Circuit Court for Baltimore City
Case No. 117285014

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2603

September Term, 2018

SEAN MORRIS

v.

STATE OF MARYLAND

Leahy,
Gould,
Battaglia, Lynne A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: July 30, 2020

On the afternoon of August 30, 2017, Troy Gladney[1] was fatally shot eight times in Edmonson Village, a residential neighborhood in Baltimore City. After hearing eyewitness testimony and viewing surveillance camera footage from the area, a jury in the Circuit Court for Baltimore City convicted Sean Morris, appellant, of first degree murder, using a firearm in the commission of a crime of violence, wearing and carrying a handgun, reckless endangerment, and possessing a prohibited firearm after a disqualifying conviction. At Mr. Morris's subsequent sentencing hearing, the court imposed a life sentence plus a consecutive term of thirty-five years.

Mr. Morris timely appealed and presents three questions for our review, which we have reordered:

1. "Did the court err in admitting testimony about witnesses' fear of Appellant?"

2. "Did the court err in refusing to admit evidence regarding a witness's mental condition?"

3. "Did the prosecutor engage in improper closing argument requiring reversal?"

Because we conclude that the court erred in admitting testimony that witnesses were afraid, and that the error was not harmless, we reverse Mr. Morris's convictions and remand for a new trial. We will address the second question to provide guidance on remand; however, in light of our decision to reverse, we need not reach Mr. Morris's last question.

[1] At various points in the transcript Mr. Gladney is mistakenly referred to as Mr. Gladden.

BACKGROUND

Our summary of the record from Morris's trial in June 2018 provides background for our discussion of the issues rather than a comprehensive review of the evidence presented. At trial the State presented an eyewitness and circumstantial evidence to corroborate his testimony that after Mr. Morris greeted Mr. Gladney in full view of neighbors on the 700 block of Kevin Road, Mr. Morris shot Mr. Gladney multiple times in the head and back.

Jarmel Wesley[2] testified that, on the day of the shooting, he and a group of others were gathered on a front porch on Woodington Road, overlooking the intersection where Cranston Avenue becomes Kevin Road.[3] Troy Gladney, whom Mr. Wesley knew as "Ping" from growing "up in the same neighborhood" was standing within sight "closer to the street." Mr. Wesley saw Mr. Morris, whom he knew as "Diesel," walk past, greet a couple people that he knew, and then walk toward the corner store on Cranston Avenue. A little later, Mr. Wesley saw Mr. Morris on the street a "second time" and observed that he "went straight to Ping. He went straight towards Troy." Mr. Wesley related that "[t]he next thing I know, I just hear shots right in the area where. . . Ping was at in the middle of

[2] Although Mr. Wesley's first name is spelled differently at various points in the record, we shall use the spelling "Jarmel" as found in the transcript from his interview with police.

[3] As shown in the State's exhibits, Cranston Avenue crosses Woodington Road and becomes Kevin Road on the west side of Woodington.

the street. I just heard shots." Then Mr. Wesley saw Mr. Morris shoot Ping, who was lying on the ground.

Mr. Wesley did not tell the police, who were on the scene, what he saw because Mr. Morris was also in the crowd gathered there. According to Mr. Wesley, Mr. Morris had seen him, and Mr. Wesley "was nervous . . . more nervous or scared." Instead, on September 2, while out of Mr. Morris's sight, Mr. Wesley went to the police station and gave a statement about the shooting. In a photo array conducted on September 5, 2017, Mr. Wesley identified Mr. Morris as the person who killed Mr. Gladney.

Eddie Lange[4] testified that he grew up on Kevin Road in Edmondson Village near Mr. Morris, whom he called "Deez" or "Diesel." On the day of the shooting, Mr. Lange went to Edmonson Village to buy "the butes, Symboxin strips[,]"[5] from Mr. Morris. After Mr. Lange pulled over and got out of his car on Wildwood Parkway, the two talked briefly. According to Mr. Lange, Mr. Morris appeared "agitated and was in a rush." Mr. Lange testified, "And then I asked him what was wrong with him? He looked mad. He said, I'm about to go over there and kill one of these mother fuckers." Mr. Lange did not "think that much into" the statement and got back into his car, while Mr. Morris "walked off" in the opposite direction from where he lived, heading towards Woodridge and "[t]owards Kevin Road."

[4] Although Eddie Lange's last name is spelled "Lang" in the trial transcripts, we shall use the spelling "Lange" as found in the transcript from his interview with police.

[5] "Symboxin" seems to be a misspelling of the drug "Suboxone," which is available as "strips."

After Mr. Lange dropped off his purchase about "a half a block" away, he stopped his car again on Cranston Avenue, to talk to his "home girl." They soon "heard gunshots go off" but were "far enough away to know that it wasn't right where" they were. When Mr. Lange drove on, he saw "Deez running back down Woodridge[,]" in the direction of his home.

Mr. Lange contacted the Homicide Unit of the Baltimore City Police Department, on September 6, 2017, and offered to provide information about the shooting. On September 13, 2017, Mr. Lange voluntarily met with the investigating officers. In double-blind photo arrays conducted that same day, Mr. Lange identified two different photographs as Mr. Morris.[6] In addition, Mr. Lange identified Mr. Morris in a still photo taken from surveillance footage obtained from "the Cranston store," which has an address of 801 Woodington Road and is located at the corner of Cranston Avenue, within sight of the murder scene.

The State presented surveillance video footage and images from two stores in the area, in an attempt to corroborate the testimony of Mr. Lange and Mr. Wesley. Baltimore City Homicide Detective Michael Vodarick, who responded to the scene of the crime, confirmed that the "801 Video" was from the "Cranston store" at 801 Woodington Road, which was within sight of where the shooting occurred. The "823 Video" was from 823 Woodington Road, which was one block away from the intersection where Mr. Gladney

[6] Mr. Lange first selected a mistakenly-included photo of Mr. Morris's younger brother, saying that it looked "like it was a younger picture."

was murdered. When shown a still from the 823 Video, Mr. Lange had identified the person in that video as "Sean Morris, 'Diesel.'" About a minute later, at 1:53 p.m., the 823 Video showed "[p]eople running," which helped Detective Vodarick understand where the murder occurred. Another minute later, at 1:54 p.m., Detective Vodarick received the first call to respond to the shooting.

We shall add material from the record in our discussion of the issues raised by Mr. Morris.

DISCUSSION

I.

Testimony About Witnesses' Fear of Testifying

Mr. Morris contends that the trial court erred in admitting testimony by Mr. Lange and Mr. Wesley about their fear of Mr. Morris. Before setting out the parties' arguments in further detail, a review of the relevant portions of the record is necessary to provide context.

A. The Record

During the direct testimony of Eddie Lange, the State asked about his concerns in testifying:

> [THE STATE]: **Did there come a point when you were afraid to speak about this incident?**
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [MR. LANGE]: **Yeah, I was nervous about it. . . .**

> [THE STATE]: **Did there come a point where you did not want to come in to testify about this incident?**
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [MR. LANGE]: **Yes.**

(Emphasis added.)

Later, on redirect, Mr. Lange became upset that he was unable to remain anonymous and that his statement to police was filmed:

> I didn't know it was video. I didn't know it was picture. I didn't even know that I was being videoed. Like when I went down there, it was supposed to be anonymous. Like that, that's been my whole problem since, **I'm agitated sitting here. Like I'm very, very, very, very, very highly upset that I'm sitting here right now. Trust and believe, if I would not been made come, I wouldn't be here.**

(Emphasis added.) Subsequently, the State asked Mr. Lange why he gave the information to police, and Mr. Lange stated that he came forward because "Troy a good dude man."

Similarly, the State questioned Jarmel Wesley about his fear and reluctance about testifying:

> [THE STATE]: Mr. Wesley, at some point you didn't want to come to Court.
>
> [MR. WESLEY]: Say that, again.
>
> [THE STATE]: **Was there a time when you did not want to come to Court?**
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.

[MR. WESLEY]: **Answer, yes.**

[THE STATE]: And why is that?

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

[THE STATE]: Was there a point where someone had to bring you to Court?

[MR. WESLEY]: Yes.

[THE STATE]: **At any point, were you afraid to come to court?**

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled, you can answer that.

[MR. WESLEY]: **Yes.**

(Emphasis added.)

On redirect, the State returned to Mr. Wesley's reluctance about testifying:

[THE STATE]: And although you did not come to Court on your own, are you telling us what happened that day?

[MR. WESLEY]: Cor –

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[MR. WESLEY]: Yes.

(Emphasis added.)

B. The Parties' Contentions on Appeal

Mr. Morris asserts that, "in order for testimony of a witness's fear to be relevant and admissible, it must be linked to conduct by the defendant or procured by the defendant."

According to Mr. Morris, the testimony in question from his trial was "irrelevant and inadmissible" because "there was no connection shown between the witnesses' fear and any threats, nor was it shown that [Mr. Morris] engaged in any conduct directed toward the witness of an intimidating nature." Mr. Morris further argues that the "court's error in permitting Lang[e] and Mr. Wesley to testify about their fear of [him] was not harmless" because the State's evidence "depended almost entirely on the credibility of Lang[e] and Mr. Wesley," and "[t]heir 'fear' testimony quite possibly prompted the jury to overlook or minimize [credibility] problems."

The State responds that "there was no explicit testimony [from Mr. Lange or Mr. Wesley] that they were afraid of Mr. Morris[, n]or was there testimony about threats to witnesses." The State contends, "Mr. Morris relies on case law from Illinois, not Maryland[,]" and that Maryland does not require that testimony of a witness's fear "be linked to conduct by the defendant or procured by the defendant" in order to be relevant and admissible. According to the State, "Maryland law permits testimony about a witness's fear because it is relevant to their credibility and demeanor."

C. Analysis

While "[i]t is a bedrock principle in Maryland that the admission of evidence is committed to the sound discretion of the trial court[,]" *Claybourne v. State*, 209 Md. App. 706, 741 (2013), there are two analytical steps in our review of the trial court's decision to admit evidence. *Smith v. State*, 218 Md. App. 689, 704 (2014). We first consider "whether the evidence is legally relevant, a conclusion of law which we review *de novo*." *Id.* at 704

(citation omitted). Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. "Evidence that is relevant is admissible, but the trial court does not have discretion to admit evidence that is not relevant." *Smith*, 218 Md. App. at 704. The second step of our analysis requires us to determine whether the court "abused its discretion by admitting relevant evidence which should have been excluded as unfairly prejudicial." *Id.* (citation and internal quotation marks omitted).

In *Washington v. State*, the Court of Appeals examined the admissibility of evidence of threats in relation to the credibility of a witness. 293 Md. 465, 468 (1982). At a hearing the day before William Washington's trial for murder, an eyewitness failed to select him from a group of five men. *Id.* at 467. At trial the following day, however, the witness positively identified Mr. Washington during her direct examination. *Id.* The defense brought out her unsuccessful in-court identification on cross-examination, prompting the State to ask the witness to explain the inconsistency on redirect. *Id.* Over objections from the defense, the witness "attributed her inability to identify Washington to fear invoked by anonymous 'threat calls' that she had been getting at her job." *Id.* The court denied the defense's motion for a mistrial, but gave the jury a cautionary instruction that testimony by the witness about threats was "not evidence of guilt on the part of the Defendant since there is no connection of those threats, if any, with the Defendant." *Id.* at 467-68.

In addressing Mr. Washington's challenge to the witness's testimony, the Court of Appeals pointed to the consensus that "evidence of threats to a witness or fear on the part of a witness, in order to explain an inconsistency, is admissible in criminal cases for credibility rehabilitation purposes even if the threats or fear have not been linked to the defendant." *Id.* at 469-70. Ultimately, the Court held that "evidence of anonymous threats was admissible for the *limited purpose of explaining the [State's witness's] prior inconsistent statement* in an effort to rehabilitate the witness's credibility." *Id.* at 472 (emphasis added). Additionally, the Court noted, in dicta, that when evidence of threats to a witness or attempts to induce a witness not to testify or to testify falsely can be linked to the defendant, the evidence "is generally admissible as substantive evidence of guilt[.]" *Id.* at 468 n.1. Absent such linkage to the defendant, however, threats or attempts are not admissible as substantive evidence. *Id.*

In *Claybourne*, this Court held that the trial court properly exercised its discretion when it permitted a State witness, Angela Gibbs, to express concerns for her safety on redirect examination. 209 Md. App. at 737-38. Ms. Gibbs's trial testimony had differed from a pretrial statement she made to police, and defense counsel sought to establish that her pretrial statement had been "induced by a promise to get her out of jail." *Id.* at 738. Consequently, on redirect, and over defense objections, the State asked Ms. Gibbs whether she had expressed concerns for her safety during her meeting with police and whether she requested a referral to the Victim Witness Assistance Unit. *Id.* at 738, 741. Ms. Gibbs answered "Yes" to both questions. *Id.* at 741.

The appellant argued that "[Ms.] Gibbs's testimony was unduly prejudicial because it was unclear whether appellant was, in fact, responsible for her fear" and because the trial court did not instruct the jury that evidence of Ms. Gibbs's fear went only to her credibility. *Id.* at 737. We disagreed and held that "evidence explaining Ms. Gibbs'[s] inconsistencies was clearly admissible for the purpose of rehabilitating her credibility." *Id.* at 747. Further, we were "unpersuaded that the admission of general testimony by Ms. Gibbs that she was fearful as a result of her participation as a witness . . . was unduly prejudicial," and noted that, even if the testimony could be construed as such, the burden was on the appellant to request an appropriate limiting instruction. *Id.* at 748.

Likewise, in *Armstead v. State*, we held that the trial court did not err in admitting testimony from the State's witness, Leroy Simon, that he felt frightened and scared for purposes of assessing his credibility. 195 Md. App. 599, 644-45 (2010). After stating at the conclusion of his cross-examination that he needed to say something, Mr. Simon told the court that he had been threatened but was doing the best he could. *Id.* at 641. The court found the testimony prejudicial and instructed the jury to disregard it. *Id.* During redirect, the State asked Mr. Simon to address defense counsel's question on cross-examination about why he did not go to the police. *Id.* Mr. Simon said that he was "scared," prompting defense counsel to object. *Id.* The trial court overruled the objection because the testimony "went to 'why he is scared or didn't come forward or what have you.'" *Id.* The court also "distinguished this testimony from any testimony that Simon was specifically threatened." *Id.*

Later, the State asked the court to reconsider its ruling striking Mr. Simon's testimony that he had been threatened, arguing that "the threat was admissible to explain Simon's inconsistent statements in his testimony." *Id.* at 642. The court ruled that the testimony could be considered with a limiting instruction, and thereafter instructed the jury to consider that evidence for "the very limited purpose of weighing or deciding [Mr. Simon's] credibility or in explaining or tending to explain any previous inconsistent statements that he gave" and not to "use it as substantive evidence against the defendant because there is absolutely no evidence that the defendant was involved in any such threats or even knew about them." *Id.* at 642-43. In holding that the evidence was properly admitted "solely for purposes of assessing Simon's credibility," this Court explained that the "pertinent comment . . . came at the end of cross-examination and arguably was Simon's attempt to explain any inconsistencies elicited by defense counsel." *Id.* at 644-45.

Although we agree with the State that testimony about witness fear is admissible "because it is relevant to their credibility and demeanor[,]" we find no support in our decisional law for the State's argument that the trial court properly admitted testimony about Mr. Wesley and Mr. Lange's fear *prior to* any challenges to their credibility. Rather, the decisions of this Court and the Court of Appeals instruct that, in the absence of a link between the defendant's conduct and the witness's fear, testimony about a witness's fear is admissible only for purposes of rehabilitating the witness's credibility, after, for example, the witness has given inconsistent statements.

As Mr. Morris wrote in his brief, this case can be distinguished from *Washington* and its progeny because "most of the challenged testimony was elicited during the direct examination of State's witnesses, prior to any putative justification for rehabilitation could arise." The State argues that defense counsel put the credibility of Mr. Lange and Mr. Wesley at issue in her opening statement, telling the jury that the "case essentially comes down to two witnesses; Eddie Lang[e] and J[a]rmel Wesley and their testimony and their credibility." We are simply not persuaded that a general reference to the credibility of the State's primary witnesses afforded the State a green light to elicit testimony, on direct examination, about Mr. Lange and Mr. Wesley's fear and reluctance to testify in Mr. Morris's trial. In the absence of any inconsistencies that needed explanation, testimony from Mr. Lange and Mr. Wesley that they were "afraid" to come to court was unfairly prejudicial to Mr. Morris.

Accordingly, we hold that the trial court erred in overruling the defense objections during the testimony of Mr. Lange and Mr. Wesley. Because this error was not harmless, we reverse his convictions and remand for a new trial.

II.

Evidence of State Witness's Mental Condition

Mr. Morris next contends that the trial court erred in excluding evidence regarding the mental condition of Jarmel Wesley, the witness who testified that he saw Mr. Morris shoot Troy Gladney. Mr. Morris argues that during the cross-examination of Detective Vodarick, the court erroneously refused to admit another police officer's handwritten

"Incident Report" regarding his encounter with Mr. Wesley on June 17, 2018—just days before he testified in the underlying trial. That encounter resulted in Mr. Wesley's hospitalization and an "emergency petition" for a mental health evaluation. Again, we start with the record to provide context for the parties' contentions.

A. The Record

The exhibit at issue and that Mr. Morris proffered at trial is a police report with handwritten entries on a pre-printed form. Baltimore City Police Officer N.D. Rose reported that, on June 17, 2018 at 11:27 a.m., he responded to a call about a "mental crisis[.]" Officer Rose wrote:

> I responded to [a residence] for an armed person and spoke to Mr. Jamel [sic] Wesley who stated that there were people at his house trying to cause him harm. My investigation revealed the people outside of his house were his girlfriend and his girlfriend's mother. Mr. Wesley had the door locked but eventually opened it. Mr. Wesley was sweating heavily and foaming at the mouth and making no sense with his statements. Mr. Wesley stated that he had previously been a witness to a homicide and that individuals came to his house to assault him in reference. Mr. Wesley's girlfriend stated that he had been acting paranoid the last few days.

Officer Rose further reported that he "contacted Homicide Unit and spoke to Detective Vaughan who stated that there was no record of Jamel [sic] Wesley as a witness or of the homicide that Mr. Wesley alleged to have occurred." Officer Rose also "contacted [CitiWatch] to have them check the cameras in the area" of Mr. Wesley's residence, and "[CitiWatch] operator Baker stated that he checked both cameras and did not see any assault occur." As indicated in Officer Rose's report, "Medic 2" then "transported Mr.

Wesley to Harbor Hospital for a mental health evaluation, and [Officer Rose] followed the medic to Harbor Hospital to fill out the Emergency Petition paperwork."

Two days after this incident, on June 19, the State requested that Mr. Wesley be held without bail pending trial, which was scheduled to begin that day. At the motions hearing, the State proffered evidence that "associates of Mr. Morris" had been threatening and intimidating Mr. Wesley in connection with his testimony in this case. The State explained:

> [THE STATE]: Your Honor, the State's concern is that [Mr. Wesley] will not return. And so while this is a bail review for him, I am asking for no bail so that I can make sure he is here to testify. **Your Honor, he has expressed his concerns in reference to fear.** He's also and I spoke to him recently. He also indicated that he has been approached and jumped, correct?
>
> MR. WESLEY: Correct.
>
> [THE STATE]: **Jumped and in reference to this case and in reference to testifying. He's been intimidated. Individuals, associates of Mr. Morris have approached him and text him not to come to court. [Sic] Your Honor, Mr. Wesley was in the past working with our victim witness, relocation of victim witness services.**

(Emphasis added.)

Mr. Wesley told the court that after such incidents at his residence,

> I'm just worried about my family, trying to take care of my family. But it was a couple incidents due to me, and my life was threatened prior . . . to us coming to Court. Like people keep banging on my door saying, oh snitches can't stay around here and then threatening me and all that crap and calling[.]

The judge interrupted and told Mr. Wesley he was "familiar with that phenomenon unfortunately." Mr. Wesley apologized for being "a little shaky" and explained: "I just came home from the hospital. I had an anxiety attack due to people kicking in my doors,

calling me snitches knowing I was coming to court." After a detective confirmed Mr. Wesley's cooperation and desire to testify to "put this behind him," the trial court released Mr. Wesley on his own recognizance.

A couple days later, when Mr. Wesley testified at Mr. Morris's trial on June 21 and 22, 2018, he was not asked about the June 17 incident. Nor did defense counsel proffer Officer Rose's report about that encounter as evidence of Mr. Wesley's mental condition for impeachment purposes. Instead, counsel sought to introduce the report during Detective Vodarick's cross-examination, after asking him whether he was aware "that on June 17th of this year[,] Mr. Wesley was brought to the psych ward at Harbor Hospital[.]" The court overruled the State's objection to the question but asked the parties to approach the bench to address the State's objection to the report, prompting the following colloquy:

> THE COURT: I guess my question is, what are you trying to elicit, information off this document that has not been moved into evidence? If it's not in evidence, then he can't testify – he can testify, as you've indicated, what the nature of the form is, but if the contents have not – if this contains information and the document is not going to be moved into evidence, then that would not be competent evidence, the information in that document.
>
> [DEFENSE COUNSEL]: I'm just trying to establish relevancy, Your Honor, just to make sure that it's understood that this report concerns an aspect of this case, in other words, a witness. That's all. . . .
>
> THE COURT: **Well, I understand, but you're asking him to testify about – you're asking him to authenticate a document that he didn't create. You're asking him about information in a document that he didn't create.**
>
> [DEFENSE COUNSEL]: No, I understand that, but **under [Rule] 5-803(8)(A)(iii), it's a police report indicating an investigation used against the State by the accused and so it's a public record that can be admitted, even if the officer is not the author.**

* * *

[THE STATE]: Your Honor, may I be heard? This is not in reference to the investigation on Troy Gladney's murder at all. . . . It doesn't have anything in reference to officers that were assigned to the investigation, the crime scene investigation, or anything. . . .

THE COURT: Well, here's the exception. It's admissible when it pertains to a civil action or when offered against the State in a criminal action, factual findings resulting from an investigation and pursuant to authority granted by law, and what [defense counsel] is suggesting is that this is not a criminal action that was against Mr. Wesley, but was rather a civil commitment, or something along those lines, correct? . . .

[DEFENSE COUNSEL]: Well no. . . .

I would be seeking to admit it under the second half, in other words, in the criminal action, meaning the State of Maryland vs. Sean Morris; that this is an investigative report used by Mr. Morris against the State in this case concerning the mental state of a key State's witness in the case against Sean Morris.

THE COURT: Well, see, it says here – no, it says "a memorandum, report, record, statement, or data compilation made by a public agency . . . . and, then, under what circumstances you can offer it against the State in a criminal action. **"Factual findings resulting from an investigation and pursuant to authority granted by law."**

But let me look at what this is. It just appears to be a police report and it's a report – the standard, formal police department incident report. It's captioned "Emergency Petition[.]" And then it concerns Mr. Wesley's complaint that people were threatening him, physical observations of him foaming at the mouth and making no sense, and indicated being a witness to a homicide; and, then, eventually, Mr. Wesley is transported to Harbor Hospital for a mental evaluation. . . .

But as I read . . . . the exception, 5-803(A)(8) [sic], "Public Records," . . . "a memorandum, report, record, statement, or data compilation by a public agency setting forth in civil actions or offered against the State in criminal actions, factual findings resulting from an investigation and made pursuant to authority granted by law." **But there's no – there's no factual – the report doesn't make factual findings.** If the point of the report is –

[DEFENSE COUNSEL]: **I believe it does, Your Honor.**

THE COURT: How so?

[DEFENSE COUNSEL]: **I believe the responding officer investigates Mr. Wesley's assertions and reports, checks the cameras, determines that no assault had occurred, determines that people that Mr. Wesley thought were threatening him were, in fact, his girlfriend and his girlfriend's mother, makes factual findings concerning the demeanor and the mental state of Mr. Wesley.**

THE COURT: But it's not something he – **he's not somebody authorized by law to make that conclusion. Perhaps parts of it are** –

[DEFENSE COUNSEL]: **He is as an officer. An officer is authorized by law to file an emergency petition and then has to make factual findings[.]** . . . .

So I don't see where in the rule this report is excluded.

THE COURT: Well, I'm trying to refresh my recollection as to . . . petitions. I have to handle them once a year and what my understanding is, there may be a referral to a commissioner – the process is, as follows: a civilian and/or a police officer may have a concern about somebody's mental health, such as he or she poses a threat to . . . themselves or other individuals, whatever the case may be. There's a referral made to the Commissioner. The Commissioner screens it and then calls some lucky guy like me, or a judge – a judge with jurisdiction. The judge then can contact a person with the individual making the complaint, usually not a police officer; rather, usually a civilian family member, but I guess it could be a police officer, also. **But the police officer or the civilian is not making a factual finding. The person making the factual finding is the magistrate, the judge who comes down there, assesses the complaint, assesses the person making the complaint.**

So that's not the process as I understand it. That may be a basis for a referral, but not making – not necessarily making factual findings, as such. So, in that regard – and I'm not saying that if you had the officer available for this, whoever made the report or authored the report, that that wouldn't be necessarily – that would probably be impeachment information against Mr. Wesley, but **I don't believe that this – that is, this report – is the vehicle to do it inasmuch as I don't think it squarely fits within the public record and report exception of the hearsay rules**. So, in that regards, I'll sustain the objection.

(Emphasis added.)

B. The Parties' Contentions on Appeal

Mr. Morris contends that the trial court erred in excluding Officer Rose's police report on the ground that it "did not contain 'factual findings resulting from an investigation made pursuant to authority granted by law[,]'" within the meaning of Rule 5-803(b)(8)(A)(iii). In his view, the court narrowly construed the rule so that the only determination that constitutes a "factual finding" is "the ultimate determination to commit a person pursuant to an emergency petition." Mr. Morris maintains, however, that "the plain language of 'factual findings' easily covers the findings in the report."

Mr. Morris further asserts that the term "factual findings" should be construed "in the same way" under subsection (iii) of the rule as it is under subsection (iv), which authorizes the admission, in a final protective order hearing, of factual findings reported to a court during proceedings for a temporary protective order under the provisions of section 4-505 of the Family Law Article ("FL"). "The clear import" of subsection (iv), Mr. Morris asserts, is that "factual findings" "include those findings presented to the court and on the basis of which the court makes the ultimate finding of whether there has been abuse[.]" Mr. Morris continues that "factual findings" in subsection (iii) "must be read in the same way" to "include[] those finding[s] made by a police officer and reported to the authority responsible for making the ultimate determination as to whether to grant the emergency petition." The exclusion of Officer Rose's report was not harmless, Mr. Morris concludes, because "Mr. Wesley was the only witness to testify to seeing [Mr. Morris] shoot Gladney and there were problems with his credibility."

The State counters that "[m]uch of the report consists of inadmissible double hearsay[,]" and the "rest . . . does not consist of 'factual findings,' as that term is defined and used in Maryland law." According to the State, the other Maryland rules and statutes that use the term "findings of fact" almost all "relate to judicial or quasi-judicial 'findings.'" The State also asserts that Mr. Morris mistakenly relies on cases that "discuss the term 'factual findings' in terms of fact versus opinion" and "involve[] a more formal court or administrative agency-like report." In the State's view, the police report proffered here "was similar to interview notes" like those that "[f]ederal courts have held . . . did not constitute 'factual findings' within the meaning of the" analogous federal hearsay exception. The State further argues that "[a]ny error was harmless beyond a reasonable doubt" because, "[o]ther than declining to admit hearsay and double hearsay, the trial court did not limit Mr. Morris'[s] ability to adduce evidence."

In reply, Mr. Morris contends that "[t]he State did not argue below that the report contained hearsay within hearsay, and the court did not base its ruling upon a conclusion that the report contained hearsay within hearsay." In any event, Mr. Morris continues, "Mr. Wesley's statement that 'there were people at his house trying to cause him harm' is not hearsay[,]" but rather, "classic non-hearsay, evidence that he 'believed certain facts.'"

C. Analysis

Standard of Review

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule

5-801(c). Hearsay is not admissible, except as provided by the Maryland Rules or "permitted by applicable constitutional provisions or statutes[.]" Md. Rule 5-802. "If one or more hearsay statements are contained within another hearsay statement, each must fall within an exception to the hearsay rule in order not to be excluded by that rule." Md. Rule 5-805.

In the absence of a provision providing for the admissibility of a hearsay statement, a trial court has no discretion to admit the hearsay. *Paydar v. State*, 243 Md. App. 441, 452 (2019) (quoting *Bernadyn v. State*, 390 Md. 1, 8 (2005)). We review de novo a trial court's legal determination of whether evidence is hearsay and whether it is admissible under a hearsay exception. *Gordon v. State*, 431 Md. 527, 538 (2013). But, we will not disturb the trial court's factual findings underpinning the legal conclusion absent clear error. *Id.*

Maryland Rule 5-803(b)(8)

At issue here is Maryland Rule 5-803(b)(8), one of the enumerated exceptions to the rule against hearsay, authorizing admission of "public records and reports." The rule provides, in relevant part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (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**; or
> (iv) in a final protective order hearing conducted pursuant to Code, Family Law Article, § 4-506, factual findings reported to a court pursuant to Code, Family Law Article, § 4-505, provided that the parties have had a fair opportunity to review the report.
>
> (B) A record offered pursuant to paragraph (A) may be excluded if the source of information or the method or circumstance of the preparation of the record indicate that the record or the information in the record lacks trustworthiness.
>
> (C) Except as provided in subsection (b)(8)(D) of this Rule, a record of matters observed by a law enforcement person is not admissible under this paragraph when offered against an accused in a criminal action.
>
> (D) Subject to Rule 5-805, an electronic recording of a matter made by a body camera worn by a law enforcement person or by another type of recording device employed by a law enforcement agency may be admitted when offered against an accused if (i) it is properly authenticated, (ii) it was made contemporaneously with the matter recorded, and (iii) circumstances do not indicate a lack of trustworthiness.

Md. Rule 5-803(b)(8) (emphasis added).

Scope of the State's Objection

We note, as a preliminary matter, that the State made a general objection to the admission of the police report proffered by defense counsel. Although the court questioned defense counsel about the admissibility of the report, neither the court nor defense counsel requested that the State provide the grounds for the State's objection. *See* Md. Rule 2-517(a) ("The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs."). Accordingly, pursuant to the "long established Maryland practice that a contemporaneous general objection to the admission

of evidence ordinarily preserves for appellate review all grounds which may exist for the inadmissibility of the evidence[,]" *Boyd v. State*, 399 Md. 457, 475-76 (2007), we need not ignore the State's appellate argument that the police report was inadmissible because it contained double hearsay. *See id.* at 476 ("Under Rules 2-517, 4-323, 5-103(a)(1), and this Court's opinions, the only exceptions to the principle that a general objection is sufficient are where a rule requires the ground to be stated, where the trial court requests that the ground be stated, and 'where the objector, although not requested by the court, voluntarily offers specific reasons for objecting to certain evidence[.]'" (quoting *von Lusch v. State*, 279 Md. 255, 263 (1977))).

Admissibility of Police Reports under Rule 5-803(b)(8)

Maryland Rule 5-805 requires that when "one or more hearsay statements are contained within another hearsay statement, each must fall within an exception to the hearsay rule in order not to be excluded by that rule." Accordingly, for a police report to be admissible under Rule 5-803(b)(8), the statements contained therein must also be admissible under a hearsay exception. *See Paydar v. State*, 243 Md. App. 441, 454 (2019).

Case law supports enforcement of this limitation when admitting police reports containing second-level hearsay. For example, in *Ali v. State*, the Court of Appeals recognized that portions of a written police report containing "direct sense impressions"—which consist "not only what the officer sees, but also what the officer may hear, feel, taste, or smell"—may be admissible as a business record. 314 Md. 295, 303 (1988), *partially abrogated on other grounds by Nance v. State*, 331 Md. 549 (1993). The Court cautioned,

however, that "[c]omplications arise when what is heard and recorded is the speech of another[,]" as those words, "because they may constitute second level hearsay, ought to be redacted from a report otherwise admissible." *Id.* Similarly, in *Paydar*, this Court held that a police officer's body camera footage, which included second-level hearsay in the form of statements from a witness at a crime scene, was not admissible under the specialized exception for such recordings in Rule 5-803(b)(8)(D), because each instance of hearsay within hearsay did not fit within its own exception. 243 Md. App. at 456-57. Likewise, in *Diggs & Allen v. State*, this Court affirmed the exclusion of a written police report containing hearsay statements made by a police officer who did not write the report. 213 Md. App. 28, 74-75 (2013), *aff'd on other grounds*, 440 Md. 643 (2014).

Officer Rose's report presents the same double hearsay problem. Officer Rose's observations and opinions, themselves, are out-of-court statements that qualify as first-level hearsay because they were offered for their truth, to prove what the officer observed and learned when he responded to Mr. Wesley's residence. And, those observations and conclusions were premised on second-level hearsay statements attributed to others and reported for the truth of assertions therein.

Officer Rose recounted Mr. Wesley's out of court statements about "people coming to his house" and being a witness to a homicide, then related statements by others as grounds for his conclusion that Mr. Wesley's fears were unfounded and reflected his mental state rather than his actual experiences. The statement attributed to homicide detective "Vaughan," that "there was no record of Jamel [sic] Wesley as a witness or of

the homicide that Mr. Wesley alleged to have occurred[,]" was cited for its truth, i.e., as factual support for discounting Mr. Wesley's statement that he was being targeted because he witnessed a murder. Likewise, Officer Rose reported that CitiWatch "operator Baker" found nothing in the surveillance footage he reviewed to support Mr. Wesley's claims that he and his residence had been targeted, but supplied no supporting information about the locations and times of the reviewed footage. Officer Rose also recounted, for their truth, the statements by Mr. Wesley's girlfriend and her mother, regarding Mr. Wesley's behavior over "the last few days[,]" i.e., as support for his conclusion that Mr. Wesley was making "no sense" and possibly "paranoid," because the only people around him were his girlfriend and her mother.

When viewed in context, it is clear that Officer Rose relied on the truth of such second-level hearsay in making his own hearsay statements about Mr. Wesley's "mental crisis." In turn, defense counsel sought to admit Officer Rose's report for the truth of such first- and second-level hearsay, in order to prove that Mr. Wesley was not credible, because he had been hospitalized days before he testified against Mr. Morris, for an acute episode of paranoia premised on unfounded fears that unnamed people were out to harm him. Indeed, admitting the police report would have presented that narrative to the jury, opening the door for the prosecution to present Mr. Wesley's counter-narrative that he suffered an "anxiety attack" as a result of threats by Mr. Morris's associates via phone and in person at his residence. Accordingly, we conclude the trial court did not err in excluding the report due to the presence of foregoing hearsay within hearsay.

Furthermore, we conclude that the court correctly excluded Officer Rose's report on the basis that it did not "squarely fit[] within the public record and report exception of the hearsay rules." As set out above, the defense reasoned that, Officer Rose, as a police officer performing law enforcement duties, was "authorized by law to file an emergency petition and then has to make factual findings" in support of that petition. As counsel construed this scenario, "the responding officer investigates Mr. Wesley's assertions and reports, checks the cameras, determines that no assault had occurred, determines that people that Mr. Wesley thought were threatening him were, in fact, his girlfriend and his girlfriend's mother, makes factual findings concerning the demeanor and the mental state of Mr. Wesley."

The trial court rejected that characterization of the officer's duties and report, finding that "[p]erhaps parts of" the report were admissible, but the officer was "not somebody authorized by law to make that conclusion" about Mr. Wesley's mental condition. Referencing the statutory scheme governing emergency petitions, the court explained that an officer, or a civilian, who "may have a concern about somebody's mental health" could make a referral to a commissioner, who would then submit the referral to a magistrate or judge "with jurisdiction" to make the ultimate factual finding. But, the court articulated, "the police officer or the civilian is not making a factual finding."

The Court of Appeals recognized the public records exception to the hearsay rule in 1985, in *Ellsworth v. Sherne Lingerie, Inc.*, 303 Md. 581, 612 (1985). The Court emphasized that "the term 'factual findings' will be strictly construed and that *evaluations*

or opinions contained in public reports will not be received unless otherwise admissible under this State's law of evidence." *Id.* (emphasis added). Subsequently, the Supreme Court, in *Beech Aircraft Corp. v. Rainey*, interpreted broadly the term "factual findings" in the analogous federal exception to the hearsay rule for public investigatory reports, Federal Rule of Evidence 803(8)(C), holding that "factually based conclusions or opinions are not on that account excluded from the scope of Rule 803(8)(C)." 488 U.S. 153, 162 (1988). Significantly, a Committee note to Maryland Rule 5-803(8) specifies that Maryland's codification of the public records exception "does not mandate following the interpretation of the term 'factual findings' set forth in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988)." The Court of Appeals has yet to address the conflict between *Ellsworth* and *Beech Aircraft Corp.* Under *Ellsworth*, Officer Rose's report would not be admissible under the public records exception, as it consists of his evaluations and opinions of Mr. Wesley. An examination of the statutory framework governing emergency petitions provides further clarity on the admissibility of the report at issue in this case.

In determining that the police officer's report did not constitute "factual findings" within the scope of the public records and reports exception to the rule against hearsay, the trial court in this case astutely discussed the procedures governing emergency petitions. Neither party's brief to this Court includes any analysis of the statutory framework governing emergency petitions. We explore that statutory scheme next and conclude that the trial court correctly construed and applied Rule 5-803(b)(8)(A)(iii) in the instant case in light of the procedures for emergency evaluations.

Part IV of Subtitle 6 of Title 10 of Maryland Code (1982, 2015 Repl. Vol.), Health-General Article ("HG")[7] establishes standards and procedures for emergency evaluation of an individual's mental health:

> Peace officers and other enumerated professionals may make a "petition for emergency evaluation" of an individual. HG § 10-622(b). The petition may be made if the petitioner believes that the individual has a mental disorder and "presents a danger to the life or safety of the individual or of others." HG § 10-622(a). Once lawfully executed, the petition is presented to a peace officer, who is authorized to transport the individual against his or her will "to the nearest emergency facility." HG § 10-624(a). "If the petition is executed properly, the emergency facility shall accept the emergency evaluee." HG § 10-624(b)(1). An "emergency facility" is one that the Department of Health ("Department") "designates, in writing, as an emergency facility," and "includes a licensed general hospital that has an emergency room." HG § 10-620(d).
>
> Within six hours of the individual's arrival at the emergency facility, "a physician shall examine the emergency evaluee, to determine whether the emergency evaluee meets the requirements for involuntary admission." HG § 10-624(b)(2). If the evaluee does not meet the requirements for involuntary admission, the emergency facility "shall" release the individual unless the individual requests voluntary admission. HG § 10-624(b)(3). "An emergency evaluee may not be kept at an emergency facility for more than 30 hours." HG § 10-624(b)(4).

In re J.C.N., 460 Md. 371, 376-77 (2018). *See also J.H. v. Prince George's Hosp. Ctr.*, 233 Md. App. 549, 582-84 (2017) (reviewing the statutory framework governing petitions for emergency evaluations and involuntary admissions).

[7] Various sections of Subtitle 6, Part IV were amended subsequent to Officer Rose's report and Mr. Wesley's evaluation. We cite to the versions of the statutes in effect at the time of Mr. Morris's trial in June 2018, when the judge ruled on the admissibility of the report.

(continued)

As is pertinent to this appeal, a "petition for emergency evaluation of an individual may be made by . . . [a] peace officer[8] who personally has observed the individual or the individual's behavior[.]" HG § 10-622(b)(1)(ii). A peace officer making a petition for emergency evaluation "may base the petition on: . . . [t]he examination or observation; or . . . [o]ther information obtained that is pertinent to the factors giving rise to the petition." HG § 10-622(b)(2). The petition for emergency evaluation shall, among other requirements,

> (vi) Contain **a description of the behavior and statements of the emergency evaluee or any other information that led the petitioner to believe that the emergency evaluee has a mental disorder and that the individual presents a danger to the life or safety of the individual or of others**; and
>
> (vii) Contain any other facts that support the need for an emergency evaluation.

HG § 10-622(c)(1) (emphasis added).

A petitioner who is not a peace officer or one of the professionals designated in § 10-623(a) must present the petition to the court for immediate review. HG § 10-623. If the court finds that there is "probable cause to believe that the emergency evaluee has shown the symptoms of a mental disorder and that the individual presents a danger to the life or safety of the individual or of others[,]" then the court shall endorse the petition. HG

[8] "'Peace officer' means a sheriff, a deputy sheriff, a State police officer, a county police officer, a municipal or other local police officer, or a Secret Service agent who is a sworn special agent of the United States Secret Service or Department of Homeland Security authorized to exercise powers delegated under 18 U.S.C. § 3056." HG § 10-620(f).

§ 10-623(b). When, as in this case, an emergency petition is lawfully executed by a "peace officer," the emergency evaluee may be taken directly to a hospital without obtaining an independent review by a judicial or designated medical/mental health professional. HG § 10-624. *See also J.C.N.*, 460 Md. at 376 (explaining that a peace officer "is authorized to transport the individual against his or her will 'to the nearest emergency facility'").

Once a peace officer has transported an emergency evaluee to the nearest emergency facility, the General Assembly has mandated an immediate medical review by a physician, which in turn may trigger judicial review. Section 10-624 governs these circumstances, providing:

> (a)(1) **A peace officer shall take an emergency evaluee to the nearest emergency facility if the peace officer has a petition under Part IV of this subtitle that:**
>
> (i) Has been endorsed by a court within the last 5 days; or
>
> (ii) **Is signed and submitted by a** physician, psychologist, clinical social worker, licensed clinical professional counselor, clinical nurse specialist in psychiatric and mental health nursing, psychiatric nurse practitioner, licensed clinical marriage and family therapist, health officer or designee of a health officer, or **peace officer**.
>
> * * *
>
> (b)(1) If the petition is executed properly, the emergency facility shall accept the emergency evaluee.
>
> (2) **Within 6 hours after an emergency evaluee is brought to an emergency facility, a physician shall examine the emergency evaluee, to determine whether the emergency evaluee meets the requirements for involuntary admission.**
>
> (3) **Promptly after the examination, the emergency evaluee shall be released unless the emergency evaluee:**
>
> (i) **Asks for voluntary admission; or**
>
> (ii) **Meets the requirements for involuntary admission.**
>
> (4) An emergency evaluee may not be kept at an emergency facility for more than 30 hours.

HG § 10-624 (emphasis added). Procedural requirements governing subsequent proceedings for an involuntary admission of an emergency evaluee are set forth in HG § 10-625 and related regulations. *See J.H.*, 233 Md. App. at 583-84.

Pertinent to the analysis of the hearsay question before us, under the statute governing emergency petitions, once a police officer submits a supporting petition for an emergency evaluation and brings an individual to a hospital, the officer transfers responsibility for that individual to a physician, whose immediate independent medical examination—made within six hours—becomes the basis for factual findings about the individual's mental condition. The role of the police officer is to transport the individual and report what caused the officer to do so. Thus, a petition for an emergency evaluation made pursuant to HG § 10-622 sets forth information to be considered by the physician who is required to conduct an evaluation and determine whether involuntary admission is warranted.

The trial court correctly concluded that a transporting officer's petition contains information pertinent to whether an emergency evaluation should be conducted, but such information does not amount to the "factual findings" by a person authorized to conduct an emergency evaluation. In the language of the statute, such a report represents the officer's "description of the behavior and statements of the emergency evaluee" and the officer's account of "other information" that led the officer to believe that an emergency evaluation was necessary. *See* HG § 10-622.

We agree that under this statutory scheme, a petition for emergency evaluation completed by a police officer relating concerns for the mental welfare of an individual does not necessarily contain "factual findings" that are automatically admissible under the hearsay exception for public records and reports. Because a police officer's role in the statutory scheme governing emergency evaluations is to report and transport, so that a physician can make the factual findings necessary to proceed with such an evaluation, the trial court did not err in ruling that Officer Rose's incident report in this case—replete with double hearsay and little if any direct observations by Officer Rose[9]—was not admissible under the hearsay exception for "factual findings resulting from an investigation made pursuant to authority granted by law[.]" Further, we note that Mr. Wesley testified over two days during the trial, and defense counsel did not seek to question Mr. Wesley about his hospitalization, nor did counsel call Officer Rose to testify as to his interaction with Mr. Wesley. *See Diggs & Allen*, 213 Md. App. at 75-76 ("[Appellant] cannot now cry foul

[9] Mr. Morris contends that "[e]ven if statements by [Mr.] Wesley's girlfriend, Detective Vaughn, and the [CitiWatch] operator were inadmissible on hearsay-within-hearsay grounds, the rest of the report, which contains these factual findings, was admissible." Our review of the report indicates that, without the statements made by other individuals, all that remains is Officer Rose's observation that "Mr. Wesley had the door locked but eventually opened it" and "Mr. Wesley was sweating heavily and foaming at the mouth and making no sense with his statements." Although this portion of the report does not present a double hearsay issue, because the observations have no context in the absence of the hearsay-within-hearsay statements, we assume the trial court correctly determined that their admission would have confused the jury. *See Williams v. State*, 416 Md. 670, 698 n.11 (2010) (explaining that the trial court retains discretion to exclude admissible hearsay evidence because, "[u]nder Rule 5-403, the court may exclude evidence that has 'probative value . . . substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]'")

when he had ample opportunity at trial to question both the observer of the incident and the author of the notes.").

For all of these reasons, we hold that the trial court did not err or abuse its discretion in excluding Officer Rose's report.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED AND CASE REMANDED FOR A NEW TRIAL. COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.