Circuit Court for Baltimore City
Case No. 120356018

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 352

September Term, 2023

BRIAN ADAMS

v.

STATE OF MARYLAND

Arthur,
Leahy,
Shaw

JJ.

Opinion by Leahy, J.

Filed: August 19, 2024

On a summer night in 2020, two bikers were hit, and one run over, by a pick-up truck driven by Brian Adams ("Appellant") during a community bike ride down Eastern Avenue in Baltimore City in which hundreds of bikers participated. Following a four-day trial, on September 30, 2022, Appellant was convicted by a jury sitting in the Circuit Court for Baltimore City of three charges of second-degree assault and several traffic related offenses.[1]

After the verdict, Appellant and his uncle proceeded to a parking garage at the intersection of Lexington and Calvert Street. Allegedly, one of the State's witnesses, Mr. Brian Henderson, approached Appellant in the parking garage and threatened, "Don't let me see you here again. You are not welcome." "That ride was the only time I did not have my gun and you['re] lucky [b]ecause if I did, I would have used it. I have a conceal to carry and I always have it don't let me see you again." Appellant reported Mr. Henderson's alleged threats to police and filled out an "Application for Statement of Charges" that same day.

Appellant filed a timely motion for a new trial under Maryland Rule 4-331(a) and argued that Mr. Henderson's statements constituted newly discovered evidence that directly contradicted the State's theory of the case and supported his theory that he acted

[1] Appellant was convicted on one charge of failure to immediately stop after the incident resulting in bodily injury, one charge of failure to immediately return and remain at the scene of an accident resulting in bodily injury, one charge of failure to stop and render reasonable aid to any person injured in said accident, one charge of failure to provide identifying information after being involved in an accident, and one charge of failure to report the accident.

in self-defense. The court heard arguments from the State and Appellant before denying the motion for a new trial.

Appellant noted a timely appeal and presents two questions for our review, which we reorder and rephrase in part:

I. "Could a rational trier of fact have determined beyond a reasonable doubt that [Appellant's] conduct was motivated by self-defense?"

II. Did the circuit court abuse its discretion when it denied Appellant's request for a new trial based on the post-trial statement of a trial witness?[2]

We hold that the trial court did not err in denying Appellant's request for a new trial based on the alleged post-trial statements. We do not reach Appellant's first question because it was not preserved for appellate review.

BACKGROUND

On August 21, 2020, at about 9:30 p.m., several hundred bicyclists gathered at the intersection of Eastern Avenue and Bond Street with a unified purpose: to ride together to Ice Queens, a minority-owned snowball stand, that had recently been vandalized.[3] The

[2] Appellant presented this question as follows:

> "Did the Court err in denying the Appellant's Motion for New Trial despite the post-verdict statement of a key State witness directly contradicting the prior testimony of that witness and the State's theory of the case, while reinforcing Appellant's primary defense at trial that he acted in self-defense?"

[3] Mr. Kenneth Pittrell testified that there was "some preregistration" for the ride, and organizers were expecting "well over 500 bikers" at the event. He was told that "over 700 bikers" took part in the ride, but he could not confirm. Mr. Henderson, one of the organizers of the event, estimated that there were approximately "three to four hundred" people in attendance.

event was organized by several nonprofit groups and dubbed "Friday Night Lights," with participants encouraged to adorn their bikes (and even unicycles) with lights The purpose of the ride was to "give back to the community" by showing solidarity with the recently vandalized business. The group assembled at a Target store in Canton between 8:30 p.m. and 9:00 p.m. before heading towards Eastern Avenue.

After the ride was well underway, Appellant and Ashley Adams, now Appellant's wife, encountered the bicyclists as they were driving down Eastern Avenue. Appellant and Ms. Adams later testified that they feared for their lives. The bicyclists told a different story—that Appellant revved his engine, which blew smoke into the bicyclists' faces, injured three people with his vehicle, and hit two cars before fleeing the scene.

Baltimore City Police officers promptly responded to the incident and gathered statements from several witnesses and surveillance footage. Police officers "ran [the tag number] through the Police Department databases[,]" and although they could not immediately locate the truck, they obtained a photo associated with the tag number. Police officers later conducted a photo array, and Appellant was identified by at least two witnesses.

Appellant was later arrested and, in a seventeen-count indictment, charged with, among other things, multiple counts of attempted first-degree murder, first-degree assault, second-degree assault, as well as various traffic offenses. Appellant was convicted on three counts of second-degree assault for striking three of the cyclists with his vehicle, and each of the traffic-related offenses.

The Trial

During a four-day jury trial, commencing on September 23, 2022, the State called six witnesses, including three injured bicyclists and another participant in the bicycle group ride, the responding police officer, and an FBI agent qualified as an expert on cellular operations and data analysis. The defense called one witness, Ms. Adams.

The State's first witness, Joseph Green, participated in the ride as one of the bicyclists. He testified that there were many inexperienced riders, including his friend, who struggled going up the hill. Mr. Green stayed near the back of the group to teach his friend how to shift gears while going up the hill and to assist other struggling riders. As they descended the hill, he noticed smoke, seemingly from a truck spinning its tires in the middle of the group of bicyclists.

Mr. Green explained that he attempted to move past the smoke that was at the bottom of the hill and proceeded north "on the wrong side of the road" when he saw a red truck, occupied by Appellant and a passenger (Ashley Adams), both of whom had "a smirk" on their face. Suddenly, the red truck surged forward and "smashed" Mr. Green—who was positioned on the driver's side of the red truck—against a white truck on the opposite side of the road.

Mr. Green suffered lacerations on his arms and a broken fibula "from being pressed in between the vehicles." Additionally, his bike's "front frame was completely bent" and "[t]he [pedal] was turned up." Mr. Green testified to enduring "a lot of pain" following the incident and stated that he had not been on a bike since the incident.

Mr. Kenneth Pittrell told the jury that he was a member of the nonprofit organizations Baltimore Bikers and "Bike More Bmore," which helped organize the ride. He participated in the ride and recorded the event on Facebook Live. Mr. Pittrell said that the group bike rides started "prior to the Pandemic" but participation increased during the Pandemic as "[a] lot of people were . . . looking to have something to do with their time[.]" He explained that the route was established ahead of time; that there were route directors and leaders to guide the riders on the route; and that there were safety advisers, like himself, who focused on everyone's well-being and arrival at the destination as a group.

As the ride progressed, Mr. Pittrell noticed that some of the less experienced riders were struggling with "a pretty large hill" and were falling behind. He moved toward the rear of the group to help these riders safely make it past the hill. Once past the hill, he observed a thick cloud of dark smoke ahead and initially thought it was from a vehicle fire. Upon closer inspection, Mr. Pittrell observed a red truck "sitting in one spot" consistently "spinning [its] tires" and emitting thick smoke from "burning rubber[.]" Mr. Pittrell "pulled up parallel" to Appellant's truck and directed other riders "to keep proceeding forward." He glanced over at the truck and observed Appellant and the passenger "smiling [and] laughing."

According to Mr. Pittrell, Appellant was "driving very aggressively" and creating "a very dangerous situation." After the truck proceeded to the next intersection, Mr. Pittrell saw a female bicyclist who "had got knocked off the bike." He rode closer to Appellant's vehicle to obtain the tag numbers. Eventually, Appellant's truck came to a stop at the

intersection at the bottom of the hill. With his Facebook Live video still recording, Mr. Pittrell provided a full description of Appellant's truck and repeated the tag numbers multiple times. An excerpt from the Facebook Live video was entered into evidence and played for the jury. After capturing the tag numbers, Mr. Pittrell "got as far away from the vehicle as [he] could" and urged others to do the same. Suddenly, he saw "headlights coming towards [him]" and the subsequent impact left him "mangled between the truck and adjacent parked car." Mr. Pittrell recounted how Appellant continued driving with him "smashed between" the truck and parked car, resulting in his bike being dragged underneath the truck. He told the jury that Appellant "proceeded to drive over my body."[4]

Mr. Pittrell said that he was "in complete shock" and feared he might be paralyzed. He underwent treatment at Johns Hopkins Hospital for an injury to his calf, a bone bruise, and nerve damage to his ankle and foot. Mr. Pittrell explained how "the tires ruptured" his calf and caused his leg to "split . . . open." His skin was removed on his ankle and foot from where the bike "rolled over [his] leg and the wheel pushed into [his] ankle with the pressure from the truck[.]" Additionally, he suffered from, among other things, a torn meniscus; seven fractures in his foot, ankle, and toe areas; major contusions in his ankle and foot; and cracked bones between his toes and the top of his foot.

The State's next witness, Mr. Brian Henderson, testified that he runs the nonprofit organization Baltimore Bikers. He explained that Baltimore Bikers was established during

[4] Mr. Pittrell was still recording as the incident occurred, and the video depicts the truck's tires running over Mr. Pittrell.

the peak of the COVID-19 pandemic, when gyms were shuttered, in order to encourage the "health and wellness in the African American community" while also organizing service events that support the local community. On the night of the incident some of the less experienced bikers struggled to climb a hill on Eastern Avenue. Mr. Henderson was riding among the rear of the group when a "vehicle . . . pulled in front of the struggling riders and to the back of the larger group." He recalled that there was "loud" noise from "screeching" tires and "black smoke just blowing" into the faces of the bicyclists who were "struggling[,]" "coughing[,]" and "starting to complain about th[e] . . . smoke[.]" He said that when he biked closer to Appellant's window, he witnessed both Appellant and his passenger laughing.

A short distance down the road, Appellant burned his tires "for a second time[,]" and Mr. Henderson instructed people to go around the truck, urging them to "[k]eep it moving" and steer clear of the smoke. Suddenly, amidst the commotion, Mr. Henderson heard people exclaiming "he hit their bike" and witnessed Appellant accelerating westbound in the eastbound lane, heading towards oncoming traffic. Mr. Henderson pursued Appellant's truck, attempting to capture a picture of the license plate. He explained that Appellant was in a "very busy intersection of . . . Fell's point" and was "going over the curb[,]" "going across the yellow lines[,]" and "going around cars" until he got to a red light and came to a standstill due to the congestion of cars and other bicyclists. Then, according to Mr. Henderson, Appellant "just floors it." It "look[ed] like [Appellant was] trying to turn and get away from other people coming up" and "when he

hits the gas, he hits Mr. Pittrell[.]" He related that Mr. Pittrell's "bike f[ell] on top of him" and "dragged him[] . . . a few feet" while the truck's tires were "spinning" but not "going over the bike[.]" Ultimately, the "front and back tire[s]" of the truck "went up over" Mr. Pittrell. Mr. Henderson characterized the situation as "pure chaos" – Appellant "hit[] two other vehicles going out of the intersection[,]" he "hit[] another biker on the side[,]" and "somebody else on the side back of the car[,]" and Mr. Pittrell was screaming.

Another bicyclist, Mr. Anthony Williams, testified that he was stopped at a red light near a Burger King, "right behind the truck[,]" when suddenly the truck began "burning out." He described "a big cloud of white smoke" that was "almost suffocating" him. Mr. Williams said he "heard someone yell that someone got hit" as the car was pulling off. He approached the left side of the truck and tapped on the window to get the driver's attention, but Appellant just "looked right at [Mr. Williams]" and "smirked" before taking his truck and "cut[ting] his wheel to push [Mr. Williams] against the oncoming traffic." Mr. Williams slammed the brakes on his bicycle and then approached the right side of the truck, again tapping the window, and tried to get the attention of the passenger to tell the driver to stop the car.

Mr. Williams asserted that the bicyclists and truck subsequently came to another red light and that was when "things[] really, really escalated[.]" Mr. Williams initially thought that Appellant "recognized what was going on" and was "about to get out" of his truck; however, all of a sudden, Appellant "hit the gas again[.]" Mr. Williams saw Mr. Pittrell try to get out of the way and fall on the ground where he was "squished between two cars."

Mr. Williams dropped his bike and jumped on top of the truck "to get out of . . . the traffic way." At that point, Mr. Williams testified, the truck "left, over the top of bikes, over the top of a person, [and] hit other cars and just went."

During cross-examination, Mr. Williams testified that "[a]s the truck [began] to hit Mr. Kenny [Pittrell], bikes, cars and everything else, people literally was trying to get the truck off of Mr. Kenny." He observed people hitting Appellant's truck with their hands and demonstrated the force used by knocking on the witness stand. Mr. Williams stated that he suffered a sprained shoulder and a bruised hip but did not seek immediate medical attention until the next day after the adrenaline wore off.

Officer Dannjie Siegars was a police officer assigned to the Southeast District in Baltimore City at the time of the accident. He testified that when he arrived at the scene of the incident, he observed two injured males – Mr. Pittrell and Mr. Robert Greene. Mr. Pittrell was "laying down on the road in the middle of the double yellow line and his left leg was swollen," and Mr. Greene was about 20 feet away on the ground with an injured leg that left him unable to stand.

While at the scene, Officer Siegars observed damage on two vehicles that the truck hit during the incident. He confirmed that he was wearing a body camera when he reported to the scene, and, over objections from the defense counsel, his body camera footage was admitted into evidence and played before the jury.

Officer Siegars detailed his efforts in obtaining surveillance footage from another witness and following-up with individuals who had witnessed the incident. He obtained a

picture of Appellant's truck's Pennsylvania tags from a witness and "put the tag over the air[.]" He also ran the tag number through the Police Department's databases, which yielded information on Appellant as a possible suspect. He concluded his involvement in the investigation by conducting a photo array with victims and witnesses.

The State's final witness was Special Agent Garrett Swick from the Cellular Analysis Survey Team within the Federal Bureau of Investigations. Agent Swick testified that he conducted cellular analysis on historical cellphone records, which are records that detail the "who, when, and where" of a phone call. After explaining, in detail, how he uses relevant cell phone tower and phone company records to track target cell phones, Mr. Swick presented a map depicting the cell phone activations of Appellant's phone, showing the cell phone moving north, away from the scene of the incident, and pausing during a call that lasted about "an hour and a half or two hours" in Red Lion, Pennsylvania, before moving up to York, Pennsylvania.

Motion for Judgment of Acquittal

At the close of the State's case-in-chief, defense counsel moved for judgment of acquittal and argued that the State "failed to elicit any evidence . . . of [Appellant's] state of mind that [the alleged attempted murder] was willful, deliberate, or premeditated." Additionally, counsel argued that the State had "failed to elicit any specific act for the first-degree assault, that this was intentionally designed to cause substantial bodily harm or serious physical injury that could result in death."

The State countered and explained that several witnesses testified to observing

Appellant with a smirk on his face and "a look of enjoyment[.]" Furthermore, the State emphasized that "[w]itnesses testified that [Appellant] was in the westbound travel lane at the time that he swerved his car across double yellow lines and struck three of the victims in this case." The State highlighted that Appellant was aware of the bicyclists' presence prior to swerving because there were "hundreds of bicycles with lights[,]" the witnesses had been traveling on the street "for blocks at this point[,]" they had had interactions with Appellant prior to him swerving over the double yellow line, and he had been burning out his tires to create smoke. The State contended that there was sufficient evidence for a jury to determine Appellant's state of mind and whether the act was done willfully or with premeditation.

The Court denied the motion and emphasized that "the jury may consider [Appellant's] acts as well as the surrounding circumstances."

Ashley Adams Testimony

The defense called its only witness, Ms. Ashley Adams, to the stand. She recounted that she had her first date with Appellant on the day of the incident, and that they ate dinner at Roy's Steakhouse. On their way home they drove past Patterson Park and "turn[ed] right" onto Eastern Avenue where they saw the group of bicyclists "all . . . lit up[,]" which was "really cool." She mentioned that they had been there for only a minute or so when the bicyclists "started hitting [Appellant's] truck[.]" Ms. Adams recalled that while coming to a stoplight, someone collided with the mirror on the passenger side, which she promptly fixed as it was folded "flat against – toward the front of the truck**."** After the light turned

green, "people kept hitting the truck[.]" Ms. Adams said she believed these initial collisions were accidental, but that the bicyclists were "damaging the truck."

Ms. Adams testified that as they proceeded down Eastern Avenue, Appellant "did a little burnout to get the bicyclists away from his truck so that it wouldn't get further damaged." As soon as the resulting smoke cleared, she said a bicyclist approached the truck and uttered, "It's not like you can fucking go anywhere now." Ms. Adams described how, as she and Appellant proceeded down Eastern Avenue, the bicyclists attempted "to rip open the car doors" at red lights, "literally jump[ed] [on] the truck[,]" and "tried to block [the] car in twice," and a person on the passenger side "grabbed ahold of the mirror and ripped it back trying to break it." She said that individuals "were launching [themselves] towards the windshield trying to breakout the windshield[,]" and others were "hitting both sides of the truck trying to break out those windows." She claimed "people . . . were surrounding [their] truck" and trying to pull the doors open, even though the doors were locked, and the windows were up. She described the events as "terrifying." According to Ms. Adams, it was at this point that Appellant drove into oncoming traffic and "hit two or three vehicles" and "ran over the bicycle that they used to block in the truck when they pulled their bicycles in front of the truck." Ms. Adams stated that the bicyclists "chased [them] all the way to [Interstate] 83" and were "[s]creaming that they were going to kill" them. Ms. Adams denied smirking or laughing, stating that at the time, she "thought [they] were going to die." She said they did not remain at the scene of the incident because she believed the bicyclists "would have killed [them]."

Immediately after the incident, Ms. Adams and Appellant drove home and spoke on the phone with Appellant's sister on the way to ask her for advice. Appellant's sister reached out to two police officer friends to inform them of the incident and to determine the next course of action. Ms. Adams stated that, after they arrived home, they called the police for the first time to "make sure that everything was covered[,]" namely, by "giv[ing their] insurance information so that the cars that we did hit got taken care of." Ms. Adams claimed that the 911 operator informed her that there was nothing further they needed to do at that time.

Defense counsel entered thirteen images of Appellant's truck into evidence. Ms. Adams provided context for the pictures, noting dents, handprints on the hood of the truck, a cracked windshield, missing and ripped side view mirrors,[5] damage on the back of the tailgate, and a handprint on the driver's side window. While Ms. Adams could not speak to the cause of all the damage, she indicated that much of it was caused by the bikers and not, for example, the truck's collisions with other vehicles. Ms. Adams explained that "the next day" she and Appellant went to the insurance company to make a claim, which amounted to $25,428.90, and that the insurance company ultimately totaled the truck.

[5] We observe that Ms. Adams testified that a bicyclist "was ripping on the mirror and he realized that it was, like, folding and that that wasn't going to break it, so he grabbed ahold of it like this . . . and ripped it down." In Appellant's brief, he states that "[b]oth of the side mirrors had been ripped off." However, Defense Exhibit R, which included the thirteen photos of the truck, clearly shows both mirrors attached to the truck, although one was cracked and the other appeared to have sustained damage near the connection point with the truck.

Motion for Directed Verdict

At the close of all evidence, defense counsel moved for a directed verdict on the attempted murder and the first-degree assault charges, arguing that no reasonable juror could conclude, based on the facts presented in the case, that Appellant formed the requisite intent "to commit attempted murder[] or a first[-]degree assault." The court denied the motion and stated that Ms. Adams's testimony merely gave the jury more testimony to weigh, and that the State had "produced enough evidence for jurors to find, . . . beyond a reasonable doubt, [that Appellant had committed] any of the counts charged, including the attempted murder and the first[-]degree assault."

Ultimately, the jury found Appellant guilty of three counts of second-degree assault, as well as five traffic offenses.

The Motion for New Trial and the Opposition to the Motion

Appellant filed a timely motion for new trial under Maryland Rule 4-331 on the general grounds that:1) "[t]he verdict is against the evidence"; 2) "[t]he verdict is against the weight of the evidence"; 3) "[t]he evidence was insufficient in law to sustain the verdict and the interests of justice will be served by a new trial"; and 4) other reasons "to be given and argued[.]" The State filed an opposition.

A month later, Appellant filed a memorandum of law containing his arguments in support of the motion. In support of his contention that, in "[t]he interests of justice[,]" the court should grant Appellant a new trial based on newly discovered evidence, he attached to the memorandum an Application for Statement of Charges ("Application") that

Appellant filed in the District Court for Baltimore City. Specifically, Appellant asserted in the Application that after the verdict was announced on September 30, he and his family left the courthouse and proceeded to the parking garage at the corner of Lexington Street and Calvert Street. Mr. Henderson allegedly stopped his vehicle next to Appellant that day, and as Appellant contended in the Application, the follow exchange occurred:

> Mr. [H]enderso[n] [p]ulled his truck up [b]eside me and said "Don't let me see you here again. [Y]ou are not welcome." I said "I am sorry for everything that happened that night." [H]e said "No you are not you['re] playing a game. That ride was the only time I did not have my gun and you['re] lucky [b]ecause if I did I would have used it. I have a conceal to carry and I always have it don't let me see you again." I repeated "I am so sorry I never me[ant] to hurt anyone" he continued to tell me that "people want to come kill me" and he will not stop them.

Appellant called 9-1-1 and filled out the Application that same day.

In his memorandum of law in support of the motion for a new trial, Appellant argued that Mr. Henderson's statements constituted newly discovered evidence entitling him to a new trial under Maryland Rule 4-331(a). Subsection (a) of the Rule applied, he asserted, because the "evidence was discovered within the ten-day period for timely filing a Motion for New Trial" and, accordingly, the court's consideration of his motion was not "subject to the same strict threshold requirements as motions filed under Subsection (c)." Appellant reiterated that he had acted in self-defense the night of the incident because the cyclists' "physical aggression and violent threats caused him to fear for his life." The interaction with Mr. Henderson after sentencing, Appellant contended, corroborated his theory of the case, and contradicted Mr. Henderson's testimony that the cyclists were peaceful and non-threatening. Appellant argued that Mr. Henderson's post-trial statements to Appellant

demonstrated that Mr. Henderson misled the jury about a material issue in the case, and thus, the interest of justice required a new trial.

In response, the State contended that the exchange between Mr. Henderson and Appellant neither corroborated Appellant's theory of self-defense nor contradicted Mr. Henderson's testimony at trial. According to the State, the statements were "conditional future threats and a conditional counterfactual claim about the events of August 21, 2020[,]" and that none of Mr. Henderson's alleged statements constituted relevant and admissible evidence. The State contended the exchange constituted inadmissible hearsay and that, even if the statements were admitted, they would not impact the verdict nor serve the interest of justice. The State emphasized that this exchange occurred over two years after the incident and "[n]either on its face nor through reasonable interpretation" could it be understood as a "refutation, recantation, or contradiction or Mr. Henderson's trial testimony." The State asserted that "[i]f the Exchange in fact occurred, it reflected nothing more than the anger of an individual directed towards [Appellant] who assaulted three of his friends and refused to take responsibility."

The Hearing on the Motion and the Sentencing Hearing

On April 19, 2023, the parties reconvened for the sentencing hearing and ruling on Appellant's Motion for a New Trial. Defense counsel argued that the exchange was "absolutely material" to Appellant's argument that the "nature and intention of some of the riders in this parade was not purely peaceful, that there was aggression." Counsel further argued that the statements constituted newly discovered evidence that would "not only

impeach [the State's witnesses, including Mr. Henderson,] but it would [also] serve as corroborating evidence of [Appellant's] defense."

The State maintained that the statements did "not corroborate any self-defense argument," pointing out that the post-trial statements indicated that if Mr. Henderson had his gun that night, he "might have used it" "after his three friends were struck by a vehicle[.]" The State emphasized that Ms. Adams's testimony—that Appellant began spinning his tires before any bikers jumped on the truck or allegedly attacked him—corroborated the State's theory that Appellant was the initial aggressor. Thus, Mr. Henderson's post-trial statements did not "corroborate anything[and] d[id't] put forth any[ ]more evidence that the bike riders were not peaceful." For these reasons, the State asserted, the post-trial statements were "not material enough to bring forth a new trial" and did not "make Mr. Henderson's testimony to be any different than what he said." The State also highlighted that Mr. Henderson, like all of the State's eyewitnesses, was cross-examined and that each witness asserted the bike ride was peaceful and that Appellant was the aggressor. At most, the State posited, the post-trial statements could have served to impeach these witnesses.

The judge engaged in the following colloquy with defense counsel about whether the statements could be used for more than impeachment and whether their admission into evidence would have altered the trial's outcome:

> THE COURT: . . . . You said, [t]he [State's] witnesses testified that [the bike ride] was peaceful.
>
> [DEFENSE COUNSEL]: Right.

> THE COURT: But we know that's not true because of the damage [to Appellant's truck], the testimony, the videos, all of that.
>
> [DEFENSE COUNSEL]: Right.
>
> THE COURT: So, **how do**[**Mr. Henderson's post-trial**] **statement**[**s**] **change anything?** There was plenty of evidence that the ride was not peaceful.
>
> [DEFENSE COUNSEL]: Having one of the witness[es] testify – and, remember, this is not just for impeachment, it would be one of the State's witness[es] corroborating our argument. That is the defense, and to have a State's witness –
>
> THE COURT: Now, you're assuming that he's – you're assuming that [Mr. Henderson] is going to come into the court and sit on the stand and tell the jury that he threatened to shoot your client?
>
> [DEFENSE COUNSEL]: **No. I would expect him to deny it.** . . . . **I would absolutely expect him to say, [t]hat's not what I meant.**

(Emphasis added). The court ultimately denied the motion for a new trial, stating, in part:

> I don't know how this statement could have made any difference in the Defense's case that this was not a peaceful ride. That all of that was presented to the jury. And, also, this piece of evidence wasn't – the Defense witness also testified that they feared for their lives, which was presented to the jury as well.
>
> And, so, the Court finds that this piece of evidence, if it were admissible, would not be material to the result of the trial given the evidence that was presented at trial.
>
> And, so, for those reasons, the motion is denied.

The judge sentenced Appellant to 2 years for each second-degree assault charge (Counts 3, 7, and 11) and 1 year for each traffic offense. Appellant timely appealed.

DISCUSSION

I.

SUFFICIENCY OF THE EVIDENCE

Preservation of Issues for Appellate Review

Appellant's first argument on appeal, querying whether "a rational trier of fact [could] have determined beyond a reasonable doubt that Mr. Adams' conduct was motivated by self-defense[,]" is not preserved for our review. Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any . . . issue [other than jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.").

Appellant concedes that the trial court correctly instructed the jury on the issue of self-defense, defense of others, and defense of property. However, Appellant claims that the State failed to meet its burden of establishing, beyond a reasonable doubt, that Mr. Adams did not act in self-defense or defense of others, and asserts that we "must review the sufficiency of the evidence de novo[.]" We do not reach the merits of this claim because in his motions for judgment at the close of the State's case and at the close of all evidence, Appellant only challenged the sufficiency of the evidence as to the attempted murder and first-degree assault counts. Appellant was not convicted on those counts—he was only convicted on the three charges of second-degree assault and several traffic related offenses. As Chief Judge Joseph F. Murphy explained in *Starr v. State*:

> It is well settled that "appellate review of the sufficiency of the evidence in a criminal case tried by a jury is predicated on the refusal of the trial court to grant a motion for judgment of acquittal." *Lotharp v. State*, 231 Md. 239, 240[] (1963). A criminal defendant who moves for judgment of acquittal is required by Md. Rule 4–324(a) to "state with particularity all reasons why the motion should be granted[,]" and is not entitled to appellate review of reasons stated for the first time on appeal.

Starr v. State, 405 Md. 293, 302 (2008) (second alteration in original) (some citations omitted); *see also, e.g.*, *Howard v. State*, 261 Md. App. 592, 608 (2024) (same). Maryland Rule 4-324 defines the procedure for a motion for judgment of acquittal:

> **(a) Generally.** A defendant may move for judgment of acquittal *on one or more counts*, or *on one or more degrees* of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall *state with particularity all reasons why the motion should be granted*. No objection to the motion for judgment of acquittal shall be necessary. A defendant does not waive the right to make the motion by introducing evidence during the presentation of the State's case.
>
> * * *
>
> **(c) Effect of Denial.** A defendant who moves for judgment of acquittal at the close of evidence offered by the State may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the defendant withdraws the motion.

Md. Rule 4-324 (italic emphasis added). The defendant is required to "argue precisely the ways in which the evidence should be found wanting and the particular elements of the crime as to which the evidence is deficient." *Poole v. State*, 207 Md. App. 614, 632 (2012) (quoting *Arthur v. State*, 420 Md. 512, 522 (2011)). "[A] motion which merely asserts that evidence is insufficient to support a conviction, without specifying the deficiency, does not comply with Rule 4-324 and this does not preserve the issue of sufficiency for appellate review." *Mulley v. State*, 228 Md. App. 364, 387-88 (2016) (quoting *Johnson v. State*, 90

Md. App. 638, 649 (1992)). "The language of the rule is mandatory, and review of a claim of insufficiency is available only for the reasons given by appellant in his motion for judgment of acquittal." *Whiting v. State*, 160 Md. App. 285, 308 (2004) (citations omitted).

Returning to the instant case, Appellant's counsel made an initial motion for judgment of acquittal when the State rested its case. Counsel stated he would "rely on the record for the majority of the counts" and, accordingly, rather than discuss each count in detail (or at all), counsel "dr[ew] the [c]ourt's attention to the attempted murder counts" and the "first degree assault" counts. As to *these* counts, counsel asserted insufficient evidence had been presented to the jury to establish Appellant held the requisite *mens rea*, or state of mind. The court denied the motion, and Appellant presented evidence in his defense, thus withdrawing the motion. Md. Rule 4-324(c).

At the close of all the evidence, the court asked whether Appellant intended to "renew [his] motion [for judgment of acquittal" to which defense counsel responded, "I'm going to make a motion for a [d]irected [v]erdict." Counsel stated he would "again rely on the record, but with respect to those two counts I previously brought to the [c]ourt's attention, I would submit at this stage[] . . . that I don't see how a reasonable juror could conclude . . . that [Appellant] formed the requisite intent to commit *attempted murder*, or a *first[-]degree assault*. So I'm asking for a [d]irected [v]erdict *on those two counts*." As an afterthought, counsel stated he would "just make a general motion on the remaining counts." As before, the court denied the motion.

The transcript plainly reveals that Appellant's counsel failed, while making either motion, to present any argument "with particularity" concerning second degree assault and the traffic-related offenses. Md. Rule 4-324(a). A 'general motion' based on 'the record' is wholly insufficient to preserve the issue of sufficiency of the evidence for appellate review. *Mulley*, 228 Md. App. at 387-88. Accordingly, any argument that the evidence was insufficient to support those convictions is not preserved for our review.

As mentioned, Appellant *did* present specific argument on the attempted murder charges and on the first-degree assault charges, but he was not convicted on those counts. More to the point, Appellant expressly elected—as permitted by Rule 4-324—to limit his argument to "one . . . degree[] of an offense which by law is divided into degrees[,]" Md. Rule 4-324(a), by discussing only first-degree and not second-degree assault. This argument was limited to whether the evidence could support the *mens rea* required for first-degree assault, which is entirely distinct from the *mens rea* required for second-degree assault.[6] Accordingly, any argument that the evidence was insufficient to support Appellant's second-degree assault convictions is not preserved for our review.[7]

[6] First-degree assault under CR § 3-202(b)(1) is a specific-intent crime that occurs when "[a] person . . . intentionally cause[s] or attempt[s] to cause serious physical injury to another." *See, e.g.*, *Middleton v. State*, 238 Md. App. 295, 308-09 (stating that the *mens rea* necessary to support a first-degree assault conviction under CR § 3-202(a)(1) is "the specific intent 'to cause serious physical injury to another" (citation omitted)). By contrast, the "mens rea for second-degree assault is a general intent to harm." *Morgan v. State*, 252 Md. App. 439, 467 (2021).

[7] We note that, in Appellant's Reply Brief, he asserts these issues are preserved because he "explicitly moved for a new trial because (among other things) 'the evidence is (Continued)

As instructed by the Maryland Supreme Court, "the appellate courts should rarely exercise" their discretion, under Rule 8-131(a), to reach the merits of unpreserved issues, since "considerations of both fairness and judicial efficiency ordinarily require that all challenges . . . be presented in the first instance to the trial court so that (1) a proper record can be made . . . and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge." *Chaney v. State*, 397 Md. 460, 468 (2007). Consequently, we will not consider Appellant's challenge to the sufficiency of the evidence on the issue of whether Appellant's conduct was motivated by self-defense.

II.

POST-VERDICT STATEMENT

A. Parties' Contentions

Appellant contends that the trial judge abused her discretion by denying his motion for a new trial because Mr. Henderson's post-verdict statements constituted newly discovered evidence and, under Maryland Rule 4-331(a), a new trial would serve the interest of justice. According to Appellant, the "the core dispute in the case [was] whether [he] acted in self-defense[,]" and the statements were "highly material" to his defense because they demonstrated "the extreme danger" he faced. Mr. Henderson's post-verdict statements "validate[] the fear that [Appellant] felt that night[,]" show Mr. Henderson's

insufficient in law to sustain the verdict.'" This argument fails because, among other reasons, "[a] sufficiency challenge is not preserved if it is raised for the first time in a motion for new trial." *Bradley v. Bradley*, 208 Md. App. 249, 263 (2012) (citing *Univ. of Md. Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 341, *cert. denied*, 427 Md. 65 (2012)).

"contemporaneous violent state of mind[,]" and lend credibility to Ms. Adams's testimony that the bicyclists were going to harm the couple. In Appellant's view, admission of Mr. Henderson's statements would thus significantly undermine the State's case against him.

Appellant argues that Mr. Henderson's post-verdict statements were more than merely cumulative or impeaching, and quotes from *Jackson v. State,* which instructed that "'[i]f the newly discovered evidence . . . was that the State's witness had actually testified falsely on the core merits of the case under review, that evidence, albeit coincidentally impeaching, would be directly exculpatory evidence on the merits and could not, therefore, be dismissed as 'merely impeaching.'" **(**quoting 164 Md. App. 679, 698 (2005) (Appellant's bold emphasis removed)). According to Appellant, Mr. Henderson's statements show that he "lied on the witness stand concerning the threatening nature of the bikers surrounding and trapping [Appellant] and his date in their vehicle, which is highly material evidence bearing on the nature of the incident."

The statements are not hearsay, Appellant says, because they were not offered for the truth of the matter asserted (that Mr. Henderson would in-fact have harmed Mr. and Ms. Adams) but instead contradicted "[Mr.] Henderson's and others' testimony that the cycling event was peaceful." In any case, Appellant contends the statements apply to various exceptions to the hearsay rule, including: excited utterance; then existing mental, emotional, or physical condition; and statement against interest.

To the contrary, the State urges that Mr. Henderson's post-trial statements do not constitute admissible evidence that could be elicited from testimony or otherwise

introduced and moved into the court record because they are inadmissible as hearsay without any identified exception. The State notes that Appellant could have cross-examined Mr. Henderson during trial about his state of mind at the time of the incident. Citing to the relevant cases for support, the State urges that evidence that only has value for testimonial impeachment does not qualify as "'newly discovered evidence[.]'"

According to the State, Mr. Henderson's post-trial statements are consistent with his trial testimony. The State highlights that when the smoke first appeared, Mr. Henderson was not aware of the smoke's source, and there was no indication that Mr. Henderson "secretly wanted to harm whoever was in the truck." And, the State observes, no one disputed that some cyclists tapped or banged Appellant's truck, and "[Mr.] Henderson's post-trial statements shed no further light on that behavior."

Appellant failed, the State says, to identify any false testimony, let alone testimony that went to "the core merits of the case" or that would be "exculpatory evidence on the merits." Furthermore, the State posits, that *at most*, Mr. Henderson's post-trial statements were "ambiguous." The statements do not clearly indicate the point in time Mr. Henderson *might* have considered using a weapon if he had one. As the State points out, if Mr. Henderson only desired to harm Appellant *after* he ran over the three cyclists, Mr. Henderson's comments would *not* have supported Appellant's claim of self-defense. The State argues that while threats made at the time or shortly before an incident are admissible in certain circumstances, an alleged threat made *after* the trial about what might have happened differently is not similarly relevant.

Finally, the State contends that, even if the post-trial statements could constitute relevant, newly discovered admissible evidence, there is no indication that the result of the trial would be different. Mr. Henderson's statements were "counterfactual" and did not "demonstrate that [he] threatened [Appellant] or his passenger at the time of the incident." Appellant presented evidence to support his claims that he acted in self-defense, and defense counsel "vigorously cross-examined" each of the State's witnesses.

B. Analysis

1. Motion for a New Trial

"The Motion for New Trial in a criminal case . . . is controlled by the provisions of Maryland Rule 4-331." *Jackson v. State*, 164 Md. App. 679, 687 (2005) (quoting *Love v. State*, 96 Md. App. 420, 426 (1993)). We review the grant or denial of a motion for a new trial under Maryland Rule 4-311 for an abuse of discretion. *Id.* at 700. "Abuse occurs when a trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of law." *Campbell v. State*, 373 Md. 637, 666 (2003) (citation omitted). While the abuse of discretion standard may seem to be "monolithic" upon appellate review of the grant or denial of a new trial, "in actuality it is not." *Jackson*, 164 Md. App. at 700. The reason lies, in part, in the structure of the Rule, whereby relief "is available on three progressively narrower sets of grounds but over the course of three progressively longer time periods." *Love*, 95 Md. App. at 426. The rule provides, in pertinent part:

> (a) **Within ten days of verdict.** On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new

> trial.
>
> * * *
>
> (c) **Newly discovered evidence.** The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule:
>
> (1) on motion filed within one year after the later of (A) the date the court imposed sentence or (B) the date the court received a mandate issued by the final appellate court to consider a direct appeal from the judgment or a belated appeal permitted as post conviction relief[.]

Md. Rule 4-331(a)-(c).

The *Jackson* Court explained that Maryland's appellate courts are more deferential to trial judges' rulings under Rule 4-331(a) than (c), because new trial motions under subsection (a) are typically "based on events that happen in the course of the trial" "under the direct eye of the trial judge" and the judge, who "has [their] thumb on the pulse of the trial . . . is in a unique position to assess the significance of such events." 164 Md. App. at 699-700. Accordingly, the judge's discretion is "at its broadest" when its exercise involves an evaluation of "the core question of whether justice has been done." *Id.* at 700 (quotation omitted).

By contrast, a motion for a new trial under Rule 4-331(c) based on newly discovered evidence necessarily "deals with things outside the course of the trial," such as the requisite finding that the evidence could (or could not have) been discovered by due diligence in time to file a motion under subsection (a). *Id.* at 700. Moreover, subsection (c) "significantly does not contain the language 'in the interest of justice' to be assessed by the

trial judge." *Id.*

Accordingly, the "degree of deference extended" on appellate review may "shift[] depending on the ground for the new trial motion[.]" *Id.* The *Jackson* Court thus explained that the trial court's discretion "will expand or contract" depending on the judge's "opportunity . . . to feel the pulse of the trial and to rely on [their] own impressions in determining questions of fairness and justice." *Id.* at 701 (emphasis removed) (quoting *Buck v. Cam's Rugs*, 328 Md. 51, 58-59 (1992)). Where the court's exercise of its discretion is heavily dependent on the court's opportunity to observe the trial, "complete with nuances, inflections, and impressions never to be gained from a cold record, it is a discretion that will rarely, if ever, be disturbed on appeal." *Jackson*, 164 Md. App. at 702 (emphasis removed) (quoting *Buck*, 328 Md. at 59).

Comparatively, a judge has a narrower range of discretion to deny motions based upon newly discovered evidence. *Id.* at 702 (construing *Buck*). Indeed, in the first instance, the court has "virtually no 'discretion' to refuse to consider newly discovered evidence that bears directly on the question of whether a new trial should be granted." *Id.* (emphasis omitted) (quoting *Buck*, 328 Md. at 58). Even if a court satisfies this threshold step by considering the newly discovered evidence, however, "the appellate court will still intervene whenever it is persuaded that the trial judge did not make a proper decision based on the newly discovered evidence." *Id.* at 702-03. Certainly where "newly discovered evidence clearly indicates that the jury has been misled" in a material way, "a new trial should be granted." *Id.* (emphasis removed) (quoting *Buck*, 328 Md. at 58).

In sum, the *Jackson* Court recognized the "vexing reality" that "at least two significantly distinct, 'abuse of discretion' standards" applied to subsections (a) and (c) of Maryland Rule 4-331, respectively. *Id.* at 703. First, decisions under subsection (a) are, the Court indicated, "virtually unreviewable" and "[r]arely, if ever, will a trial court, under it, be found to have abused its discretion." *Jackson,* 164 Md. App. at 704. These are the decisions that judges tend to make by weighing and relying on their cumulative knowledge of the case, as gained through their personal stewardship of the proceedings. *See id.* at 702-03. Decisions under Rule 4-331(c) "enjoy[] no such special immunity from appellate scrutiny." *Id.* at 704. The trial judge "still has discretion, of course, but significantly less discretion[.]" *Id.*

Turning to the instant case, we are confronted with a blend of the procedural predicates that typically underlie motions under Rule 4-331 (a) and (c). The memorandum of law that Appellant submitted in support of his motion for a new trial in the circuit court clearly stated his intention to proceed under Rule 4-331(a) and, the motion invoked Rule 4-331(a)'s "interest of justice" test and was timely filed and thus eligible for consideration thereunder. At the same time, the basis for Appellant's motion is what he described as newly discovered evidence. Importantly, the same judge who presided over Appellant's trial also ruled on the motion. Therefore, we conclude that the logic justifying the heightened deference described by the *Jackson* court for motions under Rule 4-331(a) remains the appropriate starting point in this case. However, as our decisional establishes for motions under subsection (c), we must also recognize that, even when presented in a

motion under subsection (a), a judge has "virtually no 'discretion' to refuse to consider newly discovered evidence that bears directly on the question of whether a new trial should be granted[,]" *Jackson*, 164 Md. App. at 702 (emphasis removed) (quotation omitted).

Motions filed under Rule 4-331(a) "almost invariably (if not invariably) are based on events that happen in the court of the trial[.]" *Jackson*, 164 Md. App. at 699. Rule 4-331(a) "expressly provides that the trial judge may order a new trial 'in the interest of justice' for it is he [or she] who has [their] thumb on the pulse of the trial and is in a unique position to assess the significance of such events." *Id.* at 699-700. "The list of possible grounds for the granting of a new trial by the trial judge within ten days of the verdict [under Rule 4-331(a)] is virtually open-ended." *Love*, 85 Md. App. at 427. Thus, it is unsurprising that "[i]f timely discovered within ten days of a verdict, newly discovered evidence may be urged as one of the standard reasons for granting a new trial 'in the interest of justice' under [Rule 4-331(a)]." *Isley v. State*, 129 Md. App. 611, 631-32 (2000), *overruled on other grounds*, *Merritt v. State*, 367 Md. 17, 24 (2001). As explained by the *Isley* court:

> As to how a trial judge weighs or measures the "interest of justice" in the context of ruling on a Motion for New Trial, there is little guidance in the case law. One thing, however, is clear. The measurement must be made in terms of the impact the phenomenon in question had on the defense of the case. In the words of Judge Orth in *Yorke v. State*, 315 Md. [578, 556 (1989)], the pertinent question is whether "there was a substantial or significant possibility that the verdict of the trier or fact would have been affected."

Isley, 129 Md. App. at 673.

We return to the decision in *Jackson* for its concise explication of what constitutes

newly discovered evidence that justifies setting aside a judgment and ordering a new trial:

> The evidence offered as newly discovered must be material to the result and that inquiry is a threshold question. That means that it must be more than "merely cumulative or impeaching." In addition, the trial court must determine that "[t]he newly discovered evidence may well have produced a different result, that is, there was a substantial or significant possibility that the verdict of the trier of fact would have been affected."

Jackson, 164 Md. App. at 705 (emphasis removed) (quoting *Argyrou v. State*, 349 Md. 587, 601 (1998) (citations omitted)). The trial judge should grant the motion "[i]f newly discovered evidence clearly indicates that the jury has been misled" in a way that reasonably may have impacted the verdict. *Id.* at 703 (emphasis removed) (quotation omitted).

Applying the foregoing principles in the instant case, we hold that the trial judge acted well within her broad discretion by denying Appellant's motion for a new trial under Maryland Rule 4-331(a) and, appropriately, the judge did so only after considering the purported newly discovered evidence.

To refresh, Appellant alleged, in a police report, that following his convictions Mr. Henderson approached him and told him, in pertinent part, that: "That ride was the only time I did not have my gun and you['re] lucky [b]ecause if I did I would have used it. I have a conceal to carry and I always have it[,] don't let me see you again." In denying Appellant's motion for a new trial, the judge concluded that, even if admissible, Mr. Henderson's statements would have made no difference in the outcome of the case:

> [T]here was ample evidence that notwithstanding what the witnesses testified to, and the witnesses were well cross-examined, there was ample independent evidence to support [Appellant's] position that this was not a

peaceful ride and that [Appellant] was being attacked.

The judge noted, for example, that video showed bikers jumping on Appellant's vehicle; there was damage to Appellant's truck, including a broken mirror; and that Ms. Adams testified "that they feared for their lives[.]" Given that, as the judge explained, there was ample evidence from which the jury could have concluded that the bikers were the initial aggressors rather than Appellant, we discern no abuse of discretion in the judge's ruling that Mr. Henderson's alleged statements[8] "would not be material to the result of the trial given the evidence that was presented at trial." Moreover, as the State points out, Mr. Henderson's alleged statements are readily understood to mean that he formed the desire to harm Appellant *after* Appellant ran over the three cyclists, in which case the alleged statements would *not* have supported Appellant's claim of self-defense. We defer to the judge's reasoned judgment in this case, recognizing that she had her "thumb on the pulse of the trial[,]" *Jackson*, 164 Md. App. at 702, and that she applied her thorough knowledge in considering the potential significance of Mr. Henderson's post-trial statements.

Given our conclusion that the trial judge did not err in determining Mr. Henderson's statements would have not impacted the verdicts, we could end our analysis here. We elect, however, to briefly explain why none of the hearsay exceptions cited by Appellant would apply in this case.

[8] The trial court also pointed out that Appellant's counsel was "assuming that [Mr. Henderson] is going to come into the court and sit on the stand and tell the jury that he threatened to shoot your client[.]"

2. Hearsay and Its Exceptions

"'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). Hearsay is inadmissible unless otherwise permitted by a constitutional provision or statute. Md. Rule 5-802. We consider whether evidence "constitutes inadmissible hearsay" without deference to the trial courts. *Williams v. State*, 251 Md. App. 523, 564 (2021) (citing *Parker v. State*, 408 Md. 428, 436 (2009)).

Excited Utterance

Excited utterances, as defined by Maryland Rule 5-803(b)(2), are exempt from the hearsay rule. The Rule defines an excited utterance as: "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Md. Rule 5-803(b)(2).

The rationale for exempting excited utterances from the application of the hearsay rule is the perception that such statements are more trustworthy than other run-of-the-mill hearsay, specifically, because "the startling event suspends the declarant's process of reflective thought, thus reducing the likelihood of fabrication." *Curtis v. State*, 259 Md. App. 283, 315 (2023) (quoting *State v. Harrell*, 348 Md. 69, 77 (1977)).[9] "The essential

[9] In *Mason v.* State, we recently set out the rationale for the excited utterance exception as described by leading scholars:

> At 6 Wigmore on Evidence, Sect. 1747, at 195 (Chadbourn rev. 1976), Dean Wigmore explained the rationale for the Excited Utterance exception:
>
> > This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous

(Continued)

rationale for the Excited Utterance Exception is spontaneity arising immediately from the exciting event and not yet having abated when the utterance is made." *Mason v. State*, 258 Md. App. 266, 189 (2023) (emphasis removed) (quoting *Cassidy v. State*, 74 Md. App. 1, 17 (1988)). The proponent for the admission of a hearsay statement under the excited utterance exception "must lay a foundation meeting several requirements," including: (1) "that an exciting or startling event occurred, and that the declarant had personal knowledge of that event"; (2) that "the statement relates to the underlying startling event"; and (3) "the spontaneity of the statement[,]" meaning that "the declarant was still under the stress of the

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> excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or at least as lacking the usual grounds of untrustworthiness), and this as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts.
>
> (Emphasis supplied.) McCormick on Evidence, Sect. 297, at 854-55, (E. Cleary 3d Ed. 1984), is in full accord:
>
> > First, there must be an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of an observer. Second, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought.
>
> (Emphasis supplied.)

Mason v. State, 258 Md. App. 266, 287-88 (2023).

startling event at the time the statement was made and that the statement was not the product of reflective thought." *Curtis*, 259 Md. App. at 315-17.

Appellant was tried and convicted two years after he ran into and over bikers during the August 2020 "Friday Night Lights" ride. Clearly, when Mr. Henderson allegedly confronted Appellant after the trial he was not "still under the stress of the startling event[.]" *Curtis*, 259 Md. App. at 317. Appellant's argument that the trial, rather than the assault itself, constitutes the startling event for the purpose of Rule 5-803(b)(2) is without merit. Moreover, if the trial *were* the startling event (rather than the assaults and the events leading thereto) then Mr. Henderson's post-statements would not "relate[] to the underlying startling event" and would not fall within the excited utterance exception for that reason.

Statement Against Interest

Under Maryland Rule 5-804(b)(3), a statement against a declarant's penal or pecuniary interest is not excluded by the hearsay rule if the declarant is "unavailable as a witness[.]" Md. Rule 5-804(b)(3). The exception is defined as follows:

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

Md. Rule 5-804(b)(3). This exemption is premised on the idea that people seldom make damaging statements about themselves unless they have good reason to believe the

statement is true. *See, e.g.*, *Jackson v. State*, 207 Md. App. 336, 348 (2012). To admit a statement under this exception, a trial court must determine 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.

Smith v. State, 259 Md. App. 622, 652 (2023) (quoting *Jackson*, 207 Md. App. at 336)). As is pertinent to this case, the Rule provides:

> "Unavailability as a witness" includes situations in which the declarant:
>
> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
>
> (2) refuses to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
>
> (3) testifies to a lack of memory of the subject matter of the declarant's statement;
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (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.

Md. Rule 5-804(a).

In *Bond v. State*, 92 Md. App. 444 (1992), the appellant attempted to introduce a statement obtained from a police officer that "inculpates [the declarant], and exculpates appellant[.]" *Id.* at 446. At trial, the appellant argued that the declarant would invoke his Fifth Amendment right against self-incrimination and would not testify; therefore, the declarant was unavailable for the purpose of the hearsay exception. *Id.* at 447-48. The

circuit court "declined to accept the proffer by appellant's attorney" that the declarant was unavailable, and this Court affirmed, noting that "appellant's attorney had no authority whatever to speak for Davis." *Id.* at 451.

Here, the statement against penal or pecuniary interest exception (Md. Rule 5-804(b)(3)) could not apply because Appellant failed to make any showing that Mr. Henderson would be unavailable to testify at a future trial. The following exchange at the motions hearing is dispositive of this issue:

> THE COURT: . . . [Y]ou're assuming that [Mr. Henderson] is going to come into court and sit on the stand and tell the jury that he threatened to shoot your client?
> [APPELLANT'S COUNSEL]: No. I would expect him to deny it. I would absolutely expect him to say, [t]hat's not what I meant.

As represented to the motions court, Appellant anticipated that Mr. Henderson *would* appear and testify at any new trial. Therefore, he could not have been deemed unavailable.

Then Existing State of Mind

Maryland Rule 5-803(b)(3) exempts statements concerning a declarant's then existing mental, emotional, or physical state from the application of the hearsay rule:

> *Then Existing Mental, Emotional, or Physical Condition*: A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remember or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Md. Rule 4-803(b)(3). Appellant contends that Mr. Henderson's alleged statements "demonstrate a threatening mental and emotional state that extended from the incident

itself all the way through the end of trial." Appellant's argument, however, does not float under the plain language of Rule 5-803(b)(3) and our caselaw applying the same. While the '*Then* Existing State of Mind' exception may, in appropriate circumstances, apply to a declarant's "forward-looking statements of intent . . . in order to prove that the declarant subsequently took a later action in accordance with that stated intent[,]" *Nat'l Soc'y of Daughters of Am. Revolution v. Goodman*, 128 Md. App. 232, 238 (1999) (citation omitted), as our Supreme Court instructed in *Conyers v. State*, the exception does not generally apply "to prove a fact . . . which purportedly happened *before the statement was made*." 354 Md. 132, 160 (1999) (quotation omitted). The *Conyers* Court quoted from the well-regarded treatise, MARYLAND EVIDENCE, which, in its modern form, explains that:

> Maryland has long recognized, although sometimes under the handy old res gestae umbrella, the common law hearsay exception for statements of the declarant's "state of mind," regardless whether the declarant is available to testify, unavailable to testify, or testifies in the case. Under this exception, codified in Md. Rule 5-803(b)(3), a statement of the declarant's "then existing" state of mind is admissible to prove the truth of the matter that the declarant asserted as to the state of mind she had at the time of the out-of-court statement. But **it is generally inadmissible (*except in will and probate cases*) to prove a fact that purportedly happened or existed before the statement was made** (a fact "remembered or believed by the declarant"), which contributed to or brought about the declarant's state of mind.

6A LYNN MCCLAIN, MARYLAND EVIDENCE STATE AND FEDERAL § 803(3):1 (database updated Sept. 2023), Westlaw MDEV-STFED (footnotes omitted).

The exception could not apply in this case because Mr. Henderson's alleged post-trial statement could not prove his state of mind two years earlier on August 21, 2020. Our law establishes that, with exceptions that do not apply here, Rule 5-803(b)(3) may not be

used to "prove a fact . . . which purportedly [existed] *before the statement was made*." *Conyers*, 354 Md. at 160 (quotation omitted).

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