Circuit Court for Prince George's County
Case No. CJ17-3164

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2177

September Term, 2018

SAIM MICHAEL

v.

STATE OF MARYLAND

Arthur,
Leahy,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: May 5, 2020

Saim Michael ("Appellant" or "Saim") was charged with second degree assault and malicious destruction of property following an incident that occurred at a party on July 1, 2017. The day before Appellant's jury trial in the Circuit Court for Prince George's County, because there was no defense subpoena issued to Samir Michael,[1] Appellant's brother, the State moved to suppress testimony relating to Samir's purported out-of-court statements against penal interest. The court granted the State's motion to suppress testimony about Samir's out-of-court statements that he, not Appellant, was involved in the altercation at the party.

The State nol prossed the malicious destruction charge before trial, and the jury ultimately found Appellant guilty of second degree assault. Appellant was sentenced to five years of imprisonment, with all but two years suspended, to be followed by three years of supervised probation. He moved for a new trial, based on the trial court's exclusion of testimony during trial that would have supported his misidentification theory, but the court denied his motion. In this timely appeal, Appellant challenges various evidentiary rulings linked to the single question he presents for our review: "Did the trial court err in preventing the appellant from presenting evidence to support his defense of misidentification?"

Concluding that the trial judge did not err or abuse her discretion, we affirm Appellant's conviction.

[1] Because Saim and his brother Samir share the same last name, we refer to them by their first names for the sake of clarity. We also note that Saim's brother's name appears as "Semir" in some court filings, while the transcripts and both parties' briefs use the spelling "Samir." In this opinion, we use the spelling as transcribed in the transcripts and in the briefs.

BACKGROUND

On July 1, 2017, sometime after 10:30 p.m., Jazmine Castillo attended a party at a residence in Hyattsville, Maryland with Trinity Adakomola and another female friend. While at the party, Ms. Castillo was assaulted by a man she had not met before, and an unknown partygoer told her than the man's name was "Saim." Ms. Castillo went to the police station to report the incident, but the police told her that there was nothing they could do. Several days later, on July 19, Ms. Castillo went to the commissioner's office and completed an application for statement of charges against Appellant.[2]

Appellant was charged in the District Court, sitting in Prince George's County, with second degree assault and malicious destruction of property. Appellant removed the case to the circuit court by requesting a jury trial, which was scheduled to take place on April 2, 2018. On the day of trial, defense counsel moved for a continuance on two grounds. First, defense counsel proffered that, the night before, she received contact information for a witness and needed time for further investigation. Second, defense counsel proffered

[2] At the motions hearing on June 4, 2018, defense counsel questioned Ms. Castillo about how she knew Appellant's last name, date of birth, and address to complete her application for a statement of charges. Ms. Castillo replied that she "turned in [Appellant's] license plate number to the police office and they did all of the other stuff." Ms. Castillo then indicated that she did not remember where she got his address.

In her application for statement of charges, Ms. Castillo related that, in addition to the events that took place at the party, Appellant threatened her at her place of employment and threw a rock at the screen door of her residence. This evidence was not presented at trial because the State did not bring charges against Appellant for the incident at Ms. Castillo's place of employment and, at the hearing on June 4, the State agreed to nol pros the second count for malicious destruction of property for destroying her screen door. It is not clear from the record when Ms. Castillo obtained the license plate number.

that, also the night before, she learned that an "alternate suspect," Samir Michael, informed Appellant's prior assigned defense counsel, Adam Caldwell, that he had committed the crime. Defense counsel explained that she would be seeking to subpoena Samir, but he had two open warrants in Montgomery County and an open warrant from the U.S. Marshals Service, so finding him was "proving to be very difficult[.]"

The State opposed the request for continuance, pointing out that at the hearing in the District Court on December 21, 2017 when Mr. Caldwell requested a jury trial on Appellant's behalf, he also "informed the State that they were going to have a hearing of mistake in identity, which is the witness that [defense counsel] want[s] to secure." Because defense counsel and Mr. Caldwell work for the "same agency," the State argued, defense counsel had been aware of the witness since December 21 and Samir should have been subpoenaed for trial. Defense counsel replied that she had just received the information, but she agreed that Mr. Caldwell had to withdraw because he became a potential witness in the case after Samir's confession to him. The court accepted defense counsel's proffer and continued the case, over the State's objection.

Motion to Suppress

On June 4, 2018, the day immediately before trial commenced, the State moved in limine to exclude any testimony about statements made by Appellant's brother, Samir, including Mr. Caldwell's account of the statement Samir made to him. The State argued, under the pertinent hearsay exception for statements against penal interest, Maryland Rule 5-804(b)(3), that there was an inadequate showing that Samir was unavailable, that the

exact contents of the out-of-court statement were unclear, and that there were insufficient corroborating circumstances to indicate the trustworthiness of the statement.

Defense counsel responded that she was prepared to call witnesses who would offer testimony to address the State's arguments. These witnesses included David Vaughn, an investigator who would testify as to Samir's unavailability; Mr. Caldwell, who would proffer the contents of Samir's statement regarding his relationship to the crime and indicate that he advised Samir to speak to an attorney; and Khila Demar, Appellant's "girlfriend," who would testify as to Samir's "several statements . . . that he committed the crime[,] that he is sorry to put them in this position[, and] that he would come to court if necessary." Defense counsel also argued that corroborating circumstances could be "found from a number of different sources," such as the facts "that the statement solely incriminates the declarant"; "that it was spontaneous and not the subject of coercive custodial police interrogation"; or that Samir "clearly expected that th[e] statement would subject him to criminal liability." In addition, counsel contended, "the fact that [Samir] made numerous statements, not just one statement, numerous statements bear sufficient indicia of reliability and trustworthiness such that they should fall under this hearsay exception."

Asked by the court if there was any attempt to serve a subpoena on Samir after he made the statement to Mr. Caldwell, defense counsel said it was her understanding that Mr. Caldwell thought Samir "would be cooperative." She explained that "[n]o effort was made to subpoena him then because we thought that he'd be a cooperative witness. He's since absconded and has become completely unavailable despite reasonable efforts to locate and

serve him." In fact, Samir had "since picked up new charges in D.C. and Maryland for handgun charges and [] become completely unavailable to his family[,]" as "[e]ven his parents ha[d] been unable to locate him." Defense counsel maintained that, after realizing Samir "changed his mind" about appearing, she intended to serve him but the efforts she undertook to locate him were unsuccessful.

Defense counsel emphasized that "identification is essential to this case" because the "defense is that someone else committed this crime." For that reason, counsel also argued that the issue "implicates [Appellant's] right to a fair trial and his right to present a defense[.]" Citing *Roebuck v. State*, 148 Md. App. 563 (2002), counsel continued that "given a defendant's constitutional right to present a defense, a defendant should not be subjected to an insurmountable evidentiary hurdle to obtain admissibility of a hearsay statement that is essential to the defense."

The suppression court then heard testimony from the defense's witnesses, starting with David Vaughn, a private investigator hired by the defense to locate Samir. Mr. Vaughn testified that he visited 2025 East West Highway in Silver Spring, an address provided by the defense, on two separate occasions in May 2018. He explained that the residence was located in the upstairs portion of a two-story building, and that there was no answer during either of his visits. During his second visit, Mr. Vaughn was able to speak to the doctor whose office occupied the downstairs portion of the building. The doctor informed Mr. Vaughn that "the Michaels had moved out previously and no longer lived there. And there's a different name on the mailbox as well."

Mr. Vaughn then testified that defense counsel provided him with a phone number associated with Samir.[3] Although he called that number several times and attempted to leave a voicemail, Mr. Vaughn was unable to reach Samir. Defense counsel also provided Mr. Vaughn with a phone number for Appellant and Samir's parents. Mr. Vaughn spoke to their father, who relayed that "he didn't know where [Samir] lived" and declined to "provide [] any information as far as a phone number or employment." The father told Mr. Vaughn that "he'd get ahold of [Samir] and give him the message[,]" but Mr. Vaughn never heard back. Mr. Vaughn also testified that he had access to a database search engine called "IRB," which compiles contact information from sources such as "voter registration, driver's licenses, utilities, things of that nature."**[4]** Through the database, Mr. Vaughn was unable to find any additional contact information for Samir.

On cross-examination, Mr. Vaughn admitted that he was aware that the case dated back to October 2017, but that he only started looking for Samir in May 2018. He further agreed that he never asked Appellant where his brother could be located; he had only asked defense counsel. Mr. Vaughn then testified that he also attempted to call Samir's phone number on May 23 and again that morning to see if the number was active.

[3] As we will discuss, more than one number was associated with Samir, but the transcript testimony does not reflect which number Mr. Vaughn called.

[4] Although the reference is not explained in the record on appeal, "IRB" apparently refers to IRBsearch.com, an online database available to private investigators and other professionals. *See* IRBSEARCH, http://www.irbsearch.com/ (last visited April 23, 2020).

In the middle of Mr. Vaughn's cross-examination, the State and defense counsel approached the bench with new information. According to defense counsel, Samir called her "with a brand-new number, that no one has ever heard of before, and left a voicemail."[5] The following colloquy then took place:

> THE COURT: So then he would be available to come in?
>
> [DEFENSE COUNSEL]: Well, no. He stated that he was not coming in. He's not coming near the courthouse because he has too many open warrants. I also have copies of the open warrants. This was the first contact –
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> THE COURT: If he is to come into court –
>
> [DEFENSE COUNSEL]: In order to subpoena him, we have to find him.
>
> THE COURT: Well, I understand the predicament he's in, but he's represented that he was the one that committed the assault, which means that potentially he would have a Fifth Amendment [r]ight.
>
> [DEFENSE COUNSEL]: And I explained that to him.
>
> THE COURT: He said he would have a – right, but that would be under oath. The Court would make that determination, but he wants the Court to accept the truth of his representations even though he's not coming in.
>
> [DEFENSE COUNSEL]: And I explained all that to him. I asked him for his location. He refused to provide his location.
>
> THE COURT: But what was the point of the phone call?
>
> [DEFENSE COUNSEL]: The point of the phone call was to try to get him here.
>
> THE COURT: No. You said he –
>
> [DEFENSE COUNSEL]: He called and left a message and it's an inculpatory statement that I have a recording of. Then I called him, having new contact

[5] Again, the transcript does not reveal what the "brand-new number" was.

information for him, attempting to have him come in, advised him that he would – he stated –

. . . .

I advised him that he of course could speak to a private attorney and probably have a Fifth Amendment [r]ight, but we needed him to come to court; otherwise, his statements would not be admissible. He wouldn't tell me where he was and he stated he would not come into court because he has too many open warrants to be setting foot in the courthouse.

THE COURT: So he called you?

[DEFENSE COUNSEL]: No. I called him.

* * *

THE COURT: So the Court is clear, I'm understanding that he called his brother – or the witness called this morning to state that he has a new number, that he committed the assault, but he's not coming in because of open warrants.

[DEFENSE COUNSEL]: Yes.

Defense counsel then presented the court with copies of Samir's outstanding warrants. The court noted that, in Montgomery County, Samir had failed to appear on November 10, 2017 and had an open violation of probation warrant. Samir also had been released on personal recognizance, pending a show cause hearing set for June 21, 2018, on a handgun charge in the District of Columbia. The court observed that the mail had been returned because the address used was not correct. Later, the court clarified, and defense counsel agreed, that Samir had two open warrants in Montgomery County and the show cause hearing set for later in June in the District of Columbia.

Once these exhibits were provided to the State, the cross-examination of Mr. Vaughn continued. Mr. Vaughn admitted that he did not visit the address for Samir listed on the document—1705 East West Highway—even though the information was available to him through Case Search. He also admitted that he did not know Samir was arrested in

the District of Columbia and consequently did not check those records to see if Samir listed a different address.[6]

The defense next called Adam Caldwell, the public defender originally assigned to represent Appellant. Mr. Caldwell testified that Samir approached him at a hearing in District Court before the case was transferred to the circuit court. At that time, Samir informed Mr. Caldwell that he was at the party on the night in question and that "he believed that the complaining witnesses had confused him and his brother." Hearing this, Mr. Caldwell told Samir that he might be charged in the case and asked him if he had a lawyer. Samir informed Mr. Caldwell that he had spoken to John McKenna, a local defense attorney in Prince George's County. Samir also told Mr. Caldwell that "he would be inclined to testify." Believing that Samir had retained counsel and may have a privilege to assert in the case, Mr. Caldwell "ceased communications because of ethical reasons." When asked why he did not issue a subpoena for Samir, Mr. Caldwell testified, "I'm going to respectfully request not to answer that based on attorney/client privilege."[7]

In response to a question about his physical observations of Samir, Mr. Caldwell opined that Samir "was about the same age and height" as Appellant, "looked very . . . similar[,]" "[l]ooked like certainly they could be related by blood."

[6] After reviewing the D.C. records, the court observed that there were additional addresses for Samir, including 1705 East West Highway, along with 54 Ellsworth Heights in Silver Spring.

[7] The record does not reflect why Appellant's then counsel did not seek the basis for Mr. Caldwell's invocation of the attorney-client privilege with regard to a non-client.

On cross-examination, the State sought to clarify the statement Samir made to Mr. Caldwell, and Mr. Caldwell replied, "I don't remember the exact words, but it was something to the fact [sic] of he believed that the witnesses in this case had confused Saim and Samir." Asked whether Samir said "he did anything," Mr. Caldwell replied, "I don't recall him saying that he did anything, no. He just told me he was present at the party."

Khila Demar then testified that she knew Appellant and Samir, and that Appellant was the father of her child. Ms. Demar testified that she had two conversations with Samir about this case; one in person and one over the phone. During the in-person conversation, which took place in either November or December of 2017, Ms. Demar "told [Samir] [they] needed to have a discussion because Saim was being charged with a crime that[] he did not do and from [her] understanding, Samir did it." Ms. Demar, then pregnant with Appellant's child, told Samir that she was upset by the chance that her child "will not have a father if [Appellant] is charged with this crime." Ms. Demar testified that Samir "just kept trying to extend his apologies and let me know that[] worse come to worse, he would be there. He was going to show up to the court date. He was going to get it straight." Asked whether Samir made any admissions, Ms. Demar testified that "[h]e admitted to me that he was there the night of the party. H[e] and the girl got in a physical altercation. She was scratching him up, he had to get her off of her [sic]." Ms. Demar noted that Samir "never said what the altercation was about. He just told me that it wasn't Saim, it was him."

As to the phone conversation, which took place around April of 2018, Ms. Demar admitted that she and Samir "had exchanged some words" after she told him he needed to "come forward" and "tell the truth about what happened" because "[i]t's not fair to the

baby to grow up without a dad for something her father didn't do." Ms. Demar further testified that Samir again told her "he was going to make it right. He was going to appear in court. He was going to come, he was going to testify that it was him."

Ms. Demar continued that when she turned her phone on during the first recess, she had text messages Samir had sent from a number with a 667 area code, which differed from the 415 number he used previously when talking to her.[8] Ms. Demar reported that she called him on the 667 number and told him he needed to be in court, but "his exact words w[ere] that he was not going to come into the courthouse because he had warrants for bigger things, this is for something little[.]"

On cross-examination, Ms. Demar admitted that she did not recall speaking with any private investigator about Samir. Then she provided the content of the text messages she received from Samir at 11:19 a.m. that same day: "[H]e said, I got you if they do some damage s-h-i-t – excuse my language – by tell me call him when he gets out. And then the next text message that came through said [] tell Saim to call me. And then the next one was how – I guess he meant how does the rent look, but says how us [sic] the rent looking. And then the next text message was I forgot about court." On redirect examination, Ms. Demar testified that she did not know where Samir was living.

After these witnesses testified, defense counsel argued that Samir was unavailable under Maryland Rule 5-804(a)(5) because the defense could not procure his attendance by

[8] It is not clear from the record whether either number was the number provided by defense counsel to Mr. Vaughn, or whether either number was the "brand-new number" Samir used to contact defense counsel.

process or other reasonable means. Defense counsel asserted that, although Samir had been heard from, "[h]e's a fugitive from justice in three cases and he is making intermittent communications with his family, but that's all it is." Should the court find that Samir was an unavailable witness, defense counsel continued, his statements were admissible because they were against penal interest and there were corroborating circumstances to indicate trustworthiness. Defense counsel noted that Ms. Demar's credibility was a matter for the jury, and the issue at hand was the trustworthiness of the statement itself. Counsel also reiterated that Appellant and Samir "look alike," and had a "similarity in appearance" and a "similarity in names." Finally, defense counsel argued that Appellant's right to a fair trial was implicated and that granting the State's motion to exclude the statements would deny him his right to present a defense.

To the contrary, the State argued that Samir "is clearly available and he is making a choice to not be here today." More specifically, the State argued that Mr. Vaughn, the defense investigator, failed to "show reasonable efforts to try and locate [Samir] in this case." The State explained:

> If [the defense] wanted to get him into court, they should have started this investigation after the last court date, which was April the 2nd, and it was possible to get in contact with him because [Ms. Demar] did testify that she was in contact with him on that day, although Mr. Vaughn indicated that he never went to an address that was located on a public website.
>
> Your Honor, I have access to this. He's an investigator. He has access to other tools in which he could procure the same information. He failed to

> do that. He failed to talk to the defendant's brother [Suheb].[9] He failed to talk to the defendant's girlfriend whom he has a child by[.]

The State added that it was not clear which statement the court should be analyzing as "against penal interest" because defense counsel offered "just generalized statements in whole" and did not indicate "any particular statement that was against the penal interest." Because Samir did not provide to Ms. Demar the name of the girl he fought with, the State argued, "[h]e could have got[ten] in a fight with somebody other than the complaining witness at this time." The State noted that "[a]ll we have is Adam Caldwell's testimony saying that there was some confusion. And then we have [Ms. Demar] with a text message stating something about if something goes wrong or they do some damage shit, I will help clean it up[.]"

The State next maintained that the facts "so cut against the presumption of reliability . . . that the statement[s] should not be admitted." The State noted that Ms. Demar did not want Appellant to be absent while their child, then two months old, was in her infant stages. Further, the State noted, "all these statements have been from family members or somebody related to [Appellant]. We have maybe a statement from Adam Caldwell, but we are unsure at this time what that statement may be." The State concluded that none of the prongs for admissibility of the statements under the Maryland Rules of Evidence had been met by defense counsel.

[9] The State had asked Mr. Vaughn if he was "aware if the defendant has any other brothers," and Mr. Vaughn admitted that he was not aware. Later during the hearing, the court learned that Appellant and Samir had another, younger brother—Suheb Michael—who had entered the back of the courtroom.

After hearing again from defense counsel, the court granted the State's motion to suppress. Addressing the content and reliability of the statements, the court first found that Samir's statement to Mr. Caldwell in the District Court "was he believes the girls mixed it up. He believes the complaining witness had confused him and his brother." Ms. Demar, the court found, testified that Samir told her, in person in November or December of 2017, that "he's sorry. He's going to make it right[]. He feels bad about what happened. He was present at the night of the party. Some girl scratched him and he had to get her off of him. He planned to come to court." The court also found that Samir told Ms. Demar, in a phone conversation in April of 2018, that "he would make it right, he would testify." In addition, the court observed:

> But then we see today that there was further communication because there was a text message that basically he forgot to come to court. And then we also learned from Ms. Demar that she spoke to [Samir] a couple days ago, about two days ago, and he's asking do you want me to pick up the baby.

The court noted that "just because there's a relationship between the defendant and the witness does not necessarily negate the credibility of that testimony[.]" The court concluded, however, that Ms. Demar had "not testified to anything that would exculpate [Appellant]" and that "there wasn't anything that would suggest that there's a level of trustworthiness" or "that the statements made by Samir were against his penal interest."

On the issue of unavailability, the court noted that the investigator did not check the addresses in D.C. and Maryland listed for Samir on the D.C. court records, and observed that:

> As a matter of fact, [Mr. Vaughn] testified that as far as [he] knew, there wasn't even a [younger] brother, which obviously as the Court heard

> today there was a brother; that there was no testimony that he even contacted the Assistant U.S. Attorney in the District of Columbia[,] . . . the Parole and Probation for Montgomery County, to see if they had additional information to get the whereabouts.
>
> But interestingly, Ms. Demar was able to contact [Samir] or be in contact with him. She also had several phone numbers[.]

The court concluded that the "defense didn't even meet [the unavailability] prong that Samir at this juncture would be deemed unavailable for a hearsay exception to apply." Accordingly, the court granted the State's motion to suppress.

Trial

The State's Case

The State's case against Appellant rested heavily on the testimony of Jazmine Castillo and Trinity Adakomola.

Ms. Castillo testified that she and Ms. Adakomola first encountered Appellant at a party on July 1, 2017. As they made their way back into the party with another friend after having left for a short while, Appellant touched Ms. Adakomola's hair, apparently unbeknownst to Ms. Adakomola. Ms. Castillo, who was walking behind Ms. Adakomola, asked Appellant, who was standing about a foot away from her, if he knew Ms. Adakomola. He replied that he did not. Ms. Castillo asked him "why he would touch her hair and he said because he felt like it." According to Ms. Castillo, the two "started arguing and then he punched [her] in [her] face," "right below [her] eye," with a "closed fist."

Appellant then ran to the end of the driveway with Ms. Castillo in pursuit. Once Ms. Castillo reached the end of the driveway, she stood in front of Appellant for "about five seconds before he punched [her] again in [her] face," also with a closed fist. Ms.

Castillo fell to the ground "because [Appellant] dragged [her] by [her] hair and punched [her] with the other hand." Then, she testified, Appellant was "dragging [her] by [her] hair and punching [her] at the same time" for "[p]robably about 30 seconds." Ms. Castillo tried, unsuccessfully, to get to her feet as this transpired. She lost her shoes and her prescription glasses during the altercation, and sustained multiple injuries to her face, hands, and feet.

Ms. Adakomola came outside, and an unidentified man who was standing outside with Appellant pulled out a knife and threatened Ms. Adakomola. Appellant let Ms. Castillo go at that point, pulled out his own knife, and shortly thereafter ran from the area. While Ms. Castillo was looking for her shoes and glasses, she saw Appellant in the driver's seat of a car circling back to the block. According to Ms. Castillo, Appellant tried to hit her and Ms. Adakomola with that car, but they were pulled out of the way. She stated that she could see that it was Appellant driving and demonstrated for the jury the distance between herself and the car. Believing that Appellant could not "make a U-turn" and try to hit them again, the two women "walked around to the back of the car." At that time, Appellant went into reverse and hit a nearby parked car. Appellant then "sped off" leaving the scene, but shortly returned and began "circling around the block again." Finally, when Appellant saw some of Ms. Adakomola's male friends walking the two women back to their car, Appellant "reverse[d] all the way back down the street."

Ms. Castillo positively identified Appellant, in court, as the man that punched her multiple times. And, asked to identify the driver of the vehicle that nearly hit her and Ms. Adakomola, Ms. Castillo replied "Saim." Ms. Castillo testified, "I cannot see far, but I can see close. I can see who's in front of me." Though she lost her glasses and had a swollen

eye at some point during the incident, she said that she was able to see Appellant because he was "directly in front of [her]" and she could still open her other eye. She was also able to see him behind the wheel of the car because he pulled up so close to her. Ms. Castillo agreed that when she first encountered Appellant she was wearing her glasses and the area was well lit by an "automatic porch light [that] had just c[o]me on." She described the street where the party was as comprised of "single houses," surrounded by working streetlights, with parallel on-street parking.

On cross-examination, Ms. Castillo agreed that some unidentified partygoer told her Appellant's first name. When asked on redirect examination if there was "any doubt in [her] mind that the defendant is the person who assaulted [her] that night," Ms. Castillo replied, "[n]ot at all."

Ms. Adakomola also identified Appellant in court. She corroborated Ms. Castillo's testimony, confirming that Appellant "cat-called" at her when she first arrived at the party. Ms. Adakomola testified that she turned to look at him, but "didn't find him too attractive, so [she] just went on [her] way." After a short while, Ms. Adakomola and Ms. Castillo left the party, but they returned when a friend called to say there was someone else there whom they knew. According to Ms. Adakomola, when they re-entered the house, the friends entered single file behind a third, unidentified friend, with Ms. Adakomola second in line and Ms. Castillo third in line.

About a minute or two later, Ms. Adakomola realized Ms. Castillo was not inside the party with her. She went back outside and saw Ms. Castillo on the ground; Appellant "was standing over [Ms. Castillo] . . . with his left hand holding her hair [and] right hand

hitting her face." Ms. Adakomola testified that she could see Appellant's face, lit by the nearby streetlights. To "diffuse the situation," Ms. Adakomola tried to go around Appellant's unidentified friend to reach Ms. Castillo, but she then observed the friend "[p]ulling out a knife." At that point, Ms. Adakomola testified, she was within "arm's reach" of both Ms. Castillo and Appellant. She also saw Appellant "pull[] a knife on [Ms. Castillo]" before "he ran off."

After Appellant fled from the scene, Ms. Adakomola verified that he "looped back around the block" in a car. Like Ms. Castillo, Ms. Adakomola agreed that she could see Appellant behind the wheel of the car. Ms. Adakomola testified that he pulled up next to them, again within "arm's reach," and told them, "I'll pop the trunk on you guys." While trying to get away from the car, the women ended up behind it and then watched as Appellant tried to back up towards them. Ms. Adakomola testified that someone grabbed them and pulled them out of the way.

On cross-examination, Ms. Adakomola agreed she did not know Appellant and had never seen him before the night of the party. She also agreed that an unidentified person "gave [her] the name Saim." On redirect examination, Ms. Adakomola maintained that she remembered Appellant's face and what he looked like, and that he was present in the courtroom.

The Defense's Case

After the State rested, the defense called as a witness Khila Demar, who informed the jury that Appellant was the father of her child. Ms. Demar also said that she had attempted to contact Samir about Appellant's case in November or December and again in

April. Appellant testified on his own behalf and confirmed that he and his brother, Samir, attended the party, along with some other friends. Appellant said that after leaving the party to go to 7-Eleven, he returned and saw Samir in the middle of a "brawl" with one of the State's witnesses. Appellant stated that Samir was pulled from the fight and ran towards him. Then, Appellant testified, he tossed Samir his car keys "basically so [Samir] c[ould] just get out of there because [Appellant] already knew the police would probably come or the girl's friends guys [sic] would come and retaliate." According to Appellant, he thought Samir "fled the scene," but "what he actually did was he did come back around[,]" stop, reverse, hit a parked car, and then leave.

Appellant denied assaulting Ms. Castillo and testified that he first saw her during his peace order hearing. Appellant then identified a photograph of himself and Samir, as well as a photo of just Samir, and those photos were admitted into evidence for the jury's consideration. Appellant agreed he was wearing a watch in the photograph with his brother. He further agreed that he and Samir had the same "lack of facial hair" on the date of the party, as he had recently shaved and Samir did not have facial hair at the time.

After the defense rested, the State recalled Ms. Castillo in rebuttal. Ms. Castillo looked at the defense photograph that showed both Appellant and Samir and identified the person wearing a watch in the photograph (Appellant) as the person who assaulted her. She again identified Appellant, in court, as the person who assaulted her. On further cross-examination, Ms. Castillo testified that she did not know the other person in the photograph but had seen him attend court with Appellant on prior occasions.

At the close of trial on June 5, 2018, the jury found Appellant guilty of second degree assault.

Appellant noted his timely appeal to this Court on September 28, 2018. We will supply additional background facts necessary to the resolution of the evidentiary issues addressed in the following discussion.

DISCUSSION

Appellant's defense theory was that this was a case of mistaken identity. Samir was the one who actually assaulted Ms. Castillo.[10] Appellant contends that the trial court denied him his right to present a defense by excluding: 1) out-of-court statements made by Samir that qualified as exceptions to the hearsay rule as statements against penal interest; 2) evidence that Appellant and Samir had been confused for each other before; and 3) evidence that Samir's whereabouts were unknown.

Standard of Review

Although we ordinarily review a trial court's rulings on the admissibility of evidence for abuse of discretion, we apply a different standard for hearsay evidence. *Vielot v. State*, 225 Md. App. 492, 500 (2015). "'Hearsay' is 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). Under the Maryland Rules, hearsay "*must* be excluded as evidence at trial, unless it falls within an exception to the hearsay rule

[10] Although Ms. Adakomola was also targeted by Appellant during the incident at the party, the statement of charges against Appellant named only Ms. Castillo as the assault victim.

excluding such evidence or is 'permitted by applicable constitutional provisions or statutes.'" *Bernadyn v. State*, 390 Md. 1, 8 (2005) (emphasis in original) (citing Md. Rule 5-802). "Thus, a circuit court has *no discretion* to admit hearsay in the absence of a provision providing for its admissibility." *Id.* (emphasis added). *See also Thomas v. State*, 429 Md. 85, 98 (2012) ("[I]t is clear from our case law that in deciding whether a hearsay exception is applicable, 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.").

But, as the Court of Appeals clarified in *Gordon v. State*, "not all aspects of a hearsay ruling need be purely legal" because "[a] hearsay ruling may involve several layers of analysis":

> Under th[e] two-dimensional approach, the 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, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review. Accordingly, the trial court's legal conclusions are reviewed de novo, but the trial court's factual findings will not be disturbed absent clear error[.]

431 Md. 527, 536-38 (2013) (internal citations omitted). Stated differently, we review "for clear error the trial court's findings of fact, and review[] without deference the trial court's application of the law to its findings of fact." *Hailes v. State*, 442 Md. 488, 499 (2015).

I.

Samir's Statements

Before this Court, Appellant argues that the trial court erred by barring him from introducing evidence that "Samir admitted on multiple occasions to committing the

assault." According to Appellant, Samir's declarations satisfied the requirements for admission as statements against his penal interest. First, Appellant contends, "Samir made an unambiguous admission of culpability not only to Appellant's girlfriend, Khila Demar, but also to Adam Caldwell, Appellant's former attorney and an officer of the court." Appellant then asserts that the "court's determination that the defense did not show Samir to be unavailable is equally flawed[,]" as "defense counsel acted with the requisite diligence even if she did not turn over every possible stone in an effort to find Samir." Finally, Samir contends, "corroborating circumstances clearly indicated the trustworthiness of Samir's statements." Samir points to "the fact that Samir made similar statements to both Ms. Demar and Mr. Caldwell"; "the fact that Samir inculpated only himself"; the "important factor" that Samir "repeatedly offered to help Ms. Demar"; and evidence that "Saim and Samir had similar names, were close in age, and looked alike[] so the possibility of misidentification is not fanciful."

The State maintains that the court "did not commit clear error when it concluded that Samir's statements were not inculpatory and lacked particularized guarantees of trustworthiness." In the State's view, "Samir's statements were ambiguous as to his culpability" because he did not "claim to have been the person who actually assaulted [Ms.] Castillo." The State continues,

> [a] reasonable person in Samir's position would not believe that an innocuous statement about the victim's confusion or a statement that he had to pull a girl off him at a party attended by many people was against his penal interest – at no point did [Mr.] Caldwell or [Ms.] Demar testify that Samir told one or both of them that [Ms.] Castillo was confused and that he assaulted her.

The State further argues that "[e]ven if Samir's statements were against his penal interest,

they were properly excluded because Samir was not an unavailable witness."

Rule 5-804(b)(3)

Maryland Rule 5-804(b)(3) provides an exception to the hearsay rule for the following statements against interest *if* the declarant is unavailable as a witness:

> 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.

(Emphasis added). The rule further provides that "[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." Md. Rule 5-804(b)(3). Thus, for a hearsay statement to be admissible under Rule 5-804(b)(3), the proponent 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 (2012), *cert. denied*, 429 Md. 530 (2012) (citation omitted).

The hearsay exception for statements against interest "seeks to 'balance . . . the need for evidence to ascertain truth and the exclusion of untrustworthy evidence.'" *Roebuck v. State*, 148 Md. App. 563, 578 (2002), *cert. denied*, 374 Md. 84 (2003) (citations omitted). "The theory underlying this exception is that persons ordinarily do not make statements against their interest unless they are true." *Gray v. State*, 368 Md. 529, 568 (2002) (Raker, J., concurring). The proponent bears the burden to establish that the statement is "cloaked

with 'indicia of reliability,'" or that there are "particularized guarantees of trustworthiness." *Roebuck*, 148 Md. App. at 579 (citation omitted). However, "there is no litmus test that courts must follow to establish adequate corroboration or trustworthiness." *Id.* at 580.

A. Samir's Unavailability

As statement can be admitted under the hearsay exception for statements against interest only "if the declarant is unavailable as a witness[.]" *See* Md. Rule 5-804. Pertinent to our discussion, Rule 5-804(a) provides that:

> "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.

The Court of Appeals has explained that "other reasonable means" for purposes of the unavailability of a declarant "require efforts in good faith and due diligence to procure attendance." *State v. Breeden*, 333 Md. 212, 222 (1993). Accordingly, the party seeking to admit an unavailable declarant's statement "must demonstrate that it made a good faith effort to procure the unavailable declarant." *Vielot*, 225 Md. App. at 501-02 (citation omitted). The trial court's assessment of whether the party has met this burden, and whether the witness is, indeed, unavailable is subject to review by this Court under the abuse of discretion standard. *Id.* at 502 (citing *Muhammad v. State*, 177 Md. App. 188, 298 (2007)).

The requirement that the proponent of the statement make a diligent, good faith effort to procure the unavailable declarant does not require that the proponent take *all*

measures to procure the declarant. *See Breeden*, 333 Md. at 221 ("[I]f there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation. 'The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.'") (emphasis in original) (quoting *Ohio v. Roberts*, 448 U.S. 56, 74 (1980)).

In *Coleman v. State*, the State sought to admit the prior recorded testimony of Alan Lanning on the basis that he was unavailable because he could not be located. 49 Md. App. 210, 225-26 (1981). This Court considered whether the State satisfied its burden of showing that it made a diligent inquiry in good faith to ascertain the whereabouts of the missing witness. *Id.* at 226. During a pretrial hearing on the State's motion, Detective James Moore "recounted the efforts he had made, beginning several weeks prior to the retrial, to locate Alan Lanning":

> Moore explained that he began his inquiry at the residence occupied by Lanning at the time of appellant's original trial; he found that Lanning no longer lived there, and no one at that address knew where he had gone. According to Moore, he then inquired at the Motor Vehicle Administration and the Post Office, but neither agency had any record of a change of address for Lanning. A check with the utility companies was likewise fruitless. Moore testified further that he also checked with a car dealership at which Lanning worked at the time of the first trial but learned that Lanning was no longer employed there and had left no forwarding address. Moore also explained that, in the course of his quest for Lanning, he had contacted numerous acquaintances of Lanning and that none of them knew where he was.

Id. Despite what we characterized as a "catalog of fruitless efforts by the State to locate Lanning," the appellant argued that "it was insufficient because the State did not check with the Internal Revenue Service or the Social Security Administration and did not contact

any police officers or paid informants." *Id.* We noted that it was "undeniable that those additional sources of information suggested may have proved fruitful and perhaps should have been pursued for the sake of completeness," but declined to "say that their omission was fatal under the circumstances." *Id.* at 226-27. Accordingly, we affirmed, concluding that the "efforts actually undertaken by the State to locate Lanning for trial demonstrated diligence and good faith on its part" and were "sufficient for the trial judge to properly conclude that Lanning was 'unavailable.'" *Id.* at 227.

In this case, the trial court ruled that the defense failed to satisfy its burden of showing that Samir was unavailable for a hearsay exception to apply. The court first recounted the efforts made by Mr. Vaughn:

> In this part, you have the investigator testify that he basically did one month's worth of work and he called the father on . . . May 22nd and May 23rd and then on June 4th. He testified that he had an address and he went there. There was no answer. There was a dentist office on the bottom and later he spoke to the occupant of the bottom and said that they hadn't lived there for a while. That was it.
>
> But the Court has the D.C. record check and that clearly states that there were several addresses. He did not go to 1705 East West Highway, Apartment Number Two. He did not go to 54 Ellsworth Heights in Silver Spring. As a matter of fact, he testified that as far as the investigator knew, there wasn't even a brother, which obviously as the Court heard today there was a brother; that there was no testimony that he even contacted the Assistant U.S. Attorney in the District of Columbia or any individuals, the Parole and Probation for Montgomery County, to see if they had additional information to get the whereabouts.

The court then observed:

> But interestingly, Ms. Demar was able to contact him or be in contact with him. She also had several phone numbers, and as the investigator testified that he did not do anything further than go to Maryland Case Search and in

> that first location and did not follow-up with the father or even speak with anyone else to get a[] true and actual address.

Although the defense was not required to undertake every possible measure to locate Samir to testify, the defense was required to show that it made a diligent, good faith effort to procure his presence. Here, the defense's investigator, Mr. Vaughn, attempted to call Samir, spoke to his father, visited a prior known address, and checked an online database. The defense did not, as the court noted, check the two additional addresses from the D.C. record check, contact Appellant about his brother's whereabouts, attempt to reach Samir using other phone numbers, follow-up with Samir's father, or inform Mr. Vaughn that Appellant and Samir had another brother who may have had information. These additional sources of information were known to the defense, unlike in *Coleman*, where the potential additional sources of information—the Internal Revenue Service and the Social Security Administration—were merely suggestions made by the appellant. 49 Md. App. at 226.

Further, there was evidence that Samir was in regular contact with Ms. Demar, and was indeed available through her, either by text, by phone or in person on the day of the hearing. Ms. Demar suggested, at one point, that Samir knew about the case but allegedly "forgot" about the hearing on the day it occurred. Yet, Samir also called defense counsel on the day of the hearing, causing her to have to interrupt the proceedings to clarify that Samir had just called and left her a message on a "brand-new" number. Clearly, the court was not entertained by Samir's antics calling counsel and a witness on the day of the hearing and claiming that he wanted to help but would not make himself available. Moreover, as the suppression court pointed out, it was clear that Ms. Demar and family

members were in regular communication with Samir. Based on this record, we cannot say that the suppression judge abused her discretion in finding that Samir was not "unavailable" under the Maryland Rules.

B. The Statements

Appellant takes issue with the exclusion of statements by his brother Samir, the declarant, to Mr. Caldwell and Ms. Demar. The court found that Samir's statement to Mr. Caldwell was that "he believes the girls mixed it up. He believes the complaining witness had confused him and his brother." In analyzing whether the statement was against Samir's penal interest, the court noted that

> Mr. Caldwell, being a seasoned attorney, recognizes that any statements that may potentially lead to a Fifth Amendment [r]ight, it would be best to stop that person from talking especially since the person stated they had an attorney and advised them to go back to their attorney, **but at that juncture, Mr. Caldwell didn't have sufficient evidence that there was something that would lead Samir to have a Fifth Amendment [r]ight**.

(Emphasis added).

The statement from Samir to Ms. Demar in November or December, in the court's understanding, was that "he's sorry. He's going to make it right, you know. He feels bad about what happened. He was present at the night of the party. Some girl scratched him and he had to get her off of him. He planned to come to court." Samir's statement to Ms. Demar in April 2018, according to the court, was that "he would make it right, he would testify." The court determined that Ms. Demar had "not testified to anything that would exculpate [Appellant,]" because "[e]ven with this girl's attack scratching [Samir], [Ms. Demar] ha[d] no idea who they are referencing that [Samir] was present at the night of the

party." Further, the court, while "focusing on" what the hearsay statements were, noted that there was nothing to suggest "that the statements made by Samir were against his penal interest."

The Court of Appeals has indicated that a statement is contrary to one's penal interest if it tends to subject the person to criminal liability. *Gray*, 368 Md. at 568 (Raker, J., concurring). While the statement "need not be a full confession," it "must involve substantial exposure to criminal liability." *State v. Standifur*, 310 Md. 3, 13 (1987) (citation omitted). The exposure to criminal liability is "only a beginning point of inquiry," however, and the "more important criterion is that a reasonable person in the situation of the declarant would have perceived the statement as disserving at the time he made it." *Id.* Accordingly, not every "inculpatory" statement is truly a statement against penal interest. *See id.* at 17 ("Although we agree that the statement tended to subject [the declarant] to criminal liability, we believe the evidence insufficient to prove that a reasonable person in [the declarant's] position would have understood the disserving nature of the statement when he made it.").

Here, although Appellant contends that Samir made an "unambiguous admission of culpability" to Mr. Caldwell and Ms. Demar, Samir's statements were not express admissions of guilt of the charges at issue in this case. Samir's statement to Mr. Caldwell that he thought the witnesses might have confused him and his brother does not, standing alone, subject Samir to criminal liability. The statement, without added context, is not an unambiguous admission of culpability and could be confusing to a jury. As for Samir's statements of apparent remorse to Ms. Demar, the only portion that appears directly

inculpatory is his statement that "[s]ome girl scratched him and he had to get her off of him." But even that statement is more akin to a claim of self-defense than to an admission of criminal responsibility. Moreover, the evidence is "insufficient to prove that a reasonable person in [Samir's] position would have understood the disserving nature of the statement[s] when he made [them]." *Standifur*, 310 Md. at 17. As the State pointed out, "[i]n neither of these statements did Samir claim to have been the person who actually assaulted [Ms. Castillo]." We are persuaded that the trial court did not err in its determination that Samir's statements were not clearly against his penal interest under the circumstances of this case.

Even if Samir's statements could be considered statements against his penal interest, and even if the court's conclusion that he was not unavailable was an abuse of discretion, we are not persuaded there were adequate corroborating circumstances indicating that his out-of-court statements were trustworthy. *See* Md. Rule 5-804(b)(3). As this Court has explained, the "corroboration requirement serves to deter criminal accomplices from fabricating evidence at trial." *Roebuck*, 148 Md. App. at 579 (citation and internal quotation marks omitted). There is, however, "no litmus test that courts must follow to establish adequate corroboration or trustworthiness." *Id.* at 580. Because the court's evaluation of the trustworthiness of a statement is a factual determination, *Wilkerson v. State*, 139 Md. App. 557, 576 (2001), we review the court's determination under a clearly erroneous standard, *Jackson*, 207 Md. App. at 349.

Our decision in *Stewart v. State*, 151 Md. App. 425 (2003), is instructive. In that case, this Court affirmed a trial court's decision to exclude out-of-court statements made

by the father of the appellant. *Stewart*, 151 Md. App. at 455-56. We noted that "the relationship between the declarant and an accused is a key consideration," and "in a murder case in which a father and son are both implicated, the close familial bond of father and son raises the specter that [the father] had a motive to fabricate to protect his son." *Id.* at 454-55. Looking at the father's statements, we observed that the father "did not fully inculpate himself"; rather, he "sought to exculpate both himself *and* his son" by claiming that he committed the crimes but acted in self-defense. *Id.* (emphasis in original). In addition, we noted that "there were several inconsistencies in [the father's] various accounts, which engendered the trial court's skepticism as to the trustworthiness of the declarations." *Id.* We further observed that the court had recognized that the father's "statements were made when he knew that his son was either being sought by the police or had already been arrested" and that the court may have regarded the father's claims about his involvement as implausible. *Id.* at 455-56. After concluding that the evidence before the court simply did not corroborate the father's assertions, we declined to second guess the trial court's determination that the statement was not trustworthy. *Id.* at 455-56.

Likewise, in this case, Samir is Appellant's brother and would have had a motive to fabricate to protect Appellant. Notably, the only direct testimony that Samir was even at the party came from Appellant. As indicated, Ms. Castillo positively identified Appellant in the defense's photograph of the two brothers, and both she and Ms. Adakomola identified Appellant in court as the assailant.

We also conclude that Appellant's reliance on *Gray v. State*, 368 Md. 529 (2002), and *Roebuck v. State*, 148 Md. App. 563 (2002), is misplaced. In *Gray*, petitioner James

Gray's defense was that his wife, Bonnie Gray, was actually murdered by her alleged lover, Brian Gatton. *Gray*, 368 Md. at 533. Mr. Gray subpoenaed Mr. Gatton, but Mr. Gatton invoked his Fifth Amendment right, outside of the jury's presence. *Id.* at 534. Accordingly, the defense wanted Evelyn Johnson to testify about statements Mr. Gatton made to her and in her presence "to the effect that he[] had killed the victim[.]" *Id.* The State moved to exclude the statements, and the trial court held that the hearsay testimony of Ms. Johnson should not be admitted as a statement against interest made by Mr. Gatton. *Id.* at 534-36. In its ruling, the court noted that Ms. Johnson "appeared to be rather confused." *Id.* at 536.

Before the Court of Appeals, Mr. Gray argued that "at the pretrial hearing the State took the position that the evidence relating to the statements [] allegedly made by [Mr.] Gatton should not be admitted as declarations against penal interest . . . , because [Ms. Johnson] was not a credible witness[.]" *Id.* at 538. The Court was concerned that the trial court had considered the credibility of Ms. Johnson, the in-court relator, as opposed to that of the declarant, Mr. Gatton. *See id.* at 538-44. The Court of Appeals noted that there was nothing in its precedent "that in a jury trial specifically permits a trial court to make a factual assessment of the trustworthiness of the in-court relator of the out-of-court declaration that exculpates a defendant." *Id.* at 545. Further, the Court determined that there was other evidence to corroborate Ms. Johnson's testimony about Mr. Gatton's statements against interest, and that "the fact that [Mr.] Gatton may have been attempting to intimidate [Ms. Johnson] does not detract from the fact that he, and indeed any reasonable person, would know that the statements he was making about [Mrs. Gray],

however it was used by him, was a statement against his penal interest." *Id.* at 546-47. The Court concluded that Mr. Gray was entitled to present his defense and held, therefore, that the trial court erred in excluding Ms. Johnson's testimony after Mr. Gatton became unavailable by invoking his right to remain silent. *Id.* at 547.

In *Roebuck*, the issue before this Court was whether the circuit erred in barring Akil Jabari Roebuck from introducing into evidence a statement made by his cousin, Rolston James, Jr., a co-defendant who was tried separately for the murder of Jacoby Fagan. 148 Md. App. at 567-68. A third individual, John Miller, was also charged with Fagan's murder, but the State nol prossed the charges against him in exchange for his cooperation. *Id.* at 569. At Mr. Roebuck's trial, defense counsel, during the cross-examination of an officer, sought to elicit a statement Mr. James made to police, claiming that Mr. James was unavailable, and that his statement was admissible as a declaration against penal interest. *Id.* at 572. The State argued that, because Mr. James had validly asserted his Fifth Amendment privilege, Mr. Roebuck should not be allowed to introduce the statement through the police. *Id.* at 572-73. The court "was not satisfied that the statement was sufficiently corroborated so as to render it trustworthy," and thus "concluded that James's statement was inadmissible[.]" *Id.* at 575.

Before this Court, the State did not dispute that Mr. James, the declarant, was unavailable, nor did it challenge Mr. Roebuck's claim that James's declaration was against his penal interest. *Id.* at 579. Accordingly, the central issue before us involved "the sufficiency of the corroboration and trustworthiness of the statement." *Id.* We noted that

the "court's oral ruling indicate[d] that it failed to consider the ample evidence offered by the State that corroborated James's statement":

> First, the "extra corroboration" sought by the court was provided by the fact that the State's theory of [Mr. Roebuck's] role in the murder was largely consistent with James's statement.
>
> * * *
>
> Moreover, there is no indication that the court considered Miller's testimony with regard to the matter of corroboration. Although Miller was not an eyewitness to the actual murder, the State obviously regarded him as a key witness, and his testimony corroborated much of what James said.

Id. at 592-93. Most importantly, we observed that the State itself regarded Mr. James's statement as trustworthy, because it had relied on that same custodial, recorded statement given to the police, obtained after Mr. James had been advised of his constitutional rights, in order to convict Mr. James at his trial. *Id.* at 593-94.

This Court emphasized that "although the declarant and the accused are relatives, that relationship did not compel the court to find James's statement unreliable." *Id.* at 594. Rather, we explained, Mr. James's "declaration against penal interest was made within a relatively short time after the murder"; "it was consistent with the State's theory of the case against" Mr. Roebuck; and "the State had previously vouched for James's statement when it offered the statement into evidence in its case against James." *Id.* After noting that the court failed to consider that material aspects of the proffered statement were corroborated by the State's key witness, we concluded that the trial court erred in excluding Mr. James's statement. *Id.*

Returning to the case before us, Appellant does not argue that the trial court improperly considered the credibility of the in-court relators of Samir's statements, Mr.

Caldwell and Ms. Demar. Moreover, nothing in the record suggests that the court gave improper weight to Appellant and Samir's relationship. Rather, the court properly limited its consideration to the trustworthiness of Samir's statements:

> And the defendant is correct that just because there's a relationship between the defendant and the witness does not necessarily negate the credibility of that testimony, but she has not testified to anything that would exculpate the defendant. Even with this girl's attack scratching him, she has no idea who they are referencing that he was present at the night of the party.
>
> And so while it does not have to be under oath, there has to be a level of reliability and trustworthiness in order to have statements come in. And it's correct that the trustworthiness of Ms. Demar is not what the Court is focusing on, it's what those statements are, and there wasn't anything that would suggest that there's a level of trustworthiness; that the statements made by Samir were against his penal interest.

In this case, we do not find the same level of corroboration that was present in *Roebuck* or in *Gray*. Accordingly, we hold that the trial court's determination that Samir's out-of-court statements were not sufficiently trustworthy was not clearly erroneous.

We also are not persuaded that Appellant was denied his right to present a defense. As we stated in *Roebuck*, "given a defendant's constitutional right to present a defense, a defendant should not be subjected 'to an insurmountable evidentiary hurdle' to obtain admissibility of a hearsay statement that is central to the defense and has been sufficiently corroborated." 148 Md. App. at 594 (citation omitted). Even if we were to conclude that Samir's statements were sufficiently corroborated, Appellant was able to present other evidence to support his misidentification theory. Appellant testified to his theory that Samir was the actual assailant. In addition, Appellant was able to present photographs of himself and Samir to show their purported similarities. Defense counsel also questioned

Ms. Castillo to establish the reliability of her identification, eliciting testimony that she had not met Appellant before the party, that she learned his name from someone else, and that there were possible visibility issues that night. Based on the record, we cannot say that Appellant's right to present a defense was violated.

II.

Evidence of Misidentification

Appellant also challenges the court's exclusion, "on two occasions, [of] evidence that Appellant and Samir had been confused for each other." First, he challenges the exclusion of Ms. Demar's proffered testimony that she overheard Ms. Adakomola say to Ms. Castillo "oh, my God, it's him[,]" upon viewing Samir at a District Court hearing. Second, he takes issue with the court "sustain[ing] an objection by the State when defense counsel sought to elicit from Appellant testimony that he and his brother had been confused for each other[.]" According to Appellant, the evidence was plainly relevant because

> [t]he fact that Saim and Samir had been confused for each other in the past, and in particular by one of the witnesses who claimed to identify Appellant at trial, made it more likely Ms. Adakomola and Ms. Castillo were mistaken in their identification of Appellant as the person who assaulted Ms. Castillo.

Appellant further asserts that, "[a]lthough the court did not reach the issue of whether Ms. Adakomola's statement was admissible under the hearsay rules, defense counsel was correct that it was admissible either as a prior statement of identification or a present sense impression." Also, with respect to Ms. Demar's testimony, Appellant contends that the court erred in denying his request to have Ms. Demar testify that she did not know where Samir was.

The State responds that the court's evidentiary rulings should be affirmed as a proper exercise of the court's discretion under Rule 5-403, which permits a court to exclude relevant evidence based on "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In addition, the State argues that, "[w]ithout context, [Ms.] Adakomola's statement was not admissible as a statement of identification or as a present sense impression."

1. Ms. Demar's Proffered Testimony

During Ms. Demar's direct examination at trial, defense counsel asked to approach the bench to inquire about the line of questioning pertaining to Samir. Counsel proffered that, at a prior hearing in the District Court, Ms. Demar overheard Trinity Adakomola declare to Ms. Castillo, "oh, my God, it's him," when she saw Samir. Counsel argued that the declaration was admissible as a statement of identification under Rule 5-802.1, or as "a legitimate hearsay exception under a present-sense impression" pursuant to this Court's holding in *Holland v. State*, 122 Md. App. 532 (1998), *cert. denied*, 351 Md. 662 (1998). After the State objected, the trial court denied defense counsel's request to elicit the testimony, ruling as follows:

> What the Court has before it is that on the initial trial date in District Court, the proffer is the witness would testify that the case was called and the defendant came up to the – and the brother was present in the courtroom, and that the witness saw the complaining witness nudge Trinity[11] and say, oh, my God, it's him, and the defendant wants that to be testified to in its case under 5-802.1, identification. The 5-802.1(c), which is identification.

[11] As noted, defense counsel proffered that Ms. Demar saw Ms. Adakomola nudge Ms. Castillo, rather than the other way around, as the court stated.

* * *

> With respect to the identification, again, if there is a statement that is clear as to the height of the particular person or identification, that would be admissible. **The statement that has been provided as proffered is innocuous. It's speculative as to what oh, my God, it's him means.**
>
> There are a number of what that could mean [sic]. It would require the witness to speculate as to the intent, and **the probative value of that statement is sufficiently or significantly outweighed, substantially outweighed by misleading and confusing the jury** [sic]. And with respect to the present-sense impression, again, the Court hasn't – that [] statement is speculative and requires someone to guess as to what the intent and meaning of oh, my God, it's him, in a courtroom[.]

(Emphasis added).

Upon resuming examination of Ms. Demar, defense counsel asked if she had attempted to contact Samir about the case, and if she knew where he was. The State objected to the question about Samir's whereabouts, and the court sustained. During another bench conference, defense counsel told the court, "I think the fact that our defense is that it's the brother, the jury is going to have a legitimate question as to where the brother is and I think I get to put on a defense that we've tried to find him and he's not here." The State opposed the request, contending that the issue had already been decided by the court during the motions hearing. Defense counsel replied that she had "been very clear with [Ms. Demar] that she's not to testify to anything about [Samir's] statements, but our defense being that this is a third-party perpetrator, the jury's naturally going to wonder where that person is."

The court recognized the defense's theory but questioned what the probative value was "with nothing further other than there's a brother out there," because "even if there is a defense, there still has to be some indicia of what you're presenting." The court reiterated

its prior ruling that Samir was not unavailable under the Maryland Rules, and that there was "nothing that states that he or – any statements that he himself stated . . . that he was the one that did it." In response to defense counsel's "concern that the jury would wonder why the defense hasn't presented [Samir,]" the court reminded counsel that the jury would be instructed that the defense did not have to put on any evidence at trial.

Under Rule 5-402, all relevant evidence is generally admissible, while evidence that is not relevant is not admissible. However, as provided by Rule 5-403:

> Although relevant, **evidence may be excluded if its probative value is substantially outweighed by the danger of** unfair prejudice, **confusion of the issues, or misleading the jury**, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence

(Emphasis added). "This inquiry is left to the sound discretion of the trial judge and will be reversed only upon a clear showing of abuse of discretion." *Malik v. State*, 152 Md. App. 305, 324 (2003). "Evidence is relevant when it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Montague v. State*, 244 Md. App. 24, 39 (2019) (quoting Md. Rule 5-401). As stated by this Court, for evidence to be relevant, the trial court must be "satisfied that the proffered item of evidence is, on its fact or otherwise, what the proponent claims that item to be, and, if so, that its admission increases or decreases the probability of the existence of a material fact." *Malik*, 152 Md. App. at 324 (citation omitted).

Because the State concedes that the testimony Appellant wished to elicit from Ms. Demar about Ms. Adakomola's statement was relevant, we need only determine whether

the trial court abused its discretion in ruling that the probative value of the evidence was substantially outweighed by the danger of confusion of the issues or misleading the jury. *See id.* Here, the court determined that Ms. Adakomola's statement was "speculative as to what oh, my God, it's him means," because "[t]here are a number of what that could mean [sic]" and "[i]t would require the witness to speculate as to the intent." As the State argues, "the jury would be left to speculate as to why Adakomola made the statement, about whom it as made, and what she meant when she made the statement." Additionally, again as noted by the State, "Adakomola could just have easily been referring to the friend that she testified [Appellant] was with during the altercation." Because of the lack of context surrounding Ms. Adakomola's statement, we cannot say that the trial court abused its discretion in excluding the evidence.

Regardless, even if the court erred by excluding Ms. Adakomola's statement under Rule 5-403, the statement was not admissible as an exception to the hearsay rule. Appellant claims that the statement is admissible under Rule 5-802.1(c). However, according to that Rule, "[a] statement that is one of identification of a person made after perceiving the person" is not excluded by the hearsay rule if the statement was "previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement[.]" Md. Rule 5-802.1(c). Under this exception, a court may admit "evidence of a third party testifying as to an extrajudicial identification by an eyewitness *when made under circumstances precluding the suspicion of unfairness or unreliability*, where the out-of-court declarant is present at trial and subject to cross-examination." *Nance v. State*, 331 Md. 549, 560 (1993) (emphasis added). *See also Tyler*

v. State, 342 Md. 766, 779 n.5 (1996) (noting that, after *Nance*, the identification exception was codified as Maryland Rule 5-802.1 (c)). As explained by the Court,

> The rationales for this exception to the rule against hearsay have been fully articulated. The extrajudicial identification is admitted for its greater probative value **because it occurred closer to the time of the offense, and is therefore more likely to be accurate**. It is admitted because the original identification was made under less suggestive circumstances than those existing at trial, and is accordingly more reliable. Because the declarant is available as a witness at trial for cross-examination about the prior identification, some of the danger that the hearsay rule seeks to avoid is not present. **We observe, also, that the steps of an identification procedure, such as a photographic array or police line-up, can be objectively recounted by the witness and are readily documented, further enhancing the identification's trustworthiness**.

Nance, 331 Md. at 561 (emphasis added) (internal citations omitted).

In this case, although Ms. Adakomola testified at trial and was subject to cross-examination, her purported statement of identification was not "made under circumstances precluding the suspicion of unfairness or unreliability," such as a photographic array police line-up, nor was it made closer to the time of the offense so as to suggest accuracy. *See Nance*, 331 Md. at 560-61. Rather, Ms. Adakomola's statement was made at a hearing, more than five months after the time of the offense, and without any circumstances that pointed towards reliability. Importantly, if Ms. Adakomola, upon seeing Samir actually believed that he was the culpable party, she could have made her identification known and recorded during that District Court proceeding.

We also reject Appellant's argument that the statement should have been admitted as a present sense impression. Rule 5-803(b)(1) provides that "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or

condition, or immediately thereafter" is "not excluded by the hearsay rule, even though the declarant is available as a witness[.]" Md. Rule 5-803. "[B]ecause the presumed reliability of a statement of present sense impression flows from the fact of spontaneity, the time interval between observation and utterance must be very short." *Booth v. State*, 306 Md. 313, 324 (1986). *See also Morten v. State*, 242 Md. App. 537, 555 (2019) (explaining that the present sense impression first recognized in *Booth* now appears as Rule 5-803(b)(1)). The relevant inquiry for present sense impressions is "whether, considering the surrounding circumstances, sufficient time elapsed to have permitted reflective thought." *Booth*, 306 Md. at 324. Here, even though Ms. Adakomola is alleged to have made her statement contemporaneously with her perception of a person, there is nothing in the statement that identifies who she perceived. Ms. Adakomola could have been referring to any number of individuals in the courtroom when she said, "it's him," including Appellant himself.

Appellant relies on this Court's opinion in *Holland v. State*, 122 Md. App. 532 (1998), to support his theories of the admissibility of Ms. Adakomola's statement. The pertinent facts from *Holland*, a case involving a conspiracy to distribute cocaine out of a motel room, were as follows:

> Corporal Robert Leatherman testified that after the execution of a search warrant on Room 136 of the Venice Motel, he was transporting Teresa Russ and Brenda Tennie, two teenaged females who had been arrested in Room 136, from the motel to the police station. **En route, one of the two young women spotted both the appellant and a codefendant on the street and suddenly blurted out, "There they are."** After clarifying that the antecedent of the pronoun "they" was two men who had earlier been in Room 136 of the Venice, the officer drove around the block, cut through an alley, and arrested the two.

122 Md. App. at 541-42 (emphasis added). Before this Court, the appellant argued that the words "There they are" was inadmissible hearsay. *Id.* at 542. In an alternative holding, we concluded that if "the words were somehow deemed to be hearsay, we still would have no difficulty in legitimating their admission as an exception to the Rule against Hearsay."[12] *Id.* at 542. We reasoned that "[e]ven if offered for the truth of the thing asserted, the words would presumptively qualify under Md. Rule 5-802.1(c)[.]" *Id.* at 542. We then addressed the appellant's observation that only one of the two women in the car was subject to cross-examination at trial, and that it was possible that the other woman had uttered the words and, "because of her non-availability, Rule 5-802.1(c) would not apply to an identification made by her." *Id.* at 543. In that case, we continued, "we would go on to find that the utterance was nonetheless a legitimate hearsay exception under Rule 5-803(b)(1) as a present sense impression." *Id.*

We apply important lessons from *Holland*, notwithstanding our limited analysis of the hearsay exceptions in that opinion, and conclude that it does not support Appellant's argument because the facts in *Holland* are markedly dissimilar. In *Holland*, the statement was essentially contemporaneous with the underlying crime. The declarant, one of two

[12] Our primary holding was that there was no error in admitting the evidence because the recounting of the utterance "simply provided some narrative background" for the circumstances and timing of the appellant's arrest. *Holland*, 122 Md. App. at 542. We reasoned that the "verbal event was significant not for the truth of the thing asserted but only for the effect it had on Corporal Leatherman and was, therefore, non-hearsay." *Id.* We also determined, as a "'backstop' position." that "[e]ven if, *arguendo*, the admission of the evidence were error, it was demonstrably harmless beyond a reasonable doubt." *Id.* Because the appellant had already been connected with the suspicious activity in Room 136, we explained, the "additional passing identification of the appellant merely as someone who had been in Room 136 was cumulatively redundant[.]" *Id.*

females who was being transported to the police station, spotted the appellant almost immediately after her arrest in Room 136. *Holland*, 122 Md. App. at 541-42. By contrast, in this case, the proffer was that Ms. Demar overheard Ms. Adakomola at a hearing in the District Court, several months after the assault at the party. Moreover, the declarant in *Holland* clarified to the in-court relator of her statement that "they" referred to two men who had earlier been in Room 136. *Id.* Accordingly, it was clear who the declarant in *Holland* intended to identify—or whom she had "presently" perceived. Here, nothing in the circumstances surrounding the statement offered by Ms. Demar clarified that Ms. Adakomola identified or perceived Samir. We conclude, therefore, that the trial court did not err in excluding the statement.

Finally, looking at the testimony Appellant wished to elicit from Ms. Demar about Samir's whereabouts, we conclude that the proffered evidence lacked probative value and was, therefore, inadmissible. The probative value of evidence "relates to the strength of the connection between the evidence and the issue, the tendency of the evidence 'to establish the proposition that it is offered to prove.'" *Smith v. State*, 218 Md. App. 689, 704 (2014) (citation omitted). Defense counsel intended to prove that Samir was unavailable in order to bolster the misidentification theory. In light of the court's proper determination that Samir was not unavailable, we discern no abuse of discretion in the court's decision to sustain the State's objection.

2. Appellant's Proffered Testimony

Appellant's final contention on appeal is that the court erred by sustaining the State's objection when he was asked if he and his brother had "ever been mixed up before."

The question was asked by defense counsel immediately before she introduced the photographs of Appellant and his brother. No ground for the objection was given on the record.[13] Appellant did not proffer what his testimony would be regarding the circumstances of any earlier instances of misidentification, and therefore, the court could have determined reasonably that the photos would speak for themselves, and that this line of questioning would have the tendency to confuse the jury. Consequently, we cannot say the trial judge abused her discretion in barring testimony about whether the brothers had ever been "mixed up" in unidentified circumstances when that testimony could have confused the jury.

We note that, the court permitted Appellant to testify that Samir was the assailant, and to admit into evidence the photograph of himself and Samir to illustrate their similarities. Ms. Castillo was shown the defense's photograph of both Appellant and Samir, and picked out Appellant unequivocally as her assailant, before noting that she only recognized Samir because he had attended court with Appellant on prior occasions. The jury had an opportunity to weigh this evidence. Accordingly, we hold that the trial judge did not abuse her discretion in sustaining the State's objection on this record. *See Ford v.*

[13] As Appellant points out in his brief, *after* the ruling, the State clarified that it was only seeking to bar testimony from Ms. Demar about Samir's appearance because she did not know who Samir was until after the party. The defense also agreed to "withdraw my questions as to that." The court, attempting to clarify the situation, noted "So then the record would be clear that any additional questions you intended to ask Ms. Demar would be withdrawn as she had not known Samir or had not met Samir until two months after that." Defense counsel answered, "Okay." When questioning resumed, defense counsel did not repeat her earlier question, nor did she proffer that there were other instances of misidentification that she hoped to elicit from Appellant's testimony.

State, 462 Md. 3, 46 (2018), *reconsideration denied* (Dec. 11, 2018) ("An appellate court reviews for abuse of discretion a trial court's determination as to whether evidence is inadmissible under Maryland Rule 5-403.").

In light of our holdings that Samir's out-of-court statements were not admissible as statements against penal interest and that the court's rulings on Appellant's other proffered evidence were proper, we affirm the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE ASSESSED TO APPELLANT.