Circuit Court for Baltimore County
Case No. 03-K-004588

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 205

September Term, 2018

BRANDON JARVIS HEIGH

v.

STATE OF MARYLAND

Wright,
Kehoe,
Alpert, Paul E.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Alpert, J.

Filed: October 3, 2019

*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.

After a jury trial in the Circuit Court for Baltimore County, Brandon Jarvis Heigh, appellant, was convicted of second-degree murder.[1] He was sentenced to incarceration for a term of 30 years. This timely appeal followed.

QUESTIONS PRESENTED

Appellant presents the following three questions for our consideration:

> I. Did the circuit court err in denying appellant's motion to suppress evidence and request for a *Franks* hearing?
>
> II. Did the circuit court err in denying a pre-trial motion to exclude evidence concerning Facebook posts and messages, e-mail messages, and texts?
>
> III. Was the evidence legally sufficient to sustain appellant's conviction for second-degree murder?

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

This appeal arises out of the July 26, 2016 stabbing death of Christopher Jones. At about 11:40 a.m. on the day of the stabbing, Baltimore County Police Officer Nicholas Quisgard responded to a call for an assault and stabbing and found Mr. Jones lying face down in the front yard of 4012 Villa Nova Road. Mr. Jones, who had suffered five stab wounds and ten cutting wounds, was transported to Sinai Hospital where he died. According to a medical examiner, the cause of Mr. Jones's death was sharp force injuries and the manner of death was homicide.

At the crime scene, Officer Quisgard observed a blood trail from the place where Mr. Jones was found to the driveway of 4018 Villa Nova Road, where there was an

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[1] A prior trial ended in a mistrial on July 14, 2017.

"enormous amount of blood" in the grass. In a bush at the end of the driveway of 4018 Villa Nova Road, Officer Quisgard found a cell phone, a broken ear bud, a necklace, a green baseball cap, and some additional blood. The bush was smashed down as if someone had fallen in it or sat on it. In addition, a soda can was found in the yard of 4020 Villa Nova Road.

On the day of the stabbing, Pamela Drake was in her home at 4016 Villa Nova Road with her husband, son, and grandchildren. At one point, she stepped outside and her grandson, Paris Drake, told her to go back inside the house. She heard some screaming, but could not tell who it was, and then saw "something blur by," run through her yard, and fall to the ground. Mrs. Drake saw a man lying on his stomach. The man's head was turned to the side and blood was seeping from underneath his body.

Paris Drake was on the enclosed front porch of his grandmother's house when, at about 11:40 a.m., he saw "people fighting in the yard over." He "could only see them through bushes," but he heard someone screaming and then saw 3 men move toward his grandmother's yard. One of the men was significantly shorter than the others. The victim was in the middle of the other two men and was saying, "stop, stop." The victim moved through Mrs. Drake's yard, through some bushes, and then collapsed about 3 houses away. Mr. Drake saw the other two men move toward an old silver car that was parked across the street. On some evenings before the stabbing incident, Mr. Drake had seen that vehicle parked between 4017 and 4019 Villa Nova Road. Another of Mrs. Drake's grandsons, Zeire Cummings, who also lived at 4016 Villa Nova Drive, described the vehicle as either a 2003 or 2006 silver 4-door Cadillac convertible with a cloth top.

Surveillance video recovered from a gas station on the corner of Liberty and Essex Roads showed Mr. Jones leaving the gas station and walking on Essex Road toward Villa Nova Road shortly before the stabbing was reported to police. He was wearing the baseball hat and carrying the soda can that were found at the scene of the crime. Between 11 a.m. and noon on the day of the stabbing, Tandra Callen was speaking with Mr. Jones on the phone when she heard people talking in the background just before the phone went dead. The last outgoing call from Mr. Jones's phone was placed at 11:34 a.m.

The video recording from the gas station also showed appellant's Cadillac travelling at a high rate of speed at about the same time Paris Drake called 911. Appellant's Cadillac traveled down Essex Road and turned left onto Liberty Road toward Baltimore City.

On the day of the stabbing, Baltimore County Police Detectives Alvin Barton and McDonnell Jones spoke with Angel Thomas, who lived in the home directly across the street from the Drake residence. After that conversation, the detectives went to the business office at the Gilmor Homes community in Baltimore City to ascertain whether appellant had been to work that day. The detectives arrived at about 3 p.m. and, as they exited their vehicle, they observed appellant standing next to his vehicle, which was a 1999 silver Cadillac with a black fabric top. Appellant confirmed that Angel Thomas was his girlfriend, that he frequently spent the night at her house, that he had been there the previous night, that he left at about 7:30 a.m. to go to work, and that he had gone to a housing complex in the Cherry Hill neighborhood of Baltimore City earlier that day.

Deborah Pittman, appellant's supervisor testified that appellant worked at Gilmor Homes as a maintenance worker. On July 26, 2016, he was assigned to clean the grounds

and provide a tenant with a new screen window. At about 12:15 in the afternoon, Ms. Pittman left a message on appellant's phone informing him that there was a required meeting at 1 p.m. that afternoon at a housing complex in the Cherry Hill neighborhood. Appellant arrived at the meeting between 1:30 and 1:40 p.m.

Police reviewed City Watch camera footage from the morning of July 26, 2016, and observed appellant's car leaving the parking lot at Gilmor Homes at 10:59 a.m. and turning right onto Fulton Avenue. Detective Jones testified that Fulton Avenue led towards Liberty Heights Avenue which turned into Liberty Road.

When questioned by police, appellant stated that he was late for the meeting in Cherry Hill because he had stopped at a 7-11 or Royal Farms store. Police checked video surveillance cameras at those locations but appellant did not appear on those recordings. Appellant also told police that at the time of the murder he was in the area where the crime occurred, but he was smoking "weed" with Darryl Hunter, Jr. Detective Barton knew Mr. Hunter's father, Darryl Hunter, Sr., who was a Baltimore County Police officer. Detective Barton spoke to Officer Hunter who provided a phone number for his son. Police checked surveillance videos for the area where appellant said he was smoking weed with Mr. Hunter, Jr., but did not see appellant on those recordings. When questioned, Mr. Hunter, Jr. provided conflicting information and police were not able to confirm appellant's alibi. When questioned again, appellant told police that at the time of the incident he was eating lunch at an America's Best Wings in the Towson area. Police were unable to obtain surveillance video from that restaurant.

On August 11, 2016, police arrested appellant and Ms. Thomas at 4019 Villa Nova Road and seized 2 cell phones, one belonging to each of them, from a table in the living room. Police also obtained a search warrant for the Facebook pages of Ms. Thomas and appellant and found communications between the two of them. Detective Adrienne Grant testified that on July 18, 2016, Shawn Quest, a friend of the victim, posted something on Facebook and Ms. Thomas "liked" that post. Subsequently, appellant sent Ms. Thomas a private message consisting of 3 question marks. Appellant also wrote, "Will stab him in the face," followed immediately by a photograph of what appeared to be an African-American hand holding a knife. Ms. Thomas responded:

> I don't talk to him. That's cris brother. Idk why s liking shit but Chris don't trust him himself. He always told me that when I first came around. I never knew why but I'm kinda seeing why. Sneaky. Hr liked that shit you left on my wall. Idk why. Why is a n[****] liking shit like that. IDC what u do.

Appellant responded with a series of messages, including, "[m]ust do if u liking shit like tht…. so explain b4 I overreact[;]" Not being rude[;] "Just feel myself gettin angry af[.]" Detective Grant explained that "af" was shorthand for "as fuck." On the morning of the stabbing, appellant also sent a series of text messages to Ms. Thomas that included the following statements: "I hope your life goes horribly wrong for you, yo;" "I wish all bad things in the world happen to you and only you;" "Ur a heartless bitch;" "Is the door open. gettin my shit n dont touch my shit;" "I'm not tryna hear your lies;" "I dont wanna hear it. Im gettn my shit then Im outta ya life;" "Niw u have all the time in the world to tlk to your exes."

In a Facebook message posted at 10:11 a.m. on the day of the stabbing, appellant referred to Ms. Thomas as "lying ass bitch." Later, he referred to Ms. Thomas as "t" and, at 2:45 p.m., he referred to her as "My Wife." At 11:56 a.m., Ms. Thomas sent the following messages to appellant: "I love you;" "Delete everything after no strings even the calls. Blocked calls too;" "No texting call. Only text if necessary . . not even. Be careful;" "Anything after our no strings text..delete it. Even this message."

Carrie Bialex, a forensic technician for the Baltimore County Police Department, processed appellant's silver Cadillac. She noticed that the driver's floor mat was missing and that the indents in the carpet "were highly definable." She took swabs from the interior of the car and used infra-red light to search for blood, but did not obtain any positive results. The Cadillac was processed for latent fingerprints. The parties' stipulated that appellant's fingerprints were recovered from the exterior of the driver's side door, the exterior of the passenger side door window, and the exterior of the trunk lid. A fingerprint recovered from the exterior of the passenger side window was identified as the right middle finger of Angel Thomas. DNA swabs from the victim's left and right fingernails tested positive for a male contributor, but appellant was excluded as a possible contributor.

Matthew Wilde, an FBI Special Agent who testified as an expert in the field of cellular telephone record analysis and mapping, reviewed call detail records and mapped the general location of cell phones belonging to several individuals, including appellant. Records showed that appellant's cell phone used cell phone towers near Gilmor Homes between 8:09 and 10:21 a.m. on the day of the stabbing. Thereafter, the phone moved towards Liberty Road and, at 11:27 a.m., it was used in the vicinity of the stabbing. Cell

tower use between 11:39 a.m. and 11:53 a.m. showed movement from the Liberty Road area toward Baltimore City, and between 12:06 and 12:14 p.m., appellant's cell phone again used towers in the area of Gilmor Homes. Between 12:14 p.m. and 1:42 p.m., appellant's phone used towers near Cold Spring Lane, Baltimore's Inner Harbor, and Cherry Hill.

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

DISCUSSION

I.

Appellant contends that the circuit court erred in denying his pre-trial motion to suppress evidence obtained as a result of two court orders authorizing the disclosure of his cell phone location information. According to appellant, the two identical affidavits filed in support of the requests for the court orders omitted key facts and contained misrepresentations that had the effect of misleading the judge who issued the orders. At a pretrial hearing, appellant urged the court to look beyond the four corners of the affidavits and to hold a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). The court denied appellant's request for a *Franks* hearing and his motion to suppress.

In considering appellant's challenge to the pre-trial ruling of the suppression court, we confine our review to the testimony and evidence presented at the suppression hearing. *Small v. State*, 464 Md. 68, 88 (2003)(*citing McFarlin v. State*, 409 Md. 391, 403 (2009)). We defer to the factual findings of the suppression court unless clearly erroneous, and review the court's "legal conclusions *de novo*, making our own independent constitutional

appraisal of the search." *Longshore v. State*, 399 Md. 486, 499 (2007); *Carter v. State*, 236 Md. App. 456, 467 (2018), *cert. denied*, 460 Md. 9 (2018).

The Fourth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, protects against "unreasonable searches and seizures." U.S. Const. amend. IV. As a means of ensuring reasonableness, the Fourth Amendment provides that "no Warrants shall issue, but upon probable cause[.]" U.S. Const. amend. IV; *Williamson v. State*, 398 Md. 489, 501-02 (2007)(citing *United States v. Sharpe*, 470 U.S. 675, 682 (1985)). The task of a judge issuing a warrant is "to reach a practical and common-sense decision, given all of the circumstances set forth in the affidavit, as to whether there exists a fair probability that contraband or evidence of a crime will be found in a particular search." *Patterson v. State*, 401 Md. 76, 89-90 (2007) (and cases cited therein). The issue before the reviewing court, as well as an appellate court, is not whether probable cause existed that evidence would be found, "but whether the judge who issued the search warrant had a 'substantial basis' for so finding." *State v. Johnson*, 208 Md. App. 573, 581 (2012). "The evidence necessary to demonstrate a 'substantial basis' is less than that which is required to prove 'probable cause.'" *Moats v. State*, 230 Md. App. 374, 391 (2016), *aff'd* 455 Md. 682 (2017). *See also Johnson*, 208 Md. App. at 586-87 ("A substantial basis is less weighty and less logically probative than probable cause . . . some warrant applications will [pass] muster under the lesser test that would not pass muster under the more demanding test.").

Ordinarily, when considering whether there is probable cause to justify the issuance of a search warrant, both the issuing court and a reviewing court are strictly confined to the

"four corners" of the affidavit supporting the warrant. *Greenstreet v. State*, 392 Md. 652, 669 (2006). *See also Williams v. State*, 231 Md. App. 156, 175 (2016)(holding same). In *Franks v. Delaware*, the United States Supreme Court set forth the only exception to the "four corners" doctrine by establishing "a formal threshold procedure [that must be met] before a defendant will be permitted to stray beyond the 'four corners' of a warrant application[.]" *Fitzgerald v. State*, 153 Md. App. 601, 642 (2003). The Court recognized that there is "a presumption of validity with respect to the affidavit supporting [a] search warrant," but held that when the defense meets the burden of showing "that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Franks*, 438 U.S. at 155-56, 171. Only after making such a showing will a defendant be permitted "to examine live witnesses in an effort to establish that a warrant application was tainted by perjury or reckless disregard of the truth." *Fitzgerald*, 153 Md. App. at 643. In *Franks*, the Court emphasized that in order to mandate a hearing:

> the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

Franks, 438 U.S. at 171.

Franks applies to omissions as well as misstatements, but only those that are "made intentionally or with reckless disregard for accuracy. A showing of negligent or innocent mistake will not suffice." *Holland v. State*, 154 Md. App. 351, 389 (2003). In addition, a defendant must show "that a governmental affiant has perjured himself [or herself] on a material matter." *Id.* at 389. A *Franks* hearing is a rare and extraordinary exception that must be expressly requested and that will not be indulged unless the rigorous threshold requirements have been satisfied. *Fitzgerald*, 153 Md. App. at 642.

In the instant case, each of the warrant applications included identical supporting affidavits by Detective C. Needham, which provided, in part, as follows:

> The victim [of the July 26, 2016 stabbing] was identified as Christopher Norris Jones M/B 09/19/80. It was learned that on 07/20/2016, victim Jones reported a destruction of property at his address. Victim Jones stated that on that day his ex-girlfriend, Angel Thomas, and her new boyfriend, Brandon Heigh, came to his house and threw a large rock through the bay window of his residence and then fled the scene. Officer Israel responded for the destruction of property report on 07/20/16 and after taking the information from victim Jones he responded to Angel Thomas' address known as 4019 Villa Nova Road 21207. Officer Israel reported that Angel Thomas and Brandon Heigh were sitting in a sedan at the location. Officer Israel reported that both subjects denied involvement. The phone number of 443-522-7491 was reported as Brandon Heigh's phone number on the destruction of property report. The homicide crime scene was across the street from Angel Thomas' residence.
>
> A witness to the homicide reported seeing a fight between three people. After the fight, two of those subjects ran and entered a silver four-door, older model sedan that was parked in front of Angel Thomas' residence. The vehicle then fled the scene.
>
> During the canvass of the neighborhood, it was learned that Angel Thomas' boyfriend drives a silver sedan and people reported the vehicle usually parks where the suspect vehicle for this homicide was observed to be parked.

> Investigators researched Brandon Jarvis Heigh M/B 10/07/89 and learned that on 0718/16 [sic] Brandon Heigh was the driver of a silver 1999 Cadillac sedan that was stopped for speeding at the intersection of Alter Street and Campfield Road. This vehicle closely matches the description provided by the witness to the homicide.
>
> A search of an insurance database for Brandon Heigh identified a cell phone number of 443-922-6065 as his cell phone number for a claim from 07/06/2016. The provider for both cell phone numbers are MetroPCS.

A hearing on appellant's motions to suppress and for a *Franks* hearing was held on February 3, 2017. Appellant argued that the information provided by the police to the court in support of the warrant applications was "very different" from what the detectives knew and what actually occurred. Specifically, appellant pointed to the State's failure to include information about the following items: a 13-hour delay between the time Mr. Jones said someone threw a rock through his window and when he reported that event to the police; the detectives' observations of Ms. Thomas's demeanor; reports that the perpetrators of the rock-throwing incident fled the scene in an SUV; that when police spoke to Angel Thomas, she and appellant were in a car, not an SUV; that appellant's car was a 2-door vehicle; that appellant wore his hair in dreadlocks; that witnesses to the stabbing incident described a 4-door vehicle; that one of the perpetrators of the stabbing was described as wearing a lime green shirt; and, when police encountered appellant at the Gilmor Homes, he was wearing a blue uniform shirt.

The motions court denied appellant's request for a *Franks* hearing, finding that appellant did not meet his burden of showing that the detective purposely acted to mislead the issuing judge or that he acted with reckless disregard in omitting information from the affidavit. The court concluded that there was no evidence of material misrepresentations,

untruths, or incorrect statements made with reckless disregard for their truth. The court further determined that even if the omitted information had been presented to the judge, the affidavit was sufficient to establish probable cause.

Here, appellant argues, as he did below, that he met the required threshold for a *Franks* hearing by proving that he was not "on the run" as stated in the affidavit, by showing that the affidavit omitted that he had long dreadlocks, by the fact that he was not wearing the clothing described by witnesses, and be showing that his vehicle did not match the description given to the police. Appellant also challenges the finding of the motions court that, notwithstanding the alleged failures of the affidavit, it was still sufficient to establish probable cause. Appellant maintains that removing the statement that he was "on the run," and acknowledging the discrepancies in the descriptions of the suspect and the suspect's vehicle, would have led the court to reject the request for the court order which led, ultimately, to the discovery of cell site location information for his cell phone. We are not persuaded.

Initially, we note that the statement that the perpetrators were "on the run" was not included in Detective Needham's affidavit, but there was evidence that the perpetrators of both the rock-throwing incident and the stabbing fled from the scene. The description of the assailants provided by Mr. Drake was vague and did not include any description of the assailants' hair, but it was not inconsistent with the fact that appellant had long dreadlocks. Moreover, there was no evidence that Detective Needham was aware that appellant wore his hair in long dreadlocks. Thus, on this issue, there was nothing to show that Detective Needham intentionally or recklessly made false statements. Similarly, with respect to the

fact that Mr. Drake described one of the assailants as wearing a neon green shirt, there was no evidence as to which of the assailants wore that shirt. Thus, the fact that Detective Needham did not mention the neon green shirt, or the fact that appellant was wearing his blue uniform shirt when detectives saw him near the Gilmor Homes, was neither misleading nor material.

With regard to Detective Needham's statement that the two suspects ran and entered a silver four-door vehicle, appellant failed to provide any evidence that the detective was aware of the fact that appellant's vehicle had 2 doors. Paris Drake reported that the assailants' getaway car was "a silver car, older, possibly a four door." Other detectives met with appellant and observed his vehicle near Gilmor Homes on the day of the stabbing, but there was no evidence presented to show that Detective Needham was aware that appellant's car had 2 doors. As there was no showing that Detective Needham's affidavit included any material misrepresentations, untruths, or incorrect statements made with reckless disregard for their truth, the motions court properly denied appellant's request for a *Franks* hearing.

Even if appellant had satisfied the requisite showing of an intentional and material misrepresentation or incorrect statement made with reckless disregard for the truth, the evidence at issue was not material to the finding of probable cause. Probable cause "'exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.'" *State v. Johnson*, 458 Md. 519, 535 (2018)(quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)). As we have already noted, probable cause is a "'practical, nontechnical

conception'" involving "'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Illinois v. Gates*, 462 U.S. 213, 231 (1983)(quoting *Brinegar v. United States*, 388 U.S. 160, 175-76 (1949)).

The affidavit clearly provided sufficient information to support a finding of probable cause. Detective Needham's affidavit asserted that appellant was in a relationship with Angel Thomas, that the victim, Mr. Jones, was Ms. Thomas's former boyfriend, that Mr. Jones was stabbed to death across the street from Ms. Thomas's house, that two male assailants fled the scene of the stabbing in a car that had been seen parked in front of Ms. Thomas's house; that the getaway car was a silver, older-model sedan; that appellant's vehicle closely matched the description of the getaway vehicle; and, that six days before the stabbing, Mr. Jones had accused Ms. Thomas and appellant of throwing a rock through his window. This information was sufficient to support the court's finding of probable cause for the issuance of the orders authorizing the disclosure of cell phone location information.

II.

Appellant contends that the trial court erred in denying his pre-trial motion in limine and admitting certain text messages and Facebook messages that he argued constituted inadmissible hearsay and/or evidence that was inadmissible under Maryland Rule 5-403 because its probative value was outweighed by the danger of unfair prejudice. For the reasons set forth below, we are not persuaded.

Hearsay is defined 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). Hearsay is not admissible "[e]xcept as otherwise provided by [the Maryland] rules or permitted by applicable constitutional provisions or statutes[.]" Md. Rule 5-802. "If the declaration is not a statement, or if it is not offered for the truth of the matter asserted, it is not hearsay and it will not be excluded under the hearsay rule." *Stoddard v. State*, 389 Md. 681, 689 (2005).

Even if otherwise admissible, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Md. Rule 5-403. We review a trial court's balancing of the probative value and unfair prejudice of evidence for an abuse of discretion. *State v. Broberg*, 342 Md. 544, 552 (1996); *State v. Faulkner*, 314 Md. 630, 641 (1989); *Newman v. State*, 236 Md. App. 533, 556-57 (2018)(quoting *Kelly v. State*, 162 Md. App. 122, 143 (2005)*, rev'd on other grounds*, 392 Md. 511 (2006)).

A trial court's ruling on the admissibility of evidence is ordinarily reviewed for abuse of discretion. *Wheeler v. State*, 459 Md. 555, 560 (2018)(quoting *Gordon v. State*, 431 Md. 527, 533 (2013)). However, a "trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal." *Gordon*, 431 Md. at 538. "[T]he factual findings underpinning this legal conclusion necessitate a more deferential standard of review" and "will not be disturbed absent clear error." *Id.*

With these standards in mind, we turn to the three evidentiary challenges raised by appellant: (1) certain text messages sent by him to Ms. Thomas should have been excluded both as hearsay and because they were unfairly prejudicial; (2) certain text messages from Ms. Thomas to appellant were improperly admitted as the statements of a co-conspirator;

and, (3) certain Facebook messages sent to appellant by Ms. Thomas, including a photograph of a knife, should have been excluded because they were unfairly prejudicial. We shall address each of these arguments *seriatim*.

A. Text Messages from Appellant to Ms. Thomas

Appellant's first challenge relates to the admission of two text messages sent by him to Ms. Thomas on the morning of July 26, 2016. At 5:32 a.m., appellant wrote, "I wish all the bad things in the world happen to you and only you." Later that morning, appellant wrote to Ms. Thomas, "Will get my shit on lunch." Appellant acknowledges that, pursuant to Md. Rule 5-803(a)(1), these statements were not excluded as hearsay because they were his own, but he argues that they should have been excluded because their probative value was outweighed by the danger of unfair prejudice.

The trial court did not abuse its discretion in concluding that the probative value of these messages outweighed the danger of unfair prejudice. The evidence established that Mr. Jones was stabbed across the street from Ms. Thomas's house at about 11:40 a.m. On the same day as the stabbing, appellant's text to Ms. Thomas indicated that he would get his "shit" at lunch time, and this statement was probative of appellant's presence at the scene of the crime at the approximate time of the stabbing. Moreover, when combined with other text messages sent on the morning of the stabbing, it could be inferred that, on the morning of the stabbing, appellant was engaged in an argument with Ms. Thomas and that he was jealous of her former boyfriends, including Mr. Jones. For example, at 8:29 a.m., appellant sent a text message to Ms. Thomas stating, "Now u have all the time in the world to tlk to your exes." Ms. Thomas responded at 9:12 a.m. stating, in part, "I did not

take your feelings for granted this time in other occasions yes but this time now and definitely not with the Chris situation[.]" Lastly, at 9:53 a.m., appellant wrote to Ms. Thomas stating, "Hopefully I will be one of those exes u jeopardize it all for." These text messages were probative of appellant's motive to kill Mr. Jones and the trial court did not abuse its discretion in admitting them in evidence.

B. Statements of a Co-Conspirator

Appellant argues that the trial court erred in admitting certain text messages sent to him by Ms. Thomas as statements of a co-conspirator under Md. Rule 5-803(a)(5).[2] Specifically, appellant points to testimony by a computer forensics examiner, Ashley Hoffman, who testified that at 11:56 and 11:57 a.m. on the day of the stabbing, Ms. Thomas sent appellant text messages containing the following statements: "Anything after our no strings text..delete it. Even this message[,]" and "No texting call. Only text if necessary … not even. Be careful." Ms. Hoffman testified that many text messages, including those referenced by Ms. Thomas, were deleted from appellant's phone. Appellant maintains that the trial court erred in determining that these statements qualified as statements of a co-

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[2] Maryland Rule 5-803(a)(5) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> (a) Statement by Party-Opponent. A statement that is offered against a party and is:
>
> * * *
>
> (5) A statement by a coconspirator of the party during the course and in furtherance of the conspiracy.

conspirator because Ms. Thomas was not charged with conspiracy, but rather as an accessory after the fact. Appellant also asserts that evidence of the text messages should have been excluded because their probative value was outweighed by the danger of unfair prejudice. We disagree and explain.

The trial court determined that the messages were admissible as statements of a co-conspirator under Maryland Rule 5-803(a)(5). We need not address whether that determination was correct because, even assuming that Ms. Thomas was not a co-conspirator, and the hearsay exception did not apply, there was no error in admitting the text messages. *Unger v. State*, 427 Md. 383, 405-06 (2012)(and cases cited therein); *Elliott v. State*, 417 Md. 413, 434-35 (2010)(and cases cited therein).

Here, evidence of Ms. Thomas's text messages was not excluded by the rule against hearsay because it was not offered for the truth of the matter asserted. *See Stoddard*, 389 Md. at 688-89 ("If the declaration is not a statement, or if it is not offered for the truth of the matter asserted, it is not hearsay and will not be excluded under the hearsay rule."). As a general rule, a statement is "admissible as non-hearsay if it is offered for the purpose of showing that a person relied and acted upon the statement, rather than for the purpose of showing that the facts elicited in the statement are true." *Morales v. State*, 219 Md. App. 1, 11 (2014). At the hearing on the motion in limine, the prosecutor argued that he was not offering Ms. Thomas's statements for the truth of the matters asserted, but to show that appellant responded by deleting text messages. This did not implicate the rule against hearsay. Moreover, the trial court did not abuse its discretion in admitting the text messages because they were probative of appellant's consciousness of guilt as evidenced

by the deletion of the text messages. *See Decker v. State*, 408 Md. 631, 640-41 (2009)("consciousness of guilt evidence" can include the "destruction or concealment of evidence"). For these reasons, we find no error or abuse of discretion in the trial court's decision to admit Ms. Thomas's text messages to appellant.

C. Appellant's Facebook Messages to Ms. Thomas

Appellant challenges the trial court's decision to admit in evidence certain Facebook messages he sent to Ms. Thomas 8 days before the murder of Mr. Jones. The Facebook messages included one sent by appellant to Ms. Thomas stating, "Will stab him in the face." This message was followed by a photograph of a hand holding a knife. Appellant argues that this evidence, which suggested a possible motive for the crime, "could have made it easier for the jury to arrive at a guilty verdict" and that "[m]otive is not an element of the crime." This issue was not preserved properly for our consideration.

Appellant failed to lodge an objection to either Detective Grant's testimony about appellant's Facebook messages or the photograph of the hand holding a knife. He also failed to object to the admission of State's Exhibit 45, which contained the Facebook messages and photograph. In fact, defense counsel specifically stated that he had reviewed State's Exhibit 45 and had "[n]o objections." It is well established that a party must object to the admission of evidence at the time it is offered "or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." Md. Rule 4-323(a). This is ordinarily true even when the evidence was the subject of a pre-trial motion in limine. *Brown v. State*, 373 Md. 234, 258 (2003); *Reed v. State*, 353 Md. 628, 638-43 (1999).

Even if the issue had been preserved for our consideration, we would hold that the trial court did not err or abuse its decision in admitting the evidence. Evidence of the Facebook communications between appellant and Ms. Thomas showed that appellant was jealous and angry about Ms. Thomas's relationship with her former boyfriends, specifically Mr. Jones. On the morning of the stabbing, appellant had an argument with Ms. Thomas about ending their relationship and mentioned "the Chris situation." Mr. Jones's first name was Christopher. The challenged Facebook messages were probative of appellant's jealousy, anger, and motive. As we have stated, motive, while not a formal element of a crime, is "a circumstantial fact that sometimes may help to prove guilt." *Emory v. State*, 101 Md. App. 585, 605 (1994). Thus, even if properly before us, reversal would not be required.

III.

Appellant contends that the evidence was not sufficient to sustain his conviction for second-degree murder because the State failed to establish his identity as the person who stabbed Mr. Jones. The standard of review for evidentiary sufficiency 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.'" *Smith v. State*, 415 Md. 174, 184 (2010)(quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))(emphasis in *Jackson*). "We defer to any possible reasonable inferences the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *Fuentes v. State*, 454 Md. 296,

308 (2017)(citing *State v. Smith*, 374 Md. at 557, 823 (2011)). The question for us is whether the inference made by the finder of fact was supported by the evidence. *State v. Suddith*, 379 Md. 425, 447 (2004).

In making that determination, "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))(alteration in *Morris*). We 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). Thus, the limited question before us "'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.'" *Allen v. State*, 158 Md. App. 194, 249 (2004), *aff'd*, 387 Md. 389 (2005)(quoting *Fraidin v. State*, 85 Md. App. 231, 241 (1991))(emphasis in *Fraidin*).

In support of his contention that the State failed to establish his identity as the person who stabbed Mr. Jones, appellant argues that there was no eyewitness identification, there was no physical or biological evidence linking him to the crime, there were no fingerprints linking him to the victim or the crime scene, there was no blood found in his car, and the weapon used in the crime was never found. In addition, appellant asserts that he cooperated with police, did not try to flee, and explained his presence in the area where the crime occurred. For these reasons, he maintains that the surveillance images of his car and the cell phone call records did not connect him to the crime. We disagree and explain.

The evidence presented at trial placed appellant at the scene of the crime, demonstrated his consciousness of guilt, and provided a motive for appellant to kill Mr. Jones. That evidence was sufficient to allow the jury to reasonably determine that appellant was the person who stabbed and killed Mr. Jones.

As for his presence at the scene of the crime, appellant told detectives that he had been in a relationship with Ms. Thomas for several months and frequently spent the night at her house. Surveillance camera footage showed appellant's car leave the Gilmor Homes area at about 11:00 a.m. Appellant admitted he was in the area of the murder and that the video from a gas station showed his silver, two-door Cadillac Eldorado "traveling at a high rate of speed" from Essex Road onto Liberty Road at approximately 11:38 a.m. Paris Drake testified that he observed Mr. Jones's assailants make their way toward a silver car, that the car was facing toward Liberty Road, and that he had seen a "similar vehicle" parked between 4017 and 4019 Villa Nova Road in the three weeks leading up to the stabbing. Zeire Cummings testified that he had seen "a silver Cadillac, cloth-top convertible" parked across the street from his house and that he thought it was "a four-door, and it looked like a 2003 or 2006 model." Mr. Cummings had seen the car there about three times prior to the stabbing and again on the night of July 26, 2016, after the police had left the scene.

From text messages between appellant and Ms. Thomas, the jury could infer that the two had an argument on the morning of the stabbing and that appellant was planning to remove his belongings from Ms. Thomas's house during his lunch breach. The cell tower records showed that appellant's phone was used in the area of Gilmor Homes until about 10:33 a.m., that it came into the area of the crime scene at about 11:27 a.m., and from 11:39

to 11:53 a.m. it moved along Liberty Road towards Baltimore City. From this evidence, the jurors could place appellant at the scene of the stabbing.

In addition, the jurors were presented with evidence of appellant's consciousness of guilt. Appellant did not initially acknowledge his presence near the murder scene. Later, he claimed that he had been smoking "weed" with Darryl Hunter. According to police, Darryl Hunter initially denied knowing appellant and then provided conflicting statements as to whether he knew him. Evidence was also provided that appellant deleted text messages pertaining to his communications with Mr. Jones. The jury was free to infer that appellant deleted those messages because they evidenced his motive to kill Mr. Jones and thereby demonstrated his consciousness of guilt.

In addition to consciousness of guilt, the evidence was sufficient to establish that appellant had a motive to kill Mr. Jones. Stephen Vaughan, a friend of Mr. Jones, testified that Ms. Thomas was Mr. Jones's "girlfriend at one time." There were also several Facebook messages sent by Mr. Jones to appellant six days prior to the stabbing from which the jurors could infer that Mr. Jones was previously in a romantic relationship with Ms. Thomas and was taunting appellant about his continuing contact with her. From several text messages, jurors could infer that appellant was angry and jealous of Ms. Thomas's communications with one or more of her former boyfriends, including one named Chris. The text messages admitted in evidence included: appellant's text to Ms. Thomas that, "Hopefully I will be one of those exes u jeopardize it all for[;]" a text from Ms. Thomas referencing "the Chris situation[;]" and, appellant's text to Ms. Thomas stating, "Niw u have all the time in the world to tlk to your exes." Facebook messages showed that Mr.

Jones had taunted appellant about the fact that he continued to have contact with Ms. Thomas. On July 21st, appellant copied those messages and sent them to Ms. Thomas with a series of messages, as follows: "FUCK U BITCH"; "READ THIS SHIT N U WILL NO WHY IM CARRYING U LIKE THAT"; "CALL U A RIDE"; "FUCK U GOT TO SAY NOW"; "I WILL WAIT FOR U TO GET YA LIES TOGETHER"; and, "GUESS U NEED MORE TIME." These messages combined with the text messages exchanged between appellant and Ms. Thomas showed that appellant was upset and ready to end their relationship. From this evidence, the jurors could infer that appellant's anger and jealousy about Ms. Thomas's relationship with Mr. Jones provided him with a motive to kill Mr. Jones.

For all these reasons, we conclude that there was sufficient evidence from which a reasonable jury could determine that appellant was the person who stabbed Mr. Jones.

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