DISTRICT OF COLUMBIA COURT OF APPEALS

Appeal No. 22-CF-85

Regular Calendar: February 6, 2024

Joshua C. Austin,

Appellant

v.

United States of America,

Appellee

Appeal from the Superior Court of the District of Columbia
Criminal Division

APPELLANT JOSHUA C. AUSTIN'S REPLY BRIEF

Cecily E. Baskir (D.C. Bar 485923)
Law Office of Cecily E. Baskir, LLC
4800 Hampden Lane, Suite 200
Bethesda, MD 20814
(202) 540-0314
baskir@baskirlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

* Asterisk indicates authorities upon which Austin chiefly relies.

ARGUMENT

I. Marvil's statements to the 911 operator were testimonial.

In his opening brief, Austin argued that the totality of the circumstances surrounding deceased complainant Emilie Marvil's statements to a 911 operator show that those statements were testimonial and thus barred by the Confrontation Clause from his trial. Austin Br. 15-23. As he explained, Marvil – safely in her own apartment several minutes after the stairwell assault – expressed confidence on the call that her attacker was no longer there and that she could handle her injuries without assistance. She had therefore contacted 911 to report what had happened. Viewed in an objectively reasonable way, Marvil's words and tone show an absence of imminent danger to her, no use of any weapon, no request for any type of aid, and no extreme emotional or physical distress. Austin thus argued that the primary purpose of the statements was "to provide a narrative report of a crime absent any imminent danger." *Davis v. Washington*, 547 U.S. 813, 827 (2006); *see* Austin Br. 18-23.

In response, the government disputes the relevance and Austin's characterization of certain facts while minimizing Marvil's perspective. Its arguments must fail, however, because, in this "highly context-dependent inquiry," the totality of circumstances, including the perspectives of *both* parties to the interrogation, do not point to a primary purpose "to assist police in addressing an

ongoing emergency." *Michigan v. Bryant*, 562 U.S. 344, 363, 370 (2011).

First, the government wrongly claims that "[t]he colloquy between Marvil and the operator never established" that Marvil was safely in her apartment when she called 911. Gov. Br. 25. But Marvil's very first statement was, "I'm at 5922 13th Street Apartment 209." App. 1. The apartment number leaves no reasonable uncertainty about whether she was safely in the apartment during the 911 call.

Relying on questionable reasoning, the government further claims that the safety and tranquility of Marvil's environment at the time of the 911 call "is not evidence of the absence of an immediate threat." Gov. Br. 26 (citing *State v. Soliz*, 520 (N.M. Ct. App. 2009)). But *Soliz* incorrectly states that the Supreme Court "reached the conclusion in *Davis* [*v. Washington*] that [declarant] McCottry was not in a safe or tranquil environment by contrasting her circumstances … with the [testimonial] statements of the declarant in *Crawford*." 213 P.3d at 528. On the contrary, prior to that "contrasting," *Davis* had already described McCottry's "shaken state" and "frantic efforts" to prepare to leave with her children after the assailant had run out the door. *Davis, supra*, 547 U.S. at 818, 827. At no point did *Davis* suggest, counter to common sense, that a declarant's safe environment could not be "evidence of the absence of an imminent threat." Gov. Br. 26.

The government also misses the point regarding weapon use. Although Marvil did not know if her attacker had a weapon, she quickly communicated the

significant fact that no weapon was used against her. *See* App. 1; Gov. Exh. 2 at 1:35.[1] The absence of evidence of a weapon "provides support for [the] conclusion that there is no ongoing emergency." *Andrade v. United States*, 106 A.3d 386, 389 (D.C. 2015); *see also Wills v. United States*, 147 A.3d 761, 768-69 (D.C. 2016). That Marvil had no information about a weapon would communicate to an objectively reasonable 911 operator that Marvil's attacker did not present the same kind of immediate public threat as a recently-active shooter would. In contrast, use of a weapon would have signaled a more serious potential threat to the public and supported a perception of an ongoing emergency. *See Bryant, supra*, 562 U.S. at 364, 372-74; *Tyler v. United States*, 975 A.2d 848, 855-56 (D.C. 2009).

From the perspective of the operator, who also quickly ascertained that Marvil's assailant was not there anymore, there was thus little reason to perceive an ongoing emergency. The government, however, focuses disproportionately on Marvil's later statement that she did not see in what direction the attacker went, ignoring the import of the full exchange. *See* Gov. Br. 21-22. After he asked if the attacker was "still there," the operator did not question Marvil's confident "No, sir" response.[2] *See* App. 1-2. Instead of posing follow-up questions next about the

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[1] Government Exhibit 2, the recording of the 911 call, is included in Volume II of Austin's Limited Appendix.

[2] Neither did the government at trial, reminding the jury during closing that, when she spoke, Marvil "knew that he was already long gone by then." 12/15/21 Tr. 36.

attacker's location, as he might have if he doubted her answer or believed the information important to address an ongoing emergency, the operator then asked about timing and the attacker's description. App. 2; Gov. Exh. 2 at 1:59. Only later did he inquire if she knew the attacker's direction of departure, Gov. Exh. 2 at 2:47, but any uncertainty about that direction did not by then undermine either participant's reasonable belief that the threat to Marvil or anyone else in her building had dissipated.

Moreover, Marvil's subjective purpose as revealed by her words and tone may inform the inquiry into "the purpose that reasonable participants would have had" and cannot be so easily divorced from the analysis. Gov. Br. 19. The Court in *Davis*, for example, "appeared to treat as relevant an officer's testimony about the purpose of police questioning." *Andrade, supra*, 106 A.3d at 390. *Cf. Stansbury v. California*, 511 U.S. 318, 324 (1994) (officer's subjective belief is relevant to objective determination of custody "if somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave"); *Rhode Island v. Innis*, 446 U.S. 291, 301 & n.7 (1980) (subjective police purpose in questioning is relevant to whether objectively reasonable police should have known questioning was reasonably likely to elicit an incriminating response).

That Marvil used the past tense to relate an incident that had already

happened also supports that her statements were testimonial. In *Davis*, the fact that the declarant "was speaking about events *as they were actually happening*, rather than describing past events," was key to the Court's ruling that the 911 call was non-testimonial. 547 U.S. at 817-18, 827 (emphasis in original). That fact also belies the claim that non-testimonial 911 calls "commonly report attacks that have already happened." Gov. Br. 24-25. As in *Davis*, many 911 calls describe events as they are actually happening. *See, e.g., Wills, supra*, 147 A.3d at 766; *Andrade, supra*, 106 A.3d at 387; *Frye v. United States*, 86 A.3d 568 (D.C. 2014); *Goodwine v. United States*, 990 A.2d 965 (D.C. 2010).

Although the court in *[Joseph] Smith v. United States*, 947 A.2d 1131 (D.C. 2008), concluded that statements were non-testimonial despite the complainant's use of past tense, *Smith* is easily distinguishable on its facts. For instance, as that 911 call began, the declarant "appeared to be extremely excited and anxious," and "[s]he immediately pleaded for help and attention." 947 A.3d at 1133. After agreeing that she needed an ambulance for her injuries, she continued to "plead[] with the operator to hurry in sending a response unit," as she did not know whether her estranged husband was still in her house, and she feared his return. *Id.* at 1133-34. In that context, the past-tense phrasing was outweighed by multiple undisputed circumstances that objectively indicated that the "main purpose was to summon help for an ongoing emergency." *Id*. at 1134; *see also Andrade, supra*, 106 A.3d at

389, 391 (considerations supporting a non-testimonial finding were insufficient).

In contrast, Marvil's past-tense reporting what had happened was consistent with several other objective indications that the primary purpose of her statements was not to address an ongoing emergency. Her demeanor, for instance, was not extremely excited, frantic, hyper, or obviously upset, and she was not crying, stuttering, or shaking. *Compare* Gov. Exh. 2 *with Andrade, supra*, 106 A.3d at 387; *Smith, supra*, 947 A.2d at 1132; *Long v. United States*, 940 A.2d 87, 90, 97 (D.C. 2007). Whether or not Marvil was subjectively in shock, a reasonable person speaking as she did would be perceived by an objectively reasonable interrogator as trying to report a past event. Marvil's measured tone and deliberate answers thus do undercut the government's claim that reasonable participants to the conversation would have perceived an ongoing emergency. *See* Gov. Br. 26.

Citing *Long v. United States*, *supra,* 940 A.2d at 90, 97, the government also tries to downplay the significance of Marvil's refusal of medical assistance, but *Long* does not diminish Austin's argument. There, the victim – covered in blood from a "gaping wound" down his entire face, in "hyper" condition, making "frantic" statements, and not responding directly to questions – did spend time with paramedics in an ambulance, although he refused to go to the hospital. *Id*. Those circumstances contrast starkly with Marvil's calm choice to decline medical services, objectively indicating the likelihood that her purpose in speaking was not

to address an ongoing emergency. *See* Austin Br. 19; Gov. Exh. 2 at 3:10.

Moreover, "informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent." *Bryant, supra*, 562 U.S. at 366. The situation here, unlike many informal encounters deemed non-testimonial, was not "fluid and somewhat confused." *Id.* at 377; *accord, Frye, supra*, 86 A.3d at 571. To the extent that any informality of the 911 call suggests that the primary purpose of Marvil's statements was to address an ongoing emergency, that consideration is outweighed by countervailing indications that it "was a straightforward reporting of a past event that police had a duty to investigate," as described here and in Austin's opening brief. *Wills, supra*, 147 A.3d at 769. The court should therefore reject the government's Confrontation Clause arguments.[3]

II. Marvil's statements to the 911 operator were inadmissible hearsay.

The default in our judicial system is "a rule *against* hearsay." *Sims v. United States*, 213 A.3d 1260, 1263 (D.C. 2019) (emphasis in original). The court thus resists "expansive interpretations of hearsay exceptions that would permit them to overtake the rule." *Id*. (reversing admission of statement as present sense impression); *see also Mayhand v. United States*, 127 A.3d 1198, 1201 (D.C. 2015) (cautioning about the "limited scope of" the excited utterance exception).

[3] Even if the court decides that some of Marvil's initial statements were non-testimonial, it should still find harmful error in admitting the statements after Marvil said the assailant was not still there. *See* Austin Br. 23 n.9; *Davis, supra*, 547 U.S. at 828 (a conversation can evolve to become testimonial).

In his opening brief, Austin argued that Marvil's statements to the 911 operator were neither excited utterances nor present sense impressions, because (1) Marvil's successful effort to control her emotional state during the call showed that she was not "manifestly overcome by excitement or in shock," *Mayhand, supra*, 127 A.3d at 1202; (2) her words and tone provided indicia of reflection, not true spontaneity or a "rambling stream of consciousness dump" of information, App. 7; (3) the audio recording does not support the trial court's characterizations of Marvil as distracted, bubbling up with emotion with the word "wallet," or having trouble breathing, App. 6-8; and (4) the statements were not sufficiently contemporaneous to qualify as present sense impressions. *See* Austin Br. 25-36. The government having relied heavily on the 911 recording at trial, Austin argued the improper admission of the statements was reversible error. *Id.* at 23-25, 36.

In response, the government promotes an expansive interpretation of both exceptions, defending the trial court's rulings as a permissible choice that was neither erroneous nor harmful under any standard. Depending on cases without precedential or persuasive value, it advocates for an excited utterance test that does not require manifest excitement and for a present sense impression test that does not require contemporaneity. Because the trial court's exercise of discretion was supported by neither the record nor the law, the court should reject the government's claim and reverse.

A. The hearsay issue is preserved.

As an initial matter, Austin adequately preserved his claim opposing admission of Marvil's 911 statements on hearsay grounds, and plain error review does not apply here. Although Austin did not focus his arguments below on the hearsay issue, he did not intentionally relinquish it or strategically keep his objection in his back pocket for appeal. On the contrary, (1) the government requested admission of the 911 call statements as exceptions to the hearsay rule, *see* R. 39, 47; (2) Austin opposed admission of the statements, never conceding that they were admissible on any grounds, *see* R. 41, 48; 5/27/21 Tr. 14-22; (3) the trial court ruled the statements were admissible as excited utterances and present sense impressions, *see* App. 14-16; and (4) after the trial court's initial hearsay ruling, Austin explicitly challenged the admission of the call on hearsay grounds with a standing objection at the start of trial. App. 20-21, 23. That opposition to the admission of the statements as hearsay articulated the claim, and "parties are not limited to the precise arguments they made below." *Mills v. Cooter*, 647 A.2d 1118, 1123 n.12 (D.C. 1994) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)); *accord, West v. United States*, 710 A.2d 866, 868 n.3 (D.C. 1998); s*ee Odemns v. United States*, 901 A.2d 770, 775 (D.C. 2006) (unequivocal objection to statements as "hearsay" preserves claim); *Stancil v. United States*, 866 A.2d 799, 805 (D.C. 2005) (where Confrontation Clause issue was at least implicitly raised by defense

and judge recognized issue was before her, no plain error review). Moreover, Austin highlighted for the trial court applicable hearsay law and several facts relevant to the hearsay analysis, including Marvil's lack of manifest upset and the fact that the 911 call was not made contemporaneously with the assault itself. *See* 5/27/21 Tr. 20; R. 41 at 3-4 & n.1. These circumstances suffice to preserve Austin's hearsay arguments for appeal.

B. Marvil's statements were not admissible as excited utterances.

The government is also wrong on the merits. To begin with, it claims Austin does not contest that Marvil experienced "a serious occurrence that would cause in Marvil a state of nervous excitement or physical shock." Gov. Br. 29. The analysis cannot end there, however, because the first requirement for an excited utterance in this jurisdiction is not just a serious occurrence that *would* cause "a state of nervous excitement or shock" but rather one that *did* cause such a state. *[Damon] Smith v. United States*, 26 A.3d 248, 258 (D.C. 2011); *accord, e.g., [Rafael] Smith v. United States*, 666 A.2d 1216, 1222 (D.C. 1995). As set forth in his opening brief, Austin does contest that Marvil was in a state of nervous excitement or physical shock at the time of her 911 call. *See* Austin Br. 29.

Similarly, although the government asserts that Austin does not "contest that Marvil made the 911 call within a reasonably short period after the attack," Gov. Br. 29, the second step of the excited utterance analysis requires determining

"whether, at the time the declarant spoke, [she] was still under the influence of the shocking event," or, in other words, "that the shocking impact of the incident was sufficiently long lasting such that the declarant's powers of reflection were still suspended at the time the proffered statement was made." *Pelzer v. United States*, 166 A.3d 956, 962 (D.C. 2017). As this court has clarified, there is no "safe harbor of categorical admissibility" or "standard range" of time. *Id*. at 962 & n.12 (cleaned up); *see also Mayhand, supra*, 127 A.3d at 1210. And again, Austin does contest that Marvil's powers of reflection were suspended when she called 911.

The bulk of the government's excited utterance argument, however, is an unsuccessful effort to avoid the binding effects of this court's decision in *Mayhand v. United States*. *See* Gov. Br. 29-34. As *Mayhand* stated, the "essential rationale" behind the excited utterance exception is that when "a person is overcome by excitement or in shock," that "wash of excitement blocks the reflection and calculation that could produce false statements." *Mayhand, supra*, 127 A.3d at 1206. Whether experiencing excitement or shock, a person

> who is under the immediate and uncontrolled domination of the senses should not be able to mask or otherwise control his emotional state. Indeed, the exercise of such control is precisely the type of deliberate cognitive function that the first element of the test for the admission of excited utterances is supposed to screen out.

Id. at 1208 (cleaned up). A statement will therefore not qualify as an excited utterance "unless the declarant is *manifestly* overcome by excitement or in shock."

Id. at 1201-02 (emphasis added).

The government tries to dismiss *Mayhand's* precedential value here by claiming that Marvil, unlike the declarant in *Mayhand,* was unsuccessful in her efforts to contain her emotions. Gov. Br. 31. That effort must fail, because Marvil did succeed in exercising a degree of control over her emotional state during the 911 call that is inconsistent with "immediate and uncontrolled domination of the senses." *Mayhand, supra*, 127 A.3d at 1208. Marvil "[didn't] want to cry" during the 911 call – and she did not cry. App. 7. Marvil was "trying to suppress her tears and her cries" in order to make the call, and she did suppress them during the call. *Id*. So, although the "dam" may have been "about to burst," it did not burst while she spoke, because Marvil had enough control over her emotional state to prevent that by "disassociat[ing] herself from the pain… until she [could] make this phone call." App. 7-8. As in *Mayhand*, to the extent the trial court here relied on its assessment that Marvil was "trying to hold herself together until she [could] break down and cry in private," App. 8, it "misconstrued [the] first element of the excited utterance test." *Mayhand, supra*, 127 A.3d at 1208.

That Marvil's voice and breathing may have revealed some emotion despite her efforts to contain it does not distinguish this case from *Mayhand*, contrary to the government's suggestion. *See* Gov. Br. 30-31. In *Mayhand*, the trial court also observed strain in the declarant's voice throughout that 911 call, but this court held

that "mere vocal strain or indication of some anxiety is insufficient in" a context where the declarant was "perhaps masking … his emotional agitation" during a "coherent and balanced" conversation. *Mayhand, supra*, 127 A.3d at 1206-08; *see also Pelzer, supra*, 166 A.3d at 963 (audible indications of emotion and losses of composure during call were insufficient proof of suspended reflective powers).

Acknowledging *Mayhand's* requirement of a "higher level of emotional upset" than vocal strain "to ensure than an individual's powers of reflection have been suspended," *Mayhand, supra*, 127 A.3d at 1207, the government suggests that the rule does not apply when the declarant is in a state of physical shock instead of nervous excitement. *See* Gov. Br. 32-34. In this court, however, shock cannot be distinguished easily enough from nervous excitement to remove this case from *Mayhand's* dictates. Although the court's jurisprudence often uses the disjunctive "or" when discussing excitement and shock, it does not treat them as separate phenomena creating different burdens.[4] *See, e.g., Parker v. United States*, 249 A.2d 388, 405 (D.C. 2021); *Graure v. United States*, 18 A.3d 743, 755 (D.C. 2011); *Johnson v. United States*, 980 A.2d 1174, 1185 (D.C. 2009); *Alston v. United States*, 462 A.2d 1183, 1187 (D.C. 1983). *Cf. United States v. Woods*, 571 U.S. 31,

[4] Failing to identify any cases in this court admitting statements from a declarant "in shock" who did not also manifest "nervous excitement," the government turns instead to a series of unpersuasive cases from other jurisdictions, some of which are unpublished, none of which are binding on this court, and all of which are factually distinguishable here.

46 (2013) (observing that "or" can "sometimes introduce an appositive – a word or phrase that is synonymous with what precedes it").

Rather, as used by this court, shock is a state that may coexist with or lead to the kind of excitement that results in a loss of reflective powers. For example, in *Brown v. United States*, 27 A.3d 127, 132 (D.C. 2011), the court used testimony that the declarant looked to be in shock to infer that he was rendered nervous and excited right before he made his statement. It also noted that the witness appeared to use the term "shock" in the sense of "sudden agitation or excitement of emotional or mental sensibilities" – in other words, as an equivalent of nervous excitement. *Id*. at n.3 (quoting Websters New Intl. Dict. 2317 (2d ed. 1952)). In addition, quoting Wigmore on Evidence, this court has causally linked physical shock and nervous excitement to explain the excited utterance theory: "under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock." *Guthrie v. United States*, 92 U.S. App. D.C. 361, 364, 207 F.2d 19, 22 (1953); *accord, Odemns, supra*, 901 A.2d at 778; *Alston, supra*, 462 A.2d at 1126.

The trial court's "rote recitation" that Marvil was in shock is thus not enough to evade *Mayhand's* import, and as set forth in Austin's briefing, the record here

does not show that Marvil lacked the ability to control her faculties and powers of reflection at the time she spoke to the operator. *Mayhand, supra*, 127 A.3d at 1201 (quoting *Odemns, supra*, 901 A.2d at 777); *accord, Brown, supra*, 27 A.3d at 138 (Fisher, J., dissenting) (witness's rote recitation that declarant was in shock not enough to avoid excited utterance requirements); *see* Austin Br. 29-32. Nor must this court defer to the trial court's personal assessment of the call where the record fails to support those findings. Unlike, for instance, the declarant in *Long, supra*, 940 A.2d at 90, (who repeated the same statement rather than directly responding to questions), or in *Teasley v. United States*, 899 A.2d 124, 126 (D.C. 2006), (who was "not immediately responsive to the questions that [were] asked"), Marvil answered the operator's questions in an appropriate way. *See* App. 1-3; Gov. Exh. 2; Austin Br. 30-31. That she chose to supply more detail after answering some of the questions is not an unusual narrative technique in conversation (or even oral argument), particularly where the declarant thinks additional details may be important to the listener. Despite the government's claim, neither Marvil's words nor her voice can reasonably be called a "rambling stream of consciousness dump," and the recording does not support the trial court's findings about bubbling emotion with the word "wallet." App. 6-7; *see* Gov. Br. 31; Austin Br. 30-32.

Moreover, pointing to body-worn camera video and Canales's testimony at trial, the government wrongly asserts that the circumstances surrounding the 911

call reflect the spontaneity of Marvil's statements. *See* Gov. Br. 35-36. But trial evidence about Marvil's encounter with the police is irrelevant to determining the possible spontaneity of her earlier statements to the 911 operator, particularly since she indicated her intent to relinquish control over her emotional state after the call ended.[5] *See Brown, supra*, 27 A.3d at 135 (court "not entitled to judge the trustworthiness by comparing … utterances to other evidence," such as declarant's later statements). And Canales's trial testimony that Marvil was "crying a lot" as they went up the stairs to Marvil's apartment in fact supports a determination that Marvil had enough control over her emotional state by the time she placed the subsequent 911 call to have collected herself and suppressed those tears. *See* Gov. Exh. 2. Thus, this *was* a circumstance where Marvil, "after escaping an attack, returned home to safety, collected [her]self, and then gave the police a call to document [her] encounter[,] demonstrating self-awareness." *Parker, supra*, 249 A.2d at 406 (distinguishing declarant's shaken and emotionally upset call from *Mayhand*). In sum, the government's claims are not enough to overcome the multiple indicia of self-awareness, reflection, and lack of spontaneity in Marvil's call. *See* Austin Br. 30-32; *see also Odemns, supra*, 901 A.2d at 777 (emphasizing that spontaneity is a critical requirement for excited utterances).

[5] Austin also disputes the characterization of Marvil as "wide-eyed, apparently fearful" in the body-worn camera footage. Gov. Br. 36 (citing Gov. Exh. 102).

C. Marvil's statements do not qualify as present sense impressions.

As Austin argued in his opening brief, many of the same facts that preclude admission of Marvil's 911 statements as excited utterances also show that they were not present sense impressions. *See* Austin Br. 34-35. Both hearsay exceptions look to the spontaneity of the statements to support their trustworthiness, but there is less "temporal flexibility" for present sense impressions than excited utterances, because it is the immediacy of the former that assures reliability, while the latter rely "on the emotional element to still the capacity of reflection." *Mayhand, supra*, 127 A.3d at 1209 n.13 (quoting advisory committee note to Federal Rule of Evidence 803); *accord, Hallums v. United States*, 841 A.2 1270, 1276-77 (D.C. 2004). The present sense impression exception is thus "narrower in scope" that the excited utterance one. *Hallums, supra*, 841 A.2d at 1277.

As the government concedes, the inquiry for present sense impressions "is whether sufficient time elapsed to have permitted reflective thought," Gov. Br. 37 (quoting McCormick on Evidence), and on the specific facts here, sufficient time elapsed to permit Marvil reflective thought. As the government points out, Marvil was crying as Canales helped her to her apartment after the assault, Gov. Br. 39, but once there, Marvil stopped crying to speak to the 911 operator. *See* Gov. Exh. 2. Marvil's success at suppressing her tears for the call is non-speculative evidence that she had enough time to collect her thoughts and emotions before making her

statements to the 911 operator. In addition, as the government proffered to the trial court during the colloquy on Marvil's statements, Marvil testified to the grand jury that she also took the time to change her shirt in her apartment before calling 911, further supporting Austin's non-speculative characterizations. 5/27/21 Tr. 13. Thus, even if the government's own speculation that Marvil delayed the 911 call because of a language barrier with Canales were true, *see* Gov. Br. 39, Marvil's continued delay to swap clothes and stop her tears deprives her statement of the necessary immediacy and spontaneity to circumvent the hearsay rule.

In the end, the government rests its present sense impression argument on the claim that the trial court's factual findings are not clearly erroneous, *see* Gov. Br. 39-40, but as Austin argues above and in his opening brief, enough of the factual findings are inconsistent with the recording and the content of the statements to undermine the trial court's present sense impression ruling. Therefore, the trial court's ruling represents clear error and an abuse of discretion, not a permissible alternative.

III. The erroneous admission of Marvil's statements was not harmless.

The erroneous admission of the entire 911 call was not harmless beyond a reasonable doubt, and the court cannot be fairly assured that it did not affect the verdicts. *See* Austin Br. 23, 36. Significantly, Marvil's statements on the call were the only evidence presented of robbery. The government speculates that a jury

could have inferred a robbery of some amount from a photo of Marvil's green change purse. Gov. Br. 42 (citing Gov. Exh. 106). A rational jury, however, could not find beyond a reasonable doubt from the change purse alone that a robbery occurred, particularly since it had no evidence (beyond the 911 call) of what happened to the purse between Marvil's departure from the market and the police arrival in her apartment some time later. Without the 911 statements, a jury could only speculate about whether Marvil or someone else manipulated the change purse and its contents out of view of any camera. Marvil's statements thus "were the crux of the government's case" for robbery and extremely prejudicial. *Best v. United States*, 66 A.3d 1013, 1019 (D.C. 2013); *see* 12/15/21 Tr. 45-46.

The court also cannot be confident that Marvil's statements, played and referenced repeatedly for the jury, were so inconsequential that they did not affect the jury's other verdicts. *See, e.g.*, 12/15/21 Tr. 27-28, 45-46, 49, 75-76. Even with sufficient evidence to sustain those convictions, the court may still find prejudicial error, *see In re Ty.B.*, 878 A.2d 1255, 1266-67 (D.C. 2005), and the government's marked emphasis on the 911 call at trial contradicts its appellate assertion that the call added little. *See* Austin Br. 24. Without the call and without evidence that no one else entered or exited the stairwell through the basement, the government's remaining circumstantial evidence left much more room for doubt about the assailant's identity and about Austin's motives for entering the building

and briefly interacting with Marvil and her items. *See* 12/9/21 Tr. 37-38 (defense opening). This is not a case where, absent Marvil's statements, the evidence of guilt was essentially uncontroverted. *See Wills, supra*, 147 A.3d at 776-77.

Moreover, although the government claims that Marvil's description of the assailant in the 911 call was cumulative of other testimony, Gov. Br. 42, it is highly probable that without the 911 call evidence, the defense would have pursued a strategy that did not open the door to that other testimony. Austin would have had no need to challenge Marvil's ability to describe her attacker, and an objectively reasonable defense counsel would not have cross-examined police witnesses about any description if the description from the call were not already in evidence. Austin Br. 23 n.10.[6] Under any standard, Marvil's statements on the 911 call were prejudicial, and their admission is reversible error.

CONCLUSION

For the foregoing reasons and those set forth in Austin's opening brief, Austin respectfully requests that this court reverse his convictions due to the erroneous admission of the 911 call at trial.

[6] Even if the court were to apply the plain error standard to Austin's hearsay claim, the trial court committed error that was inconsistent with well-settled precedent and legal principles, and Austin was prejudiced by the plainly erroneous admission of the 911 call enough to affect both his substantial rights and the fairness, integrity, and public reputation of the proceeding, as set forth above and in his opening brief. *See supra*; Austin Br. 23-25, 36; *Wills, supra*, 147 A.3d at 774 (even in highly fact-specific inquiries, "the plainness of the error can depend on well-settled legal principles as much as well-settled legal precedents") (cleaned up).

Respectfully Submitted,

___/s/ Cecily E. Baskir_____

Cecily E. Baskir (D.C. Bar # 485923)
Law Office of Cecily E. Baskir, LLC
4800 Hampden Lane, Suite 200
Bethesda, MD 20814
(202) 540-0314
baskir@baskirlaw.com
Counsel for Mr. Joshua C. Austin

District of Columbia
Court of Appeals

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Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

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I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving mental health services and/or under evaluation for substance-use-disorder services. *See* DCCA Order No. M-274-21, May 2, 2023, para. No. 2.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

Initial here

G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.

/s/ Cecily E. Baskir
Signature

22-CF-85
Case Number(s)

Cecily E. Baskir
Name

1/23/2024
Date

baskir@baskirlaw.com
Email Address

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing Brief electronically using the Appellate E-Filing system on Chrisellen Kolb, Esq., and Katherine Kelly, Esq., U.S. Attorney's Office, 601 D Street, NW, Washington, DC 20530, on this 23rd day of January, 2024.

/s/ Cecily E. Baskir
Cecily E. Baskir