Circuit Court for Prince George's County
Case No. CT161577X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 568

September Term, 2020

MICHAEL DUVALL

v.

STATE OF MARYLAND

Graeff,
Gould,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: September 14, 2021

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

Appellant was convicted in the Circuit Court for Prince George's County of second-degree murder. He presents the following questions for our review:

> "1. Was [appellant] denied the right to a speedy trial?
> 2. Did the court err in instructing the jury on second-degree murder?
> 3. Did the court err in admitting the prior testimony of Dana Daniels?
> 4. Did the court err in admitting evidence about [appellant]'s prior, unrelated case?
> 5. Is the evidence insufficient to sustain the second-degree murder conviction?"

Finding no error, we shall affirm.

I.

Appellant was indicted by the Grand Jury for Prince George's County in a single count short-form indictment charging first-degree murder. He proceeded to trial on February 25, 2019 and the jury was unable to reach a unanimous verdict. The court declared a mistrial and the case was re-tried on October 21, 2019. At that trial, the jury acquitted appellant of first-degree murder and convicted him of second-degree murder. The court imposed a term of incarceration of thirty years.

This case was a 'cold case.' The murder occurred in 2005. Appellant was indicted on December 29, 2016. He was detained for approximately 26 months from then until his first trial in early 2019. Shortly before that first trial, he filed a motion to dismiss the charges based upon a denial of speedy trial. In his motion to dismiss, he stated that he

suffered significant stress and anxiety because of that period of detention. The trial court denied the motion, explaining as follows:

> "Okay. Well, by my calculation there's been 20 months of delay from the original trial date until today. Nine months were attributable to the State—first because a witness was in the hospital; second, because the case had been reassigned from one prosecutor to another, and third, because the assigned prosecutor was in trial in a different case before Judge Dawson. Thereafter, there were 11 months of delay or continuation, five months due to the Defense continuance because [defense] counsel was ill, and then six months due to a joint continuance because counsel for both sides were new to the case. So, by my calculation, the [appellant] was responsible solely or in part for 11 months of the delay; the State was responsible for nine months of the delay. I don't think we get to *Barker v. Wingo*, and even if we did, in looking at the various factors, the reasons for the delay all seem legitimate on both sides, but the majority of that delay is attributable to the Defense. So, I don't find that the [appellant] has been prejudiced. There's been no showing of that, and I am going to deny the motion to dismiss."

We set forth the following facts as gleaned from the record. Around 11:30 pm on September 15, 2005, Officer Jordan Peretta was on patrol in "the Grove" in Prince Georges County when he received a call reporting an accident on West Street just west of its intersection with 10th Street—near the Laurel City Hall. He went to the location described in the call and saw a car that was off the road and smashed into a cement sign. The air bags had deployed and a man was in the driver's seat. The man said "[h]e got me." Officer Peretta observed a puncture wound on the man's chest.

Other officers arrived on scene, and they removed the driver from the car. Officer Peretta identified the victim as Brian Moses. Officer Peretta canvassed the Grove but did not find any physical evidence or witnesses who had seen what happened. Mr. Moses was

transported to Prince George's Hospital for treatment. He had suffered a stab wound to his chest that went through part of his left lung, through his heart, and into his right lung. He died three weeks later.

Evidence technician John Hamilton went to the scene that night and took photographs, collected blood samples from the vehicle, searched the area around the vehicle, and unsuccessfully attempted to lift fingerprints from the vehicle. The next day he took custody of a steak knife that detectives found about a half mile from the accident.

Although the investigation into Mr. Moses's death was considered a 'cold case,' his mother, Shirley Bell, remained in regular contact with detectives over the years. In 2016, Detective Adam Cheek received information that led him to resume the investigation and re-interview two witnesses: Dana Daniels and Lisa Jones.

The first jury was unable to reach a unanimous verdict, and the case was re-tried in October 2019. A key prosecution witness at the first trial was Dana Daniels. When the second trial began, she was hospitalized for treatment for lung cancer and unavailable to testify at trial. She had testified at the first trial and been cross-examined by appellant's counsel. That testimony had been memorialized by a court stenographer (no audio or video recording). At the second trial, the State moved to have her testimony from the first trial read to the jury. Appellant objected and presented a three-pronged argument. First, appellant argued that Ms. Daniels's testimony did not meet the requirements of Md. Rule 5-804(a)(4)[1] for unavailability of a witness. Second, appellant argued that Ms. Daniels's

[1] Md. Rule 5-804(a)(4) provides as follows: (footnote continued…)

prior testimony was inadmissible under *Crawford v. Washington*, 541 U.S. 36 (2004), because it limited his counsel's ability to prepare a new cross-examination strategy. Third, appellant argued that the court should admit only an audio or video recording of the testimony because, if the jury could not hear Ms. Daniels's voice, it would be unable to assess her credibility. Lacking audio recording, the court overruled appellant's objection and permitted Ms. Daniels's testimony to be read to the jury.

Ms. Daniels testified as follows. About seven hours before Brian Moses was found by Officer Perettta, she met up with Mr. Moses to braid his hair. They met at Emancipation Park near the intersection of Eighth Street and Maple Avenue. Mr. Moses parked his car on Clays Lane, and then walked around the corner, onto Maple Avenue, to meet her at the park. While she braided his hair, she saw the appellant—whom she had known for about four months—walk past them through the park and then meet up with her cousin Anthony and her boyfriend Pedro. They went behind her cousin Lorcey's house, which was across Eighth Street from the park. Sometime between 7:40 and 8:40 pm that day, she was still braiding Mr. Moses's hair when a police officer told them to leave the park.

For the hair braiding, they had agreed on a price of twenty dollars, but Mr. Moses had only eighteen dollars. He said he would drive to get the remaining two dollars and come back and give it to her. They parted ways at the corner of West Street and Clays Lane.

"'Unavailability as a witness' includes situations in which the declarant is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity."

Mr. Moses went north on Clays Lane to his car. She saw him drive up that hill to a little past the stop sign at the intersection of West Street and Tenth Street, where he crested the hill. She then lost sight of his car. Almost immediately thereafter, however, she saw appellant running down that hill. The following morning, she learned that Mr. Moses had been stabbed.

At appellant's first trial, appellant's defense counsel cross-examined Ms. Daniels extensively. As part of this cross-examination, counsel presented Ms. Daniels with prior statements she had made to detectives and to the grand jury. Many of these statements were inconsistent with her trial testimony. Ms. Daniels explained most of these inconsistencies by saying that she had been brought up not to cooperate with police and had decided recently to cooperate for moral reasons.

Lisa Jones testified at the second trial as follows. Ms. Jones met appellant in 2001, and they became friends and sometimes romantic partners. On September 15th, 2005, appellant asked to borrow her car. He told her that he needed it to go to the Grove, because somebody there owed him something. He said he would bring the car right back. He left with the car around 6:00 or 7:00 p.m. but did not return until the early morning hours.

When appellant returned with her car he was very dirty, and he said that he needed to "lay low" to avoid the police. When she asked him why he was late, he said that "something had happened." When she went to check on her car, she noticed that there was no gas in it, and that the steering wheel had blood on it. When she confronted appellant about the blood, he told her it was not his blood.

Ms. Jones further testified that, after that night, appellant on three or four occasions told people that "Mo" "never saw it coming," and imitated stabbing someone—siting in a car—in the chest. At the time, she knew of two different people named "Mo" that regularly visited the Grove. Appellant elaborated that that this man—who he had stabbed—had cheated him.

In the weeks following Mr. Moses's death, she began to hear rumors that appellant, who some people thought was her boyfriend, had killed somebody. About a month after Mr. Moses's death, she and appellant were passing a funeral together when appellant told her "that's who I took care of."

Ms. Jones and appellant lost contact after 2005. Then, in 2016, police contacted Ms. Jones about appellant. Police provided Ms. Jones with appellant's phone number and recorded two phone calls she made to him. In one of those phone calls, Ms. Jones asked appellant if he had gotten rid of a knife, and appellant responded "[t]hat done been gone." On that same call, appellant instructed Ms. Jones not to provide the police with any information.

At trial, appellant objected to the introduction into evidence of these recorded calls. Appellant had been convicted of an unrelated stabbing about ten years prior to trial, and he argued that during those recorded calls he was talking about—and was under the impression Ms. Jones was talking about—the knife from that stabbing. The trial judge overruled his objection and admitted the recorded phone call into evidence.

At the second trial, the State requested that the judge instruct the jury on second-

degree murder in addition to first-degree murder. Defense counsel objected. The judge overruled the objection and instructed the jury as to both first-degree and second-degree murder. The jury returned a not-guilty verdict as to first-degree murder and convicted appellant of second-degree murder. The court imposed sentence and this timely appeal followed.

II.

Appellant presents five issues for our review. First, he argues that the trial court erred in denying his motion to dismiss the case based on the State's failure to timely bring him to trial. He claims that this delay was due mainly to the State not having its act together, that it caused him great stress and anxiety, and that it prejudiced his defense.

Second, appellant argues that the trial court erred in instructing the jury as to second-degree murder. Appellant argues that the State pursued only one theory at trial—that Mr. Moses's death was the result of a deliberate, premeditated first-degree murder—and that that choice foreclosed the possibility of a second-degree murder conviction. According to appellant, the State presented no evidence to support a finding that appellant was guilty of second-degree murder and, therefore, the only plausible verdicts were guilty of first-degree murder, or not guilty.

Third, appellant argues that the trial court erred in admitting the prior trial testimony of Dana Daniels because of the manner in which it was admitted, *i.e.*, having the transcript read to the jury. In his view, this made it impossible for the jury to observe her demeanor

and hear her voice, and thus was unfair to the appellant.[2]

Fourth, appellant argues that the court erred in admitting evidence about the recorded phone call between Ms. Jones and appellant because the call was not relevant, was misleading, and was unfairly prejudicial. He objects to the testimony related to the knife and maintains that the knife he referred to in the phone call related solely to his other stabbing case. By admitting evidence related to the knife connected to a different case, he claims he was left with a "Hobson's choice"—"to either let the jury believe that he had admitted to knowing that the knife used in this case was gone—or introduce the highly prejudicial evidence that he had previously been involved in a separate altercation involving a knife to explain what he really meant."

Finally, appellant argues that the evidence is insufficient to sustain the judgment of conviction for second-degree murder. He argues that the evidence here is, at best, a *possibility* of guilt, and does not support any finding, beyond a reasonable doubt, that he

[2] He argues in his brief as follows:

> "While the admission of the prior testimony did not violate Rule 8-504 or [appellant]'s right to confront witnesses, under [*Crawford v. Washington*, 541 U.S. 36 (2004)] and its progeny, the lack of an audio or audio/video recording of Daniels's testimony deprived [appellant] of a fair trial, thereby denying him due process of law, as the jury was unable to weigh her credibility, which was a crucial issue in the case."

Appellant's brief at 25 (citing *Dionas v. State*, 436 Md. 97, 110 (2013))

We note that *Dionas* does not support appellant's argument. *Dionas* dealt with harmless error. Both the Court of Special Appeals and the Court of Appeals agreed that the trial judge erroneously limited the defense counsel's cross-examination of a State's witness regarding an expectation of leniency. The Court of Appeals reversed the Court of Special Appeals, holding that the error was not harmless.

committed the murder.

The State responds as follows. As to appellant's claim of denial of a speedy trial, the State argues that the trial court denied appellant's motion to dismiss correctly. According to the State, the delay here was not of constitutional dimension, and, even if it was, a significant portion of the delay was attributable to the defense or for legitimate reasons. The State argues further that appellant's claimed anxiety was nothing more than that experienced by most or all persons charged with serious crimes.

To the second-degree murder instruction, the State presents a two-pronged argument.[3] First, the state argues that the evidence presented supported an instruction to the lesser-included offense of second-degree murder. The State points out that its theory related to appellant's intent was compatible with an intentional—but not a premeditated—killing. Second, the State argues that appellant was charged in the statutory short-form

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[3] The State presents a third argument: that under Maryland Rule 4-325(e) appellant failed to preserve this issue for appellate review because he did not object *after* that jury instruction was given. The State is correct that the general rule is that an objection is required after instruction to the jury. But, there is a judicially created exception to this rule that is met when

> "[1] there [was] an objection to the instruction; [2] the objection [appears] on the record; [3] the objection [is] accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the record, and [4] the circumstances [were] such that a renewal of the objection after the court instructs the jury would be futile or useless."

Gore v. State, 309 Md. 203, 209 (1987).

The first three elements are met in this case. And, we hold the fourth element met here because the second-degree murder instruction was opposed to at two trials, the issue was argued thoroughly, and thus it was unlikely the court would have taken any action as a result of an objection. *See Baby v. State*, 172 Md. App. 588, 630 (2007) (finding issue preserved for appeal despite lack of *ex post* objection where it was "vigorously opposed in the trial court at two separate proceedings").

indictment provided for in Md. Code Ann., Crim. Law Article (2002, 2012 Repl. Vol), § 2-208, and thus he was charged with second-degree murder.

As to Dana Daniels's testimony from the first trial which was read to the jury, the State argues the court admitted the transcript testimony properly. The transcript was the best available evidence, as there was no video or audio recording made at the first trial. Back then, the record was made by an in-person court stenographer. The State notes that appellant did not object below as to the *manner* in which the reader presented Ms. Daniel's testimony. The State argues that the prior recorded testimony was admissible because the witness was unavailable, satisfied the requirements under Rule 5-804 for admissibility, and appellant had full opportunity to cross-examine the witness previously.

The State argues that the trial court admitted properly the recorded call. Considering the context of the four-minute call, according to the State, it is clear that appellant was talking about the knife *in this case*. The State reasons that if appellant had been talking about the knife from the other stabbing, he would not have been worried about information getting to the police because he had pled guilty to that stabbing in 2009 and no longer needed to hide information about it.

Turning to the sufficiency of the evidence, the State maintains that the evidence was sufficient to support the judgment of conviction beyond a reasonable doubt. The evidence presented included motive—that appellant was motivated to stab the victim, and that he acted upon that motive. The motive was that the victim had sold appellant fake drugs, and that appellant went to the Grove to settle a score. Moreover, according to the State,

although circumstantial evidence is sufficient to support a conviction, appellant's statements provide further proof that appellant stabbed the victim.

III.

The trial judge found that appellant was not denied his speedy trial rights. We agree and hold that the court denied properly appellant's motion to dismiss. After weighing the factors set out in *Barker v. Wingo,* 407 U.S. 514 (1972), we conclude that the factors weigh against dismissal. In *Klopfer v. North Carolina*, 386 U.S. 213 (1967), the United States Supreme Court held that the Sixth Amendment to the United States Constitution providing a right to a speedy trial applies to the states through the Fourteenth Amendment. In Maryland, the right of an accused to a speedy trial is guaranteed by Article 21 of the Maryland Declaration of Rights as well as the Sixth Amendment to the Constitution of the United States. When assessing whether a defendant's right to a speedy trial was violated, we make our own independent constitutional analysis. *Glover v. State,* 368 Md. 211, 220 (2002). We accept the lower court's findings of fact unless they are clearly erroneous. *Id.* at 221. To determine whether appellant has been deprived of his right to a speedy trial, we engage in a two-step analysis. *See United States v. Loud Hawk*, 474 U.S. 302, 314 (1986) (citing *Barker*, 407 U.S. 514, 530). First, we ask whether the length of the delay triggers presumptive prejudice. *See id.* Second, if it does, we consider the other three factors set out by the Supreme Court in *Barker,* 407 U.S. at 530: the reason for the delay, the defendant's assertion of the right, and prejudice to the defendant. *Id.*

A. Length of Delay

We turn first to the length of the delay. Appellant claims the length of delay was 788 days; the State claims the delay was 322 days.[4] Although there is a significant difference between 788 days and 322 days, it matters not for "presumptive prejudice" analysis, because we hold that 322 days constitutes presumptive prejudice.

"When the delay is of a sufficient length, it becomes 'presumptively prejudicial,'" thereby triggering a "balancing test [which] necessarily compels courts to approach speedy trial cases on an *ad hoc* basis." *Brady v. State*, 288 Md. 61, 65 (1980) (quoting *Barker* at 530 (internal quotation marks omitted). It has been said that "[b]ecause whether a period is presumptively prejudicial, or not, depends upon the length of a pre-trial delay, the first factor is to some extent a triggering mechanism." *Id.* Unless there is a delay that is prejudicial, or presumptively prejudicial, there is no need for any inquiry into the other factors that go into the balance. *Id.* For speedy trial analysis, the length of delay is measured from the date of arrest or the filing of formal charges, such as indictment or information, to the trial date. *Divver v. State*, 356 Md. 379, 388-9 (1999). In Maryland, a delay of one year and fourteen days, or about twelve and one-half months, has been found to be presumptively prejudicial. *See Glover*, 368 Md. 211, 223; *Jones v. State,* 279 Md. 1, 6 (1976). The delay in this case raises a presumption of prejudice and triggers analysis of

[4] Appellant measures the delay length from the date of the indictment, December 29, 2016, to February 25, 2019, the date of the hung jury, for a total of 788 days. The State measures the time from the date that "meaningful trial proceedings" began, April 9, 2018 to the subsequent trial date, February 25, 2019, for a total of 322 days.

the other three *Barker* factors.

B. Reason for Delay

We look at the reasons for the delay and allot different weights to the reasons therefor. The reason for delay is closely related to the length of delay, and different weights are assigned to different reasons. *Barker* at 531. A deliberate attempt to delay the trial to hamper the defense should be weighed heavily against the State. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily against the state. "A valid reason, such as a missing witness, should serve to justify appropriate delay." *Id.*; *State v. Bailey*, 319 Md. 392, 412, cert. denied, 498 U.S. 841 (1990).

Appellant was indicted on December 29, 2016, and his first trial date was set for July 19, 2017. This time has been deemed necessary for the orderly administration of justice and is classified as neutral status. *See Jules v. State*, 171 Md. App. 458, 484 (2006); *Ratchford v. State*, 141 Md. App. 354, 361 (2001); *Howell v. State*, 87 Md. App. 57, 82 (1991). From July 19, 2017 until November 13, 2017, 126 days passed, and these should be counted as neutral delay. That delay was attributable to the hospitalization of witness Lisa Jones. *See Barker* at 531 (finding that delay for a missing witness is appropriate delay). From November 13, 2017 to April 9, 2018, a delay of 147 days passed because of staffing issues in the State's Attorney's Office; this delay weighs slightly against the State. From April 10, 2018 until September 17, 2018, 160 days of delay passed. This delay was attributable to a serious health issue of defense counsel. Because the State was prepared to proceed to trial on April 10th, this delay is attributable to appellant, and at worst, is a

neutral factor. From September 17, 2018 until February 25, 2019, 161 days of delay passed. This postponement was based upon a joint request by the State and defense because each side had new counsel, and both needed more time to prepare for trial. This delay is accorded neutral status. In sum, although part of the delay is attributable to the State, there is no evidence of intentional delay or intent to interfere with the defense, and therefore, the delay weighs slightly against the State.

C. Assertion of Right

The parties agree that appellant asserted his right early and often. In *Barker*, the Supreme Court explained as follows:

> "The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."

Id. at 531-2. This factor weighs in his favor.

D. Prejudice

The trial court found no constitutional prejudice. We agree.

The Supreme Court in *Barker* held that prejudice "should be assessed in the light of the interests of defendants which the speedy trial was designed to protect." *Id.* at 532. Although we hold there is presumptive prejudice here, we look at any actual prejudice to appellant, identified as "the most important factor." *Jules*, 171 Md. App. 458, 488. The Supreme Court identified three interests: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the

defense will be impaired. *Barker* at 532; *Bailey*, 319 Md. 392, 416-17. Of these three interests, impairment of the defense is the most important. *Id.*

In this case, the trial court found that appellant's defense was not impaired by the delay. Appellant argued below, and argues again before us, this finding was error only a with a general claim that memories are less reliable with time. Under *Barker*, a general statement that memories fade with time is insufficient to establish actual prejudice to a defendant. *See State v. Pugh*, 212 A.3d 787, 798 (Conn. App. 2019) ("A claim of general weakening of witnesses' memories, relying on the simple passage of time, cannot, without a more specific showing, be said to prejudice the defendant"). Appellant argues further that he was prejudiced because he suffered from anxiety and concern, and because he was incarcerated during that time. His incarceration weighs in his favor. But, notably, appellant notes no anxiety other than that which is commonly experienced generally by defendants awaiting trial. Bald statements of anxiety are insufficient to establish actual prejudice. *See Cantu v. State*, 253 S.W.3d 273, 285-6 (Tex. Crim. App. 2008) (stating "evidence of generalized anxiety, though relevant, is not sufficient proof of prejudice under the *Barker* test, especially when it is no greater anxiety or concern beyond the level normally associated with a criminal charge or investigation"); *see also State v. Friberg*, 435 N.W.2d 509, 513 (Minn. 1989) (noting that prejudice is not shown when a defendant shows no evidence of greater stress or anxiety more than that experienced by others involved in a trial).

Appellant's early and often assertion of his right to a speedy trial weighs in his favor.

His detention for the entire time from indictment to trial weighs in his favor. But, the latter weighs only lightly in his favor. *See, e.g.*, *Malik v. State*, 152 Md. App. 305, 322 (2003). Significantly, the lack of any evidence of greater than normal stress and anxiety, and the trial judge's finding that the appellant's ability to mount a defense was not impaired, cuts significantly against the appellant. *See Hayes v. State*, 247 Md. App. 252, 304 (2020); *Hallowell v. State*, 235 Md. App. 484, 519 (2018); *Fields v. State*, 172 Md. App. 496, 541–4 (2007); *Wilson v. State*, 148 Md. App. 601, 639 (2002). We hold that the trial court denied properly appellant's motion to dismiss on speedy trial grounds.

IV.

We turn to the jury instruction on second-degree murder. The indictment in this case used the statutory short-form. *See* Md. Code Ann., Crim. Law Article (2002, 2012 Repl. Vol), § 2-208. It is well-decided that the statutory short-form includes first-degree murder, second-degree murder, and manslaughter. *Dishman v. State*, 352 Md. 279, 288-9 (1998) (quoting *State v. Ward*, 284 Md. 189, 200 (1978), overruled on other grounds by *Lewis v. State*, 285 Md. 705 (1979)) (stating "It is well settled that under an indictment pursuant to the statutory formula, even though it spells out murder in the first degree, the accused may be convicted of murder in the first degree, of murder in the second degree, or of manslaughter"). The purpose of jury instructions is to "direct the jury's attention to the legal principles that apply to the facts of the case." *General v. State*, 367 Md. 475, 485 (2002). At the time of trial, Rule 4-325 provided as follows:

> "The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding….The court need not grant a requested instruction if the matter is fairly covered by instructions actually given."

This Rule requires trial courts to give a party's requested jury instruction when the requested instruction states correctly the law, the instruction applies to the facts of the case (*e.g.*, is generated by some evidence), and the content of the jury instruction is not otherwise covered by another instruction. *Preston v. State*, 444 Md. 67, 81-2 (2015).

At issue in this case is whether the State adduced *some* evidence to support a jury instruction for the offense of second-degree murder. *See Nicholson v. State*, 239 Md. App. 228 (2018). Some evidence is a low bar. *Arthur v. State,* 420 Md. 512, 526 (2011). The level required need not rise to the level of beyond a reasonable doubt, clear and convincing, or even preponderance. *Id.* In *Dykes v. State,* 319 Md. 206 (1990), the Court of Appeals explicated on the "some evidence" requirement as follows:

> "Some evidence is not strictured by the test of a specific standard. It calls for no more than what it says—'some,' as that word is understood in common, everyday usage. It need not rise to the level of 'beyond reasonable doubt' or 'clear and convincing' or 'preponderance' The source of the evidence is immaterial; it may emanate solely from the defendant. It is of no matter that the self-defense claim is overwhelmed by evidence to the contrary. If there is any evidence relied on by the defendant which, if believed, would support his claim that he acted in self-defense, the defendant has met his burden. Then the baton is passed to the State. It must shoulder the burden of proving beyond a reasonable doubt to the satisfaction of the jury that the defendant did not kill in self-defense."

Id. at 216-7. On appeal, our task is to determine whether the proponent "produced that

minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired." *Bazzle v. State*, 426 Md. 541, 550-1 (2012) (internal citation omitted).

We hold that the trial court did not err or abuse its discretion in instructing the jury as to both first-degree and second-degree murder.[5] Although the State maintained that appellant killed the victim with premeditation and deliberation, the evidence allowed for the jury to conclude that appellant's actions were not premeditated but fit within the definition of second-degree murder.

V.

We next address whether the trial court erred in admitting the transcript of Dana Daniel's prior testimony from appellant's first trial that ended in a mistrial. The trial court found that the prior testimony complied with *Crawford* and Rule 804.

Below, appellant objected first on the grounds that Ms. Daniel's situation did not meet the requirements of unavailability under Rule 5-804 and that appellant would be denied the right to cross-examine witnesses because he "would be stuck with the same

[5] The trial court instructed the jury on second-degree murder using the Maryland Criminal Pattern Jury Instruction 4:17.1(B). In pertinent part, it stated as follows:

> "In order to convict the defendant of second-degree murder, the State must prove: (1) that the conduct of the defendant caused the death of [Brian Moses]; and (2) that the defendant engaged in the deadly conduct either with the intent to kill or with the intent to inflict such serious bodily harm that death would be the likely result."

MPJI-Cr 4:17.1(B) (2019).

defense strategy used in the last trial." After the court disagreed, appellant wanted an audio recording of the testimony presented to the jury. No audio recording existed. Appellant objected. He argued that because there was no audio or video recording of the witness testifying at the first trial, the jury was deprived of an opportunity to assess her credibility. He makes the same argument here, and he adds that even though the admission of the prior testimony did not violate Rule 5-804 or appellant's right to confront witnesses, under *Crawford*, the lack of an audio or video recording deprived appellant of a fair trial, thereby denying him due process of law. He appears to sum up his argument to one complaint: the manner of admission of Ms. Daniel's testimony made it impossible for the jury to assess her credibility, rendering appellant's trial unfair and requires reversal.

We hold that the trial court did not abuse its discretion, or err, in admitting the transcript of the prior testimony of Ms. Daniels. Admitting an out-of-court statement for the truth of the assertion complies with *Crawford* if the statement is non-testimonial, the declarant is available to testify, *or the accused had a prior opportunity to cross-examine the declarant. See* Lilly, Capra, and Saltzburg, Principles of Evidence at 289-9 (8th ed. 2019). We have found no authority, and appellant has cited none, to support his argument.

The United States Court of Appeals for the Eighth Circuit, in *United States v. Weber*, 987 F.3d 789 (8th Cir. 2021), addressed this exact issue, and found no abuse of discretion. The court explained aptly as follows:

> "Finally, Weber asserts the district court abused its discretion when it admitted GRC's prior testimony from the Montana trial under Rule 804(b)(1) on the ground that it was difficult for the jury to evaluate GRC's credibility from a cold transcript. This

> reasoning is an attack on the policy behind Rule 804(b)(1), not an argument that the Rule was improperly applied. Whenever Rule 804(b)(1) testimony is admitted, it is more difficult for the jury to evaluate credibility than when the witness is present in court. Rule 804(b)(1) represents a compromise and is premised on a preference for admitting prior testimony over a complete loss of the evidence. *See* Fed. R. Evid. 804 advisory committee's note to 1972 proposed rule. The district court did not abuse its discretion by admitting GRC's prior testimony from the Montana trial under Rule 804(b)(1)."

Id. at 794. This reasoning applies equally to Maryland Rule 804(b)(1).

VI.

We turn to appellant's recorded telephone call with Lisa Jones that was admitted into evidence over appellant's relevancy objection. We review the trial court's ruling for abuse of discretion. *Colkley v. State*, 251 Md. App. 243 (2021). We agree with the State that viewing the phone call in context, the discussion in the call related to the instant case and not some prior case.

During the phone call, appellant was aware that "Detective Ivy" wanted to talk to Jones about appellant and that Jones did not want to say something that would "trip him up." Appellant asked where Detective Ivy is "at now," which indicated that appellant knew him. Inasmuch as appellant was convicted of stabbing Anthony White ten years earlier, it would have made little sense for Detective Ivy to be interested in talking to Jones about a case that appellant had pled guilty to years ago. Likewise, it would have made little sense for Jones to be concerned about the police finding the knife used in the commission of a stabbing to which appellant had admitted.

A fair reading of the call would include the notion that the police wanted to talk to Ms. Jones about the cold case for which no one had yet been convicted, and therefore Jones and appellant were referring to Mr. Moses and the knife that was used to stab him. When Jones asked appellant whether he had gotten rid of the knife, appellant never suggested any confusion as to which incident she had referred. He responded that the knife "done been gone." That appellant had instructed Ms. Jones to not provide the police with any information suggested that appellant believed Ms. Jones had incriminating information about a case incriminating appellant.

VII.

In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the State. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Morrison*, 470 Md. 86, 105 (2020). We give due regard to the trial court's finding of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses. *State v. Raines,* 326 Md. 582, 589 (1992). The deferential standard recognizes the trier of fact's better position to assess the evidence and credibility of the witnesses. *Smith v. State*, 415 Md. 174, 184-5 (2010). We do not re-weigh the evidence or credibility of witnesses or attempt to resolve conflicts in the evidence. *Id.* Our concern "is only with whether the verdicts were supported with sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts that could fairly convince a trier of fact of the defendant's guilt of the

offenses charged beyond a reasonable doubt." *State v. Albrecht,* 336 Md. 475, 479 (1994). The verdict "must rest on more than mere speculation or conjecture." *Smith*, 415 Md. 174, 185.

We hold that the evidence was sufficient to support the judgment of conviction beyond a reasonable doubt. Appellant's attack on the sufficiency of the evidence is directed primarily to whether the State proved beyond a reasonable doubt that appellant was linked to the murder. The State presented sufficient evidence, both direct and circumstantial, to support the judgment and appellant's criminal agency.

Although not an element of the crime, the State presented evidence of appellant's motive to stab Mr. Moses, *i.e.*, the alleged bad drug deal. Presence of motive may be considered as evidence of guilt. *Jackson v. Stat*e, 87 Md. App. 475, 485 (1991). In addition, appellant's statements provided evidence of his criminal agency.

Ms. Daniels testified that appellant said he "took care of business" at the Grove and that "Mo" "never saw it coming." On several occasions, he mimicked stabbing someone, sitting in their car, in the chest. Brian Moses was stabbed to death, in his chest, in his car. If the jury believed the testimony that appellant stated, after the murder, he "walked up on 'Mo'" who was in his car, and swung at his chest, a reasonable jury could interpret those statements as admissions and as evidence of his criminal agency. Ms. Daniels testified that appellant said he "took care of business" at the Grove and that Mo "never saw it coming." Brian Moses was stabbed to death, in his chest, in his car. The evidence, viewed in the light most favorable to the State, supports the judgment of conviction beyond a reasonable

doubt.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

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

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