Circuit Court for Frederick County
Case No. 10-K-16-058498

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1580

September Term, 2017

TIERRA NICOLE LUCAS

v.

STATE OF MARYLAND

Meredith,
Leahy,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: August 10, 2018

*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.

Tierra Nicole Lucas, appellant, was convicted in the Circuit Court for Frederick County of second-degree murder for the death of Brian Graves. She presents three questions for our review:

> "1. Did the circuit court err in not instructing on perfect or imperfect defense of others?
>
> 2. Did the circuit court fail to exercise its discretion in preventing the defense from eliciting the content of a written statement made by an eyewitness who indicated that a male committed the stabbing?
>
> 3. Did the circuit court err in preventing the defense from eliciting other relevant evidence?"

We find no error and shall affirm.

I.

The Grand Jury for Frederick County indicted appellant with the offenses of first-degree murder, second-degree murder, and first-degree assault of Mr. Graves. The State *nolle prossed* the assault charge, and a jury acquitted appellant of first-degree murder and convicted her of second-degree murder. The trial court imposed a term of incarceration of thirty years.

The following evidence was presented at trial: On April 3, 2016, Mr. Graves went to Olde Towne Tavern with friends, including Demetria McClary and her son Deon Pryor. After last call in the Tavern and as the lights came up, Mr. Graves was arguing with several female customers and forcefully shoved Alexis Lucas, appellant's sister, to the ground.

Olde Towne employees told him to stop and threw him out of the bar when he balled his fist and seemed ready to punch the bouncer.

Outside the bar, Mr. Graves continued to argue with the women. Alexis ran toward him with a knife, and he punched her in the face. Mr. Graves backed away and two men came between Mr. Graves and Alexis. As Mr. Graves backed up, appellant ran to Alexis, who gave appellant the knife. Appellant pushed through the two men and swung the knife into Mr. Graves's chest, after which Mr. Graves tried to punch appellant and stepped back into the street. Appellant then backed away, still holding the knife, stating repeatedly, "we're going to kill you," before she was pulled away. Witnesses saw another man arguing with Mr. Graves—one witness said the man punched Mr. Graves. Less than thirty seconds later, Mr. Graves walked into the street, bleeding from the chest. Appellant said "let's go" to her friends as police sirens approached. Other witnesses heard an unidentified woman tell Mr. Graves to get out of her face or that "she was going to kill him or hurt him or something."

During the incident inside Olde Towne, Ms. McClary saw Mr. Graves and Alexis swing at each other, and when she asked Mr. Graves why he was acting out, Mr. Graves pushed her. Mr. Pryor helped the bouncers remove Mr. Graves from the bar, and also exchanged swings with him after demanding to know why Mr. Graves had pushed Ms. McClary.

At 1:34 a.m., Officer Kyrie Wolfe responded to a call to the scene, where she observed Mr. Graves stumbling in the middle of Market Street. She called for backup to assist with Mr. Graves's large chest wound. Officer Wolfe tried to tend the wound, but

Mr. Graves "scratched her, shoved her when he attempted to stand up, and briefly struggled with her." Other officers saw Officer Wolfe subduing a disorderly individual. Detective Sean McKinney spoke with several people at the scene, including Frank Bevilacqua who gave a written statement to the police. Detective Kevin Forrest later identified Mr. Graves and his friends in security and cell phone videos, which included Mr. Graves striking Ms. McClary. The police never recovered a knife or other weapon.

At 2:52 a.m., Mr. Graves was taken to Shock Trauma in Baltimore, where his blood alcohol content was measured at .208.[1] He died the following day, and Assistant Medical Examiner Carol Allan determined in an autopsy that the cause of death was a "front to back" stab wound to the chest.

During trial, defense counsel asked witness Jeremiad Deike, an Olde Towne bouncer who ejected Mr. Graves from the bar and was one of the men who stepped between Mr. Graves and Alexis during the outdoor confrontation, "correct me if I'm wrong, didn't Detective Forrest ask you if you were covering up for these girls at some point?" The State objected on hearsay grounds, and the trial court sustained the objection.

Other testimony provided that Mr. Graves stood 6'2" tall and weighed 257 pounds at the time of his autopsy, while appellant measured approximately 5'7" and 130 pounds, and Alexis was about 5'4" and 150 pounds.

The State played video footage of the incident during the testimony of eyewitness Lisa Barrett, and objected to appellant's cross-examination of Ms. Barrett as follows:

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[1] For comparison, a blood alcohol content of .080 or higher is the minimum standard for Driving Under the Influence in Maryland.

> "[DEFENSE COUNSEL]: You said at some point in time you said people were still trying to fight the gentleman in the street?
>
> [MS. BARRETT]: Yes.
>
> [DEFENSE COUNSEL]: Now is that after—in other words, we didn't see that—you didn't see that on the video? It doesn't show up?
>
> [MS. BARRETT]: Uh-uh.
>
> [THE STATE]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: And you're telling us people were still trying to fight the gentleman in the street? Was that after he would have lifted up his shirt?
>
> [MS. BARRETT]: Yes."

Defense counsel, while cross-examining Det. Forrest, attempted repeatedly to question him about Mr. Bevilacqua's written statement, in which he indicated that he saw *a man* stab Mr. Graves. The trial court sustained the State's hearsay objections to each question, including a discussion of Mr. Bevilacqua's unavailability as follows:

> "[DEFENSE COUNSEL]: Okay. So, I think the State's Attorney and I both subpoenaed Mr. Frank Bevilacqua. I think that we both were unsuccessful in serving him, and I think that Mr. Bevilacqua had a lawyer who happened to be his father that wouldn't let him talk to us.
>
> THE COURT: There's a lawyer Bevilacqua—
>
> [DEFENSE COUNSEL]: Okay. Maybe—
>
> THE COURT: —apparently.
>
> [DEFENSE COUNSEL]: Okay. So, based upon that, I'm going to suggest to the Court that he is unavailable under the

> meaning of the rules, and I should be entitled to ask this detective, or, perhaps, Detective McKinney about the contents of the statement.
>
> THE COURT: I don't think not being able to serve somebody means they're not available. I think that's pretty settled, but nice try. Any other reason you want to give?
>
> [DEFENSE COUNSEL]: No, sir."

Appellant also cross-examined Det. Forrest about his interview of Mr. Deike as follows:

> "[DEFENSE COUNSEL]: [Mr. Deike] was the only witness that ever was interviewed twice, is that true?
>
> [DET. FORREST]: I believe so.
>
> [DEFENSE COUNSEL]: You didn't believe him, did you?
>
> [DET. FORREST]: It's not that I didn't believe him. I think that there was, we just had to clarify some things on the video as to what we saw.
>
> [DEFENSE COUNSEL]: Well, at one point in time, didn't you ask him if he was covering up for [appellant and Alexis]? Remember asking him that?
>
> [DET. FORREST]: Sure.
>
> [DEFENSE COUNSEL]: And you found it incredible that he didn't see the stabbing—
>
> [THE STATE]: Objection to the characterization.
> [DEFENSE COUNSEL]: —did you not?
>
> THE COURT: Sustained to the characterization.
>
> [DEFENSE COUNSEL]: Well, when he told you that he didn't see anybody with a weapon, did you believe him?
>
> [THE STATE]: Objection as to whether he believed him.

> THE COURT: Overruled.
>
> [DET. FORREST]: I mean initially, yeah, it was hard to believe that anybody didn't see somebody with a weapon. Initially, that was my first perception, yes."

Before resting her case, appellant called two witnesses, Officer Patrick Wharton and Det. McKinney. She did not testify in her own defense. She requested jury instructions, *inter alia*, on perfect and imperfect defense of others on the theory that appellant stabbed the victim after he had twice assaulted her sister. The State objected, and the court denied the request, reasoning as follows:

> "[T]he jury instruction requires that there be some evidence that—it specifically says to the jury you have heard evidence that the defendant killed Brian Graves in defense of another person.
>
> That has absolutely not been shown in this case at all.
>
> ***
>
> [T]he court is making this decision solely on the fact that there has been no evidence in this case at all that self-defense was present.
>
> There has to be at least some evidence that the defendant was in fear of imminent bodily harm or at least to another person. There is absolutely no evidence in this case that has shown that at all . . . ."

The court did, however, allow defense counsel to argue defense of others in its closing argument.

The jury convicted appellant and the court imposed sentence. This timely appeal followed.

II.

Appellant presents three arguments before this Court. First, as to self defense, she argues that the trial court erred or abused its discretion by not instructing the jury on both perfect and imperfect defense of others. She maintains that the test to support an instruction, the generation of "some evidence," was satisfied in this case. She points to the fact that Mr. Graves had just assaulted appellant's sister, Alexis, and suggests that his assault, in and of itself, justified appellant in coming to Alexis's aid. She asserts that the size difference between Mr. Graves and Alexis, along with Mr. Graves's high blood alcohol content, enhanced the inference that it would have been reasonable for appellant to come to her sister's aid. Finally, she relies on the testimony of witnesses who testified that Mr. Graves was aggressive toward Alexis and that Mr. Graves was belligerent at the time of the incident. In sum, appellant argues that the above evidence provided ample support for an instruction on both perfect and imperfect defense of others.

Next, appellant argues that the circuit court failed to exercise its discretion in preventing the defense from eliciting the content of a written statement given to Det. Forrest by an eyewitness, Frank Bevilacqua, who was not present at the trial. Defense counsel proffered to the court that throughout Mr. Bevilacqua's statement, he said that he saw a male commit the stabbing. Neither the State nor appellant was able to subpoena the witness, and because Mr. Bevilacqua was "unavailable" for trial as that term is defined in Md. Rule 5-804, the trial court should have permitted defense counsel to ask the detective about the contents of the statement to support an inference that someone other than appellant stabbed Mr. Graves. Appellant is not claiming that the witness's statement was

not hearsay; she is claiming that the court erred in concluding that it is "pretty settled" that being unable to serve a potential witness has no bearing on whether that witness is unavailable. She argues that by so concluding *ipso facto*, the court erred in not holding a hearing and not exercising its discretion in evaluating whether the witness's prior out-of-court statement was admissible under Rule 5-804(a)(5).

Finally, appellant argues the court erred in preventing appellant from eliciting other relevant evidence. In particular, she maintains the court erred in not allowing the defense (1) to ask witness Lisa Barrett whether video footage did not capture all of Mr. Graves's altercation with others and (2) to ask witness Jeremiah Deike whether Det. Forrest asked him if he was covering up for appellant and her sister.

The State argues that the trial court exercised its discretion properly by not instructing the jury on defense of others, both perfect and imperfect, because the evidence did not generate the defense. The State maintains that there was no evidence of appellant's state of mind, no evidence that appellant's sister was under direct attack or under immediate or imminent danger of harm from Mr. Graves when appellant stabbed him, and no evidence that appellant's use of deadly force was justified. In addition, assuming *arguendo* a subjective belief by appellant of harm to Alexis, either reasonable or unreasonable, appellant used more force than reasonably necessary to defend against the unarmed Mr. Graves.

As to appellant's evidentiary argument related to the admissibility of Mr. Bevilacqua's statement, the State's argument is twofold: first, that appellant never argued below that the trial court did not exercise its discretion to determine admissibility under a

hearsay exception other than Rule 5-804 and hence did not preserve it for our review; and second, on the merits, that the trial court did not abuse its discretion in not allowing cross-examination of the detective as to the hearsay statement. In support of the trial court's ruling, the State argues that, in addition to being cumulative, questioning as to the statement would likely have misled and confused the jury, who could not evaluate properly the witness's perception of the events in question, his memory of the events, his sincerity in making the statements, and his narration of the events.

As to appellant's argument that the trial court limited cross-examination of Ms. Barrett and Mr. Deike, the State maintains that the trial court exercised its discretion properly, because as to Ms. Barrett, the question as to what was not pictured on the video as compared to her testimony was not a proper question. As to Mr. Deike and whether he was "covering up for these girls," the trial court permitted the defense to explore sufficiently Det. Forrest's state of mind when he interviewed Mr. Deike—"specifically, his certainty about [appellant's] guilt."

III.

We address first appellant's jury instruction argument that the trial court erred in not instructing the jury as to perfect and imperfect defense of others.

Rule 4-325(c) provides that a trial "court may, and at the request of any party shall, instruct the jury as to the applicable law." When a party's request for a jury instruction correctly states the law, is generated by some evidence, and the content of the requested instruction is not otherwise covered, the court is required to give the jury instruction.

Preston v. State, 444 Md. 67, 81–82 (2015). In evaluating whether the evidence generates the requested instruction, "we view the evidence in the light most favorable to the accused." *General v. State*, 367 Md. 475, 487 (2002). "The source of the evidence is immaterial." *Dykes v. State*, 319 Md. 206, 217 (1990). "Some evidence" simply means any evidence, regardless of source, that, if believed, would support the defendant's claim. *General*, 367 Md. at 486–87. "Whether the evidence is sufficient to generate the requested instruction in the first instance is a question of law for the judge." *Id.* at 487 (footnote omitted).

Defense of others is a recognized defense in Maryland. *Lee v. State*, 193 Md. App. 45, 55 (2010). We explained the defense in *Lee*, stating as follows:

> "Defense of others, like self-defense, is a justification or mitigation defense. If the appellant proved that he was acting in perfect defense of others, *i.e.*, that he held a subjectively genuine and objectively reasonable belief that he had to use force to defend another against immediate and imminent risk of death or serious harm *and* the level of force he used was objectively reasonable to accomplish that purpose, he would be entitled to an acquittal on the murder charge. *See* Judge Charles E. Moylan, Jr., *Criminal Homicide Law* 194 (2002). On the other hand, if the appellant held an actual belief that he had to use force to defend another, but his belief was not objectively reasonable and/or the level of force he used was not objectively reasonable, the result would be to mitigate 'what might otherwise be murder down to the manslaughter level.' *Id*. at 193. The former is the 'perfect' or 'complete' form of the defense; the latter is the 'imperfect' or 'partial' form. *Id*."

Id. at 58–59 (emphasis added) (footnote omitted).

Perfect defense of others exists if (1) the defendant actually believed that the person she was defending was in immediate and imminent danger of death or serious bodily harm; (2) the defendant's belief was reasonable; (3) the defendant used no more force than was

reasonably necessary in light of the threatened or actual force; and (4) the defendant's purpose in using force was to aid the person she was defending. Md. State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* § 4:173(C). A perfect defense results in a not guilty verdict. *Lee*, 193 Md. App. at 58. Imperfect defense of another arises when a defendant had "an actual belief that [s]he had to use force to defend another, but [her] belief was not objectively reasonable and/or the level of force [she] used was not objectively reasonable." *Id.* at 59. Imperfect defense of another reduces murder to manslaughter. *Id.*

The trial court denied the requested instruction on the ground that the evidence did not generate the requested instruction. We agree. Although evidence to generate self-defense or defense of others does not have to come from the defendant, appellant in this case elected not to testify. Before this jury, there was absolutely no evidence, from any source, as to appellant's state of mind at the time of the event or the killing. Neither the disparity in their sizes nor Mr. Graves's disposition is sufficient to show appellant's actual belief for her actions. In fact, and highly significant, appellant suggested that another person stabbed Mr. Graves. In addition, the evidence did not show that Alexis was under direct attack when appellant allegedly came to her defense and stabbed Mr. Graves. The evidence did not generate the instruction.

IV.

We turn next to appellant's hearsay issue and Rule 5-804(a). Before this court (and not before the trial court), appellant argues that because the defense and the State were unable to serve Mr. Bevilacqua, he was unavailable as a witness under Rule 5-804(a), and

even though the witness's statement did not fit under the exceptions set out in the Rule, the trial court erred in not exercising its discretion in determining whether the statement satisfied any other hearsay exception. We hold that this argument is not preserved for our review.

Maryland Rule 5-804, Hearsay Exceptions, Declarant Unavailable, provides in pertinent part as follows:

> "(a) Definitions of Unavailability. 'Unavailability as a witness' includes situations in which the declarant:
>
> ***
>
> > (5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4) of this Rule, the declarant's attendance or testimony) by process or other reasonable means.
>
> A statement will not qualify under section (b) of this Rule if the unavailability is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying."

The State offers no argument in support of the trial court's ruling that, per se, inability to serve a witness cannot qualify as "unavailability" under the Rule. Instead, the State argues that even if appellant is correct, and the witness satisfied the threshold "unavailability" requirement, the statement was nonetheless inadmissible hearsay and did not fit within the Rule's hearsay exception. We agree.

Sub-section (b) of Rule 5-804 sets out hearsay statements that are not excluded if the declarant is unavailable. Those statements are former testimony, statements made

under belief of impending death, statements against interest, statements of personal or family history, and certain statements in a civil action where the declarant is unavailable because of a party's wrongdoing. Even if the trial judge erred in concluding that the witness was not "unavailable" as a matter of law, the statement of the witness does not fit within any exception set out in the Rule. Whether the statement fits into any other hearsay exception was never raised below, and is not preserved for our review.

V.

We turn to appellant's final argument, that the trial court erred in refusing to permit defense counsel to inquire of witnesses Ms. Barrett and Mr. Deike certain questions on cross-examination. We address Ms. Barrett first. On direct examination, Ms. Barrett described what she saw as to the stabbing. She described one female hand a knife to the other female and the blood coming through Mr. Graves's shirt. On cross-examination, defense counsel referred to her testimony that at some point in time, other people were still trying to fight the gentleman in the street, and he referred to a video that showed the event. He asked her "You didn't see that on the video? It doesn't show up?" The court sustained the State's objection.

The trial court did not abuse its discretion in sustaining the State's objection to defense counsel's effort to elicit what was or was not on the video. The jury had seen the video. The jury heard Ms. Barrett's description of everything she saw that evening. The video speaks for itself as to its contents. Counsel was free to argue in closing argument any inferences fairly generated by the evidence. We find no error.

Appellant argues that the trial court erred in restricting cross-examination as to Mr. Deike when the court sustained the State's objection to counsel's question: "And correct me if I'm wrong, didn't Detective Forrest ask you if you were covering up for these girls at some point?" Appellant claims that the trial court erred because the court precluded her from eliciting testimony that would have "shed light on Detective Forrest's state of mind when he interviewed Mr. Deike—specifically, his certainty about [appellant]'s guilt." For this purpose, appellant argues, the evidence was not inadmissible hearsay but instead relevant testimony as to state of mind. We find no abuse of discretion or error. We fail to see how Det. Forrest's state of mind when he interviewed the witness was relevant. Even if relevant, the trial court permitted defense counsel to explore the detective's state of mind during the detective's testimony. We find no error.

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