Circuit Court for Baltimore County
Case No. C-03-CR-22-002662

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 113

September Term, 2023

WILLIAM T. A. DIGGS, JR.

v.

STATE OF MARYLAND

Berger,
Reed,
McDonald, Robert N.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: June 18, 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 Maryland Rule 1-104(a)(2)(B).

A jury in the Circuit Court for Baltimore County found William Tyrone Anthony Diggs, Jr., the Appellant, guilty of assault in the second degree against his girlfriend, Wynter Thomas. The Appellant filed a motion for new trial. Following a hearing, the court denied his motion. The court thereafter sentenced the Appellant to ten years' imprisonment, with all but seven years suspended, followed by three years' supervised probation. The Appellant noted an appeal, raising three issues for our review, which we have slightly rephrased:

> I. Did the trial court err, on either constitutional or hearsay grounds, in admitting out-of-court identifications of the Appellant by a witness [Ms. Thomas] who did not testify?
>
> II. Did the trial court err in allowing testimony from a State's witness, a police investigator, who was not disclosed until midway through trial and who provided critical evidence only during rebuttal?
>
> III. Did the trial court abuse its discretion in denying the Appellant's motion for a new trial?

Finding neither reversible error nor abuse of discretion, we shall affirm.

FACTUAL & PROCEDURAL BACKGROUND

In the afternoon of April 20, 2022, Nichole Adams received a FaceTime video telephone call from her daughter, Ms. Thomas. Ms. Adams noticed "a bruise on the side

of" Ms. Thomas's face. When Ms. Adams observed her injury, Ms. Thomas abruptly "hung up[.]"[1] Ms. Adams, concerned for her daughter's welfare, "just called 911."[2]

Baltimore County Police officers responded a few minutes later to the apartment in Parkville that Ms. Thomas and the Appellant shared with her two children from prior relationships.[3] Officer Kevin Schreiber[4] "approached the residence and knocked on the door," and a "female answered" it. The woman, who "was very upset[,]" "identified herself as" Wynter Thomas. According to Officer Schreiber, "she was very excited" and "mildly frantic," and the officer inferred that "she didn't want to be talking to" him.

Officer Schreiber noticed "a cut to her finger with some blood on it" and "an injury . . . on her forearm." In addition, Ms. Thomas had "makeup smeared all over beneath her eyes," which he suspected was concealing injuries to her face. Ultimately, he observed "some swelling to her cheek." A second responding officer, Sergeant William Delcher,

[1] Ms. Adams took a screenshot of that call, but no one ever subpoenaed her phone records or otherwise sought to obtain that image, and it was not introduced into evidence at the Appellant's trial.

[2] Not only was Ms. Thomas's face visibly bruised, but she was several months pregnant at the time.

[3] Ms. Thomas had two children from prior relationships, and at the time of the offense, she was pregnant with the Appellant's child.

[4] Officer Schreiber's name is misspelled in the trial transcript. Other parts of the record, including the statement of charges he filled out himself as well as the trial court's reading of the State's Witness List during voir dire, confirm the correct spelling of his surname.

observed "a large bruise and swelling on [Ms. Thomas's] face." A crime lab technician was called to the scene and took photographs depicting Ms. Thomas's injuries.

While police officers were still at the scene, the Appellant returned and approached the apartment. When Ms. Thomas saw the Appellant approach, she became agitated and shut the door. Before Ms. Thomas shut the door, Officer Schreiber asked her who had inflicted her injuries, and "she said him," while "point[ing] . . . towards" the Appellant.

The police officers attempted to separate the Appellant from Ms. Thomas, and they ordered him to remain outside. The Appellant eluded them, however, and he rushed inside the building, holing up in the basement. Police officers evacuated Ms. Thomas and the children, and, after a stand-off lasting approximately twenty minutes, they persuaded the Appellant to exit the building and submit to arrest.[5] Ms. Thomas was treated at the scene by a paramedic.

A statement of charges was filed in the District Court of Maryland for Baltimore County, charging the Appellant with assault in the second degree. Trial was scheduled to be held June 6, 2022, but the Appellant prayed for a jury trial, and the case was transferred to the Circuit Court for Baltimore County. Trial in the circuit court was scheduled initially on July 13, 2022, but Ms. Thomas failed to appear, and the trial was postponed until September 1, 2022 on a finding of good cause shown. One week later, the court granted

[5] Ms. Adams had told the 911 dispatcher that she believed that the Appellant "may have had guns." During the stand-off between police officers and the Appellant, they asked him whether he had any weapons, and, although his recorded response, from body-worn camera videos, is inaudible, police officers did not recover any weapons after they arrested the Appellant and searched his residence.

the State's request for a body attachment of Ms. Thomas. Nine days after that, Ms. Thomas appeared in the circuit court (with her children) for a surrender hearing. The court quashed the body attachment warrant and issued a summons, ordering Ms. Thomas to appear at the Appellant's trial.

By letter received August 22, 2022, Ms. Thomas notified the court that she did not wish to proceed and that "this was all a big misunderstanding." The following day, a postponement hearing was held via Zoom, and the Appellant's trial was rescheduled to November 3, 2022.[6] Trial was postponed several more times, once because the prosecutor had COVID, and two other times because a jury was unavailable.

Finally, in January 2023, a two-day jury trial was held. Ms. Thomas, the victim, did not appear despite having been subpoenaed by the State. The State called four witnesses: Ms. Adams, the victim's mother; Officer Schreiber and Sergeant Delcher, two of the police officers who responded to the 911 call; and Detective Christopher Needham, a late-disclosed witness who testified, over defense objection, about certain jail calls to which the Appellant was a party. The Appellant testified on his own behalf.

Ms. Adams, Officer Schreiber, and Sergeant Delcher testified as previously summarized. Through Officer Schreiber's testimony, contemporaneous photographs taken by a police evidence technician, depicting Ms. Thomas's injuries, were introduced into evidence and published to the jury. Officer Schreiber further testified, over defense

[6] The prosecutor explained to the court that Ms. Thomas's due date was "very close to the September 1st trial date."

objection, that Ms. Thomas identified the Appellant as her assailant. The State also introduced, over defense objection, excerpts from Officer Schreiber's and Sergeant Delcher's body-worn camera videos, depicting events from the date of the offense, specifically, during the period after the Appellant arrived at the scene, including the basement stand-off.

Detective Needham testified about his unsuccessful efforts, shortly before trial, to serve Ms. Thomas with a subpoena, ordering her to appear.[7] He also authenticated recorded jail calls between the Appellant and Ms. Thomas. Over defense objection, excerpts from several of those calls were admitted into evidence and played before the jury. In those calls, the parties were discussing how Ms. Thomas could avoid service of process and that, if she continued to avoid appearing for the Appellant's trial dates, the State eventually would give up.[8]

The Appellant testified that, among other things, on the date of the incident, he left to take the younger of Ms. Thomas's children to a medical appointment when Ms. Thomas called him, "in an uproar." He returned home "to check on her." According to the

[7] During the first of those visits, on January 2, 2023, one week before trial, Detective Needham observed that hot air was blowing out of the dryer vent of the apartment, and he "heard a door close or some sort of thump from inside that kind of caused" one of "the larger windows to kind of reverberate a little bit," suggesting that the apartment was occupied. The windows all were covered, and no one answered the door during either attempt to serve the subpoena. After the second attempt, on January 4, 2023, Detective Needham left a copy of the summons "wedged within the door."

[8] On one of those jail calls, the Appellant told Ms. Thomas that "if you don't come to court they're going to keep postponing it until they can't[.]"

Appellant, Ms. Thomas had been in an argument with the father of her younger child.[9] During cross-examination, the prosecutor asked the Appellant to explain why, if he knew "who [had done] this to Wynter," he told her "not to come to court[.]" The Appellant replied: "She wanted to come to court but you [i.e., the State] kept harassing and threatening her."

The State called Detective Needham in rebuttal. Through Detective Needham's testimony, a jail call excerpt, in which the Appellant admitted to Ms. Thomas that he "was banging and hitting" her, was played before the jury over defense objection.

After deliberating for approximately one hour, the jury found the Appellant guilty of second-degree assault of Ms. Thomas. The court sentenced the Appellant to ten years' imprisonment, with all but seven years suspended, followed by three years' supervised probation. The Appellant then noted a timely appeal.

Additional facts are included where pertinent to the discussion of the issues.

DISCUSSION

I. Admission of Ms. Thomas's Statements

The Appellant contends that the trial court erred in admitting an out-of-court identification of him by Ms. Thomas, a witness who did not appear. Admission of that evidence, he claims, violated both his right of confrontation and the rule against hearsay. According to the Appellant, Ms. Thomas's out-of-court identification was "testimonial

[9] The Appellant stated that the child's father "came there demanding that she give him his son."

hearsay" under *Davis v. Washington*, 547 U.S. 813 (2006), and *State v. Lucas*, 407 Md. 307 (2009), and therefore, because he did not have a prior opportunity to cross-examine Ms. Thomas, that evidence was inadmissible.

In addition, the Appellant asserts that the trial court erred in finding that her out-of-court identification was admissible as an "excited utterance." According to the Appellant, the trial court failed to make the requisite factual findings to support its ruling, and the State failed to establish that Ms. Thomas had a spontaneous reaction.

The State counters that the "four factors identified in *Lucas* and *Davis* all support" the trial court's finding that Ms. Thomas's statements were not "testimonial" and that, therefore, the Confrontation Clause does not apply. According to the State, "there was an ongoing emergency" that had not dissipated at the time she made those statements, which were made with the primary purpose of assisting the police in addressing the emergency.

The State further asserts that, under the totality of the circumstances, "the trial court did not err in finding that [Ms.] Thomas was still excited and upset" at the time she made the out-of-court identification. According to the State, among those circumstances were that Ms. Thomas was injured; her attacker (the Appellant) was approaching her door, unrestrained by the police; and ultimately, he evaded them and entered the building. Thus, the trial court did not err in finding that Ms. Thomas's "statements were made while she was still under the stress and excitement of the domestic assault." Citing *Curtis v. State*, the State points out that it was not required "to establish the precise quantum of time that elapsed between the event" and Ms. Thomas's statement to establish that the excited utterance hearsay exception applied. *Curtis v. State*, 259 Md. App. 283, 322 (2023). In

addition, the State disputes the Appellant's contention that the trial court failed to make the requisite factual findings; according to the State, the trial court's declaration that "the predicate has been laid for excited utterance," combined with the prosecutor's argument and witness testimony, is sufficient to conclude that the trial court impliedly found the requisite facts.

Analysis

Confrontation

"The Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right to confront the witnesses against him." *Smith v. Arizona*, 602 U.S. 779, 783 (2024). It "bars the admission at trial of 'testimonial statements' of an absent witness unless she is 'unavailable to testify, and the defendant ha[s] had a prior opportunity' to cross-examine her." *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004)). For an out-of-court statement to be inadmissible under the Confrontation Clause, it must be both "testimonial" and "hearsay." *Id.* at 784–85, 800. Because there is no dispute here that the statements at issue were hearsay, our focus becomes whether they also were "testimonial statements."[10] *Id.* at 784.

Generally, that requires us to decide what is the "'primary purpose' of the statement, and in particular on how it relates to a future criminal proceeding." *Id.* at 800. We "must

[10] Only one hearsay exception, recognized at the Founding, has been recognized by the United States Supreme Court as exempt from the Confrontation Clause. *Crawford*, 541 U.S. at 56 n.6 (stating that the only exception recognized at the Founding was that for dying declarations, which it characterized as "*sui generis*").

therefore identify the out-of-court statement introduced, and must determine, given all the 'relevant circumstances,' the principal reason it was made." *Id.* at 800–01 (quoting *Michigan v. Bryant*, 562 U.S. 344, 369 (2011)).

The Supreme Court of the United States has set forth several not-entirely-consistent tests to determine whether a hearsay statement is "testimonial" and therefore falls within the restrictions imposed by the Confrontation Clause. *Id.* at 800 (observing that prior decisions have set forth "varied formulations of the standard"); *see also Franklin v. New York*, 604 U.S. ____, 145 S. Ct. 831, 834–35 (Gorsuch, J., statement respecting denial of certiorari) ("But even after years of toiling with that project [i.e., adopting "a test that must be satisfied in every case" raising a confrontation claim], our cases have never quite settled on what the primary-purpose test *is*.") (emphasis in original).

Whether there was a violation of the Confrontation Clause is a question of law, which we review *de novo*. *Langley v. State*, 421 Md. 560, 567 (2011); *see also Snowden v. State*, 156 Md. App. 139, 143 n.4 (2004), *aff'd*, 385 Md. 64 (2005) ("We . . . apply the *de novo* standard of review to the issue of whether the Confrontation Clause was violated in this case."). We will make our own "independent constitutional appraisal, by reviewing the law and applying it to the peculiar facts of the particular case." *Stokes v. State*, 362 Md. 407, 414 (2001) (quoting *Jones v. State*, 343 Md. 448, 457 (1996)).

There are three U.S. Supreme Court decisions most pertinent to the issue before us: *Davis v. Washington* and its companion case *Hammon v. Indiana*, 547 U.S. 813 (2006), and *Michigan v. Bryant*, 562 U.S. 344, 369 (2011). All these decisions involved the

admissibility of hearsay statements made to emergency responders that prosecutors sought to introduce over confrontation-based objections.

"Perhaps the most demanding articulation of the primary-purpose test came in *Bryant*, where the Court indicated that an out-of-court statement qualifies as testimonial if it was procured 'with a primary purpose of creating an out-of-court *substitute for trial testimony*.'" *Franklin*, 604 U.S. at ____, 145 S. Ct. at 835 (statement of Gorsuch, J.) (quoting *Bryant*, 562 U.S. at 358) (emphasis added by *Franklin*). In contrast, the companion cases *Davis* and *Hammon* articulated a different, more defendant-friendly test:

> 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.

Davis, 547 U.S. at 822. The Supreme Court of Maryland set out the factors discussed by the *Davis* court for analyzing the primary purpose of the interrogation, which the Court stated as follows:

> (1) the timing of the statements, *i.e.* whether the declarant was speaking about actually happening or past events; (2) whether the "reasonable listener would recognize that [the declarant] . . . was facing an ongoing emergency"; (3) the nature of what was asked and answered, *i.e.* whether the statements were necessary to resolve the present emergency or simply to learn what had happened in the past; and (4) the interview's level of formality.

Lucas, 407 Md. at 323 (quoting *Davis*, 547 U.S. at 827).

In *Davis*, the U.S. Supreme Court held that statements made during a 911 call, in which a domestic violence victim told the operator that "Davis had 'just run out the door'

after hitting" her; that "he was leaving in a car with someone else"; that included identifying information about Davis, such as his birthday, Davis's purpose in coming to the premises, and "the context of the assault," were not testimonial. *Id.* at 818, 826–28 (cleaned up). The Court observed that the victim was describing events "*as they were actually happening*," giving "frantic" answers to the 911 operator's questions in an informal and perhaps even unsafe environment, and that the operator's queries "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.* at 827 (emphasis in original).

In *Hammon*, police officers responded late at night to a call of a domestic disturbance and found the wife on the front porch, "appearing somewhat frightened," and the husband in the kitchen, explaining that they had been in an argument but that it "never became physical." *Id.* at 819 (internal quotations and citation omitted). The police physically separated the parties, and one of the officers interrogated the wife. *Id.* at 820. "After hearing [the wife's] account, the officer had her fill out and sign a battery affidavit," which later was introduced into evidence at the husband's trial because she did not appear to testify. *Id.* (internal quotations and citation omitted).

The U.S. Supreme Court held that Ms. Hammon's statements and affidavit were testimonial statements. *Id.* at 829–30. She was "actively separated from" Mr. Hammon when she made her statements, "deliberately" relating to police officers, in response to their questions, "how potentially criminal past events began and progressed," and she did so "some time after the events described were over." *Id.* at 830. Thus, the Court concluded, "there was no emergency in progress," and her statements were "an obvious substitute for

live testimony." *Id.* at 829–30. Although Ms. Hammon was not interrogated in an interview room at a police station, as Ms. Crawford had been, the circumstances surrounding Ms. Hammon's interrogation were "formal enough," "with the officer receiving her replies for use in his 'investigation.'" *Id.* at 830 (citation omitted) (cleaned up).

Finally, in *Bryant*, the U.S. Supreme Court expanded the set of factors a reviewing court should consider in determining whether a hearsay statement is "testimonial." In that case, the victim, Covington, had been shot just outside the doorway of Bryant's home, and Covington then drove to a nearby gas station, where police found him after responding to a 911 call. 562 U.S. at 349. After responding police officers questioned Covington about "what had happened, who had shot him, and where the shooting had occurred," he "was transported to a hospital and died within hours." *Id.* (internal quotations and citation omitted).

The Court held that Covington's statements, identifying Bryant as the person who had shot him, were not testimonial. *Id.* at 348. Among the factors the Court considered were that this case had involved a shooting, which implicates a larger "zone of potential victims" than a domestic assault without the use of weapons; the victim's dire medical condition; the informality of the encounter between the police and the declarant; and "the statements and actions of both the declarant and interrogators." *Id.* at 363–67.

In this case, although police officers asked Ms. Thomas "who dunnit," the overall situation was fluid and informal, much more like that in *Davis*, where police officers were still trying to secure the scene, and quite unlike that in *Hammon*, where police officers had

the parties securely separated and were engaged in structured interrogation of Ms. Hammon, for the express purpose of obtaining a statement. 547 U.S. at 829–30.

Officer Schreiber testified that, when he first encountered Ms. Thomas, she appeared "[v]ery upset," "[e]xcited," and "scared," and she "almost wanted to close the door on" him. Because she had visible injuries, she was treated at the scene by a paramedic. Then, when the Appellant arrived, Ms. Thomas's demeanor changed, and she appeared visibly frightened; in the words of Officer Schreiber, she became "even more excited and she wanted to be out of sight," closing the door on him.

Moreover, *after* Ms. Thomas pointed at the Appellant and told officers that he had assaulted her, the Appellant eluded the police and barricaded himself in the basement, prompting the police to evacuate Ms. Thomas and her children from the building. At that time, police officers had reason to believe that the Appellant was armed, and even though no weapons were recovered from him or the premises, that fact was not known to the officers at the time Ms. Thomas made her identification.

When Ms. Thomas made her statements, one could hardly say that police had resolved the ongoing emergency or that they had secured the crime scene. Looking at the *Davis* factors, the primary purpose of the statements here was for Ms. Thomas to identify the person that caused her injuries in order for police to respond to an ongoing emergency. When the specific question of "who's responsible . . . for your injuries?" was asked, the Appellant was approaching, and Ms. Thomas had become more frantic and scared. With no suspects or persons in custody and the victim acting in an increasingly scared manner, a reasonable listener would recognize there was an ongoing emergency. The nature of the

question asked was necessary to resolve the present emergency in a manner similar to *Davis*, where officers were trying "to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon." 547 U.S. at 827. Lastly, the level of formality of the interview was low, as the interview was in Ms. Thomas's home and was an attempt by officers to gather basic information, with a single question being the focus of this argument.

We conclude that Ms. Thomas's hearsay statements, identifying the Appellant as the perpetrator, were not "testimonial," and therefore, their admission into evidence did not violate the Appellant's rights under the Confrontation Clause.

Hearsay

"Hearsay," 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), generally is not admissible. Md. Rule 5-802. A "statement" is either "an oral or written assertion" or "nonverbal conduct of a person, if it is intended by the person as an assertion." Md. Rule 5-801(a). Among the exceptions to the rule against hearsay is the one at issue in this case, the "excited utterance" exception: "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" is not excluded by the rule against hearsay. Md. Rule 5-803(b)(2).

"The essence of the excited utterance exception is the inability of the declarant to have reflected on the events about which the statement is concerned. It requires a startling event and a spontaneous statement which is the result of the declarant's reaction to the

occurrence." *Parker v. State*, 365 Md. 299, 313 (2001) (quoting *Mouzone v. State*, 294 Md. 692, 697 (1982)).[11] "'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.'" *Id.* (quoting *Mouzone*, 294 Md. at 697). "The proponent of a statement purporting to fall within the excited utterance exception must establish the **foundation for admissibility**, namely **personal knowledge** and **spontaneity**." *Id.* (emphasis added).

In determining whether a statement is an excited utterance, a trial court must consider "'the declarant's subjective state of mind' to determine whether 'under all the circumstances, [they are] still excited or upset to that degree.'" *Gordon v. State*, 431 Md. 527, 536 (2013) (quoting 6A Lynn McLain, *Maryland Practice: Maryland Evidence State & Federal* § 803(2):1(c) (2d ed. 2001)). Among the factors considered are "how much time has passed since the event, whether the statement was spontaneous or prompted, and the nature of the statement, such as whether it was self-serving." *Id.* (citation omitted). Those underlying factual determinations are reviewed under the deferential clear error standard. *Id.* at 536–38.

Ms. Thomas obviously had personal knowledge of the Appellant and of the situation. As for spontaneity, there were *two* startling events: the Appellant's assault against Ms. Thomas and his return to the apartment while she was speaking with police

[11] *Mouzone* was overruled on other grounds by *Nance v. State*, 331 Md. 549 (1993), but its description of the excited utterance hearsay exception is now codified at Rule 5-803(b)(2).

officers. There is no direct evidence of how much time passed from the first event until she made her statements, but the trial court could infer that the assault had occurred a short time before and, in any event, earlier that day. The court could draw those inferences from the surrounding circumstances: that Ms. Thomas's mother had just observed her daughter on a FaceTime call, showing visible injuries (one of which was a fresh wound on her finger, as police officers soon would discover), followed by Ms. Thomas's abrupt ending of the call, which prompted Ms. Adams to call 911; and the rapid response of the police to Ms. Thomas's apartment. *See Curtis*, *supra*, 259 Md. App. at 322 (concluding that "it was not necessary to establish the precise quantum of time that elapsed between" the startling event and the statement to establish that it was an excited utterance). Moreover, it was clear from Officer Schreiber's testimony that Ms. Thomas was visibly frightened when the Appellant returned to the scene, prompting her to close the door on the officer. At this point in time, the circumstances showed that she was excited by the Appellant's return. The statement was prompted by the officer's questions, but the totality of the circumstances showed that Ms. Thomas's statement was made under the stress of excitement caused by the event of the Appellant's return and his prior assault of her. The trial court did not clearly err in concluding that Ms. Thomas "was under the stress of excitement caused by the event or condition" at the time she made the statements at issue.[12] Md. Rule 5-803(b)(2).

[12] In passing, we agree with the State that the trial court was not required to articulate specific factual findings before ruling that the excited utterance exception applied. Here, the testimony immediately preceding the trial court's ruling, combined with the prosecutor's contemporaneous argument, provided a sufficient factual basis for the trial court's ruling. "Generally, circuit courts do not need to fully articulate their reasoning for (continued)

II. Admission of Detective Needham's Testimony

The Appellant contends that the trial court erred in allowing testimony from a State's witness, Detective Needham, who was not disclosed until midway through trial and who provided what the State called "critical" evidence only during rebuttal. Detective Needham's purportedly objectionable testimony on direct examination included his description of unsuccessful attempts to serve Ms. Thomas with a subpoena and his authentication of excerpts from several jail calls between the Appellant and Ms. Thomas, during which the Appellant encouraged her not to appear at trial. The purportedly objectionable testimony during rebuttal comprised excerpts from two jail calls, one of which included the Appellant's admission that he had "bang[ed]" the victim's head.

According to the Appellant, the prosecutor's proffered excuses for the late disclosure "were implausible, and the faulty disclosure prejudiced the defense." The proffered excuses included the potential absence of Ms. Thomas at trial, the recent employment of Detective Needham by the State's Attorney's Office and involvement in the case to be able to identify the jail calls, and the prior disclosure of the calls to the Appellant. Thus, he asserts, "none of [Detective] Needham's testimony should have been allowed." In the alternative, the Appellant maintains that, even if "some" of Detective Needham's testimony were admissible, the State "impermissibly waited" until rebuttal to

decisions on the record, because each decision is presumed to correctly and faithfully apply the law." *Rainey v. State*, 480 Md. 230, 267 (2022).

introduce "what it considered its critical, substantive evidence," which unfairly prejudiced his defense.

The State counters that, although "the failure to disclose Detective Needham before trial violated the discovery rules," and "the trial court did not explicitly make a finding as to the existence of a discovery violation," any error that resulted was harmless. As for the rebuttal evidence, the State asserts that the Appellant's claim as to the first jail call was not preserved, that the second call was proper rebuttal evidence, and that, in the alternative, any error in admitting it was harmless.

The State emphasizes that the defense had proper notice of the jail calls themselves, which, it asserts, were "the substance of Detective Needham's testimony." Relying upon *Alarcon-Ozoria v. State*, 477 Md. 75 (2021), which held that the disclosure, immediately prior to trial, of 200 jail calls the defendant had made, was not a discovery violation because State correctional facilities are not part of the prosecution and therefore not covered by the prosecution's discovery obligations, the State maintains that here, given the much lesser volume of information at issue and the much earlier disclosure of that information to the defense, any alleged discovery violation was harmless.

Moreover, according to the State, because the Appellant had been provided the calls "months in advance of trial and was a party to" those calls, we should discount his assertion of "undue surprise."[13] Finally, according to the State, the Appellant raises two arguments

[13] The State further asserts that, because Detective Needham's "testimony did not include any elements of assault and merely sought to explain [Ms.] Thomas's absence," "that testimony could not have contributed to the guilty verdict and did not prejudice [the (continued)

on appeal why the rebuttal evidence was improper—first, Detective Needham's rebuttal testimony should have been excluded because the State failed to disclose him prior to trial, and second, the substance of the rebuttal evidence, especially the "confession" jail call, admitted as an adoptive admission by the Appellant, could only be introduced in the State's case-in-chief—but only the first was preserved. As for the preserved argument, the State maintains that it is without merit but that, in the alternative, any error was harmless.[14]

Additional Facts Pertaining to the Claim

Detective Needham was not disclosed as a witness until trial already was in progress, during luncheon recess on the first day of trial, after Ms. Adams had finished testifying. Defense counsel objected, and the prosecutor explained that she did not "put him on the voir dire list because" she filed it "early," acknowledging her mistake, and suggesting that the court could "voir dire the jurors now, if anybody knows him." She further assured the court that "all of the evidence has been provided in discovery." The trial court held the matter "under advisement" until the State called Detective Needham to

Appellant]." This argument is without merit; the entire point of introducing the evidence in question was to establish the Appellant's consciousness of guilt, which was highly probative evidence tending to prove his criminal agency.

[14] In its brief, the State asserts that the disputed "evidence did not prove any element of assault. It explained the reasons or motives for Thomas not appearing for trial. Therefore, the Appellant did not suffer prejudice as a result of this evidence and it was harmless, even if it was admitted in error." We disagree with the State's narrow view of harmless error. If the evidence did not matter, we doubt that the prosecutor would have sought to introduce it, and perhaps we would even have anticipated a defense objection on the ground of relevance. We need not address this matter further, however, because we conclude that the trial court did not err in admitting rebuttal evidence.

testify. When the jury returned after lunch break, the court posed an additional voir dire question to ascertain whether any venire members knew Detective Needham; no one responded.

Later, after the other State's witnesses had testified, the prosecutor called Detective Needham to the stand, and the following colloquy took place:

> [DEFENSE COUNSEL]: I want to just reiterate my objection to this undisclosed witness testimony. It just is a part of due process of knowing who is going to testify in a trial, and finding out mid-trial, um, that this person is being a witness in a case, um, and I had none, prior to this day.
>
> Um, so, I would be objecting on that basis, and on the basis of the relevance of the phone calls, all the previous objections that I made.
>
> THE COURT: Let me hear from the State, anything?
>
> [PROSECUTOR]: I would just (unintelligible, not near microphone) argument, your Honor. (Unintelligible).
>
> THE COURT: Well, when did you first -- first of all, the -- **the name of State's witnesses have to be turned over in discovery, correct?**
>
> [PROSECUTOR]: (Unintelligible, not near microphone).
>
> THE COURT: **Was that done?**
>
> [PROSECUTOR]: (Unintelligible, not near microphone) it didn't (unintelligible) wanted to (unintelligible).
>
> THE COURT: (Unintelligible) District Court?
>
> [PROSECUTOR]: (Unintelligible) pretrial.
>
> THE COURT: **Okay. So you disclosed earlier today or yesterday?**
>
> [PROSECUTOR]: **I disclosed, um, after the lunch break** (unintelligible, not near microphone) after the jury.

THE COURT: Well, you had -- **but you had disclosed to Defense counsel that you were pulling jail calls?**

[PROSECUTOR]: **Yes.**

THE COURT: **When was that done?**

[PROSECUTOR]: Um, the jail calls (unintelligible, not near microphone). [Defense counsel] (unintelligible).

THE COURT: When were these jail calls, the date of these jail calls?

[PROSECUTOR]: Um, the ones that (unintelligible) April (unintelligible).

[DEFENSE COUNSEL]: Again, your Honor, we have to investigate --

THE COURT: Are you --

[DEFENSE COUNSEL]: -- him to get his IA's, any kind of investigation, you can't stop --

THE COURT: Have you been able to listen to them?

[DEFENSE COUNSEL]: Hum?

THE COURT: Have you been li -- have you had a chance -- did you forward them?

[PROSECUTOR]: **Yeah, I provided the ones from April.**

THE COURT: Oh, you provided (unintelligible)? Okay.

[PROSECUTOR]: I'm not using the ones that are (unintelligible, not near microphone).

THE COURT: Okay.

[PROSECUTOR]: (Unintelligible).

THE COURT: So the jail calls that you hope to admit into evidence --

[DEFENSE COUNSEL]: You forwarded e-mails from detective -- are you just talking about the jail calls, you're not talking about the --

[PROSECUTOR]: Detective Lawlor (unintelligible).

[DEFENSE COUNSEL]: She's not --

THE COURT: Are you just using -- are you -- in other words, are you just getting those jail calls in through this witness?

[PROSECUTOR]: Um, and then I'm going to ask him about (unintelligible).

THE COURT: Oh.

[PROSECUTOR]: (Unintelligible).

THE COURT: All right. Do you want to be heard?

[DEFENSE COUNSEL]: **Yes, your Honor. Again, due process, number one. Like you calling a surprise witness in the middle of trial, that – it's not television, that is not how this works.**

THE COURT: Yeah, but –

[DEFENSE COUNSEL]: -- this is a criminal case.

THE COURT: -- it's statement of opposing – State's Attorney says that you were given these jail calls months ago.

[DEFENSE COUNSEL]: Being given jail calls and being noticed -- having me on notice of a witness that's going to be -- testify, that's completely different, your Honor. **And he's not on the jail calls for me to worry about investigating him.**

THE COURT: Right.

[DEFENSE COUNSEL]: **And his background and his IA, and anything about him.**

THE COURT: Um --

[PROSECUTOR]: (Unintelligible). She (unintelligible, not near microphone) her office is (unintelligible) about a week ago.

THE COURT: **Jail calls were disclosed a long time ago**, I don't -- I don't -- **I don't think that's a problem.**

[DEFENSE COUNSEL]: Not -- not all of them, your Honor.

THE COURT: Well, the ones that are being -- the ones that are being used --

[PROSECUTOR]: (Unintelligible).

THE COURT: -- were admitted – were turned over to you a long time ago.

[DEFENSE COUNSEL]: Again, I would be objecting to --

THE COURT: Okay.

[DEFENSE COUNSEL]: -- the use of these calls.

THE COURT: I'm going to overrule it.

(Emphasis added.)

Detective Needham then testified about his unsuccessful efforts, the week prior to trial, to serve a subpoena on Ms. Thomas. He also authenticated excerpts from three jail calls (which were played before the jury) made by the Appellant, in which he and Ms. Thomas discussed how she should avoid service of process and not appear at trial. The State then concluded its case-in-chief.

When trial resumed the following day, the Appellant testified on his own behalf. Among other things, he claimed that Ms. Thomas had been in a dispute with the father of her then-younger son, strongly intimating that the individual was the culprit in the assault against Ms. Thomas. During cross-examination, the Appellant claimed that Ms. Thomas

told him who had assaulted her but that he never had the opportunity to tell the police. The prosecutor then asked the Appellant to explain why, if he knew "who [had done] this to Wynter," he told her "not to come to court[.]" The Appellant replied: "She wanted to come to court but you [i.e., the State] kept harassing and threatening her."

The latter exchange prompted the State to call Detective Needham as a rebuttal witness. Over defense objection, he testified about two additional jail call excerpts which were played before the jury. In one of those excerpts, Ms. Thomas said to the Appellant, "You were banging my head and (unintelligible), like you didn't take it serious." The Appellant replied, "I did, I was just stupid, that's all." The other excerpt was a three-way call between the Appellant, his mother,[15] and Ms. Thomas. Among other things, the unknown woman (presumably the Appellant's mother) said, "And as long as you don't open the door, you ain't got to worry about nothing."

Analysis

Maryland Rule 4-263(d)(3) provides:

> Without the necessity of a request, the State's Attorney shall provide to the defense . . . [a]s to each State's witness the State's Attorney intends to call to prove the State's case in chief or to rebut alibi testimony: (A) the name of the witness; (B) except as provided under Code, Criminal Procedure Article, § 11-205 or Rule 16-912 (b), the address and, if known to the State's Attorney, the telephone number of the witness; and (C) all written statements of the witness that relate to the offense charged[.]

[15] Detective Needham identified the unknown woman as the Appellant's mother, but the trial court sustained a defense objection to that testimony. In the excerpt played before the jury, however, the Appellant addressed the unknown woman as "Ma."

The State's duty to disclose extends to tangible evidence it wishes to use at trial under Rule 4-263(d)(9):

> (9) *Evidence for Use at Trial.* The opportunity to inspect, copy, and photograph all documents, computer-generated evidence as defined in Rule 2-504.3 (a), recordings, photographs, or other tangible things that the State's Attorney intends to use at a hearing or at trial [.]

Rule 4-263(h) further provides in relevant part:

> **(h) Time for Discovery.** Unless the court orders otherwise:
>
> (1) the State's Attorney shall make disclosure pursuant to section (d) of this Rule within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213(c)[.]

Furthermore, both parties have a continuing duty to disclose information after fulfilling their initial obligations:

> **(j) Continuing Duty to Disclose.** Each party is under a continuing obligation to produce discoverable material and information to the other side. A party who has responded to a request or order for discovery and who obtains further material information shall supplement the response promptly.

"We review *de novo* whether a discovery violation occurred." *Thomas v. State*, 168 Md. App. 682, 693 (2006) (citing *Cole v. State*, 378 Md. 42, 56 (2003)), *aff'd*, 397 Md. 557 (2007). If a discovery rule is violated, the remedy is, "in the first instance, within the sound discretion of the trial judge. The exercise of that discretion includes evaluating whether a discovery violation has caused prejudice. Generally, unless we find that the lower court abused its discretion, we will not reverse." *Cole*, 378 Md. at 56 (quoting *Williams v. State*, 364 Md. 160, 178 (2001), *abrogated on other grounds by State v. Jones*, 466 Md. 142 (2019)). Moreover, Rule 4-263, "on its face, does not require the court to take any action; it merely authorizes the court to act. Therefore, the presiding judge has

the discretion to select an appropriate sanction, but also has the discretion to decide whether any sanction is at all necessary." *Thomas*, 397 Md. at 570.[16] The *Thomas* Court set out factors for a trial court to consider in exercising its discretion regarding sanctions for discovery violations: "(1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the [feasibility] of curing any prejudice with a continuance; and (4) any other relevant circumstances." *Id.* at 570–71 (footnote omitted). "The most accepted view of discovery sanctions is that in fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules." *Id.* at 571.

It is undisputed in this case that the prosecution failed to comply with Rule 4-263 in failing to disclose Detective Needham as a witness until trial had begun. Both parties seem to suggest that the trial court did not make a ruling as to whether a discovery violation occurred. Were that the case, we would be obliged to determine, under *de novo* review, whether a discovery violation occurred, and if so, whether any error was harmless. *Williams*, 364 Md. at 178–79.

We disagree, however. The quoted colloquy clearly indicates that the trial court recognized that the State had violated the discovery rules, declaring to the prosecutor, "the

[16] Since *Thomas* was decided, Rule 4-263 has undergone substantial revisions, but the subsection of the Rule it was interpreting, governing sanctions for violations, is similar to current Rule 4-263(n). Indeed, the current version of the Rule is even more explicit than former Rule 4-263(i); the current version adds that "The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court." Md. Rule 4-263(n).

name of State's witnesses have to be turned over in discovery, correct?" and then ascertaining that the prosecutor did not, in fact, disclose Detective Needham to the defense until after lunch break that day. Because defense counsel wished to exclude Detective Needham from testifying at all (notably, the defense never asked for a continuance), the entire thrust of the colloquy was to enable the trial court to exercise its discretion in fashioning a remedy for that violation. But the trial court then determined that the defense had been provided the calls at issue (except for one call, which was subsequently introduced during the State's rebuttal), and it denied the defense's motion.

The defense claimed that it had no opportunity to research Detective Needham's disciplinary record for impeachment purposes, but it never sought a continuance to do so. In addition, Detective Needham's testimony about Ms. Thomas's avoidance of service concerned events that took place only a few days before trial, and therefore, for that purpose, the prosecutor's obligation to disclose him only coalesced a few days before trial. Under these circumstances, we find no abuse of discretion. *See Raynor v. State*, 201 Md. App. 209, 228 (2011) (noting that, "if a defendant declines a limited remedy that would serve the purpose of the discovery rules and instead seeks the greater windfall of an excessive sanction, the double or nothing gamble almost always yields nothing") (citations and quotations omitted), *aff'd*, 440 Md. 71 (2014), *cert. denied*, 574 U.S. 1192 (2015).

As for the rebuttal evidence, we agree with the State that the Appellant's claim that the State introduced his confession improperly as rebuttal evidence rather than in its case-in-chief was not preserved. "It is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives

any grounds not specified that are later raised on appeal." *Klauenberg v. State*, 355 Md. 528, 541 (1999). Defense counsel objected on the grounds that Detective Needham was a "surprise witness" and that "this is rebuttal." Additional arguments were made about whether the testimony was a proper adoptive admission as an exception to hearsay, which the trial court ruled it was after taking a recess to reviewing case law and hearing arguments on the matter. The defense did not raise the claim now before us, based upon *Wright v. State*, 349 Md. 334 (1998), that the State could not hold back a confession in its case-in-chief only to introduce it in rebuttal.[17] As a result, the particular argument made on appeal was not preserved.

The other item of rebuttal evidence, the additional excerpt from one of the jail calls, in which the Appellant's mother stated to Ms. Thomas, "And as long as you don't open the door, you ain't got to worry about nothing," was proper rebuttal evidence, given the Appellant's testimony that Ms. Thomas wanted to come to court and that she did not do so only because the State "kept harassing and threatening her." This call served to rebut the Appellant's testimony by showing that Ms. Thomas was told how to avoid coming to court,

[17] Even had this claim been preserved, it is far from clear whether there was error under *Wright*, in which the Supreme Court of Maryland held that the trial court abused its discretion by admitting during the State's rebuttal an out-of-court admission by the defendant that the State could have admitted during their case-in-chief but instead tactically held it back until rebuttal. 349 Md. at 353–54 Arguably, the prosecutor was countering not only the Appellant's testimony during cross-examination, but also his testimony during direct examination, when he first implied that the younger child's father had been the assailant. *See Bruce v. State*, 318 Md. 706, 728–29 (1990) (finding prior statements were admissible in rebuttal as prior inconsistent statements, and could be used as substantive evidence because the appellant did not request a limiting instruction).

rather than her trying to avoid any harassment or threats from the State. Therefore, as proper rebuttal evidence, the trial court did not err in admitting it.

III. Denial of Motion for New Trial

The Appellant contends that the trial court abused its discretion in denying his motion for new trial. He asserts that, at the hearing on the motion for new trial, the prosecutor "offered implausible reasoning" for her tardy disclosure and that we should infer bad intent, "like in other areas of the law." He further maintains that, to the extent that the prosecutor's "faulty explanation was only clear at that stage, the trial court could have remedied this error at that time" and that, likewise, "[g]ranting the motion would also have remedied" the alleged confrontation and hearsay errors.

The State counters that the Appellant merely resurrects the same allegations of error—erroneous admission of testimonial hearsay and the State's alleged discovery violation—that he raised previously as the reasons why the trial court should have granted his motion for new trial. The State further asserts that the prosecutor's proffered reasons for the late disclosure of Detective Needham, including the potential absence of Ms. Thomas, and Detective Needham's use as a sponsoring witness for the jail calls that were previously disclosed, were "not implausible" and furnishes no basis for "the extraordinary remedy of the granting of a new trial."

Analysis

A defendant may move for a new trial within ten days after the verdict. Md. Rule 4-331(a). The trial court may grant the motion "in the interest of justice." *Id.* The court's decision whether to do so "is ordinarily reviewed under the abuse of discretion standard[.]"

Jenkins v. State, 462 Md. 335, 344 (2019). "Abuse occurs when a trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of law." *Campbell v. State*, 373 Md. 637, 666 (2003) (citation omitted).

The breadth of a trial court's discretion in ruling on a motion for new trial "is not fixed and immutable." *Buck v. Cam's Broadloom Rugs, Inc.*, 328 Md. 51, 58 (1992). "[R]ather, it will expand or contract depending upon the nature of the factors being considered, and the extent to which the exercise of that discretion depends upon the opportunity the trial judge had to feel the pulse of the trial and to rely on his own impressions in determining questions of fairness and justice." *Id.* at 58–59.

Under narrow circumstances, an appellate court will review a trial court's denial of a motion for new trial without deference. *Williams v. State*, 462 Md. 335, 345–46 (2019) (citing *Merritt v. State*, 367 Md. 17, 30–31 (2001)). Under that exception,

> when an alleged error is committed during the trial, when the losing party or that party's counsel, without fault, does not discover the alleged error during the trial, and when the issue is then raised by a motion for a new trial, we have reviewed the denial of the new trial motion under a standard of whether the denial was erroneous.

Merritt, 367 Md. at 31. The Appellant does not claim that this case falls within that narrow exception to the general rule of discretionary review.

For the same reasons we have concluded that there was no reversible error either in admitting out-of-court statements or in denying the defense motion to preclude Detective Needham from testifying, we conclude that the trial court did not abuse its discretion in refusing to revisit those claims as repackaged in the motion for new trial.

CONCLUSION

Accordingly, we affirm the judgment of the Circuit Court for Baltimore County.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.