mind. It cannot ordinarily be proven directly because there's no way of looking into somebody's mind. A defendant's intent may be shown by surrounding circumstances. In determining his intent, you consider his acts as well as those surrounding circumstances." Finally, the trial court provided an instruction on voluntary intoxication, stating: "Generally, voluntary intoxication is not a defense and does not excuse or justify criminal conduct. However, when charged with an offense requiring specific intent, the

defendant cannot be guilty if he was so intoxicated at the time of the act that he was unable to form the necessary intent."

The parties then proceeded to closing. In its closing argument, the State stated:

> [THE STATE:] He had intention to leave. He said, I'm going to jail tonight. He knew what was happening. So, yes, he may have consumed alcohol, but that doesn't mean that he was so drunk that he couldn't form the intent.
>
> So while that instruction [on voluntary intoxication] has been read to you, the evidence is not there to support that he should be found not guilty because of that because he had the intent every step of the way.
>
> I can't go into his mind and know all of the things. I can't ask him why he placed his hands around her neck. I can't ask him why he also applied such force that [S.C.] had to use her hands to pry his hands off of her neck to be able to scream for help.
>
> I can't ask why he bit his face -- her face. I certainly can't ask if he specifically had latched on to her face with the intent –
>
> [COUNSEL FOR FITCHETT]: Your Honor, I'm going to object to this line of arguing. She's specifically commenting on him not testifying.
>
> THE COURT: Overruled.
>
> [THE STATE]: As the State, I am unable to look into someone's mind asking those questions. That is what I am talking about here.
>
> I can't look into the mind of the officer to ask why they did a certain thing. Why the report only has some things but not every single detail. I can't look into someone's mind in order to determine those things.

> We have to look at an individual and know that they intend the natural and probable . . . results of their actions.

The jury found Fitchett guilty of first-degree assault against S.C. and second-degree child abuse against M.C.

On February 16, 2024, Fitchett was sentenced to 25 years for the first-degree assault and 15 years, all but 10 suspended for the second-degree child abuse, for a total active period of incarceration of 35 years. The convictions from the first trial for the second-degree assaults of S.C. and M.C. merged into the convictions for first-degree assault and second-degree child abuse respectively for sentencing purposes. This appeal followed.

STANDARD OF REVIEW

"What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case." *Smith v. State*, 388 Md. 468, 488 (2005). As such, "[a]n appellate court should not disturb the trial court's judgment absent a clear abuse of discretion by the trial court of a character likely to have injured the complaining party." *Grandison v. State*, 341 Md. 175, 225 (1995). "Where a party complains that the trial judge's action abridged a constitutional right, however, our review is *de novo*." *Savage v. State*, 455 Md. 138, 157 (2017). "[T]he Fifth Amendment to the United States Constitution and Article 22 of the Maryland Declaration of Rights provide a defendant with the right not to have the prosecutor comment on his [or her] decision not to testify." *Harriston v. State*, 246 Md. App. 367, 372 (2020). "Since a burden-shifting claim is an allegation of a violated constitutional right, our review is without deference to the circuit court." *Id.*

"[A] circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility." *Bernadyn v. State*, 390 Md. 1, 8 (2005). "[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." *Gordon v. State*, 431 Md. 527, 538 (2013). The "factual findings underpinning this legal conclusion . . . will not be disturbed absent clear error." *Id*.

DISCUSSION

I. The circuit court did not err when it overruled Fitchett's objection to the State's closing argument statements that the State was unable to ask Fitchett questions to ascertain his intent.

Fitchett contends that the circuit court erred when it allowed the State to make comments during closing argument regarding its inability to ask Fitchett why he acted a certain way to establish his intent during the alleged assault of S.C. Fitchett argues that these statements amount to an impermissible reference to his decision declining to testify at trial. Fitchett also argues that through these statements, the burden of proof improperly shifted to Fitchett to prove his lack of intent. The State argues that Fitchett's burden-shifting argument is waived, and even so, fails on the merits as the State still maintained the burden to prove Fitchett's intent. The State contends that the comments in the closing argument referred to the State's lack of evidence of intent, rather than Fitchett's decision not to testify. Finally, the State maintains that the court instructed the jury not to consider

Fitchett's decision not to testify and reiterated that the State bore the burden of proof rather than Fitchett, thus any harm done by the closing argument was corrected.

To begin, we address a few axiomatic points. "In a criminal prosecution, the State bears the burden of proof beyond a reasonable doubt on all elements of the crimes charged and a defendant has no obligation to testify, to call witnesses, or to produce evidence." *Harris v. State*, 458 Md. 370, 377 (2018). One of the most deeply held rights of an individual is a defendant's right to avoid self-incrimination by being compelled to testify in his or her own defense in a criminal trial. U.S. Const. amend. V; Md. Decl. of Rts. Art. 22. Furthermore, "the Fifth Amendment to the United States Constitution and Article 22 of the Maryland Declaration of Rights provide a defendant with the right not to have the prosecutor comment on his [or her] decision not to testify." *Harriston v. State*, 246 Md. App. 367, 372 (2020). With these truths in mind, we continue our discussion below.

First, we briefly address whether Fitchett's burden-shifting argument is preserved for review. During the State's closing argument, Fitchett lodged an objection after counsel made various statements referencing the inability to "go into [Fitchett's] mind" to ask him what his intent was when he took certain actions. Fitchett's counsel stated "Your Honor, I'm going to object to this line of arguing. She's specifically commenting on him not testifying." The objection was overruled. Fitchett did not object on the grounds that this statement impermissibly shifted the burden of proof regarding intent from the State to Fitchett. The State argues that these are two separate arguments on appeal -- that the State impermissibly commented on Fitchett's invocation of the right to remain silent, and that

the State impermissibly shifted the burden of proof to Fitchett -- and that to address either argument, the objection needed to allege each particular issue. By failing to lodge an objection on the particular basis that the State was shifting the burden of proof to Fitchett, the State argues, Fitchett waived his right to make such an argument on appeal.

"[B]urden-shifting claims, made in response to prosecutorial comments on a lack of evidence supporting the defense, are borne out of the defendant's constitutional right to refrain from testifying." *Harriston*, 246 Md. App. at 373. "But even if the comment was not 'tantamount to one that the defendant failed to take the stand . . . it might in some cases be held to constitute an improper shifting of the burden of proof to the defendant.'" *Molina v. State*, 244 Md. App. 67, 174 (2019). Implicit in a reference to a defendant's decision not to testify is that the defendant *should have* testified, intimating that some burden rests on the defendant to disprove his own guilt. Although distinct, in this case the burden-shifting argument is so intertwined with the argument that arose from the alleged improper reference to Fitchett's invocation of the right to remain silent that citing both as reasons for objection would have been duplicative. We are not persuaded by the State that Fitchett's objection to the State's closing as a reference to Fitchett not testifying was insufficient to preserve his burden-shifting argument as well.

Finding Fitchett's burden-shifting argument sufficiently preserved, we turn to the merits of his contentions. Fitchett argues that the State's remarks during closing argument were comments on Fitchett's decision not to testify on his own behalf. The State argues in response that these statements were merely admissions by the State regarding weaknesses

in its case, specifically, that it struggled to demonstrate that Fitchett had the requisite intent to meet the requirements for first-degree assault because it could not "go into his mind."

As noted above, it is well settled that a prosecutor may not comment on a defendant's silence or decision not to testify at trial. *See, e.g., Griffin v. California*, 380 U.S. 609 (1965) ("[T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.") *Smith v. State*, 169 Md. 474, 475 (1936) (holding improper a remark that "was susceptible of the inference by the jury that they were to consider the silence of the traverser in the face of the accusation of the prosecuting witness as an indication of his guilt"); *Harriston*, 246 Md. App. at 372 ("[T]he Fifth Amendment to the United States Constitution and Article 22 of the Maryland Declaration of Rights provide a defendant with the right not to have the prosecutor comment on his [or her] decision not to testify.")

This Court has noted, however, that "not every neutral or indirect reference that the State makes which implicitly refers to a defendant's silence is improper comment." *Funkhouser v. State*, 51 Md. App. 16, 30 (1982), *abrogated on other grounds by Pepper v. Johns Hopkins Hosp.*, 111 Md. App. 49 (1996). "Despite [Maryland's] long history of protecting [a] defendant's right not to testify, a prosecutor may summarize the evidence and comment on its qualitative and quantitative significance." *Smith v State*, 367 Md. 348, 354 (2001); *see also Molina v. State*, 244 Md. App. 67, 174 (2019) ("The State's comment on the defense's failure to produce evidence, however, will not always amount to impermissible burden-shifting."). "But the State may not exceed the bounds of permissibly

commenting on the absence of evidence by commenting, instead, 'directly on the defendant's failure to testify.'" *Molina*, 244 Md. App. at 175 (quoting *Smith*, 367 Md. at 360). Thus, we must determine whether the prosecution's comments in Fitchett's case refer to a failure to produce evidence, or specifically reference Fitchett's failure to take the stand.

Maryland courts have considered this precise question on several occasions. In *Smith*, the defendant was convicted of various charges relating to burglary and theft. 367 Md. at 352. The defendant did not testify at trial. *Id*. During closing arguments, the prosecution stated "*What explanation* has been given to us *by the defendant* for having the leather goods? Zero, none." *Id*. (emphasis in original). The Court held that this comment specifically "went beyond any qualitative assessment of the evidence" and instead "effectively suggested that the defendant had an obligation to testify at trial." *Id*. at 359. The prosecutor "impermissibly commented directly on the defendant's failure to testify," and the Court reversed.

Similarly, in *Marshall v. State*, 415 Md. 248 (2010), the defendant was convicted of possession of cocaine and possession of cocaine with the intent to distribute. The defendant did not testify at trial, and defense argued that the defendant was a drug addict and user. *Id*. at 254. In closing, the prosecutor stated: "[Defense counsel] himself said that, again testifying for [the defendant], he said he's a cocaine addict. Now, [the defendant] *did not take the stand* so I ask you to take that with a great deal of caution when [defense counsel] tries to indicate a health problem for [the defendant] because there's no evidence

of that whatsoever." *Id*. at 255 (emphasis in original). Later, the prosecutor additionally stated: "*We don't have Mr. Marshall's thoughts* but we do have so many other pieces and when you put those pieces together, they spell out guilty." *Id*. at 256. The Court concluded that these comments impermissibly referenced the defendant's right not to testify. *Id*. at 264, 268 (noting that the State did not contend that the remarks were proper, only that they were an invited response to defense's argument, and holding that they were not).

Conversely, in *Choate v. State*, 214 Md. App. 118 (2013), this Court addressed a similar issue where a defendant was convicted of rape in the first degree and sexual offense in the first degree. In closing argument, when discussing the victim's credibility as a witness, the prosecution stated "There's only two people there. In this case, the two people who were there were [the victim] and the defendant. And yesterday, [the victim] came in and she sat here and she told you what happened." *Choate*, 214 Md. App. at 135. The defendant requested a mistrial on the grounds that this "create[d] an inference that the defendant should have gotten on the stand and told his story." *Id*. The court disagreed, and we affirmed. This Court held that given the context of talking about a witness's credibility, "the prosecutor's comments were not susceptible of the inference that the jury should consider the appellant's silence as evidence of guilt." *Id*. at 137. "The prosecutor did not suggest that the jury should take any negative inference from the fact that the appellant chose not to testify, or that the appellant had any burden to tell his side of the story." *Id*.

In Fitchett's case, the prosecutor's comments similarly "were not susceptible of the inference that the jury should consider the appellant's silence as evidence of guilt." *Id*. In its closing argument, the State said:

> I can't go into his mind and know all of the things. I can't ask him why he placed his hands around her neck. I can't ask him why he also applied such force that [S.C.] had to use her hands to pry his hands off of her neck to be able to scream for help.
>
> I can't ask why he bit his face -- her face. I certainly can't ask if he specifically had latched on to her face with the intent --

The prosecution's remarks were made in a particular context -- Fitchett was charged with first-degree assault, a specific intent crime. Fitchett's defense to that crime was voluntary intoxication, that he was so intoxicated that he could not form the requisite intent for first-degree assault. The prosecutor's remark following the objection is noteworthy. The prosecutor stated that: "As the State, I am unable to look into someone's mind asking those questions. That is what I am talking about here." In our view, that sufficiently clarified to the jury that the argument was referring only to a weakness in the State's case in that it had difficulty proving intent. This statement, coupled with the instructions provided to the jury that the State bore the burden of proof and that the jury was not to consider Fitchett's decision not to testify, was sufficient to direct the jury in that regard. *See Spain v. State*, 386 Md. 145, 160 (2005) ("Maryland courts long have subscribed to the presumption that juries are able to follow the instructions given to them by the trial judge, particularly where the record reveals no overt act on the jury's part to the contrary.").

Regarding Fitchett's burden-shifting argument, burden-shifting arguments are impermissible where the State "sp[eaks] directly to the *defendant's* failure to provide evidence." *Harriston*, 246 Md. App. at 380 (emphasis in original) (holding that the State did not shift the burden when "the prosecutor did not call out [the defendant's] failure to provide an explanation for his innocence."). In the instant case, the State did not comment on Fitchett's failure to provide evidence; instead, it pointed out a weakness in the State's own case: that it could not provide direct evidence to prove Fitchett's intent; and the jury would instead have to rely on the circumstantial evidence provided by S.C.'s testimony regarding Fitchett's intoxication and actions. Therefore, the court did not err in denying Fitchett's objection to the prosecutor's remarks as either an impermissible comment on his decision not to testify or as an impermissible shifting of the burden of proof to the defense.

II. The circuit court did not err when it admitted the statement regarding the cause of M.C.'s injuries under the excited utterance exception to hearsay.

Fitchett next contends that the court erred when it admitted Ms. Hayhurst's testimony regarding the statements made by M.C. about her injuries following the incident. Fitchett argues that M.C.'s statement was made after she had calmed down and in response to Ms. Hayhurst's question "what happened" and "why is your side hurting." As a result, he alleges that it was not an excited utterance.[3] The State argues that M.C.'s statements

[3] In Fitchett's brief, he also quotes Ms. Hayhurst's testimony from the first trial, which referred to similar statements made by M.C. Because Fitchett argues that the statements "would have impermissibly bolstered the believability of [M.C.'s] testimony contributing to Mr. Fitchett's conviction for second-degree child abuse," and does not argue that his conviction of second-degree assault on M.C. was also improper for these reasons, we will only discuss Ms. Hayhurst's testimony from the second trial.

to Ms. Hayhurst squarely fit within the excited utterance exception against the admission of hearsay evidence, and the court did not err in admitting the testimony. Even so, the State contends, any error in its admission was harmless because sufficient other evidence was submitted to the jury to support Fitchett's conviction of second-degree child abuse against M.C.

Hearsay is defined 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." Md. Rule 5-801(c). Hearsay is inadmissible at trial unless it fits within a permissible exception. Md. Rule 5-802. One such exception to the rule against hearsay is the excited utterance exception, which makes admissible 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). "First, there must be an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of an observer. Second, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought." *Mason v. State*, 258 Md. App. 266, 288 (2023) (quoting *McCormick on Evidence*, Sect. 297, at 854-55, (E. Cleary 3d Ed. 1984)). "The rationale behind the excited utterance exception is that the startling event suspends the declarant's process of reflective thought, thus reducing the likelihood of fabrication." *State v. Harrell*, 348 Md. 69, 77 (1997).

"In determining whether a statement falls within the excited utterance exception, we examine the totality of the circumstances." *Id*. "A statement may be admitted under this

exception if the declaration was made at such a time and under such circumstances that the exciting influence of the occurrence clearly produced a spontaneous and instinctive reaction on the part of the declarant who is still emotionally engulfed by the situation." *Id*. (cleaned up).

"In determining whether a declarant was under the stress of a startling event while making a statement, one primary consideration is the time between the startling event and the declarant's statement. Time, however, is not alone determinative." *Id*. "The admissibility of evidence under this exception is, therefore, judged by the spontaneity of the declarant's statement and an analysis of whether it was the result of thoughtful consideration or the product of the exciting event." *Parker v. State*, 365 Md. 299, 313 (2001) (quoting *Mouzone v. State*, 294 Md. 692, 696 (1982) *overruled on other grounds by Nance v. State*, 331 Md. 549 (1993)). "While fourteen hours may in one case not be too long, a statement made within a few moments of the exciting event could well be" in another instance, depending on the circumstances of the case. *Id*. at 698 (differentiating *State v. Stafford*, 237 Iowa 780 (1946), where a woman's statement that her husband tried to kill her was admissible fourteen hours after the assault when the woman's statement "stood the test of spontaneity, and [was] a natural expression of what had happened to her" from *Neusbaum v. State*, 156 Md. 149 (1928), where a statement immediately made by the witness to an automobile accident to "get his [license plate] number" and the statement of the number were not admissible as it was instead a "narrative of what she had discovered after the accident."). Therefore, time -- while one consideration -- is not dispositive of

whether the declarant is still in an excited state, and the court must instead determine if the statements are the product of "measured, deliberate thought." *Parker*, 365 Md. at 317 (discussing *Neusbaum*).

Furthermore, whether the statement was made in response to a question is also not dispositive. *Harrell*, 348 Md. at 77 (holding that a statement that the defendant "beat [the witness] up" in response to a question by police was admissible because the questioning commenced minutes after the assault and the witness was still emotionally overwhelmed). "Where the circumstances are such that they indicate that the exciting event still dominates the declarant's thought processes, then the answer to a question is admissible." *Mouzone*, 294 Md. at 699.

Thus, an out-of-court statement may be admissible as excited utterance hearsay, even after some time has passed such that the declarant has calmed down and if it is in response to a question if, based on a totality of the circumstances, the declarant was still "in the throes of the exciting event and therefore not capable of reflective thought." *West v. State*, 124 Md. App. 147, 164 (1998).

The court determined that M.C.'s statement to Ms. Hayhurst was an excited utterance and, therefore, admissible. At the time of the assault, M.C. was 11 years old. The evidence adduced at trial demonstrated that immediately following the events that transpired in S.C.'s room -- M.C. running into the room, witnessing her mother being assaulted by Fitchett, and being thrown or pushed by Fitchett such that she hit the windowsill -- M.C. ran to Ms. Hayhurst's home and was clearly in an excited state. Ms.

Hayhurst immediately called 911.[4] Ms. Hayhurst testified that immediately after calling 911, she observed M.C. in holding her side, and asked M.C. what was wrong, to which M.C. responded that Fitchett "had pushed her into the window sill." Although no testimony was offered regarding the length of time that had passed between the assault and M.C.'s answer to Ms. Hayhurst's question "what happened," it was hardly a lengthy period of time. When she arrived at Ms. Hayhurst's home, M.C. believed that Fitchett was going to kill her mother. Under the circumstances of this case, the trial court did not err in concluding that, after witnessing her mother's assault and being in physical pain, 11-year-old M.C.'s response to Ms. Hayhurst's question was not fabricated or the result of reflective thought. *Harrell*, 348 Md. at 77.

As such, the circuit court's factual findings that M.C. was still in an excited state when she made the statement regarding her injuries to Ms. Hayhurst was not clearly erroneous. Thus, the court did not err when it determined that Ms. Hayhurst's testimony regarding M.C.'s statements were admissible pursuant to the excited utterance exception to hearsay.

CONCLUSION

In sum, the trial court did not err in permitting the State, during closing argument, to refer to its inability to enter Fitchett's mind and ask him questions to understand what his intent was during the assault. Further, the court did not err in allowing Ms. Hayhurst's

[4] A recording of Ms. Hayhurst's call to 911 was admitted at trial. The entire clip was less than one minute long.

testimony regarding statements made to her by M.C. about her injuries as an excited utterance exception to the rule excluding hearsay. We, therefore, affirm.

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

Circuit Court for Wicomico County
Case No. C-22-CR-23-000119

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 51

September Term, 2024

BRIAN NIGEL FITCHETT

v.

STATE OF MARYLAND

Berger,
Friedman,
Hotten, Michele D.
(Senior Judge, Specially Assigned),

JJ.

Dissenting Opinion by Friedman, J.

Filed: December 23, 2025

* 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).

I regret that I cannot join. I know of no lower standard in our law than the "susceptible of the inference" standard set out in *Smith v. State*, 169 Md. 474, 475 (1936) (quoted by the majority opinion, slip op. at *12). *See also Simpson v. State*, 442 Md. 446, 457-58 (2015); *Smith v. State*, 367 Md. 348, 354-55 (2001). And while Judge Berger's fine opinion sets out a plausible, maybe even likely, alternative meaning of the question—that it was about the difficulties of proving intent generally—I believe that the statement remains "susceptible of the inference" that the State's inability to prove intent was the result of Fitchett's invocation of his right against self-incrimination.