Circuit Court for Anne Arundel County
Case No. 02-K-13-001824

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2352

September Term, 2018

ORLANDO MARECUS JONES

v.

STATE OF MARYLAND

Reed,
Shaw Geter,
Raker, Irma S.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: February 26, 2020

A jury of the Circuit Court for Anne Arundel County convicted Orlando Marecus Jones ("Appellant") of possession of a regulated firearm after a disqualifying crime, carrying a handgun, and reckless endangerment. The court imposed a sentence of 15 years' incarceration for possession of a firearm after a disqualifying conviction, a concurrent term of three years for wearing or carrying a handgun, and five years' for reckless endangerment. Appellant timely filed this appeal and presents the following question for our review, which we have expanded for clarity:[1]

I. Did the trial court err by admitting the statements made in the anonymous 911 call over Appellant counsel's objection?

For the reasons that follow, we answer in the affirmative and reverse Appellant's convictions.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are based on trial testimony. On July 20, 2013, just after 6:00 p.m., the Annapolis Police Department ("APD") received an anonymous call reporting a shooting in the 1300 block of Tyler Avenue. The police operator dispatched units to that area. Six minutes and twenty seconds after that call, police received a second anonymous 911 call in which the caller identified Appellant by his nickname, "Tutti," as being involved in the shooting. The call was transcribed[2] as follows:

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[1] Appellant presents the following question: "Did the trial court err by admitting hearsay?"

[2] The recording of the 911 call was not transcribed or admitted into evidence during the circuit court proceedings. Rather, the recording was transcribed for purposes of this appeal upon this Court's grant of Appellant's Unopposed Motion to Correct the Record.

OPERATOR: Annapolis City 911. Where is your emergency?

CALLER: They were shooting in the Robinwood Area.

OPERATOR: Okay. I've got officers down there. Do you - - do you know - -

CALLER: Yeah. And it was the boy name Tooty Brown (phonetic).[3]

OPERATOR: Okay. What was his name?

CALLER: Tooty. They call him Tooty.

OPERATOR: Okay.

CALLER: They know (indiscernible).

OPERATOR: Do they - - do you know his real name?

CALLER: That's his nickname. The polices probably know his nickname. He was shooting on the street like that. That doesn't make any sense. This boy need to be off the street.

OPERATOR: I understand.

CALLER: He - -

OPERATOR: Do you know who he was shooting at?

CALLER: No. Everybody outside. I had my cookout and everybody started running in the house.

OPERATOR: Okay.

CALLER: This is ridiculous.

OPERATOR: Okay.

[3] In closing argument, the prosecutor suggested that the caller apparently thought that Appellant shared his mother's last name, which, according to the prosecutor, is Brown.

CALLER: And it's Tooty. They know who he is. The Annapolis police know who he is. It's him.

OPERATOR: Okay.

CALLER: (Indiscernible) - -

OPERATOR: Well, I'll - - I'll send someone down to talk to you and we'll - -

CALLER: No. You don't need to talk to me.

OPERATOR: - - (indiscernible). Okay. We'll - -

CALLER: Just send somebody and you alls just get him.

OPERATOR: Okay. We'll go talk to him.

Detective Shomar Johnson was one of the officers who responded to the call. He spoke to Appellant's aunt, Tina Brown, who stated that she knew who was involved. Detective Johnson transported Ms. Brown to the police station to give a statement. On the way, Ms. Brown told Detective Johnson that she knew the two people that were shooting at each other and identified them by their nicknames, "Dummy" and "Tutti." Ms. Brown testified at trial that Appellant is her nephew, and that he is known by the nickname, "Tutti." She stated that, on the day of the shooting, she was attending a baby shower for her niece that was being held at her mother's house at 1385 Tyler Avenue. Appellant was present at the house.

Ms. Brown was sitting outside with four or five other people when she noticed a car that had stopped nearby. An individual whom she identified as "Dummy" got out of the passenger side of the car and positioned his hand on the roof of the car in a way that indicated to her that he had a gun. She heard what she thought were two gunshots.

Appellant then "came from in front of the door," pulled out a gun from his waistband, and started shooting back, firing off four of five rounds. The car that Dummy arrived in sped off without Dummy, who then ran away.

While the other individuals in the area ran in response to the shooting, Ms. Brown "sat there for [ ] two or three minutes because [she] was kind of shocked that this was going on again." On cross-examination, Ms. Brown denied that she was under the influence of PCP[4] at the time of the shooting. She was also questioned about a signed statement she had given to Detective Steven Sugg in which she stated that Dummy started shooting at "someone," but she did not identify Appellant as the intended target. On redirect examination, Ms. Brown explained that she was not asked to identify the person who shot back at Dummy.

Detective Sugg, an APD officer with thirty years of experience, stated that he spoke to Ms. Brown "minutes" after the incident. According to Detective Suggs, Ms. Brown stated that "Dummy exited the vehicle's passenger compartment and attempted to shoot at another individual named Orlando who was…starting to shoot back at Dummy." Ms. Brown told Detective Suggs that "Orlando fired two or three shots while he was in front of 1385 Tyler Avenue[,]" at which point Dummy "started to run" and "fired several rounds back at Orlando." Detective Suggs stated that Ms. Brown was "cooperative" and

[4] "PCP" is the abbreviation for the hallucinogenic drug known as phencyclidine.

"intelligent" and did not appear to him to be under the influence of drugs or alcohol.[5] A couple hours after speaking with Ms. Brown at the scene of the shooting, Detective Suggs interviewed and obtained her written statement at the police station. At trial, Ms. Brown's recorded interview was played for the jury.[6]

On cross-examination, Detective Suggs confirmed that, in her recorded interview, Ms. Brown stated that "the person in the car was shooting at the person standing at the door," but that "she didn't know who was in front of her mother's house[,]" and that she was not aware that Appellant had a weapon. Detective Suggs was also shown a copy of Ms. Brown's written statement and agreed that she stated that Dummy "pulled his gun out on someone[,]" but she did not identify or mention Appellant at that time. Detective Suggs explained that the primary focus of the interview was "to locate who the people were in the car," and he did not ask Ms. Brown any questions about Appellant because "part two of that investigation was going to be focused on [Appellant] and his role[.]" Detective Suggs further stated that he asked Ms. Brown to prepare a written statement on "[w]hat she saw about Dummy." The day after the shooting incident, Ms. Brown was shown a photo array and identified Appellant as one of the people involved in the shooting.

Appellant's jury trial commenced on September 4, 2014. On the second day of trial, the prosecutor informed the court of her intent to offer into evidence the second anonymous

[5] Detective Suggs stated that he had encountered individuals under the influence of PCP "many times" during his 30-year career in law enforcement and stated that Ms. Brown did not exhibit any of the signs of being under the influence of PCP.

[6] Although Ms. Brown's recorded interview was played at trial, the audio was not transcribed in the trial transcript and the recording itself is not part of the record before us.

911 call, particularly the statement identifying Appellant by his nickname as being involved in the shooting. The prosecutor asked to approach the bench[7] then argued that the 911 call was admissible pursuant to the "excited utterance" and "present sense impression" exceptions to the hearsay rule. The call was not played for the court at that time, but the prosecutor proffered that the caller said, "there's a shooting going on[,] [y]ou need to come fast…Tudy's [sic] shooting up the neighborhood." The prosecutor argued that the call was contemporaneous with the shooting and stated that the caller was "clearly still under the excitement of the event because she sounds quite alarmed and is obviously calling saying . . . you need to stop it."

Defense counsel challenged the State's proffer, stating that it was "incorrect," and "not what happened." Defense counsel asserted that the call was not contemporaneous with the shooting, as there was a six-minute "delay" between the first anonymous 911 call that initially alerted police to the shooting and the second anonymous 911 call at issue. Defense counsel disagreed with the prosecutor's characterization of the caller's voice as "alarmed," contending that the caller was "not excited."

Appellant's counsel moved to exclude the second call, however the court denied the motion, noting that the evidence so far was that "this is…a shootout that took place over a period of time…This is not one shot that was fired six minutes earlier. This was an event

[7] On the first day of trial, before the first witness was called, the court and counsel discussed a motion in limine relating to the 911 call, and it was agreed that the motion would be addressed later in the trial, when the court "had a feel for the case."

that may…not have taken place all at one particular moment." The recording of anonymous 911 calls were then admitted into evidence and played for the jury.

Also admitted into evidence at trial were two nine-millimeter bullets and four nine-millimeter shell casings that the officers had recovered from "the front left of 1337 Taylor Avenue." No fingerprints were recovered from the bullets or casings, and the DNA tests were inconclusive. Nonetheless, the detectives were able to determine that the four shell casings were fired from the same firearm, and one of the bullets had similar markings to that of the four shell casings. Based on those findings, the expert witness for the State testified that the bullet "possibly [ ] cycled through the same firearm." No handguns were recovered in connection with the investigation into the shooting.

During his case-in-chief, Appellant's counsel called four witnesses. One of whom was Corporal Jennifer Crews-Carey, who had retired from the Annapolis Police Department by the time of trial. Corporal Crews-Carey stated that when she responded to the scene of the shooting and spoke to Tina Brown, Ms. Brown told her that: (1) "she saw Dummy point a gun in the direction of her mother's house[;]" (2) "it appeared that [Dummy] was trying to fire off rounds, but the gun did not work[;]" and (3) "after Dummy tried to fire the gun he then got into the front passenger side of the silver Caddy" and "drove off." Corporal Crews-Carey further testified that Ms. Brown did not mention anyone else involved in the shooting by name. On cross-examination, Corporal Crews-Carey explained that it was not her role to interview Ms. Brown more thoroughly, and she could not recall if she had asked Ms. Brown whether other people were involved.

Appellant's counsel also called Derek Taylor, Ms. Brown's brother. Mr. Taylor testified that he lives with his mother and was upstairs at the time of the shooting. He testified that Ms. Brown uses PCP "every day" and that he saw Ms. Brown using PCP the day of the shooting. He observed that Ms. Brown was "moving very slowly[,]" that day, her speech was "slurry[,]" and her eyes were "bloodshot red." According to Mr. Taylor, Appellant arrived at the house "after everything was over."

The court also heard testimony from Detective Jon-Paul Hipsky, another officer assigned to investigate the shooting incident. Detective Hipsky testified that he met with Ms. Brown approximately seven hours after the shooting to show her a photo array. During that meeting, Ms. Brown identified Appellant as being involved in the shooting. However, Ms. Brown also stated that she heard gunshots, but she did not know who was standing at the door to her mother's house because she did not turn around. Detective Hipsky testified that Ms. Brown was cooperative and did not appear to be "under the influence of anything." However, Officer Teal, another one of the responding officers, was the last witness called by Appellant's counsel. Although having only spoke to Ms. Brown for "a minute or two,"[8] Officer Teal testified that Ms. Brown was "intoxicated[,]" "had slurred speech,' and "her eyes appeared glassy."

Presented with the aforementioned evidence and testimony, the jury found Appellant guilty of possession of a regulated firearm after a disqualifying crime, carrying a handgun, and reckless endangerment.

[8] Officer Teal's first name is not included in the transcript.

STANDARD OF REVIEW

"[W]hen the issue involves whether evidence constitutes hearsay, that is a legal question that we review de novo." *Baker v. State*, 223 Md. App. 750, 760 (2015). "Whether hearsay evidence is admissible under an exception to the hearsay rule, on the other hand, may involve both legal and factual findings." *Id*. "In that situation, we review the court's legal conclusions *de novo*, but we scrutinize its factual conclusions only for clear error." *Id.* at 538.

DISCUSSION

A. Parties' Contentions

Appellant contends that the second anonymous 911 call should have been excluded as inadmissible pursuant to the rule against hearsay, and the call did not fall within an exception to the rule. Specifically, he argues the present sense impression exception to the hearsay rule was inapplicable because the caller did not describe the events while she perceived them. The caller spoke in the past tense, and the statements were not made "immediately after" the shooting, rather "some unknown length of time" thereafter. Appellant further contends that the call was not admissible under the "excited utterance" exception to the rule against hearsay because the caller "sounded fairly calm – perhaps annoyed or upset, but hardly overwhelmed or hysterical – and offered her considered opinions about Appellant and the shooting." Appellant argues that the error in admitting the second anonymous 911 call was not harmless because the only other evidence identifying Appellant as the shooter came from Ms. Brown, who gave "numerous

inconsistent versions of events," and, according to two witnesses, "appeared highly intoxicated at the time of the incident."

The State counters that the trial court properly admitted the second anonymous 911 call as a present sense impression because it was placed within minutes of the shooting, and its contents were corroborated by other evidence The State further maintains that "the excitement in the caller's voice combined with the short lapse of time between the call and the shooting," and the caller's apparent belief that "there was an ongoing emergency," satisfied the foundational requirements for the statements to be admitted as an excited utterance. We disagree.

B. Analysis

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). "A trial court has 'no discretion to admit hearsay in the absence of a provision providing for its admissibility.'" *Vielot v. State*, 225 Md. App. 492, 500 (2015) (quoting *Gordon v. State*, 431 Md. 527, 535 (2013)) (in turn quoting *Bernadyn v. State*, 390 Md. 1, 7-8 (2005)). *See also* Md. Rule 5-802 ("Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible.")

Exceptions to the rule against hearsay are provided for in Maryland Rule 5-803. Two of the exceptions are relevant to the case before us. The first is an "excited utterance," which is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Md. Rule 5-803(b)(2).

The other exception at issue is "present sense impression," which is defined as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Md. Rule 5-803(b)(1). The State, as the proponent of the evidence, bears the burden of proving that the evidence falls within an exception to the hearsay rule. *Morten v. State*, 242 Md. App. 537, 546-47 (2019).

1. Excited Utterance

The Court of Appeals has explained that "[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." *Mouzone v. State*, 294 Md. 692, 697 (1982) (overruled on other grounds by *Nance v. State*, 331 Md. 549 (1993)). The exception "requires a startling event and a spontaneous statement which is the result of the declarant's reaction to the occurrence." *Id.* "The rationale for overcoming the inherent untrustworthiness of hearsay is that the situation produced such an effect on the declarant as to render his [or her] reflective capabilities inoperative." *Id.*

Timing is a "critically important factor" in assessing whether the statement falls within the exception for an excited utterance. *Morten*, 242 Md. App. at 548. "So long as the declarant, at the time of the utterance, was still in the throes of the 'exciting event' and therefore not capable of reflective thought, and sufficient foundation was laid to enable the trial court to reach this conclusion, the statement is admissible." *Id.* at 549 (quoting *Harmony v. State*, 88 Md. App. 306, 320 (1991)).

In *Morten*, which Appellant cites as "highly persuasive if not outright dispositive" of the issue in this case, an unidentified female made three 911 calls shortly after a fatal

shooting.[9] *Id.* at 542. The trial court admitted all three calls under exceptions to the hearsay rule: the first call as an excited utterance, and the second and third calls as present sense impressions. *Id.*

In the first call, the caller in *Morten* stated that she "heard somebody got shot . . . on Reisterstown Road and [she] saw two guys running up the alley[,]" and that she then saw them throw something into the alley. *Id.* at 542-43. When the police operator asked whether it was a gun that was thrown into the alley, the caller responded: "I just heard a shot and then I saw them running." *Id.* at 543. The caller gave a description of the physical characteristics of the two individuals and how they were dressed. *Id.*

In the second call, which came in six minutes later, the same caller advised that the police were "looking in the wrong direction" and provided details of the area where she saw the item thrown. *Id.* at 543-44. Eight minutes after that, a third call came in and the caller again advised that the police officers were not looking in the right area and directed them to the "empty houses on the left" side of the alley. *Id.* at 544.

In holding that the court erred in admitting the first call under the excited utterance exception to the hearsay rule, we first noted that the hearsay declarant was unidentified, which imposed a heavier burden on the State, as the proponent of the evidence, to establish trustworthiness, "primarily because it is more difficult to establish personal observation

[9] Appellant filed a reply brief on September 6, 2019, two days after our decision in *Morten* was filed, and three days after the due date for the reply brief, along with an unopposed motion to extend the time for filing the reply brief, or in the alternative, to accept the brief as timely filed. We hereby grant the motion to accept Appellant's reply brief as timely filed.

and spontaneity where the declarant is unknown." *Id.* at 549 (quoting *Parker v. State*, 365 Md. 299, 314 (2001)). Ultimately, we held that the first call did not qualify as an excited utterance because the call was made 24 minutes after the shooting, the declarant was "narrating past events, not discussing present excitement[,]" and the wording of the declarant's statements "convey[ed] neither a sense of immediacy nor a sense of emotional distress." *Id.* at 550. We concluded that "[t]he decision to call 911 and make a report to the police was a conscious and reflective choice of a good citizen to help the police solve a crime. It was not an uncontrolled emotional spasm in response to overpowering excitement." *Id.* at 552.

Having reviewed the recording of the 911 call at issue, we conclude that the statements contained therein do not qualify as an excited utterance. The call was placed six minutes after police received the initial report of shots fired, and the unidentified caller was narrating past events, signifying that the shooting was over: "They were shooting in the Robinwood Area," "[I]t was the boy name Tooty Brown," "He was shooting on the street like that," "[E]verybody started running in the house." The intonation and wording of the caller's statements do not appear to be either an "uncontrolled emotional spasm in response to overpowering excitement" or a "spontaneous statement" made while the caller's reflective capabilities were rendered inoperable. Rather, as in *Morten*, the caller appeared to have made a conscious choice to call 911 to help the police solve the crime. Moreover, we are persuaded that the caller's statements identifying Appellant, whom she described as well-known to the police, were reflective given her admitted desire for the operator to "just send somebody" to get Appellant "off the street."

2. Present Sense Impression

In *Morten*, although we found inconsequential the hearsay statements in the second and third 911 calls, wherein the caller directed police to the location of the discarded item, as they "neither added to nor subtracted from the State's case," we briefly commented on the hearsay exception for present sense impressions for future guidance. *Morten*, 242 Md. App. at 557. We noted that, to constitute a present sense impression, the statement "must have been made either during the declarant's perception of the event or condition in question or immediately afterwards. Anything more than a slight lapse of time between the event and the statement will make the statement inadmissible." *Id.* at 556 (quoting Lynn McClain, Maryland Evidence: State and Federal Sect. 803(1) at 435-36 (3d ed. 2013)) (emphasis omitted). We further noted that "[t]he present sense impression becomes inadmissible hearsay when the declarant stops talking about what he is now observing and starts talking about what he observed in the past." *Id.* at 557-58 (quoting Joseph F. Murphy, Jr., Maryland Evidence Handbook Sect. 803(b) (4th ed. 2010)) (emphasis omitted). We commented that, although there were one or two statements in the two calls that qualified as a present sense impression, most of the statements were a narration of past events: "'There was a shooting.' 'They're looking for a gun.' '[I]t was two guys. They threw it, more like buried it.'" *Id.* at 557. We cautioned that the calls "illustrate [ ] how easy it is for a seemingly simple declaration to "wander randomly back and forth between present impression and past narration." *Id*. at 558.

Here, the statements in the 911 call were not what the caller was observing but were entirely a narration of past events. Moreover, the statements were made at least six minutes

after the shooting, which, under the circumstances of this case, were more than a "slight lapse of time," weighing against a finding that they were a present sense impression. Accordingly, we conclude that the statements do not amount to present sense impressions for the purposes of the exception to the rule against hearsay and should not have been admitted as such.

3. Harmless Error

"In general, when an appellate court finds that the trial court erred . . . it employs harmless error review to determine whether reversal is warranted." *Newton v. State*, 455 Md. 341, 353 (2017). "Under harmless error review, reversal is warranted unless 'a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.'" *Id.* (quoting *Simpson v. State*, 442 Md. 446, 457 (2015)).

It is quite possible that the jury could have discredited Ms. Brown's trial testimony in light of her arguably inconsistent statements regarding Appellant's involvement in the shooting, and the testimony of Derek Taylor and Officer Teal that Ms. Brown was either under the influence of PCP or intoxicated at the time of the shooting. Accordingly, because the only other evidence tying Appellant to the shooting was Ms. Brown's testimony, we cannot conclude that the error in admitting the 911 call was harmless beyond a reasonable doubt.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED. COSTS TO BE PAID BY ANNE ARUNDEL COUNTY.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/2352s18cn.pdf