Circuit Court for Montgomery County
Case No. 125769

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1567

September Term, 2017

ANTONIO DARNELL MATTHEWS

v.

STATE OF MARYLAND

Woodward, C.J.,
Fader,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: August 1, 2018

Following a jury trial in the Circuit Court for Montgomery County, Antonio Matthews, appellant, was convicted of second-degree assault. Matthews raises two issues on appeal: (1) whether the circuit court erred in admitting a recording of a 911 call because, he claims, it was inadmissible hearsay, and (2) whether the evidence was sufficient to support his conviction. For the reasons that follow, we affirm.

At trial, the State played a recording of a 911 call from Matthews's cousin, Michelle Harriday, who was present at Matthews's residence during the assault. In that call, Harriday told the 911 operator that: (1) Matthews was "beating his wife (the victim) with a crow bar"; (2) she and the victim's children were trying to hide from Matthews because he had threatened "to get a shotgun and kill us all"; (3) everyone in the residence was "in danger"; and (4) they needed police and an ambulance. The 911 call was admitted over Matthews's objection as an excited utterance.

Harriday also testified for the State but was a reluctant witness. Although she admitted making the statements in the 911 call, she denied that they were true. Instead, she testified that the victim was, in fact, the initial aggressor and that Matthews had only struck her "accidentally" when he was "fighting back." Harriday also claimed, somewhat inconsistently, that she was drunk and did not remember "most" of the evening.

Matthews first contends that the circuit court erred in admitting Harriday's 911 call because, he claims, it was not admissible as an excited utterance. Maryland Rule 5-803(b)(2) defines the excited utterance exception to the hearsay rule as "[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. "The proponent of a statement purporting to

fall within the excited utterance exception must establish the foundation for admissibility, namely personal knowledge and spontaneity." *Parker v. State*, 365 Md. 299, 313, 778 A.2d 1096, 1104 (2001)(emphasis added).

Notably, Matthews does not challenge Harriday's personal knowledge of the assault or the spontaneity of her comments to the 911 dispatcher.[1] Rather, his sole contention is that Harriday's statements were not admissible because she "refused to vouch for [them]," at trial. In doing so, Matthews seeks to superimpose upon the excited utterance exception a foundational requirement that does not exist. The Court of Appeals has explained that "[t]he rationale behind the excited utterance exception is that the startling event suspends the declarant's process of reflective thought, thus reducing the likelihood of fabrication." *State v. Harrell*, 348 Md. 69, 77 (1997) (citation omitted). Thus, "[t]he essence of the excited utterance exception is the inability of the declarant to have reflected on the events about which the statement is concerned." *Parker*, 365 Md. at 313 (citation and quotation marks omitted). To conclude that an otherwise admissible excited utterance could be deemed inadmissible based solely on the fact that the declarant chose to disavow it upon further reflection would, of course, defeat the very purpose of the excited utterance exception. Consequently, we hold that the trial court did not err in admitting the 911 call as an excited utterance.

Matthews also claims that the evidence was insufficient to sustain his conviction for second-degree assault because Harriday was the sole eyewitness to the assault and

[1] In any event, we have reviewed the record and are persuaded the State clearly established each of these foundational requirements.

"recanted her allegations against [him], made in the 911 call, and accused the complainant of being the aggressor and the only person who used a weapon." However, when a defendant is tried by a jury, appellate review of sufficiency of the evidence is available "only when the defendant moves for a judgment of acquittal at the close of all the evidence and argues precisely the ways in which the evidence is lacking." *Mulley v. State*, 228 Md. App. 364, 388 (2016) (citation omitted). The issue is not preserved "when [the defendant]'s motion for judgment of acquittal is on a ground different than that set forth on appeal." *Id*. Here, defense counsel did not move for a judgment of acquittal at the close of all the evidence. Moreover, when making his motion for judgment of acquittal at the close of the State's evidence, defense counsel only contended that the evidence was insufficient to establish that the victim's injuries were sufficiently serious to constitute a first-degree assault. That is not the claim that Matthews now advances. Consequently, his sufficiency of the evidence claim is not preserved for appeal.

Moreover, even if preserved, Matthews's contention lacks merit. "The standard for our review of the sufficiency of the evidence is 'whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Neal v. State*, 191 Md. App. 297, 314 (2010) (citation omitted). "The test is 'not whether the evidence *should have or probably would have* persuaded the majority of the fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.'" *Painter v. State*, 157 Md. App. 1, 11 (2004) (citations omitted). In applying the test, "[w]e defer to the fact finder's 'opportunity

to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence.'" *Neal, supra,* 191 Md. App. at 314 (citation omitted).

In addition to the 911 call, the State presented evidence that the victim had spoken to the responding officers and told them that Matthews had gotten angry at her, struck her in the face, pulled her to the ground, and kicked her in the head.[2] Moreover, the radiologist who examined the victim at the hospital indicated that she had sustained an "orbital blowout fracture," caused by "blunt trauma" to the left side of her face. That evidence, if believed, was legally sufficient to support a finding of each element of the second-degree assault charge beyond a reasonable doubt. *See Archer v. State*, 383 Md. 329, 372 (2004) ("It is the well-established rule in Maryland that the testimony of a single eyewitness, if believed, is sufficient evidence to support a conviction."). The fact that Harriday testified, inconsistent with her 911 call, that the victim was the initial aggressor does not affect the sufficiency of the evidence because, in weighing the evidence, the fact-finder "can accept all, some, or none of the testimony of a particular witness." *Correll v. State*, 215 Md. App. 483, 502 (2013).

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

[2] The victim asserted her marital privilege and did not testify at trial.