Circuit Court for Carroll County
Case No. K-16-47553

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2353

September Term, 2017

BRET M. WHEELER

v.

STATE OF MARYLAND

Wright,
Graeff,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: July 15, 2019

After a jury trial in the Circuit Court for Carroll County, Bret M. Wheeler, appellant, was convicted of first-degree murder, conspiracy to commit first-degree murder, first-degree assault, conspiracy to commit first-degree assault, and accessory after the fact to first-degree murder. He was sentenced to life, with all but 40 years suspended, for the first-degree murder conviction and a concurrent term of life, with all but 40 years suspended, for the conspiracy to commit first-degree murder conviction. The court did not impose any sentence for accessory after the fact to first-degree murder, and the remaining convictions were merged for sentencing purposes.

QUESTIONS PRESENTED

On appeal, appellant presents the following three questions for this Court's review:

> 1. Did the trial court err in denying appellant's motion to disqualify the jury pool after one potential juror who was a friend of the victim's ranted in front of many other jurors about, *inter alia*, how she did not want to be there because she knew the victim, had followed the case, believed appellant to be responsible for the murder, and said that appellant's accomplice had already been convicted of murder?
>
> 2. Did the trial court err in refusing to allow appellant to admit into evidence co-defendant Bosley's statement to the police, which exculpated appellant, as a statement against Bosley's penal interests?
>
> 3. Is the evidence sufficient to support appellant's convictions for first-degree murder, conspiracy to commit first-degree murder, first-degree assault, and conspiracy to commit first-degree assault?

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

In August 2016, Kandi Gerber lived with her fiancée, appellant, in the basement of a home located at 2000 Dennings Road in Carroll County. The home was owned by Cheryl

Bosley, who lived there with her adult son, Jeffrey Turco, and her ten-year-old son, Noah Glass. Mrs. Bosley's husband, Robert Bosley, also lived at the home, but in August 2016, he was incarcerated at the Carroll County Detention Center, where he participated in a work release program. Jeffrey Turco's girlfriend, Lindsay Ulsch, moved into the home on August 8, 2016.

According to Ms. Ulsch, Mr. Bosley and Ms. Gerber disliked each other and the two "fought a lot." Although Mr. Bosley was in a work release program, Ms. Ulsch saw him at the Dennings Road home every day. Beginning some time near the end of July 2016, Mr. Bosley tried to determine who had called his work release program and reported that he was drinking and not attending work as required. At some point, he asked Ms. Ulsch and Mrs. Bosley to help him find out who had made that report. Ms. Ulsch denied making the report, and she testified that Ms. Gerber was suspected of having done so.

On August 8, 2016, Ms. Ulsch began moving her personal belongings into the house on Dennings Road. As she and Mr. Turco approached the house in a vehicle loaded with her possessions, they encountered appellant and Mr. Bosley, who were driving away from the house in appellant's yellow pick-up truck. Ms. Ulsch testified that appellant drove Mr. Bosley "all the time, everywhere." Ms. Ulsch and Mr. Turco pulled into the driveway and then walked over to speak with appellant and Mr. Bosley, who had stopped. Ms. Ulsch "caught the tail end" of a conversation in which Mr. Bosley told Mr. Turco that "it was about to get real and that he needed him to be on his team." Ms. Ulsch understood that statement to mean that Mr. Bosley and Ms. Gerber "were going to get into an argument."

Ms. Ulsch knew that Ms. Gerber was at the Dennings Road property because, earlier that day, she had seen her in the yard and knew that she had gone into the basement.

Mr. Bosley and appellant asked Mr. Turco and Ms. Ulsch to take Noah from the house to a nearby convenience store because they were going to evict Ms. Gerber and did not want Noah to hear any arguing or yelling. Mr. Turco and Ms. Ulsch got Noah and drove to the store. Appellant dropped off Mr. Bosley near the Dennings Road property and then went to the convenience store, where he met up with the others.

While at the convenience store, appellant was "acting really strange," and he told Ms. Ulsch "that he specifically wanted Noah out of the house because . . . [Mr. Bosley and Ms. Gerber] had to settle something and, you know, he wasn't allowed to be there and to keep him away for, you know, at least 20 minutes or so." Appellant said that Mr. Bosley and Ms. Gerber were going to have "a conversation that had needed to be had for a while." He asked Ms. Ulsch and Mr. Turco if they had ever seen the Phantom of the Opera, specifically the part where the guy jumps out from behind a curtain and kills a girl. Ms. Ulsch and Mr. Turco asked what he was talking about, but appellant just "laughed it off." Ms. Ulsch and Mr. Turco "brushed . . . off" what appellant said because he had been drinking. After a short time, appellant left the convenience store and returned to the house.

Ms. Ulsch and Mr. Turco did not wait for the full 20 minutes to return to the home on Dennings Road because they needed to finish moving Ms. Ulsch's possessions. As they pulled into the driveway, they saw appellant leaning against his pick-up truck, which was pulled in so the tailgate was near the exterior entry door to the basement. As appellant stood up, Mr. Bosley came out of the house. Both appellant and Mr. Bosley were angry

that Ms. Ulsch, Mr. Turco, and Noah had returned early. Mr. Bosley asked Mr. Turco "to be a brother for once in his life and take Noah out of the house because he should not be there." Mr. Bosley then told Noah to go inside and play his Xbox game, which he did.

Shortly thereafter, Ms. Ulsch and Mr. Turco left to return to the home of Ms. Ulsch's mother to retrieve more of Ms. Ulsch's belongings. Approximately four minutes after leaving, they realized they had forgotten some things, so they returned to the Dennings Road house. Mr. Bosley and appellant were not there, appellant's truck was gone, and Noah was at home alone. Ms. Ulsch asked Mr. Turco to check on Ms. Gerber because she believed that Ms. Gerber would be "pretty upset" about getting kicked out of the house, and she wanted to know if Ms. Gerber needed help moving any of her belongings. Mr. Turco asked Noah to yell downstairs for Ms. Gerber. Noah did so, but he then called Mr. Turco, who looked into the basement from the stairs in the main living area. Mr. Turco saw blood "covering the entire basement floor" and "bloody handprints everywhere." Mr. Turco told Ms. Ulsch to call Ms. Gerber's phone, which rang in the basement. At that point, Mr. Turco, Ms. Ulsch, and Noah left the house and called 911. While they were on the phone with 911, appellant and Mr. Bosley returned in the yellow pick-up truck, which had blood in the truck bed. Mr. Turco and Ms. Ulsch told appellant and Mr. Bosley that the police were coming, and Mr. Bosley "got very angry." Appellant then "peeled wheels out of the driveway and took off," driving "really fast."

Mr. Bosley's ex-mother-in-law, Sandra Schwartz, who lived on South Springdale Road, testified that, in the early evening hours of August 8, 2016, Mr. Bosley and appellant knocked on her door. Mr. Bosley was wearing shorts but no shirt and Ms. Schwartz

smelled alcohol on his breath. Mr. Bosley told her they had hit a deer and asked if they could clean up and take showers at her home. Ms. Schwartz let appellant take a shower and then sat down to listen to her telephone messages, one of which was from Mr. Bosley's wife. Ms. Schwartz told Mr. Bosley to call his wife, but he did not. Appellant then went outside with one of Ms. Schwartz's bathroom towels wrapped around him. When Ms. Schwartz questioned him about taking her towel, appellant replied, "there's nothing wrong, sweetheart, I just want to use your pressure washer." Appellant also asked for a trash bag. Ms. Schwartz noticed a bottle of beer on the hood of the pick-up truck and then told appellant he could not use her pressure washer and could not have a trash bag. She then asked the men to leave her property.

Ms. Schwartz went inside her house with her dog and locked the door. She then checked all of the doors in the house to make sure they were locked. At one point, as she looked out a window, she saw police officers with guns pointed toward her garage.

Bradley Merrell, who owns a home improvement business, had employed appellant and Mr. Bosley. Just before 4:00 p.m. on August 8, 2016, Mr. Merrell received a telephone call from Mr. Bosley, who asked if he could help remove Ms. Gerber from his house because she had called the work release unit on him, and he wanted her out of his house. Mr. Merrell stated that he was working and could not help until later in the day. Mr. Bosley called him two more times. In one of those calls, Mr. Bosley told Mr. Merrell, "[w]e're bros. You would help me with anything." Mr. Merrell responded, "[d]epends what. Yeah, I mean, you know, I know you." Mr. Bosley then stated, "[a]lright. Hurry up and get here."

Mr. Merrell drove to the Dennings Road house where he saw a young lady in the yard speaking on a telephone and a young man he had seen a couple times before. He did not know their names. The young man approached Mr. Merrell and said, "we went down to the basement. There's blood everything. And you need to leave. We called the police." Mr. Merrell backed out of the driveway and called appellant's phone. Mr. Bosley answered and said they were heading to his ex-mother-in-law's house, which was close to Mr. Merrell's home.

Mr. Merrell proceeded to drive to Ms. Schwartz's home. As he was driving there, he saw the yellow pick-up truck, which he had purchased for appellant to use for work, parked in front of a liquor store. Mr. Merrell pulled into the parking lot and Mr. Bosley came out from the liquor store and asked him to follow them to his ex-mother-in-law's home. According to Mr. Merrell, appellant was driving and Mr. Bosley sat in the front passenger's seat.

When they arrived at Ms. Schwartz's home, Mr. Merrell pulled up next to appellant's pick-up truck. Mr. Bosley got out of the pick-up truck and ran inside the house. Mr. Merrell observed that both appellant and Mr. Bosley had blood all over them, that there was blood in the back of the pick-up truck, and there was a box of shells in a shoebox on the passenger side floorboard. Mr. Merrell asked appellant what was going on, and appellant responded that Mr. Bosley had slit Ms. Gerber's throat and that her body had been dumped on the side of a road. Mr. Merrell asked what road and whether they could go get Ms. Gerber, but appellant said, "[n]o, she's dead." When Mr. Bosley came out of the house, Mr. Merrell asked him what was going on. He replied that "the bitch come at

me with a knife. I side-stepped her, put her in a headlock, and she split her throat. What was I supposed to do, bro?" Mr. Bosley also stated that Ms. Gerber's body had been dumped at the end of Muller Road. Mr. Bosley turned toward appellant and said, "I told you to get your clothes off. Get in the house and take a shower." After appellant went inside the house, Mr. Bosley told Mr. Merrell that he was going to take a shower and "go back to lockup like nothing ever happened." Mr. Bosley then removed his clothing and stood out on the driveway in his underwear.

Mr. Merrell, who had seen the box of shells in the pick-up truck and was afraid that there might be a gun, moved slowly toward his own truck, opened the door, started the engine, and then got into the truck and closed the door. As Mr. Merrell was making his way back to his own truck, Mr. Bosley asked if he would take his and appellant's clothes and get rid of them. Mr. Merrell said no, he did not "want to touch anything." Mr. Merrell then backed out of the driveway and called 911.

Christopher Green, a Deputy Sheriff with the Carroll County Sheriff's Office, was working on August 8, 2016, when he received a call to proceed to Ms. Schwartz's home on South Springdale Road. As he approached the property with another Deputy Sheriff in another vehicle, he saw a yellow pick-up truck and appellant seated in the driver's seat with the door ajar. Another individual, Mr. Bosley, was exiting the garage. The deputy sheriffs ordered both men to put their hands on their heads and eventually handcuffed appellant and Mr. Bosley. Mr. Bosley was wearing cargo shorts with blood stains on them and appellant was wearing only a pair of boxer shorts.

Based on information received from Mr. Merrell, Sergeant Michael Zepp, a member of the Carroll County Sheriff's Office, conducted a search of the area surrounding a gravel road near Muller and Old Washington Roads. Ms. Gerber's body was located in a grassy area about 20 feet from the gravel road. Paramedics arrived and Ms. Gerber was pronounced dead. Sergeant Zepp observed pieces of blue string or fabric, consistent with tarp-like material, on Ms. Gerber's body, and pressboard material was "caked in her hair that was blood soaked." Sergeant Zepp also observed a laceration on the right side of her neck.

Sergeant Zepp then went to Ms. Schwartz's home on South Springdale Road and observed in the Nissan pick-up truck a circular pool of blood, remnants of a blue tarp, and the same press board material that was in Ms. Gerber's hair. He also responded to Mrs. Bosley's home on Dennings Road, where a search warrant was executed. A rusted and used utility blade was found in an in-ground swimming pool that was used as a burn pit.

Kelly Timms, a forensic services technician with the Carroll County Sheriff's Office, was also at the scene where Ms. Gerber's body was found. She observed blue fibers wrapped around Ms. Gerber's fingers and a significant laceration and injuries to her neck. She also observed fibers from a tarp in the brush where Ms. Gerber's body was found. Ms. Timms later responded to a location about 6 minutes away on Muller Road and recovered 2 pieces of tarp from a trash receptacle.

Ms. Timms then went to Ms. Schwartz's home. She took lifts for two fingerprints from the top edge of the bed of appellant's pickup truck. Both of those prints were matched to appellant. Ms. Timms also recovered from the cab of the pickup truck appellant's

driver's license, knives, and Ms. Gerber's purse, identification card, social security cards, and driver's license.

Dr. Melissa Brassell, an assistant medical examiner, performed an autopsy on Ms. Gerber's body. She concluded that the cause of Ms. Gerber's death was multiple injuries, including sharp force and blunt force injuries and asphyxia, and that the manner of death was homicide.

Teri Zerbe, a member of the Maryland State Police Forensic Services Division, testified as an expert in forensic serology and DNA analysis. She opined that Ms. Gerber's DNA profile was obtained from blood stains found on appellant's boxer shorts, a pair of Quicksilver cargo shorts, the basement stairs, a tarp, and the wheel well of the pick-up truck.

We shall include additional facts as necessary in our discussion of the questions presented.

DISCUSSION

I.

Appellant contends that the trial court erred in denying his motion to disqualify the jury pool after it was reported that one potential juror had been "ranting and raving" in the presence of other potential jurors about her desire not to be present because she knew the victim, whom she identified by her first name, had followed the case, knew that another person had been tried and convicted for the murder, and suggested that appellant was guilty. The potential juror who was alleged to have engaged in the "ranting and raving"

was identified as Juror No. 180, and she was excused at the end of the first day of jury selection.

During the second day of jury selection, the court received a note from Juror No. 65. When Juror No. 65 was called to the bench, the following conversation occurred:

> THE COURT: Okay. So what did you see or hear that gave you some concern?
>
> [JUROR NO. 65]: You know, I don't think it's a big deal but because I swore an oath, I felt like I needed to bring it to somebody's attention. Yesterday was crazy. Everybody was in here and a lot of people were out –
>
> THE COURT: Sure.
>
> [JUROR NO. 65]: -- in the lobby because it was so hot. There was probably about 10 or 15 of us sitting out and I believe it was Juror 180, she came out, a heavyset woman. Don't quote me on it because I'm not sure but she was ranting and raving like why am I here? She apparently knew –
>
> THE COURT: Yes, she has been excused.
>
> [JUROR NO. 65]: Yeah, and that's the thing I didn't know that at the time when I – but she had said a lot of stuff about the case, about the other gentleman that had something to do with this case and like I said, I'm not familiar with everything but she said something about that one of the other jurors said, well, alleged, other Defendant. And she said, oh, no, he's already been tried and convicted.
>
> And I was like, okay, that's not information and you kind of heard a pin drop at that point and it was like maybe 10, 5 or 10 people that heard that. So it just felt – I think everybody kind of felt like that was not a really good thing that could happen.
>
> And then she continued to kind of rant and rave. She just really didn't want to be here.
>
> THE COURT: I understand.

[JUROR NO. 65]: And then I removed myself and a couple of other jurors removed ourselves. We weren't involved in the conversation. It was more of her ranting and people just hearing what she was saying.

THE COURT: Okay.

[JUROR NO. 65]: It wasn't really a conversation between anybody. But it just kind of felt like – it just felt wrong.

THE COURT: I am glad you brought this to our attention.

* * *

THE COURT: Well, we appreciate your bring that – I am going to further question the panel but since you are here let me ask you, based upon anything she said or did, do you believe that that would affect your ability to be fair in this case?

[JUROR NO. 65]: Not be fair, no. And you know what? What she said, I don't even know if what she said is true or not. I don't know, you know, if there was another person. If there was a person, was that person tried, was that person in jail now? I don't know. So, yeah, I don't think it would affect my –

THE COURT: So you can still decide this case based solely on the evidence that is presented in court?

[JUROR NO. 65]: Yes, absolutely, yes.

At defense counsel's request, the judge then asked Juror No. 65 if she recalled "specifically what else was said?" Juror No. 65 responded:

[Juror No. 180] was ranting and raving. She came out. We were already out there. She came out. She leaned up against the wall. She said I don't know why I have to be here. I know – she said you used the girl's name, Kandi.

She said I've been following this case for 16 weeks now. She's like I want to stay, I think she said. He's guilty but I can't swear to that.

An[] older gentleman about 65ish maybe going on 70, kind of was listening intently and she said – she started talking about another gentleman

> involved in the case and the other – what was the word she used? The other, the other person that – I think she said – I don't want to use the word murder. The other person that hurt Kandi was in this – the other person hurt Kandi has already been – and then she stopped and then the older gentleman said alleged. The other juror said alleged. And she said, no, not alleged. He has already been tried and he has been found guilty. And that was pretty much the extent of the conversation.
>
> Well, no, I take that back. The extent that I heard because I removed myself at that point because I wasn't in this conversation but I heard it and I knew that that was not a good conversation to be even privy to.

Juror No. 65 then identified for the judge Juror No. 77, a woman, and Juror No. 157, a tall man with a moustache, as jurors who might have overheard her "ranting and raving." In addition, there was an "older gentleman" who was standing and said the word "alleged," but Juror No. 65 did not see him in the courtroom at the time she informed the judge about what she had experienced. The judge asked Juror No. 65 to write down everything she heard and witnessed. Juror No. 65 submitted a handwritten statement, marked as Court's Exhibit 2A, which was consistent with her oral statements to the judge.

The judge then addressed the remaining members of the jury pool, stating that it had come to his attention that Juror No. 180 violated his order not to discuss the case and indicated that she knew the victim, Ms. Gerber. The judge requested that anyone who had been exposed to someone in the hallway "either discussing or ranting or yelling or raising their voice about any aspect" of the case to stand and form a line. He then spoke individually with each potential juror that responded to this request.

Juror No. 37 advised the judge that he had observed Juror No. 180 ask the bailiff when the court would start releasing people. When the bailiff responded that he did not know, Juror No. 180 stated that she was "not sure how much longer I can be seated in the

room with that man[.]" Juror No. 37 assumed Juror No. 180 was referring to appellant. According to Juror No. 37, there were about 15 people in "the whole sort of lobby area out there." When asked by the judge if what he observed would affect his ability to be fair and impartial in the case, Juror No. 37 replied, "[n]o, sir." Neither the State nor the defense challenged Juror No. 37 for cause, although defense counsel noted that "there is still certainly some concern about the jury as a whole."

Juror No. 62 stated that she heard Juror No. 180 say that she knew appellant's accomplice and the victim's ex-husband, "but that's all that I overheard." According to Juror No. 62, there were approximately 9 or 10 people within earshot of Juror No. 180. Juror No. 180 was not speaking to anyone in particular, just "ranting and raging," and no one responded to her.

Juror No. 77, who wore hearing aids, stated that he was sitting outside the courtroom when Juror No. 180 came out and stated that she did not know why she was still present in court. Juror No. 180 knew the victim and had been following the case for the last 14 months. She said "something about the accomplice," to which "a gentleman said you mean the alleged[.]" Juror No. 180 responded, "no, he's already been found guilty." Juror No. 77 stated that Juror No. 180 was "annoying, angry, [and] wouldn't leave." Juror No. 77 walked away from the area. When the court asked Juror 77 whether he could "discharge his duty as a juror fairly and impartially and based solely on the evidence," he responded that he could.

Juror No. 182 told the judge that he observed Juror No. 180 "ranting about how she didn't want to be here and that she knew the family[.]" He stated that there were "a good

20 people" within earshot of Juror No. 180. Juror No. 182 "just kind of walked away from her because I realized what she was kind of trying to get people to say something back to her." He described Juror No. 180 as speaking "[a]lmost like to herself but you could tell that she was getting agitated" and "angry." Juror No. 182 responded "[a]bsolutely" when the court asked whether he could "set aside whatever she said in violation of the Court's order and decide this case fairly and impartially and based solely on the evidence."

Juror No. 248 stated that he overheard Juror No. 180 "expressing her anger that she had to even be here because she was a close personal friend of the victim[.]" Juror No. 180 had an expression on her face indicating that she was "angry and distraught that she . . . had to be here and/or her attachment to the victim." When the court asked whether he was able to consider the "case impartially and fairly and based on the evidence presented in [the] courtroom," Juror No. 248 stated: "I would have to say no." He explained: "I, basically, am going to look at what was coming out of her mouth and the expression and the way that she expressed herself[.]"[1]

Juror No. 157 informed the judge that she was sitting near Jurors 65 and 77 when Juror No. 180 "gave a pretty good impression that the Defendant was guilty and that she had a lot of dislike for him and she was very good friends with Kandi." She "called the Defendant some names. I can't even remember what it was but they were not something to be proud of. And she also mentioned that the other person that was charged in the case had been found guilty." Juror No. 157 explained that Juror No. 180 "left an impression on

[1] As explained, *infra*, this juror, and the next juror, Juror 157, were stricken from the panel.

me that, you know, certainly from her perspective that someone who had been following the case for quite a while that, you know, [the defendant] was the reason the girl had died[.]" When asked whether she would be able to consider the case fairly and impartially based solely on the evidence, Juror 157 replied, "I think what [Juror No. 180] said will definitely weigh on what I was hearing and my decision as part of that."

Juror No. 275 told the judge that Juror No. 180 was "upset that she was being kept" and that "she had a personal relationship with some of the people involved in this case and that she had been following the news related to the case for months." According to Juror No. 275, there were 20 people within earshot of Juror No. 180, but "she was sort of more over in an alcove by the courtroom doors and I was more over by the wheelchair accessible ramp and so I didn't have a great sightline." There were some women sitting near Juror No. 180, and "some women" were "interacting with her," but Juror No. 275 "didn't hear specifically" what was said. When asked whether he would be able to set aside what he saw and heard and fulfill his duty to decide the case fairly and impartially based solely on the facts and evidence presented in the courtroom, Juror No. 275 stated, "Yes, I can."

At the conclusion of the court's interviews of the potential jurors, the defense moved to disqualify Jurors No. 248 and No. 157. The court granted that request.

Defense counsel then requested that the judge disqualify the jury panel, arguing, in part:

> Your Honor, I think at this time we would move to disqualify the jury panel. They are – tainted at this point. The sheer number of jurors – we have reports that there were 20 people in earshot of this woman in one ranting.

> There is another separate ranting that we have reports of that had at least 10 people privy to that. One of these jurors reported to us *sua sponte* that this happened. And we do not know – given her behavior in the courtroom all day where she was crying, she was glaring openly at Mr. Wheeler the entire time, it is impossible to say how many of the jurors were poisoned in some way by her behavior and given that, I think it is impossible for us to know whether this jury has been tainted by her behavior.
>
> And again, I think this is information that, this is information, poison, that certainly a fair and impartial jury should be free of particularly when we haven't even impaneled a jury at this point. We are still in the jury – the opening stages of *voir dire* at this point.

The court denied the motion to disqualify the jury panel, explaining, in part:

> But as to the entire panel, this panel has come forward and told the Court the truth as far as what each constituent member heard, what they saw and the fact that they are unaffected by it.
>
> Look, nobody is probably relishing what they believe is going to be a 10 day trial. This would have been – anybody who was looking to bail in this case [sic] the opportunity to do it. So I think you have got truthful jurors here that are answering these questions and I think these people have simply proven their medal [sic] as good jurors by virtue of the fact that they are – they have stepped forward, they have been honest, they have had the opportunity to get out of this commitment. They have not taken it.
>
> I think these are the kind of people you want on this panel and I have every confidence that they are going to be able to be fair and impartial. So I am going to deny the overall motion to disqualify the panel.

With respect to Jurors No. 62 and No. 77, who mentioned a reference to appellant's accomplice, the court stated that it would instruct the jury about the meaning of the word accomplice and the need to follow the court's instructions. The judge stated that he was confident the jurors could abide by their oaths. The court denied the motion to strike Jurors No. 62 and No. 77 for cause and ruled that "it is a matter of preemptory [sic] challenge if the Defense is uncomfortable based on their hearing of the word accomplice." Ultimately,

Juror No. 37 and Juror No. 62, two of the potential jurors who advised the court that they heard comments made by Juror No. 180, became members of the jury.

Appellant contends that, in failing to excuse the jury pool and start anew with an untainted jury pool, the trial court deprived him of a fair trial. Specifically, appellant argues that Juror No. 180's "rantings and behaviors undermined" basic Constitutional guarantees "by exposing a significant number of potential jurors to prejudicial and inflammatory statements relating directly to the State's theory of the case before [his] trial even began." Further, because only 8 jurors reported their observations to the court, there is no way to know if some jurors who heard Juror No. 180's statements failed to respond to the court and ended up on the jury. With respect to the jurors who expressed a belief that they could be fair and impartial after hearing Juror No. 180's comments, appellant asserts that such a belief is "unrealistic given the severity and specificity of the comments" and the human limitations of the jurors. As explained below, we disagree.

A criminal defendant's right to a fair and impartial jury is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 21 of the Maryland Declaration of Rights.[2] Maryland Rule 4-312(a)(3) provides:

[2] The Sixth Amendment provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const. Amend. VI. This right is applicable to the states through the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145 (1968). Similarly, Article 21 of the Maryland Declaration of Rights provides, in part, that "in all criminal prosecutions, every man hath a right . . . to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty."

.

> (3) *Challenge to the array*. A party may challenge the array on the ground that its members were not selected or summoned according to law, or on any other ground that would disqualify the array as a whole. A challenge to the array shall be made and determined before any individual member of the array is examined, except that the trial judge for good cause may permit the challenge to be made after the jury is sworn but before any evidence is received.

Courts have made clear that a juror need not be free of any knowledge regarding a case. As the United States Supreme Court explained in a case where the venire was exposed to pretrial publicity about the case, a juror's knowledge of a case alone does not make the trial unfair:

> It is not required, however, that the jurors be totally ignorant of the facts and issue involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 722–23 (1961). *Accord Calhoun v. State*, 297 Md. 563, 580 (1983) (a juror need not be free of all preconceived notions or be totally ignorant of the facts; "'[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.'") (quoting *Irvin*, 366 U.S. at 723), *cert. denied*, 466 U.S. 993 (1984).

We review a trial court's decision to deny a motion to dismiss a jury panel for an abuse of discretion. *Jones v. State*, 4 Md. App. 616, 623 (1968) (defendant's motion to strike jury panel rests in discretion of trial judge). Here, based on the record, we cannot

conclude that the trial court abused its discretion in denying appellant's motion to disqualify the jury panel.

The trial court conducted a thorough inquiry regarding the situation, questioning each individual member of the venire who had contact with Juror No. 180. It found each individual to be credible, accepting the statements made by potential jurors that they could be fair and impartial and determine the case based only on the evidence presented at trial. Specifically, Jurors No. 37 and No. 62, who ultimately served on the jury, both indicated that the comments they heard would not affect their ability to be fair and impartial.

Appellant suggests that the circumstances surrounding this case were "akin to the review of a mistrial motion after a witness says something that is inadmissible and prejudicial to the defendant and the court instructs the jury to disregard it." He maintains that the jurors in the instant case could not be expected to disregard their encounter with Juror No. 180, even if they were instructed to do so, and therefore, the trial court was required to discharge the tainted jury pool. Appellant's analogy is misplaced.

Juror No. 180 was a potential juror, not a sworn witness in the case. She did not testify during trial and was not subjected to cross-examination. Several of the potential jurors questioned by the trial judge were aware that Juror No. 180's statements were inappropriate, as indicated by their attempt to walk away or stop listening to her. None of the potential jurors heard very much of what was said, and their characterization of her statements as "ranting" suggest that her statements were not given weight. And as indicated, the two jurors who heard her "ranting" and ultimately served on the jury stated that they could be fair and impartial, statements that the court found credible. Under these

circumstances, we perceive no abuse of discretion by the circuit court in denying appellant's motion to disqualify the jury pool.

II.

Appellant contends that the trial court erred in refusing to admit in evidence co-defendant Bosley's statement to Carroll County Sheriff's Detective Brandon Holland during a video and audio-recorded interrogation of Mr. Bosley. He asserts that the statement exculpated appellant and was admissible as a statement against Mr. Bosley's penal interest.

The specific statement sought to be admitted was as follows:

> CORPORAL HOLLAND: Okay. So where does Bret [Wheeler] come into this?
>
> MR. BOSLEY: Bret is my wheels.
>
> CORPORAL HOLLAND: I know. But when – at what point did he come in?
>
> MR. BOSLEY: He came into the aftermath like, "Oh, my God. What the fuck just happened?"
>
> CORPORAL HOLLAND: Okay. Did he just walk in or did you call him?
>
> MR. BOSLEY: No. I went out and I was just like "Oh, my God. You got to come help me."
>
> CORPORAL HOLLAND: Okay. So you walked back out this way?
>
> MR. BOSLEY: Yeah, I went back out this way. I said like, "Oh my God, dude." I'm covered with blood. He freaks too.
>
> MR. BOSLEY: It was like spur of the moment. Like we didn't know what to fucking do like I said.

> CORPORAL HOLLAND: How long did that take? Between the time that you – did you know she was dead before you went and got Bret?
>
> MR. BOSLEY: No. I knew she was in the process of. She had to have been with this blood as it was.

Appellant sought to admit this passage as a statement against Mr. Bosley's penal interest. The parties stipulated that Mr. Bosley was an unavailable witness. After a hearing, the court denied the motion in limine stating, "[w]ell, the first line of inquiry is whether this statement as offered is a statement against Bosley's penal interest. And the court finds that it is not."

The Maryland Rules define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). "Except as otherwise provided by [the Maryland] rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5-802.

Ordinarily, we review rulings on the admissibility of evidence using an abuse of discretion standard. *Wheeler v. State*, 459 Md. 555, 560 (2018). In determining whether a hearsay exception is applicable, however, "we review the trial judge's ruling for legal error rather than for abuse of discretion; that is because hearsay is never admissible on the basis of the trial judge's exercise of discretion." *Thomas v. State*, 429 Md. 85, 98 (2012).

Maryland Rule 5-804(b)(3) carves out an exception to the hearsay rule for statements against interest and provides as follows:

> (b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

> (3) **Statement against interest.** A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest, so tended to subject the declarant to civil or criminal liability, or so tended to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

To be admissible as a statement against penal interest under Rule 5-804(b)(3), the proponent of the statement must convince the trial court that "1) the declarant's statement was against his or her penal interest; 2) the declarant is an unavailable witness; and 3) corroborating circumstances exist to establish the trustworthiness of the statement." *Jackson v. State*, 207 Md. App. 336, 348–49, *cert. denied*, 429 Md. 530 (2012) (internal quotations and citations omitted). In *Jackson*, we noted that the trial judge must "'be satisfied that the statement was in fact against the declarant's interest and that the declarant actually understood that his statement could indeed cause him [or her] a loss of property, money, or liberty.'" *Id.* at 350 (quoting Joseph F. Murphy, Jr., *Maryland Evidence Handbook*, § 802[E] (4th ed. 2010)). The statement "need not be a full confession but must involve substantial exposure to criminal liability." *State v. Standifur*, 310 Md. 3, 13 (1987) (citing *McCormick on Evidence*, § 279, at 825 (E. Cleary 3d ed. 1984)).

In *Standifur*, the Court of Appeals explained:

> In summary, a trial judge considering the admissibility of a hearsay statement offered as a declaration against penal interest must carefully consider the content of the statement in the light of all known and relevant circumstances surrounding the making of the statement and all relevant information concerning the declarant, and determine whether the statement

> was in fact against the declarant's penal interest and whether a reasonable person in the situation of the declarant would have perceived that it was against his penal interest at the time it was made. The trial judge should then consider whether there are present any other facts or circumstances, including those indicating a motive to falsify on the part of the declarant, that so cut against the presumption of reliability normally attending a declaration against interest that the statements should not be admitted. A statement against interest that survives this analysis, and those related statements so closely connected with it as to be equally trustworthy, are admissible as declarations against interest.

Id. at 17.

Appellant argues that Mr. Bosley's statement "was against his penal interest because he admitted that he was alone in a basement with a woman who ended up dead and that he was covered in her blood which any reasonable person would understand would subject him or her to criminal liability." In addition, appellant asserts that Mr. Bosley's statement placed "all suspicion solely on" himself.

Mr. Bosley's statements to the police must be taken in context. They were made in the context of his claim that he acted in self defense. Even if Mr. Bosley's statement could be construed as an assertion that appellant did not have anything to do with the actual killing of Ms. Gerber, that statement did not subject Mr. Bosley to more serious charges or more severe punishment. At best, it was an attempt by Mr. Bosley to exculpate appellant that left his own position unchanged. As a result, Mr. Bosley's statement, to the extent it suggests that appellant was not involved in the actual killing of Ms. Gerber, was not a statement against Mr. Bosley's penal interest. Accordingly, the circuit court did not err in determining that the identified portion of Mr. Bosley's recorded statement to police was not a statement against Mr. Bosley's penal interest.

III.

Appellant argues that the evidence was insufficient to sustain his convictions because the State's evidence required the jury to speculate that he and Mr. Bosley had conspired or that he aided Mr. Bosley with the intent to assist him in murdering Ms. Gerber. According to appellant, there was no evidence to show that he conspired to harm Ms. Gerber or that he had any knowledge that Mr. Bosley was going to cause serious physical harm to her or kill her. Appellant maintains that he reasonably believed Ms. Gerber was dead when he first observed her in the basement. As a result, although his assistance in moving Ms. Gerber's body constituted the crime of accessory after the fact to murder, he could not be found guilty under a theory of accomplice liability for failing to render aid to her.

The State disagrees. It contends that the evidence was sufficient to support appellant's convictions.

The standard of review for an evidentiary sufficiency challenge is 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.'" *Donati v. State*, 215 Md. App. 686, 718 (2014) (quoting *State v. Coleman*, 423 Md. 666, 672 (2011)), *cert. denied*, 438 Md. 143 (2014). Evidence is sufficient to sustain a conviction if it "'either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offense charged beyond a reasonable doubt.'" *Donati*, 215 Md. App. at 718 (quoting *State v. Albrecht*, 336 Md. 475, 479 (1994)). Circumstantial evidence alone may be enough to

prove a defendant's guilt as long as "the circumstances, taken together, do not require the trier of fact to resort to speculation or conjecture[.]" *Smith v. State*, 415 Md. 174, 185 (2010) (citation and quotation marks omitted).

The test is "'not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.'" *Painter v. State*, 157 Md. App. 1, 11 (2004) (citations omitted) (emphasis in original). In making that determination, we give "'deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [we] would have chosen a different reasonable inference.'" *Donati*, 215 Md. App. at 718 (quoting *Cox v. State*, 421 Md. 630, 657 (2011)). We view the evidence and "all reasonable inferences deducible from the evidence in a light most favorable to the State." *Smith*, 415 Md. at 185 (citation and quotation marks omitted). In addition, we "defer to the fact finder's opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]" *Neal v. State*, 191 Md. App. 297, 314 (2010) (quotation marks and citations omitted), *cert. denied*, 415 Md. 42 (2010).

Here, there was sufficient evidence to support appellant's convictions. Prior to the murder, appellant participated in ensuring that the other residents of the home, Ms. Ulsch, Mr. Turco, and Noah Glass, were not at the home on Dennings Drive when the murder presumably took place. While they were at the store, appellant referenced the film "Phantom of the Opera," in which a woman is killed. According to Ms. Ulsch:

> [Appellant] was acting really strange and he had made a comment while we were in the parking lot about he asked us if we had ever saw Phantom of the Opera. And we were just kind of like what, you know, we

> didn't understand the question or why it was being asked and he said, the part of the movie where the guy jumps out behind the curtain and kills the girl and at that point we knew, you know, he had been drinking so we just kind of like brushed it off.

From that testimony about appellant's "really strange" behavior, and the reference to a movie scene involving the murder of a girl, the jury could reasonably infer that, before appellant returned to the Dennings Drive home, he was aware of Mr. Bosley's intent to kill Ms. Gerber. Moreover, there was evidence that appellant returned to the Dennings Drive home prior to Ms. Ulsch, Mr. Turco, and Noah Glass, and that he was upset when they returned earlier than expected. Upon her return, Ms. Ulsch observed appellant's pick-up truck parked with the tailgate facing the entrance to the basement and appellant waiting near the truck. In addition, there was evidence that appellant transported Ms. Gerber's body in his truck, assisted Mr. Bosley in dumping her body after the murder, drove Mr. Bosley to a liquor store and Ms. Schwartz's house, showered at Ms. Schwartz's house, and asked to use Ms. Schwartz's pressure washer. This evidence was sufficient to support appellant's convictions.

JUDGMENTS OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.