Circuit Court for Baltimore City
Case No. 114057027

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1255

September Term, 2017

AVERY LITTLE

v.

STATE OF MARYLAND

Meredith,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: June 13, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On June 8, 2017, a jury in the Circuit Court for Baltimore City found appellant Avery Little guilty of: second-degree murder; use of a firearm in the commission of a crime of violence; and wearing, carrying or transporting a handgun. The court sentenced appellant to thirty years' incarceration for murder, and twenty years consecutive for use of a handgun in the commission of a crime of violence. The remaining handgun charge merged for sentencing purposes. Appellant timely appealed and presents the following three issues for our review:

1. Did the circuit court err in denying Appellant's motion to suppress his statement to the police?

2. Did the court err in admitting statements by the anonymous 911 caller?

3. Did the court err in excluding evidence that the victim was struck by bullets fired by a gun different than the one recovered near Appellant?

We perceive no error and affirm appellant's convictions.

FACTS AND PROCEEDINGS

On January 28, 2014, Baltimore Police Officers James Dill and Donald Burns were patrolling the Northwest District of Baltimore near the 5200 block of Denmore Avenue when they observed "trouble brewing" among a group of approximately twelve individuals. After five to ten minutes, the group dispersed, and the officers received a call from another officer requesting assistance. While speaking with that officer, dispatch reported to Officers Dill and Burns that a shooting had just occurred at the 5200 block of Denmore Avenue.

Heading back to the location of the shooting, the officers observed appellant "walking really fast" and "constantly looking behind him back toward Denmore." As Officer Dill put his patrol vehicle in reverse, appellant took off running, and Officer Burns exited the police vehicle to chase appellant on foot while Officer Dill pursued appellant by vehicle. Eventually, Officer Burns caught and restrained appellant. When Officer Dill arrived, he noticed blood on appellant despite the fact that neither he, Officer Burns, nor appellant appeared to be shot or injured. This caused Officer Dill to conclude that the blood came from someone else. After escorting appellant to the paddy wagon, Officer Dill retraced appellant's steps during the chase, and found a .38 revolver and a green lighter on top of the snow-covered ground. Also in the snow was a single set of footprints consistent with appellant's escape path leading to where Officer Burns ultimately arrested appellant.

Meanwhile, Officer Burns returned to the 5200 block of Denmore. There, he came upon two victims: Derrill Crawley and Steven Melton. Crawley, who was lying on the porch of 5220 Denmore, Apartment B, had been shot three times, stabbed, and had suffered blunt force trauma injuries. Melton, who was lying on the sidewalk in front of 5220 Denmore, Apartment A, had been shot once. Whereas Melton survived his gunshot wound, Crawley died from his injuries. On the ground near the porch of 5220 Denmore, police found a fully-loaded .22 caliber handgun. At the time, appellant lived at 5220 Denmore Avenue, Apartment B.

The State charged appellant with first-degree murder, use of a firearm in the commission of a crime of violence, and wearing, carrying or transporting a handgun. Prior

to trial, appellant moved to suppress a statement he made to police following his arrest, as well as a 911 call made by an anonymous witness. After the suppression court rendered an unclear basis for excluding portions of the 911 call, the State appealed and this Court remanded for clarification. *See State v. Little*, No. 247, Sept. Term, 2016 (filed Aug. 16, 2016). On remand, the suppression court again provided an unclear basis for suppressing portions of the call, the State appealed, and our Court again remanded for clarification. *State v. Little*, No. 1910, Sept. Term, 2016 (filed Mar. 15, 2017). Eventually, the suppression court denied appellant's motion to suppress the 911 call, and the case proceeded to trial. As stated above, a jury convicted appellant of second-degree murder, and two related weapons offenses. We shall provide additional facts as necessary to resolve the issues on appeal.

DISCUSSION

I. Appellant's Statement to Police

Appellant first argues that the suppression court erred in denying his motion to suppress his statement because he unambiguously and unequivocally invoked his rights to counsel and to silence at the outset of his interrogation by the detectives. Specifically, appellant contends that he invoked his rights when he made the following two statements prior to interrogation: "But maybe if I need a lawyer if you all are trying to charge me with something, maybe now would be a good time if you're trying to[;]" and "I wouldn't even want to say anything because I don't know what's going on."

Regarding the appropriate standard of review from the denial of a motion to suppress evidence, the Court of Appeals has stated,

> When reviewing the denial of a motion to suppress evidence, we confine ourselves to what occurred at the suppression hearing. We view the evidence and inferences that may be reasonably drawn therefrom in a light most favorable to the prevailing party on the motion, here, the State. We defer to the motions court's factual findings and uphold them unless they are shown to be clearly erroneous. The credibility of the witnesses, the weight to be given to the evidence, and the reasonable inferences that may be drawn from the evidence come within the province of the suppression court. We, however, make our own independent constitutional appraisal, by reviewing the relevant law and applying it to the facts and circumstances of this case.

Gonzalez v. State, 429 Md. 632, 647-48 (2012) (internal citations and quotation marks omitted). In making our own independent constitutional appraisal, we conclude that appellant did not invoke his rights at the outset of the interrogation.

In *Ballard v. State*, 420 Md. 480, 482 (2011), the Court of Appeals discussed whether a phrase Ballard uttered during an interrogation constituted an unequivocal invocation of the right to counsel. There, Ballard waived his *Miranda*[1] rights and agreed to speak with police regarding a homicide investigation. *Id*. at 483. During questioning, Ballard told a detective, "You mind if I not say no more and just talk to an attorney about this." *Id*. at 485. The detective replied, "What benefit is that going to have?" *Id*. Ballard responded, "I'd feel more comfortable with one." *Id*. The detective continued to interrogate Ballard, who went on to confess to committing the homicide. *Id*. at 485-86. Prior to trial, Ballard moved to suppress his statement to police, arguing that he

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

unequivocally and unambiguously invoked his rights to counsel and to silence. *Id*. at 486-87. The suppression court denied Ballard's motion. *Id*. at 487.

On appeal, the Court of Appeals first established that "The accused's invocation of the right to counsel . . . cannot be equivocal or ambiguous." *Id*. at 490. The Court explained that the inquiry into whether a defendant invoked his right to counsel is an objective one. *Id*. (citing *Davis v. United States*, 512 U.S. 452, 459 (1994)). Turning to Ballard's statement, the Court held that the statement "You mind if I not say no more and just talk to an attorney about this" was an unambiguous and unequivocal assertion of the right to counsel. *Id*. at 491. In reaching its decision, the Court compared Ballard's statement to the statements uttered in: *Davis*; *Matthews v. State*, 106 Md. App. 725 (1995); and *Minehan v. State*, 147 Md. App. 432 (2002). *Id*. at 491-92. In *Davis*, the Supreme Court held that the statement "Maybe I should talk to a lawyer" was an ambiguous invocation of the right to counsel. 512 U.S. at 462. In *Matthews*, our Court held that "Where's my lawyer?" was an ambiguous assertion of the right to counsel. 106 Md. App. at 737-38. Finally, in *Minehan*, our Court noted in dicta that "Should I get a lawyer?" would likely constitute an ambiguous request under *Davis*. 147 Md. App. at 443-44. In holding that Ballard's statement was distinguishable from the statements in *Davis*, *Matthews*, and *Minehan*, the *Ballard* Court stated,

> None of the statements under consideration in those cases—"Where's my lawyer," "Maybe I should talk to a lawyer," or "Should I get a lawyer"—provides any indication that the suspect, at the time the statement was uttered, actually desired to have a lawyer present for the remainder of the interrogation.

420 Md. at 492. The Court also went on to construe the phrase "you mind if . . ." to be a colloquialism rather than Ballard requesting permission to obtain an attorney. *Id*. at 492-93. Further, the Court noted that Ballard's comment that he would "feel more comfortable" with an attorney present "clarified [Ballard's] desire for an attorney." *Id*. at 494. The line of demarcation, then, was whether Ballard indicated that he actually desired to have a lawyer present for the interrogation, as opposed to whether he simply mentioned the idea of having a lawyer present during the interrogation.

Appellant argues that, like the petitioner in *Ballard*, he unequivocally invoked his rights to counsel and to remain silent when he entered the police station's interrogation room.[2] The basis for appellant's contention that he properly invoked his rights is found in the following colloquy:

> MR. LITTLE: I mean, could I ask does anybody know how --
>
> [DETECTIVE]: Just give me one minute. We're going to go over some paper work and then we'll get to the point where I can talk to you about whatever it is that you need to know about. All right?
>
> MR. LITTLE: All right.
>
> [DETECTIVE]: What's your --
>
> MR. LITTLE: Am I being charged with anything?

[2] We note that here, appellant uttered the statements that he argues constituted his invocation of the rights to counsel and to remain silent before he received his *Miranda* warnings. Because interrogation was imminent at that moment, appellant's *Miranda* rights had attached. *See Williams v. State*, 219 Md. App. 295, 322 (2014). Accordingly, we must determine whether appellant invoked his rights unequivocally and unambiguously.

[DETECTIVE]: We're going to talk about all that. Okay?

MR. LITTLE: *Okay. But maybe if I need a lawyer if you all are trying to charge me with something, maybe now would be a good time if you're trying to.*

[DETECTIVE]: Okay. Well, let's go through this paper work and then you get to the point where you feel as though you need a lawyer, then that's definitely your call. Okay?

MR. LITTLE: *Okay. But I -- I wouldn't even want to say anything because I don't know what's going on. I know when they put me in the paddy wagon, they said I'm never coming home or something.*

[DETECTIVE]: Okay. Well, we're going to talk and we'll get through as much as we can or, hopefully, we can get through everything that we need to. Okay?

MR. LITTLE: Okay.

(Emphasis added). After the detectives asked appellant to provide his name, address, age, and other background information, they provided appellant with a form advising him of his *Miranda* rights. The detectives asked appellant to read the form, and the following exchange took place when appellant read his right to speak to an attorney:

MR. LITTLE: You have the right to talk with an attorney before any questioning or during any questioning. If you agree to answer questions, you may stop at any time, request an attorney and no further questions will be asked.

[DETECTIVE]: You understand that?

MR. LITTLE: *Yes. I mean, so why -- I mean, when earlier I asked you all if I needed one and nothing happened?*

[DETECTIVE]: Well, basically, we're not -- I'll be honest with you, we're not -- we don't tell you oh, yeah, you need a lawyer or we don't say you don't need a lawyer.

MR. LITTLE: I understand that.

[DETECTIVE]: You know what I'm saying? So we just -- we're just merely just going over this form and, basically, this is informing you of the rights that you have, you know, available to you. If at any time you decide that, you know, I don't want to talk no more, I have nothing else to say or anything like that, then that's why I said right there if you agree to answer questions, you can stop at any time.

MR. LITTLE: Oh.

[DETECTIVE]: You understand what I'm saying?

MR. LITTLE: Okay.

[DETECTIVE]: So just you going over this form, this is only an explanation of the rights that you have available to you. Now, if you decide well, I don't want to talk no more, I want to get an attorney to talk further about this, then you have that right to do so and that's what these for – this form is just informing you of.

MR. LITTLE: Okay.

(Emphasis added).

Relying on *Ballard*, appellant contends that he unequivocally invoked his rights to counsel and to remain silent. We note that

> The right to silence is invoked in precisely the same way that the right to counsel is invoked. The right to counsel is waived in precisely the same way that the right to silence is waived. The common invocation procedure, moreover, applies in the pre-waiver context precisely as it does in the post-waiver context.

In re Darryl P., 211 Md. App. 112, 169 (2013). Against this backdrop, we disagree that appellant invoked his rights to counsel and to remain silent.

We first address whether appellant invoked his right to counsel. In *Ballard*, although the Court of Appeals concluded that Ballard's colloquialism "You mind if" did not negate his unambiguous and unequivocal desire to have an attorney present, we do not believe that appellant here indicated his actual desire to have an attorney present. Instead, we conclude that appellant's statement "But maybe if I need a lawyer if you all are trying to charge me with something, maybe now would be a good time if you're trying to[,]" was an ambiguous and equivocal indication of appellant's desire to request an attorney.

The statement "But *maybe* if I need a lawyer if you all are trying to charge me with something, *maybe* now would be a good time if you're trying to[,]" fails to indicate appellant's desire to have an attorney present for the interrogation. (Emphasis added). The use of the word "maybe" indicates that although appellant contemplated requesting an attorney, he did not actually do so. Whereas in *Ballard* the Court of Appeals stated "A speaker who begins a statement with the phrase 'you mind if . . .' suggests to his or her audience that the speaker is about to express a desire, whether to do something or have something occur," 420 Md. at 492, here, appellant's use of the word "maybe" undermined the clarity of his alleged invocation. Appellant's language more closely resembles the statement in *Davis*, "Maybe I should talk to a lawyer," which, as we noted above, the Supreme Court held did not constitute an unambiguous invocation. 512 U.S. at 462.

We are further bolstered in our conclusion that appellant did not invoke his right to counsel because of the question appellant posed to the detectives after reading aloud his right to counsel. When asked whether he understood his right to counsel, appellant replied,

"so why -- I mean, when earlier I asked you all if I needed one and nothing happened?" This question corroborates that appellant did not invoke his right to counsel at the outset of his meeting with the detectives. Instead, this subsequent question clarifies that appellant merely asked *if* he needed a lawyer. Asking the detectives if he should request counsel was not an indication that appellant actually desired to have a lawyer present for the remainder of the interrogation. *Ballard*, 420 Md. at 492. Accordingly, appellant did not unequivocally and unambiguously invoke his right to counsel.

To resolve whether appellant unequivocally and unambiguously invoked his right to silence in the statement, "But I -- I wouldn't even want to say anything because I don't know what's going on[,]" we look to *Williams v. State*, 219 Md. App. 295 (2014), *aff'd*, 445 Md. 452 (2015). There, prior to being advised of his *Miranda* rights, Williams told police "I don't want to say nothing. I don't know[.]" *Id*. at 309. Williams then reviewed his *Miranda* rights with police, and ultimately made an incriminating statement. *Id*. at 309-10. On appeal, Williams argued that his statement "I don't want to say nothing. I don't know,—" constituted an invocation of the right to silence, and that the police violated that right by continuing to interrogate him. *Id*. at 323.

There, we began our analysis by acknowledging the objective standard established in *Ballard*, that the issue was "whether a reasonable police officer under the circumstances present . . . would understand [Williams's] statement to be an invocation of the right to silence." *Id*. at 326. With this standard in mind, we noted that,

> As a classic expression of uncertainty, "I don't know" introduced a level of doubt into the message being communicated by [Williams] to [the

> detectives]. Indeed, the inclusion of those three words strongly suggest that [Williams] himself—let alone the police officers whom the law charges with understanding his intent—was unsure of how to proceed.

Id. at 327. We concluded that, in this context, "At most, [Williams's] comment suggested that he *might* want to remain silent. *Id*.

The context of Williams's statement helped us determine that he had failed to unambiguously invoke his right to silence. We noted that "[Williams's] comment was more ambiguous when placed in context with the other statements that he had made in the interrogation room up to that point." *Id*. Specifically, we noted that "[Williams] had asked [detectives] three times, 'What's the incident?' and, three other times, told them that he didn't know 'what's going on' or 'what [they] all [were] talking about.'" *Id*. at 328. Based on these circumstances, we stated, "Viewed objectively, the statements made by [Williams] in the moments leading up to his saying 'I don't want to say nothing. I don't know,—' suggest that [Williams] was merely trying to ascertain from the police what was the specific incident they were investigating." *Id*. Because Williams's statements were made in the context of his attempts to obtain information from the police, they were ambiguous and equivocal as to his invocation of the right to remain silent. *Id*.

The circumstances of appellant's case similarly cast doubt on the notion that he unequivocally invoked his right to silence. Before detectives could review appellant's *Miranda* rights with him, appellant attempted to ascertain why he was being interrogated, stating: "could I ask does anybody know how--" and "Am I being charged with anything?" When the detectives failed to answer these questions, appellant mentioned that "maybe"

he needed a lawyer if he were being charged with something. A detective told appellant that requesting counsel was appellant's decision to make. In response, appellant replied "*But I -- I wouldn't even want to say anything because I don't know what's going on.* I know when they put me in the paddy wagon, they said I'm never coming home or something." (Emphasis added). Because all of appellant's statements were made in the context of ascertaining whether he was being charged, a reasonable officer would have construed his statement "I wouldn't even want to say anything because I don't know what's going on" to be an ambiguous invocation of his right to remain silent. In the parlance of *Williams*, "[a]t most, appellant's comment suggested that he *might* want to remain silent." *Id*. at 327.

We recognize the delicate nature of interpreting statements to determine whether a defendant has validly invoked his or her rights to counsel or to remain silent. Indeed, courts throughout the country have construed similar language differently. *Compare North Carolina v. Jackson*, 497 S.E.2d 409 (N.C. 1998) (holding that the statement "I think I need a lawyer present" constituted an unambiguous invocation), *abrogated on other grounds by North Carolina v. Jackson*, 543 S.E.2d 823 (N.C. 2001), with *Davis v. Texas*, 313 S.W.3d 317 (Tex. 2010) (holding that "I should have an attorney" was ambiguous based on the context of the statement), and *Arizona v. Eastlack*, 883 P.2d 999 (Ariz. 1994) (holding that "I think I better talk to a lawyer first" was ambiguous because of the phrase "I think"). Nonetheless, based on the language appellant used in this case, and the circumstances

surrounding his statements, we conclude that appellant did not unambiguously and unequivocally invoke his rights to counsel or to remain silent.

II. The Admissibility of the 911 Call

Appellant next argues that the suppression court erred in admitting the identification portions of the 911 call. Specifically, he contends that the court erred for three reasons: 1) the admission of the call violated appellant's right to confrontation; 2) the call constituted inadmissible hearsay; and 3) the call unfairly prejudiced appellant pursuant to Maryland Rule 5-403, and also violated his right to due process. The 911 call is provided below in full, with emphasis given to the portions appellant alleges are inadmissible:

[911 OPERATOR]:	Baltimore City 911. What is the address of the emergency?
[CALLER]:	5200 block of Denmore Avenue. Guy just shot somebody. Now he's stabbing somebody else. Please hurry.
[911 OPERATOR]:	Where -- where is this at?
[CALLER]:	5200 block of Denmore Avenue.
[911 OPERATOR]:	Where is the person at that was shot?
[CALLER]:	In front of the apartment building and this guy is still out there stabbing.
[911 OPERATOR]:	Is he on the odd or the even side of the street?
[CALLER]:	The even side of the street.
[911 OPERATOR]:	Okay. Give me a description of the suspect.
[CALLER]:	The suspect is … tall, dark skin --

[911 OPERATOR]:	Black male?
[CALLER]:	I mean, no. Tall, light skin, and got on black shirt -- I mean, black pants, black jacket. He just ran into the apartment building. *I think it was -- I think his name is Avery.*
[911 OPERATOR]:	Okay. Possibly named Avery?
[CALLER]:	Yeah. Please (indiscernible).
[911 OPERATOR]:	And you say -- you say he shot one person and stabbed another?
[CALLER]:	Yeah. I didn't actually see the shooting but I saw him with a gun and then he ran -- ran in the house with the gun. Then he came back out with a butcher knife and he was over there stabbing the guy.
[911 OPERATOR]:	So, he did not shoot anyone?
[CALLER]:	He's out there with the gun in his hand. He's still shooting.
[911 OPERATOR]:	Okay. We're on the way.
[CALLER]:	He's still shooting.
[911 OPERATOR]:	All right. We're on the way. Discharging a firearm at 5200 block of Denmore Avenue. Discharging a firearm at 5200 block of Denmore Avenue. Suspect is a black male, light skinned --
[CALLER]:	He just --
[911 OPERATOR]:	-- black pants, black jacket.
[CALLER]:	He just ran across --
[911 OPERATOR]:	Possibly named Avery.

[CALLER]:	Yeah. And he just jumped the fence and ran through the back.
[911 OPERATOR]:	Okay. Do you know Avery's last name?
[CALLER]:	No.
[911 OPERATOR]:	How many people been shot?
[CALLER]:	Two. You need to send at least two ambulances.
[911 OPERATOR]:	Okay. Does Avery live in that building?
[CALLER]:	Yes. Well, he -- he just jumped over the fence and ran to the back.
[911 OPERATOR]:	Okay. And the back of what -- what's the name of the street in the back?
[CALLER]:	I don't know the name of the street on the other side. But if they comes through Denmore Avenue, they'll see everything.
[911 OPERATOR]:	Okay. So the suspect lives in the building?
[CALLER]:	Yeah. You need to send two ambulances quickly.
[911 OPERATOR]:	Okay. I've told them. They're on their way. We got a lot of people calling.
[CALLER]:	Okay.
[911 OPERATOR]:	So I'm getting this information from you and then someone else is getting the other. Okay?
[CALLER]:	Okay.
[911 OPERATOR]:	Okay. Stay on the line with me. You're giving me good information.

[CALLER]:	Oh, God. And please let this be anonymous. Please.
[911 OPERATOR]:	Yes. He jumped the fence and ran behind the building? Okay. And you say he stabbed one of them?
[CALLER]:	Yeah. First he shot one. Then he was trying to shoot another one. Looked like he ran out of bullets or something. He ran in the house. He got a knife. And he came back out and started stabbing him. Then he ran back and got a gun and came back out with the gun again. It didn't -- the one he was stabbing he shot again.
[911 OPERATOR]:	Okay. Okay. And you say he shot one man?
[CALLER]:	He shot two men.
[911 OPERATOR]:	No, at first. Tell me what happened. You say he shot --
[CALLER]:	First I heard these gunshots. I went outside and looked. And it was a guy down on the street and a guy beside the house that was down. And it looked like he was trying to shoot him. Then he ran in the house and got a butcher knife and started stabbing the one that was down. Then he -- he went back in the house and got the gun again and started the one he was stabbing. *Hey it was Avery, wasn't it?* He was shooting -- he shot that guy and another guy and stabbed him and he shot him.
[911 OPERATOR]:	Okay. And he run -- ran in the house?
[CALLER]:	Okay. The police is down there now.
[911 OPERATOR]:	Okay. Thank you so much.
[CALLER]:	Yes. Please. Anonymous, okay.

[911 OPERATOR]: Okay.

(Emphasis added).

A. Right to Confrontation

Appellant first argues that the admission of the 911 call violated his right to confrontation. In his brief, appellant acknowledges that this Court already decided that the call was non-testimonial and its admission did not violate his right to confrontation in *State v. Little*, No. 1910, Sept. Term 2016 (filed March 15, 2017), and that the law of the case doctrine "ordinarily" controls. Appellant nevertheless argues that we erred.

The Court of Appeals has described the law of the case doctrine as follows:

> The law of the case doctrine is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter. Under that doctrine, once an appellate court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling, which is considered to be the law of the case. It is the country cousin to the more ornately named doctrines of *res judicata*, collateral estoppel and *stare decisis*.

Baltimore Cnty. v. Fraternal Order of Police, Baltimore Cnty. Lodge No. 4, 449 Md. 713, 729 (2016) (internal citations, quotation marks and footnote omitted). Because the law of the case doctrine applies here, we decline to address appellant's argument regarding the Confrontation Clause.

B. Hearsay

Appellant next argues that the suppression court erred in determining that the caller's identification statements constituted both an excited utterance and a present sense impression. According to appellant, the 911 caller "was not excited" when she uttered

appellant's name and therefore the excited utterance exception did not apply. Additionally, appellant contends that the 911 caller lacked personal knowledge and provided the name "Avery" only after conscious reflection, rendering the present sense impression exception inapplicable. At the hearing on the motion to suppress the 911 call, appellant disputed the admissibility of the statement "I think his name is Avery," but when the suppression court found that statement admissible, appellant withdrew his argument that the statement "It was Avery, wasn't it?" was also inadmissible. At the outset, we note that the suppression court needed only to find that one of these two possible hearsay exceptions applied in order to admit the statements. We agree with the suppression court that both exceptions applied.

We review *de novo* the suppression court's legal conclusions, but do not disturb that court's factual findings absent a finding of clear error. *Gordon v. State*, 431 Md. 527, 538 (2013). Because appellant only contends that the suppression court erred in its factual findings, we apply the clearly erroneous standard of review. *Id*. Accordingly, we will not overturn the court's findings unless they are unsupported by substantial evidence. *Id*.

Maryland Rule 5-803(b)(2) provides an exception to the hearsay rule known as the "excited utterance" exception for "[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." In *Parker v. State*, the Court of Appeals explained the excited utterance exception as follows:

> 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. The rationale for overcoming the

> inherent untrustworthiness of hearsay is that the situation produced such an effect on the declarant as to render his reflective capabilities inoperative. *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*.

365 Md. 299, 313 (2001) (emphasis added) (internal citations and quotation marks omitted).

Here, the suppression court found that the anonymous caller's identification of appellant was a "spontaneous statement." The court found that the caller volunteered appellant's name without being asked, that she "sound[ed] harried by the event," that she seemed "to be under stress of observing an excitable event," and that the caller uttered, "Oh, gosh"[3] at some point during the call. Because the court's finding that the 911 caller was excited was amply supported by the evidence, that finding is not clearly erroneous. *Gordon*, 431 Md. at 538. The statement was therefore admissible under the excited utterance exception to the hearsay rule.

Appellant next disputes whether the caller had sufficient personal knowledge to identify appellant and whether the caller's statement was an opinion rather than a fact, for purposes of the present sense impression exception. Maryland Rule 5-803(b)(1) defines a present sense impression as "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." In order for a statement to meet the present sense impression exception, it must be made

[3] Appellant correctly notes that the caller did not utter "Oh, gosh" but instead uttered "Oh, God."

spontaneously and contemporaneously, the declarant must speak from personal knowledge, and the declarant must express fact rather than opinion. *Booth v. State*, 306 Md. 313, 324-25 (1986).

Here, the suppression court noted that the statement "I think his name is Avery" came "at the tail end of the caller's physical description on inquiry of the dispatch" but that it was not the answer to a question. The court went on to find that the statement was spontaneous, a statement of fact, and based on the caller's personal knowledge. Specifically, the court noted, the caller was "very clearly perceiving the events that [she was] describing as [they were] unfolding before her." This finding is supported by the evidence. Accordingly, the court's conclusion that the caller had personal knowledge and provided appellant's name without conscious reflection is not clearly erroneous, and the statement was independently admissible under the present sense impression expression.

C. Rule 5-403 and Due Process

Appellant also argues that the identifying statements should have been excluded pursuant to Rule 5-403 and constitutional due process. Rule 5-403 provides that,

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Evidence is unfairly prejudicial when "it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged." *Burris v. State*, 435 Md. 370, 392 (2013) (quoting *Odum v. State*, 412 Md. 593, 615 (2010). This typically occurs when the evidence "produces such an emotional

response that logic cannot overcome prejudice or sympathy needlessly injected into the case." *Odum*, 412 Md. at 615 (quoting Joseph F. Murphy Jr., Maryland Criminal Evidence Handbook § 506(B) (3d ed. 1993 & Supp. 2007)). The admission of the 911 call did not violate Rule 5-403; the 911 call neither influenced the jury to disregard the evidence, nor did it produce an emotional response that logic could not overcome.[4]

Appellant also argues that the Due Process Clause precluded admission of the identifying statements in the 911 call. In making this argument, appellant notes that the Court of Appeals has held that "the due process standard only bars admission of evidence that is so extremely unfair that its admission violates 'fundamental conceptions of justice.'" *Armstead v. State*, 342 Md. 38, 84 (1996) (internal quotation marks omitted). In making his due process argument, appellant states, "the court erred in ruling that [the caller's statements] were not barred by Rule 5-403 and [appellant's] right to due process. Without knowing who the caller was, [appellant] could not cross-examine her or even investigate whether she saw the relevant events and was able to identify him based on personal knowledge." On this record, we cannot say that the acts complained of were "of such quality as necessarily prevent[ed] a fair trial." *Id*. at 85 (quotation marks omitted) (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)). Accordingly, the admission of the 911

[4] In his brief, appellant cites to a federal district court case from California, *United States v. Ng*, 2017 WL 4119158 at 1 (N.D. Cal. 2017), and urges us to find that 5-403 prejudice also occurs "where admission of evidence would 'significantly interfere' with a defendant's ability to cross-examine an adverse witness or mount a defense." The limited legal analysis in *Ng* is unpersuasive, and, in any event, we are not bound by federal trial court decisions.

call was not so extremely unfair that its admission violated fundamental conceptions of justice.

III. Exclusion of Evidence

Appellant's final argument on appeal is that the trial court erred in sustaining a hearsay objection during appellant's cross-examination of Detective Jackson, the lead detective assigned to appellant's case. During cross-examination, appellant's trial counsel asked Detective Jackson about the bullets extracted from Crawley, the deceased victim. The following colloquy then took place:

[DEFENSE COUNSEL]:	When a firearm exam is done on a weapon that you submit to ECU, or Evidence Control Unit, where bullets are recovered, do you receive any paperwork back from the laboratory?
[DETECTIVE JACKSON]:	Yes, ma'am.
[DEFENSE COUNSEL]:	As lead detective, you would get all reports from any experts in this case, correct?
[DETECTIVE JACKSON]:	Yes, ma'am.
[DEFENSE COUNSEL]:	Okay. Do you recall receiving a report from James Wagster?
[DETECTIVE JACKSON]:	I'm sure I received a report, yes, ma'am. I just can't recall off the top of my head.
[DEFENSE COUNSEL]:	And his role in this case was the firearm examiner; is that correct?
[DETECTIVE JACKSON]:	Yes, ma'am.

[DEFENSE COUNSEL]:	If you saw the report that he sent to you and that you received, would it refresh your recollection as to what the bullets were –
[THE STATE]:	Objection, Your Honor.
[DEFENSE COUNSEL]:	-- in this case?
[THE STATE]:	I'm sorry. Objection, Your Honor. It's hearsay.
THE COURT:	Can counsel approach?

(Counsel and the defendant approached the bench and the following ensued:)

[DEFENSE COUNSEL]:	Your Honor, he said he doesn't recall. He said he did receive the report. So, I think --
[THE STATE]:	But the report is prepared by someone else entirely. I mean, it's Mr. Wagster's report. I mean, Mr. Wagster would be the one who would be able to answer that question.
THE COURT:	Sustained.

Appellant concedes that he sought to elicit hearsay testimony, but argues that the testimony would have been admissible, and that the trial court erred in sustaining the State's objection.

Appellant relies on Rule 5-803(b)(8), which permits the admission of public records and reports, to argue that the court erred in sustaining the objection. He further argues that, because the State "did not suggest at any point that [Mr. Wagster's] findings were unreliable or untrustworthy" and because "the court made no such finding," the factual

findings within that report were admissible from Detective Jackson's testimony. According to appellant, this error "kept Mr. Wagster's findings from the jury."

We conclude that the court did not err. First, appellant never sought to introduce Mr. Wagster's report, and the report is not in the record. Without the report, we are unable to verify its admissibility under Rule 5-803(b)(8)(A). That Rule provides "the following are not excluded by the hearsay rule, even though the declarant is available":

> (8) Public Records and Reports. (A) Except as otherwise provided in this paragraph, a memorandum, report, record, statement, or data compilation made by a public agency setting forth
> (i) the activities of the agency;
> (ii) matters observed pursuant to a duty imposed by law, as to which matters there was a duty to report;
> (iii) in civil actions and when offered against the State in criminal actions, factual findings resulting from an investigation made pursuant to authority granted by law[. . . .]

Here, although Detective Jackson testified that Wagster was a firearms examiner, we have no way of knowing whether he is an employee or agent of a "public agency" as required by the Rule. Even if Wagster is an employee or agent of a public agency, the record is devoid of any description of the "activities of the agency," whether Wagster's report was made "pursuant to a duty imposed by law," or whether the factual findings were the result of "an investigation made pursuant to authority granted by law" as required by Rule 5-803(b)(8)(A)(i) to (iii). To the extent that appellant wanted Detective Jackson to read Wagster's conclusions as a firearms examiner into the record rather than admit the record itself, *Reynolds v. State*, 98 Md. App. 348 (1993) is instructive. There, this Court

considered whether expert opinions contained in hospital records were admissible. We stated,

> Opinions contained in a hospital record are not excluded under the rule against hearsay. They are, however, subject to the foundational requirements that apply to expert testimony. For an opinion to be admitted through a hospital record it must appear from the record itself that the person who expressed the opinion is qualified to do so.

Id. at 358. Rule 5-702 requires a court to first determine: 1) the qualifications of a witness as to his or her knowledge, skill, experience, training or education; 2) the appropriateness of the expert testimony on the subject; and 3) whether a sufficient factual basis existed to support that expert's testimony. Because appellant was apparently attempting to elicit an expert opinion concerning the relationship between the bullets and the firearms recovered by the police, and because Wagster did not testify at trial, the foundational requirements that apply to expert testimony are lacking here. For these reasons, the court did not err in excluding testimony related to Wagster's forensic examination.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.