Circuit Court for Baltimore City
Case No. 116077014

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1711

September Term, 2017

ANGEL FURY

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: April 25, 2019

On the morning of January 5, 2016, Edward Yesaitis was found beaten to death in a motel room on Pulaski Highway in Baltimore City. The State charged appellant Angel Fury and her boyfriend, Christopher Wilkins, with Yesaitis's murder.

A jury in the Circuit Court for Baltimore City convicted Fury of first-degree felony murder and robbery, but acquitted her of first-degree premeditated murder and conspiracy to commit murder. The court sentenced Fury to life in prison, but suspended all but 50 years.

Fury appealed. We affirm.

BACKGROUND FACTS

As 2015 came to an end, Fury and Wilkins were at the end of their rope. She was pregnant, he had no money, and she had very little. They made a plan to leave Baltimore and to move to North Carolina to live with Wilkins's father.

Pursuant to the plan, the pair bought one-way train tickets from Baltimore to North Carolina on January 2, 2016. The train was to depart from Penn Station on January 5, 2016.

After buying the tickets, Fury and Wilkins had only $88 in cash. Their reserves dwindled to approximately $70 after they purchased a clock radio and cigarettes. They stayed at a motel on Pulaski Highway on the night of January 2, 2016, which further depleted their funds.

With no money and nowhere to sleep, Fury and Wilkins returned to the train station on January 3, 2016, with the intention of staying there overnight. A police officer

instructed them, however, that they could not spend the night in the station. Consequently, they moved to the sidewalk in front of the station.

That same evening, while en route from Connecticut to South Carolina, Edward Yesaitis was removed from an Amtrak train in Baltimore for being intoxicated and disorderly.

Yesaitis called an old friend in Baltimore and angrily demanded to be picked up at the train station. A shouting match ensued, and the friend refused to pick up Yesaitis, but told him of a hotel within walking distance of the train station.

Yesaitis did not go to the hotel. Instead, an Amtrak security video showed that he was approached by Fury. Within a matter of moments, Yesaitis was talking to Wilkins, who lent his phone to the intoxicated man, as Yesaitis had apparently misplaced his own.

Wilkins persuaded Yesaitis to take him and Fury to the motel on Pulaski Highway, where they had stayed the night before. Yesaitis paid for a Lyft to the motel. In the meantime, an Amtrak employee had found Yesaitis's missing phone.

When Yesaitis, Wilkins, and Fury arrived at the motel, Fury and Yesaitis went to the office, where Yesaitis paid for a room. Once Yesaitis had gotten the room, he and Wilkins went out to buy vodka, beer, and crack cocaine, which Yesaitis paid for as well.

Over the next 36 hours, Yesaitis, Wilkins, and Fury drank alcohol and smoked crack. On one occasion, Yesaitis left the room to pay for a second night. On another, the

men left the room so that Yesaitis could withdraw money from an ATM and buy more cocaine.[1]

On the morning of January 5, 2016, the motel manager went to the room, because Yesaitis did not check out by the required time. She found the room in disarray and Yesaitis's battered body on the floor, covered by a sheet.[2]

In the motel room, the police detectives found a receipt, which contained the address of a store and the time of a purchase. The police obtained the store's security video, which showed Wilkins making the purchase. In addition, the police recovered Fury's and Wilkins's fingerprints and DNA from the motel room.

A detective spoke with Yesaitis's father, who identified a phone number from which he had received calls from his son in the days before his death. The number was tied to Fury and Wilkins.

The motel's security video, which was shown to the jury and entered into evidence, showed that Yesaitis had checked into the motel on January 3, 2016, in the

[1] Wilkins, who testified in Fury's defense, claimed that Fury did not participate in the drinking and drug use, because, he said, she was withdrawing from methadone and did not feel well. (Wilkins said that he was withdrawing from methadone as well.) By contrast, in a statement to the police after her arrest, Fury agreed on several occasions that she was drinking and smoking crack with the two men.

[2] The Assistant Medical Examiner testified that Yesaitis had facial, rib, spine, and back fractures, as well as multiple bruises, lacerations, and abrasions on his torso, back, extremities, and face, and numerous internal injuries. The medical examiner opined that Yesaitis had probably been kicked or stomped at least 10 to 15 times over the course of several minutes. The cause of death was multiple injuries, the manner of death a homicide. At the time of the autopsy, Yesaitis, who weighed 255 pounds, had a blood-alcohol concentration of .26, more than three times the legal limit for driving. He tested positive for cocaine metabolites and prescription medications.

company of a man and a woman, whom a detective identified as Fury and Wilkins. The video also showed that Fury and Wilkins left the room together at 7:04 a.m. on January 5, 2016. Yesaitis's body was discovered at 10:30 a.m. that morning.

Fury and Wilkins used Yesaitis's phone to order an Uber to take them from a location near the motel to a location near Penn Station. An Amtrak security video depicted them in the station that morning, wearing some of Yesaitis's clothes. A citizen found Yesaitis's wallet, with no money inside of it, near Penn Station on January 6, 2016, and turned it over to the police.

With the assistance of the United States Marshals Service, the police arrested Fury and Wilkins in North Carolina on January 11, 2016. At the time of their arrest, they had some of Yesaitis's clothing and shoes. Neither displayed any physical injuries.

After her arrest, Fury gave a recorded statement, which the State played for the jury. In the statement, Fury confirmed that she, Wilkins, and Yesaitis went to the motel, which was near where she had been raised. She also confirmed that Yesaitis bought them drugs and alcohol and that she, Wilkins, and Yesaitis used the drugs and drank the alcohol. She denied that she participated in the beating of Yesaitis, but she also made several statements that could be characterized as expressions of consciousness of guilt, including statements that she would "get life" in prison. She asserted that Wilkins beat Yesaitis after Yesaitis had made a sexual advance on her, and she claimed that Yesaitis was still alive when they left him.

Wilkins, who had pleaded guilty to robbery and murder, testified in Fury's defense. He claimed that Yesaitis had tried to force himself on Fury, that he intervened

to protect her, that Yesaitis attacked him, and that he retaliated. Like Fury, Wilkins claimed that Yesaitis was somehow still alive when they left him. Wilkins said that he took Yesaitis's phone and wallet, but claimed that he did so to prevent Yesaitis from following them. He also said that Yesaitis had given them his clothing to wear because their own clothes were wet and dirty. He discarded Yesaitis's wallet and phone in the bushes near the train station.

According to Wilkins, Fury hid under the sheets and did not participate in the fight. The State established, however, that when Wilkins pleaded guilty, he agreed that both he and Fury had punched and kicked Yesaitis while Yesaitis was wrapped in a blanket.

The jury initially returned a legally inconsistent verdict – convicting Fury of first-degree felony murder, but acquitting her of robbery, the underlying felony. Fury objected to the inconsistent verdicts, and the trial court re-instructed the jury and sent it back to deliberate further. After six hours of additional deliberations, the jury found Fury guilty of both felony murder and the underlying felony.

QUESTIONS PRESENTED

Fury asks us to consider the following questions:

1. Is the evidence sufficient to sustain the convictions?
2. Did the trial court err in instructing the jury on felony murder?
3. Did the trial court err in denying Ms. Fury's *Batson* challenge?
4. Did the trial court err in denying Ms. Fury's motion to suppress?
5. Did the trial court err in refusing to redact Ms. Fury's statement?

6. Did the sentencing court err by (1) relying on bare allegations of charges not resulting in conviction, and (2) considering what it perceived as lack of remorse from the outset?

DISCUSSION

I. Sufficiency of the Evidence

Fury contends that the evidence was insufficient to sustain the conviction for felony murder. Citing *State v. Allen*, 387 Md. 389 (2005), she argues that, because robbery was the predicate offense for the charge of felony murder, the State was required to establish, beyond a reasonable doubt, that she formed the intent to rob Yesaitis before he was murdered or concurrently with his murder. She insists that the jury could only speculate as to when she formed the intention to rob Yesaitis.

In assessing the sufficiency of the evidence supporting a criminal conviction, we ask "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *McClurkin v. State*, 222 Md. App. 461, 486 (2015) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "In applying that standard, we give 'due regard to the [fact-finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Id*. (quoting *Harrison v. State*, 382 Md. 477, 488 (2004)). We do not "'distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Montgomery v. State*, 206 Md. App. 357, 385 (2012) (quoting

Morris v. State, 192 Md. App. 1, 31 (2010)). A court, on appellate review of evidentiary sufficiency, will not "retry the case" or "re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. 174, 185 (2010).

Viewing the evidence in a light most favorable to the State, we conclude that the jury could reasonably have found sufficient circumstantial evidence to prove that Fury had planned to rob Yesaitis before his murder.

On the evening of January 3, 2016, Fury and Wilkins had no money and no place to go: they were standing in the cold, outside of the train station. They encountered Yesaitis, who was vulnerable because he was intoxicated, had been put off his train in a strange city, and had misplaced his phone. Fury approached Yesaitis, and within minutes she and Wilkins had persuaded him to pay for a ride and for a motel room for the three of them. Over the next 36 hours, Yesaitis spent his money on alcohol, drugs, and food, which he shared with Fury and Wilkins. Before Fury and Wilkins left the motel room on the morning of January 5, 2016, they used Yesaitis's phone (and his credit card) to order a ride. Before leaving him for dead, they took his wallet, cell phone, and clothes. The trial judge cogently expressed the State's theory at sentencing, when she described Fury as the "bait" that led Yesaitis into a trap.

From these facts, the jury could reasonably have inferred that, at a point when Fury and Wilkins were destitute and desperate, they identified Yesaitis as a victim to exploit – as someone who, in the words of the prosecutor, they could "use and lose." If the jury drew that reasonable inference, it would not have been required to find that Fury (and Wilkins) decided to rob Yesaitis (of his clothes, his phone, his wallet, and the

remaining contents of the wallet) only after they had beaten him to death. Instead, the jury could reasonably have found that Fury (and Wilkins) formed an intention to rob Yesaitis when they first persuaded him to take them to the motel. In short, the evidence was sufficient to support a conviction for felony murder.[3]

II. Felony Murder Instruction

Fury argues that the trial court erred in instructing the jury on the charge of felony murder. Although the court gave the pattern jury-instruction for first-degree felony murder in MPJI-Cr 4:17.7,[4] Fury complains that the instruction was inadequate, because, she says, the evidence generated a jury question about whether she formed the intention to steal Yesaitis's property only after the fatal beating had occurred. Because a person can be found guilty of first-degree felony murder only if he or she formed the intention to commit an enumerated felony before or during the commission of the conduct that

[3] In Fury's brief, she poses a question about whether the evidence was sufficient to support a conviction for robbery, but she includes no argument on that issue. Hence, we do not consider it. *See HNS Dev., LLC v. People's Counsel for Baltimore County*, 425 Md. 436, 459 (2012).

[4] The court gave the following instruction on felony murder:

> The Defendant in this case is charged with the crime of first degree felony murder. It is not necessary for the State to prove that the Defendant intended to kill Edward Yesaitis. In order to convict the Defendant of first degree felony murder in this case the State must prove: one, that the Defendant or another person—pardon me—the Defendant or another participating in the crime with the Defendant committed a robbery; two, that the Defendant or another participating in the crime killed Edward Yesaitis; and, three, that the act resulting in the death of Edward Yesaitis occurred during the commission of the robbery.

resulted in the victim's death (*State v. Allen*, 387 Md. at 402), Fury argues that the court should also have given the "afterthought felony" instruction in MPJI-Cr 4:17.7.1.[5]

[5] That instruction reads:

> The defendant is charged with the crime of first degree felony murder. Felony murder does not require the State to prove that the defendant intended to kill the person who was killed. In order to convict the defendant of first degree felony murder, the State must prove:
>
> (1) that [[the defendant] [another participating in the crime with the defendant]] [[committed] [attempted to commit]] a robbery;
> (2) that [the defendant] [another participating in the crime] killed (name);
> (3) that the defendant had the intent to commit the robbery before or at the same time as the act causing the death of (name); and
> (4) that the act resulting in the death of (name) occurred during the [commission] [attempted commission] of the robbery.
>
> [Give appropriate robbery instruction from MPJI-Cr 4:28 or MPJI-Cr 4:28.1.]
>
> When a person is charged with felony murder based on an alleged robbery, the sequence of events can be important.
>
> To convict the defendant of robbery, the State does not have to prove that the defendant decided to rob (name) before or at the same time as the commission of the act(s) that killed (name). For robbery, it is sufficient if the State proves that the act(s) of force and the robbery were parts of the same general event, even if the defendant made the decision to rob (name) as an afterthought, after the commission of the act(s) that caused the death of (name).
>
> The law as to felony murder is different. To find the defendant guilty of felony murder, the State must prove that the defendant had the intent to rob before or at the same time as the commission of the act(s) that killed (name). When the decision to rob the victim is an afterthought, made after the commission of the act(s) that caused the victim's death, a defendant may not be convicted of felony murder.

Fury, however, never asked the trial court to give the "afterthought felony" instruction and never objected to the instructions that the court actually gave. We cannot fault the circuit court for failing to give an instruction that Fury did not request.

Acknowledging her omissions, Fury argues that the trial court committed plain error in failing to give an instruction that she did not request. We decline to exercise our discretion to review that issue for plain error.

"'[A]ppellate invocation of the "plain error doctrine" 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.'" *Winston v. State*, 235 Md. App. 540, 567 (2018) (quoting *Morris v. State*, 153 Md. App. 480, 507 (2003)), *cert. denied*, 458 Md. 593 (2018), and *cert. dismissed*, 461 Md. 509 (2018); *accord Givens v. State*, 449 Md. 433, 469-70 (2016); *White v. State*, 223 Md. App. 353, 403 n.38 (2015).

The Court of Appeals has articulated the following four conditions that must be met before an appellate court will reverse for plain error:

> 1. There must be a legal error that has not been intentionally relinquished or abandoned by the appellant.
>
> 2. The error must be clear or obvious, and not subject to reasonable dispute.
>
> 3. The error must have affected the appellant's substantial rights, which in the ordinary case means that it affected the outcome of the proceedings.
>
> 4. If the previous three parts are satisfied, the appellate court has discretion to remedy the error, but it should exercise that discretion only if the error affects the fairness, integrity or reputation of judicial proceedings.

Winston v. State, 235 Md. App. at 567 (citing *Newton v. State*, 455 Md. 341, 364 (2017)); *see also Givens v. State*, 449 Md. at 469; *State v. Rich*, 415 Md. 567, 578 (2010).

To say that the trial court committed plain error in this case is essentially to say that the court had an obligation to propound an instruction without any request from Fury. That contention would turn the law of jury instructions on its head.

Under Maryland law, the trial court's obligation to propound an instruction depends, in the first instance, on a party's request for an instruction. *See* Md. Rule 4-325(c) ("[*t*]*he 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") (emphasis added). In an adversary system of justice, a court cannot and should not take it upon itself to propound instructions that no party has requested. In this case, therefore, the trial court did not err, much less commit plain error, when it failed to give an instruction that no one requested. For that reason, we decline to exercise plain-error review.

In any event, in the general pattern jury-instruction for felony murder, jurors are instructed that, to convict the defendant, they must find that the murder occurred "*during the commission of the robbery*." MPJI-Cr 4:17.7 (emphasis added). Thus, because the trial court gave the general pattern jury-instruction in this case, it instructed the jurors that, to convict Fury of felony murder, they were required to find that "the act resulting in the death of Edward Yesaitis occurred *during the commission of the robbery*." (Emphasis added). Under this instruction, the jurors could not have convicted Fury of felony murder if they found that the robbery was a mere afterthought to the murder itself – i.e., if they found that the robbery did not occur until after the act resulting in Yesaitis's death. Consequently, even if the court somehow erred in failing to give an instruction that Fury

did not request, the error could not have affected her substantial rights. For that additional reason, we decline to exercise plain-error review.[6]

III. *Batson* Challenge

During jury selection, Fury objected that the State was exercising its peremptory strikes to exclude African-American jurors. In accordance with *Batson v. Kentucky*, 476 U.S. 79 (1986), the trial court found, on both occasions, that Fury had established a prima facie case of racial discrimination and required the State to come forward with a race-neutral explanation for its strikes. After hearing the State's explanations, however, the court denied Fury's objections. Later, when the clerk asked Fury whether the panel was acceptable, she did not renew her objection, but instead answered in the affirmative.

[6] At trial, Fury argued that the court should not give the general instruction on felony murder (MPJI-Cr 4:17.7), because, she said, the murder did not occur during the course of a robbery. She did not, however, reiterate her objection after the court instructed the jury, as required by Md. Rule 4-325(e) ("[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection"). Consequently, she has waived any objection to the court's decision to give the general instruction. Contrary to the assertion in her brief, this case does not represent one of the "rare exceptions" (*Sims v. State*, 319 Md. 540, 549 (1990)), in which a party substantially complied with Rule 4-325(e) despite the failure to reiterate an objection after the court had instructed the jury. *See, e.g.*, *Gore v. State*, 309 Md. 203, 209 (1987) (holding that counsel substantially complied with Rule 4-325(e) despite the failure to reiterate the objection, because further objection would have been futile when the court, on its own motion, devised and delivered an erroneous instruction in response to counsel's comments in closing argument and told counsel, "'You can object all you want, but I'm going to do it'"). But even if Fury had substantially complied with Rule 4-325(e), we would hold that the court did not err in giving MPJI-Cr 4:17.7, because it accurately restates the law, and because it was generated by the evidence. *See supra* § I.

Fury challenges the trial court's conclusion that the State offered an adequate, race-neutral justification for the strikes. As Fury recognizes, however (Brief at 21 n.9), "the defense waives objections regarding the inclusion or exclusion of prospective jurors if, in response to the court's question whether the jury is acceptable to the defense, counsel answers affirmatively." *Accord Gilchrist v. State*, 340 Md. 606, 618 (1995) ("[w]hen a party complains about the exclusion of someone from or the inclusion of someone in a particular jury, and thereafter states without qualification that the same jury as ultimately chosen is satisfactory or acceptable, the party is clearly waiving or abandoning the earlier complaint about that jury"). Because Fury admittedly waived her *Batson* challenge, we do not consider it.[7]

IV. Motion to Suppress

Fury argues that the trial court erred in denying her motion to suppress the statement that she made to the police while in custody in North Carolina. She advances two arguments in support of that contention. First, she argues that the statement was the product of an improper inducement in violation of Maryland common law (*see generally Smith v. State*, 220 Md. App. 256, 273-75 (2014)), because one of the detectives said that her situation would "automatically" improve if she told them what had happened in the motel room. Second, she argues that her will was overborne during the interrogation and,

[7] Fury does not argue that we should review the *Batson* issue for plain error, but if she did, we would conclude that plain-error review is unavailable. In this case, Fury did not merely fail to preserve an objection; she affirmatively waived it. While "[f]orfeited rights are reviewable for plain error, waived rights are not." *State v. Rich*, 415 Md. at 580.

hence, that her statement was not "voluntary" under the Due Process Clause of the Fourteenth Amendment and Article 22 of the Maryland Declaration of Rights. *See generally id.* at 273 & n.8.

As the State correctly observes, Fury did not ask that her statement be suppressed on the ground that it was the product of improper inducements. Instead, she argued only that, in the totality of the circumstances, her statement was not voluntary. Therefore, her common-law claim relating to improper inducements is not preserved for appellate review. Md. R. 8-131(a); *see Smith v. State*, 182 Md. App. 444, 460 (2008) (citing *Stone v. State*, 178 Md. App. 428, 445 (2008), and *Brashear v. State*, 90 Md. App. 709, 720 (1992), for the proposition that "the failure to argue a particular theory at a suppression hearing waives the ability to argue that theory on appeal").

Fury did preserve her constitutional claim that the trial court should have suppressed her statement on the ground that her will was overborne and hence that her statement was not voluntary. When we review that ruling, "we look exclusively at the record of the suppression hearing, view the evidence in the light most favorable to the prevailing party on the motion, and defer to the fact findings of the suppression judge unless clearly erroneous; however, we review the ultimate question of constitutionality *de novo*." *Williams v. State*, 212 Md. App. 396, 401 n.3 (2013).

To determine whether the trial court erred in not suppressing Fury's statement, we must decide whether, under the totality of the circumstances, the statement was given freely and voluntarily. *See, e.g.*, *Hof v. State*, 337 Md. 581, 595 (1995). The totality of the circumstances includes a number of factors, such as: where the interrogation was

conducted; its length; who was present; how it was conducted; whether the defendant was given *Miranda* warnings; the defendant's mental and physical condition; the defendant's age, background, experience, education, character, and intelligence; when the defendant was taken before a court commissioner after arrest; and whether she was physically mistreated or intimidated or psychologically pressured. *Perez v. State*, 168 Md. App. 248, 268 (2006) (citing *Hof v. State*, 337 Md. at 596-97).

In support of her motion to suppress, Fury argued that she was pregnant, hungry, tired, and distraught during the interview. The interview occurred in a room in which she was with three male officers, including a United States Marshal. She indisputably received *Miranda* warnings, but she points out that she did not formally sign a document to acknowledge that she had received them. Finally, she argues that she was relatively young (26), had only an eleventh-grade education, and did not have a great deal of prior experience with the criminal justice system.

In denying the motion to suppress, the trial court considered the factors to which Fury pointed as well as other factors in the totality of the circumstances. The court found that Fury was interviewed in a "well-lit[,] reasonably comfortable room in the middle of the day"; that the detectives did not raise their voices and that she was not subject to any physical mistreatment or aggression; that the interview was "rather short," lasting "about an hour"; that she received *Miranda* warnings and agreed to give a statement; that she received food when she asked for it; that the marshal in the room did not participate in the interview and stayed mostly out of Fury's line of sight; and that nothing about her

age, her level of education, or her physical or mental condition led to a conclusion she was coerced into making a statement.

Fury offers no reason to conclude that the trial court's findings are clearly erroneous. On the basis of those findings, we see no reason to disagree that, in the totality of the circumstances, Fury's statement was voluntary.

V. Redaction of Fury's Statement

Immediately after the trial court denied the motion to suppress Fury's statement, she asked the court to redact portions of the statement in which she referred to the possibility of receiving a life sentence for murder and said that she "hate[d]" Central Booking and did not want to go there. The State responded that both of those subjects were relevant.

On the subject of Fury's comments about a life sentence, the State argued that, after Fury advanced the allegation that Yesaitis had sexually assaulted her, a detective suggested that if what she said was true, it might help her in sentencing. Yet notwithstanding the detective's statement, Fury continued to assert that she was getting a life sentence.[8] In doing so, the State argued, Fury was implicitly admitting that she did not have a claim of mitigation.

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[8] The conversation went as follows:

Detective: How does Chris get him down to the floor?
Fury: [Head in hands.] I ain't getting out of jail anyway so what does it matter?
Detective: Well it matters a lot.
Fury: I ain't getting out.
Detective: Well let me?

On the subject of Central Booking, the State observed that, in the midst of her account of how Yesaitis had made a sexual advance on her, she suddenly abandoned that allegation and began to express concern about going to Central Booking. According to the State, her conduct undermined the credibility of her assertion that she had been sexually assaulted. In the State's view, the context of Fury's statements was relevant to her credibility and to the jury's assessment of the validity of the defense.

The court declined to redact Fury's statements about "getting life," "going down for life," or "going to jail for life." It reasoned that, on the heels of the detective's explanation of mitigating factors, Fury's insistence she was getting life could be seen as "a tacit or implicit admission on her part or a statement against interest of some level that is highly relevant, given the time of the statement and the context of the interview in its total."

Fury: Charged with first degree murder and second degree murder.
Detective: Okay.
Fury: So how am I getting out[?]
Detective: You – you know the difference between them?
Fury: No.
Detective: Okay first degree murder, life without.
Fury: Right so I'm getting life.
Detective: Second degree murder.
Fury: So I'm getting life.
Detective: Top – top is 25 – manslaughter is 10 years – assault 10 years.
Fury: So I'm getting life.

A few lines later, the detective referred to mitigating circumstances, which would reduce the charge to second-degree murder, and to self-defense. Fury reiterated that she was "going to jail for life anyway." And at the very end of the interview, when asked if she had anything else to add, Fury again said, "There ain't nothing else to say. I'm going down for life."

The trial court agreed to redact Fury's statement that she "hate[s] Central Booking," but not her statement that she did not "want to go to Central Booking." The court found that the latter statement was probative of Fury's credibility and that it was not unfairly prejudicial for the jury to hear that Fury may have had prior encounters with the criminal justice system. In reaching its decision, the court reasoned that the statement did not specifically concern past experiences with Central Booking and that "everyone in Baltimore City" knows that Central Booking is not a desirable place to go.

Fury argues that the trial court erred in declining to redact the references to the prospect of a life sentence and to wanting to avoid Central Booking upon her return to Baltimore. The statements, she claims, were not relevant to establish consciousness of guilt or to enhance or diminish the likelihood of any other contested issue in the case. Even if the statements were minimally relevant, however, she argues that any probative value was substantially outweighed by the potential for unfair prejudice.

Evidence is relevant if it tends 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. A court may admit relevant evidence, but it has no discretion to admit evidence that is irrelevant. *Smith v. State*, 218 Md. App. 689, 704 (2014) (citing Md. Rule 5-402). A ruling that evidence is legally relevant is a conclusion of law, which we review de novo. *See id.*

Even if evidence is relevant, however, a court may exclude it "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or

needless presentation of cumulative evidence." Md. Rule 5-403. We review that decision for abuse of discretion. *See, e.g.*, *Carter v. State*, 374 Md. 693, 705 (2003). When weighing the probative value of proffered evidence against its potentially prejudicial nature, a court abuses its discretion "where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles." *Webster v. State*, 221 Md. App. 100, 112 (2015) (alteration in original) (citations and quotation marks omitted). The decision "will not be reversed simply because the appellate court would not have made the same ruling." *King v. State*, 407 Md. 682, 697 (2009).

After a crime has been committed, a defendant's behavior is often relevant to guilt, because it offers clues to her state of mind and may supply circumstantial evidence from which guilt may be inferred. *Thomas v. State*, 372 Md. 342, 351 (2002). Evidence suggestive of the defendant's state of mind may be admissible "not as conclusive evidence of guilt, but as a circumstance tending to show a consciousness of guilt." *Snyder v. State*, 361 Md. 580, 593 (2000). To be relevant, "it is not necessary that evidence of this nature conclusively establish guilt." *Thomas v. State*, 397 Md. 557, 577 (2007). "The proper inquiry is whether the evidence *could* support an inference that the defendant's conduct demonstrates a consciousness of guilt." *Id.* "If so, the evidence is relevant and generally admissible.'" *Id.*

During her interview with the police, Fury repeatedly insisted that she would get a life sentence for her part in Yesaitis's death. She continued to insist that she would get a life sentence even after a detective advised her that mitigating factors could reduce the

charges and the sentence. In these circumstances, the jurors could have found that Fury's statements revealed nothing more than her hopelessness and despondency. The jurors, however, could also have found that because of her insistence that she would spend her life in prison, Fury herself did not believe the mitigating allegation of sexual assault, but was experiencing consciousness of guilt for an unmitigated murder. The references to a life sentence were therefore relevant.

Similarly, Fury's stated desire not to go to Central Booking, in the context of other aspects of her recorded statement, had some relevance to consciousness of guilt and to her credibility. When Fury told the detectives that Wilkins fought Yesaitis only after Yesaitis made a sexual advance on her, the detectives explained that self-defense could be a mitigating circumstance to reduce the charges against her. Yet instead of attempting to provide further details, Fury asked where she was going and expressed concern over going to Central Booking. In the jurors' eyes, her statements could have served to undermine her allegation of sexual assault.

It remains to decide whether the trial court abused its broad discretion in concluding that the probative value of Fury's statements was not substantially outweighed by the danger of unfair prejudice. Md. Rule 5-403. "'[T]he fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in Rule 5-403.'" *Odum v. State*, 412 Md. 594, 615 (2010) (quoting Lynn McLain, *Maryland Evidence: State and Federal* § 403:1(b) (2d ed. 2001)). "[E]vidence is considered unfairly prejudicial when it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the

defendant] is being charged." *Burris v. State*, 435 Md. 370, 392 (2013) (citation and internal quotation marks omitted). "The more probative the evidence is of the crime charged, the less likely it is that the evidence will be unfairly prejudicial." *Odum*, 412 Md. at 615.

Here, the trial court found that Fury's references to life imprisonment were "highly relevant" and thereby implicitly found that they would not be unfairly prejudicial. In addition, the court explicitly found that Fury's references to Central Booking were not unfairly prejudicial, because they did not refer to Fury's prior experiences at Central Booking and because they expressed a common sentiment about the undesirability of being sent there. We see no abuse of discretion in either of the court's rulings.

VI. Sentencing

Fury claims that the trial court erred during the sentencing proceeding when it relied on "bare allegations" of prior charges that the State had elected not to pursue and when it considered what it perceived as a lack of Fury's remorse regarding Yesaitis's death. The court's conduct, she concludes, warrants a new sentencing proceeding. We disagree.

At sentencing, the State presented a presentence investigation report. Among many other things, the report disclosed that Fury had been charged with assault on six prior occasions and that one of the charges had a pending court date when Fury left for North Carolina with no intention to return. Fury's counsel argued that the court should not consider those charges, because the State had entered a *nolle prosequi* as to all but the last of them, which remained pending. The court recognized that the other charges were

only allegations that did not result in a conviction, but said that it was entitled to consider them within a "spectrum" of factors in sentencing.

In handing down its sentence (of life in prison, with all but 50 years suspended), the court remarked that Fury had made "no expression of remorse for the loss of Mr. Yesaitis's life, whether or not Ms. Fury takes responsibility for it." The court made it clear that it did not fault her for "consistently denying involvement in the actions that resulted in Mr. Yesaitis's death," but it noted the absence of any expression of regret "that an individual met with such a horrendous death." After the court imposed the sentence, defense counsel asserted, for the record, that Fury's lack of remorse was not a proper consideration for sentencing.

Under Maryland law, a "'sentencing judge is vested with virtually boundless discretion' in devising an appropriate sentence." *Cruz-Quintanilla v. State*, 455 Md. 35, 40 (2017) (quoting *Smith v. State*, 308 Md. 162, 166 (1986)). "The sentencing judge is afforded such discretion 'to best accomplish the objectives of sentencing – punishment, deterrence and rehabilitation.'" *Id.* (quoting *Smith v. State*, 308 Md. at 166). "To achieve those objectives, the sentencing judge is not constrained simply to 'the narrow issue of guilt.'" *Id.* (quoting *Smith v. State*, 308 Md. at 167). "Rather, '[h]ighly relevant—if not essential – to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.'" *Id.* (quoting *Smith v. State*, 308 Md. at 167). "So it is that, in exercising that discretion, the sentencing judge may take into account the defendant's 'reputation, prior offenses, health, habits, mental and moral propensities, and social background.'" *Id*. (quoting

Jackson v. State, 364 Md. 192, 199 (2001)). "Given the broad discretion accorded the sentencing judge, 'generally, this Court reviews for abuse of discretion a trial court's decision as to a defendant's sentence.'" *Id.* at 41 (quoting *Sharp v. State*, 446 Md. 669, 685 (2016)).

Nonetheless, "[t]he sentencing judge's discretion, although broad, is not without its limits." *Id.*

> A given sentence is subject to review on any of three potential grounds: "(1) whether the sentence constitutes cruel and unusual punishment or violates other constitutional requirements; (2) whether the sentencing judge was motivated by ill-will, prejudice or other impermissible considerations; and (3) whether the sentence is within statutory limits."

Id. (quoting *Jackson v. State*, 364 Md. at 200).

Fury does not argue that her sentence was unconstitutional or that the sentence exceeded the statutory limits, or that the sentencing judge was motivated by ill-will or prejudice. She argues only that the judge was motivated by "impermissible considerations" – specifically, by the evidence that she had been charged with, but not convicted of other crimes; and her perceived lack of remorse. In evaluating that contention, we "must read the trial court's statements 'in the context of the entire sentencing proceeding' to determine whether the trial court's statements 'could lead a reasonable person to infer that the [trial] court might have been motivated by an impermissible consideration.'" *Sharp v. State*, 446 Md. 669, 689 (2016) (quoting *Abdul-Maleek v. State*, 426 Md. 59, 73 (2012)).

We turn first to the trial court's consideration of the charges that the State had dismissed or that had not resulted in a conviction. Although a court may not consider

"bald accusations of criminal conduct" at sentencing (*Henry v. State*, 273 Md. 131, 147 (1974)), it may consider "uncharged or untried offenses, or even circumstances surrounding an acquittal." *Anthony v. State*, 117 Md. App. 119, 130-31 (1997); *accord Smith v. State*, 308 Md. at 172 ("a sentencing judge may properly consider uncharged or untried offenses"). In this case, the court had a thorough presentence investigation report, which detailed Fury's background, including her extensive history of encounters with the criminal justice system. Fury's trial counsel herself characterized the report as a "detailed description" of the other incidents, not as bald accusations of misconduct. The court did not abuse its discretion in considering those incidents as a factor in the sentencing decision. In this regard, we take note of the court's express recognition that the other charges involved mere allegations of criminal conduct.

Nor did the court abuse its discretion in considering Fury's apparent lack of remorse about the victim's death, which the court aptly said involved "an unthinkable degree of depravity and cruelty." In commenting upon Fury's demeanor, the court was not criticizing Fury for insisting upon her innocence or putting the State to its proof; it was simply observing that Fury seemed unmoved at the painful death that the beating victim had suffered, in her presence. *See Saenz v. State*, 95 Md. App. 238, 250-51 (1993) ("the trial court's present tense observation of a defendant's lack of remorse, so long as it is not explicitly linked to a defendant's prior claim of innocence or not guilty plea or exercise of his right to remain silent, is an appropriate factor to consider at sentencing"). It was not an abuse of discretion for the court to take that conduct into account in evaluating Fury's "'moral propensities'" (*Cruz-Quintanilla v. State*, 455 Md. at 40

(quoting *Jackson v. State*, 364 Md. at 199) or her "lack of remorse." *Jennings v. State*, 339 Md. 675, 688 (1995).

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS ASSESSED TO APPELLANT.