Circuit Court for Baltimore City
Case No. 821021001

UNREPORTED*

IN THE APPELLATE COURT

OF

MARYLAND**

No. 215

September Term, 2022

DOMINIC GARDENER

v.

STATE OF MARYLAND

Arthur,
Reed,
Albright,

JJ.

Opinion by Albright, J.

Filed: June 23, 2023

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

In March 2022, a jury in the Circuit Court for Baltimore City found Appellant, Dominic Gardener, guilty of Revenge Porn.[1] The circuit court sentenced Appellant to two years of incarceration with all but six months suspended and two years of supervised probation. His timely appeal followed.

[1] In essence, Maryland's Revenge Porn statute makes it a misdemeanor to knowingly distribute an intimate image of another person with intent to harm or harass that person (among other intended results) if the distributor knows, or recklessly disregarded knowing whether, the other person consented to distribution, and the other person reasonably expected that the image would remain private. The statute provides in pertinent part:

> (c) A person may not knowingly distribute a visual representation of another identifiable person that displays the other person with his or her intimate parts exposed or while engaged in an act of sexual activity:
>
> (1) with the intent to harm, harass, intimidate, threaten, or coerce the other person;
>
> (2)(i) under circumstances in which the person knew that the other person did not consent to the distribution; or
>
> (ii) with reckless disregard as to whether the person consented to the distribution; and
>
> (3) under circumstances in which the other person had a reasonable expectation that the image would remain private.

Md. Code, Crim. Law § 3-809 (eff. Oct. 1, 2020). In 2023, the General Assembly repealed and reenacted this statute, effecting a definitional change that is not pertinent to this case. That change will take effect October 1, 2023.

Appellant presents five questions for our review, which we have reordered and reworded as follows:[2]

1. Did the trial court err in permitting Victim[3] to testify about the content of text messages she received?
2. Did the trial court err or abuse its discretion by admitting State's Exhibits 1-9?
3. Did the trial court err or abuse its discretion in allowing Victim to testify that Appellant had previously threatened her with physical violence?
4. Did the trial court err in denying Appellant's motions for judgment of acquittal?

[2] Appellant's five questions on review originally appeared as follows:

1. Did the trial court err in admitting impermissible hearsay evidence regarding the text messages [Victim] claimed to have received?
2. Did the trial court err in admitting State's Exhibits 1-9 because they were not properly authenticated and/or because they contained impermissible hearsay?
3. Did the trial court err in denying defense counsel's motions for judgment of acquittal because the State presented legally insufficient evidence as to agency or electronic distribution?
4. Did the trial court err in allowing [Victim] to testify that [Appellant] had previously threatened her with physical violence?
5. Did the trial court err in allowing the prosecutor to improperly appeal to the jury's emotions and argue facts not in evidence in her rebuttal argument?

[3] For privacy purposes, we refer to the victim as "Victim." We mean no disrespect in doing so.

5. Did the trial court abuse its discretion by allowing the State, during rebuttal argument, to appeal to the jury's emotions and argue facts not in evidence?

For the following reasons, we answer "no" to all of these questions and affirm the circuit court's judgment.

BACKGROUND

On August 15, 2020, Victim awoke to approximately 50 text messages from men she did not know, all of whom texted her "inappropriate things . . . trying to pay [her] for sexual things[.]" The messages persisted for about two days. When Victim texted one of the men to ask how he got her contact information, he responded with a link to a website. Victim clicked the link, leading her to an adult website that promoted escort services. Displayed on the website were several intimate photos and a video of her, along with her real name, phone number, and current address. Until that day, Victim knew of only one other person who had access to the intimate photos: Appellant, her former boyfriend.[4]

Appellant and Victim were in a four-year relationship that started in 2016. In February 2020, the relationship ended after Appellant found text messages on Victim's phone from another man, concluded that she had been unfaithful, and kicked her out of the house. Victim then moved into her mother's home. According to Victim, after the breakup, Appellant would follow her, come by her mother's house, and make general statements about coming to her job, getting her fired, and wishing that she would get everything coming her way. Victim did not speak to Appellant again until March 2020,

[4] Though she recognized herself in the video, Victim had not known that Appellant had taken a video before she saw it on the website.

when they had a civil conversation, found common ground, and officially ended their relationship on what Victim believed were amicable terms.

That belief lasted less than a month. In April 2020, at about the time that Victim started a relationship with someone else, Appellant sent a text message threatening to post her intimate photos on the "Porn Hub" website. On August 15, 2020, Appellant's threat became Victim's reality when she saw the intimate photos and a video of herself uploaded to an escort services website. Because Victim knew that Appellant possessed the photos, knew her name, had her phone number and her current address, she concluded that Appellant was responsible. She then applied for a criminal charge against Appellant with the District Court Commissioner. Ultimately, Appellant was charged with knowingly distributing Victim's intimate images with intent to harm, harass, intimidate, threaten, or coerce Victim, in violation of Maryland's Revenge Porn statute, codified as Maryland Code, Criminal Law ("CL") § 3-809.[5]

The Trial

The opening statements provided a preview for some of the issues here. During the State's opening, Appellant objected that the text messages Victim would describe receiving were hearsay. After the State confirmed that the texts would be offered not for their truth, but rather for their effect on Victim, the trial court overruled Appellant's objection. During his opening statement, Appellant did not deny that Victim's intimate

[5] The charging document did not specify the manner in which Appellant allegedly distributed Victim's intimate images.

images had been posted on the website, theorizing instead, "[t]he hurdle the State can't get over is who posted the items on the website."

Victim was the State's only witness. She testified that on August 15, 2020, she woke up to "probably about 50 text messages from different men texting [her] inappropriate things[,] . . . asking [her], trying to pay [her] for sexual things, calling [her], sending [her] pictures of their self[,]" among other similar texts.[6] According to Victim, the "texts continued for about two days[,]" and made her feel "scared" and "confused." She had to change her telephone number. To investigate why she was getting the texts, Victim asked one of the texters how he got her information, and the texter sent her a link. Victim clicked on it and discovered naked photos of herself and a video of her having sex with Appellant.

Victim's testimony established that Appellant had the motive, means, and opportunity to post the intimate images on the internet. According to Victim, she took some of the images, while Appellant took others, and both she and Appellant had possession of the images.[7] After the relationship ended, Victim recalled, Appellant was "[v]ery irate" over their break up, "wish[ing] everything that [came] [her] way, [] bad

[6] Appellant repeated his hearsay objection to this testimony. The trial court overruled it again, concluding that the text messages were offered not for the truth but rather "for their effect on [Victim]."

[7] Victim also testified that she did not agree to release the images to anyone else. She believed the images would "stay between [her and Appellant] during the course of [their] relationship."

things," coming by her house, following her, and saying that "he was going to come to [her] job, get [her] fired," or get somebody to harm her and her family. According to Victim, Appellant threatened to beat up her and her unborn child.[8] Appellant's threat to post Victim's intimate images on Porn Hub came about two months after their relationship ended.

The State also introduced screenshots of the images Victim saw on the website as State's Exhibits 1-9. Victim identified them as "fair and accurate representation[s]" of the photos she saw when she clicked on the link she received.[9] The screenshots included Victim's intimate images, along with Victim's name, address, and telephone number.[10] When Appellant objected to admission of the "language" on the exhibits, the court overruled the objection. After Victim's testimony, the State rested its case.

After the court denied Appellant's motion for judgment of acquittal, Appellant testified on his own behalf. He admitted that he and Victim had been in a romantic relationship that ended in February 2020 when Appellant, looking at Victim's phone, concluded that Victim had been unfaithful.[11] Appellant was "devastat[ed]" and "hurt" by

[8] Victim's unborn child was not Appellant's.

[9] One exhibit included a photo that appeared to be the beginning of a video clip.

[10] One exhibit contained a telephone number that did not belong to Victim.

[11] In addition to admitting that he had been convicted of robbery in the past, Appellant testified that his relationship with Victim resumed after they broke up and did not end finally until October 2020 when Victim learned that Appellant was seeing Victim's friend.

Victim's "disloyalty." Appellant admitted that the photos posted on the website had been on his phone "at some point," but denied posting them. He testified that his iCloud account was hacked and he "lost his whole phone . . . "[i]n January of 2021" when he dropped it at work in December 2020. He later claimed that "[he] couldn't even get in [his] phone" between August 2020 and January 2021 because the screen cracked when he dropped it.

On cross-examination, Appellant changed the timeline, testifying that he dropped his phone in October 2020. When the State asked whether he had access to it in August 2020, Appellant said, "No, no, no. I dropped my phone working. I really don't recall a time limit. But I know I didn't have a phone for three or four months and then I was getting a new phone in January." When the State asked Appellant when he lost access to his phone, Appellant said "I believe in August or September[.]"

Appellant rested his case with his testimony and then renewed his motion for acquittal, arguing that the State had not met its burden because it did not provide forensic evidence proving that Appellant was the source of images posted to the internet or that the images were ever posted to the internet. According to Appellant, this failure of evidence left the jury with nothing other than Victim's assumption that it was Appellant that posted the images. According to Appellant, "[a]n assumption by someone is not enough to prove someone guilty beyond a reasonable doubt." The court denied the renewed motion.

Later, during the State's rebuttal closing argument, the trial court overruled

Appellant's objection to an argument made by the State. Appellant's objection came when the prosecutor, arguing that Victim's name and images would be online "forever more," asked the jurors to put themselves in the shoes of Victim.

> [THE STATE]: [Victim] is a young woman just starting out at life and this is something she has to deal with for the rest of her life. Her real name attached to those images forever more, for anyone to see at any time.
>
> Imaging [sic] having to Google your name and never know what's going to come up. Imagine 5 years from now when she's in her job market -
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE COURT[12]]: Overruled.
>
> [THE STATE]: And having to wonder whether an employer is going to Google her and find those images. Her nude body in sexual activity because she consented during the time that she was in a committed relationship with this Defendant. And when that relationship was over he took advantage of that trust.

We will supplement with additional facts as needed.

The Text Messages

Appellant contends that the circuit court abused its discretion by permitting Victim to testify about text messages she received because they were hearsay. Appellant argues that even though the State offered Victim's testimony about these text messages for their effect on Victim, the State actually relied on this testimony to prove more. According to

[12] The trial transcript attributes this ruling to Appellant's Defense Counsel. We assume this was a transcription error and that it was the trial court that overruled Defense's Counsel's objection.

Appellant, the State looked to this testimony to show that texters had sexually propositioned Victim and, via a link from one texter, that Victim's contact information and intimate images were distributed to the internet generally. For this reason, says Appellant, it was error to admit Victim's testimony about the text messages. We disagree.

"[W]hen the issue involves whether evidence constitutes hearsay, that is a legal question that we review *de novo*." *Baker v. State*, 223 Md. 750, 760 (2015) (quoting *Gordon v. State*, 431 Md. 527, 537-38 (2013)). Given that Appellant's argument focuses on whether the text messages and the link were (or were not) hearsay, our review is *de novo*.

Because Victim's testimony about the text messages she received was not hearsay, we see no error in the trial court's decision to admit it. Hearsay[13] 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). A statement "is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Md. Rule 5-801(a). A declarant "is a person who makes a statement." Md. Rule 5-801(b). Appellant's argument that Victim's testimony is hearsay fails at least three of these basic definitions.

Victim's testimony about the text messages was not hearsay because, contrary to Rule 5-801(c), the testimony was not offered for any "truth" asserted in the text

[13] Hearsay, of course, is inadmissible "[e]xcept as otherwise provided by [the Maryland Rules], or permitted by applicable constitutional provisions or statutes." Md. Rule 5-802.

messages.[14] Rather, as the trial court ruled, the testimony was admitted to show how the text messages affected "the hearer[,]" Victim. Admission on this basis is designed to show how someone acted in response to hearing, or reading, an out-of-court statement, *Burgess v. State*, 89 Md. App. 522, 538 (1991), or to show that the hearer had notice of the statement, Lynn McLain, Maryland Practice, 6A *Maryland Evidence*, § 801:10 (2022), or to show how someone felt on reading or seeing the out-of-court statements, *United States v. Sanon*, 738 Fed. Appx. 655, 658-59 (11th Cir. 2018).

Here, as Victim testified, receipt of the text messages led Victim to suffer, to cry "a lot," to feel "overly stressed," and to feel "scared" and "confused." It also prompted her to change her cell phone number. Appellant does not debate that receipt of the text messages affected Victim, conceding in his opening brief that "[t]hese alleged texts formed the basis for [Victim's] belief that her intimate photographs had been uploaded to an adult website on the internet[.]"

Beyond the purpose for offering the text messages, their content amounted not to "assertions" under Rule 5-801(a) but rather non-assertive "verbal acts" that tended to prove consequential facts. *See Garner v. State*, 414 Md. 372, 388 (2010). In *Garner*, a

[14] This observation distinguishes this case from *Green v. State*, 81 Md. App. 747 (1990), the case on which Appellant relies. In *Green*, the challenged evidence, a license plate number written on a folder, was inadmissible hearsay. *Id.* at 757. Specifically, the eyewitness to a robbery wrote the license plate number of the getaway car on the folder and gave it to police. The folder was admitted at trial and the defendant was convicted, but the eyewitness did not testify. We reversed the conviction, holding that as an out-of-court assertion of truth, the folder was hearsay whose admission was not harmless. *Id.* at 757, 761. Here, by contrast, and as we explain, the text messages were not hearsay.

defendant was charged with drug dealing. An officer testified that when he answered the defendant's phone, a male caller asked, 'can I get a 40[?]' and then hung up when the officer asked his name." 414 Md. at 376. Of the question, "can I get a 40[?]," our Supreme Court said,

> [w]hile there may be an "implied assertion" in almost any question, in the case at bar, the only assertion implied in the anonymous caller's question was the assertion that the caller had the funds to purchase the drugs that he wanted to purchase. Because the caller's request did not constitute inadmissible hearsay evidence, the rule against hearsay does not operate to exclude evidence of the "verbal act" that established a consequential fact: Petitioner was in possession of a telephone called by a person who requested to purchase cocaine.

Id. at 388.

Here, as in *Garner*, the solicitations contained no real assertions of truth. In other words, whether the texters were (or were not) actually interested in soliciting Victim for sex, i.e. the truth, was not the point. Instead, from Victim's testimony about the text messages, the State established the consequential facts that many texters, apparent strangers, got Victim's contact information together with the notion that Victim was available for sexual solicitation. As such, the text messages were not hearsay.

As for the text message that contained the hyperlink, it, too, was not hearsay because it was offered not for any "truth" but to show how Victim discovered that her intimate images were on the internet. As above, out-of-court statements offered to show that the hearer reacted in a particular way in response to hearing the statement are not hearsay. *Burgess*, 89 Md. App. at 538 (citing *Brown v. State*, 80 Md. App. at 194 (1989)).

Victim asked one texter how he got her information. To the extent that the texter's reply – a hyperlink – was an out-of-court statement,[15] it was offered to show what Victim did in response to receiving the hyperlink. In a sense, the asserted "truth" in the text message was that the hyperlink would operate to send those who clicked on it to a website. But, whether the hyperlink operated correctly (truthfulness of a kind) or not (falsity of kind), the text message containing the hyperlink was offered to explain what Victim did next. Accordingly, the text message that contained the hyperlink was not hearsay and permitting Victim to testify about it was not error.

State's Exhibits 1-9

Appellant contends that State's Exhibits 1-9 should not have been admitted because they were inauthentic. Appellant adds that because the exhibits contained "words and symbols" that permitted the jury to find that the photos had been posted on an internet site called "Escort Babylon," they contained inadmissible hearsay.

Before moving to the substance of Appellant's arguments, we agree with the State that but for Appellant's argument about the "words and symbols" on Exhibits 1-9,

[15] If the hyperlink was computer-generated, we doubt it would even qualify as a "statement" under Md. Rule 5-801(a). *Baker v. State*, 223 Md. App. 750, 762 (2015) (computer-generated telephone call records do not implicate the hearsay rule because they are not the "statement" of a person); *United States. v. Hamilton*, 413 F.3d 1138, 1140 (10th Cir. 2005) (in child pornography prosecution, computer-generated "header" listing screen name, subject of posting, and date of posting were not hearsay as "computer-generated."). *See also* Lynn McLain, Maryland Practice, 6A *Maryland Evidence*, § 801:14 (2022) (footnotes omitted) ("Under Fed. R. Evid. 801, as under [Md. Rule 5-801], only a person can be a declarant: neither animals nor machines qualify.").

Appellant's arguments are unpreserved because of the limits he placed on his objection below. If the particular grounds for an objection are volunteered or requested by the court, appeal is limited to a review of those grounds only, and any ground not stated is waived. *See State v. Jones*, 138 Md. App. 178, 218 (2001), *aff'd*, 379 Md. 704 (2004). Here, Appellant indicated that he was not objecting to "the photos and the pictures." Specifically, Appellant told the court, "[t]o the language. Anything beyond the photos and the pictures that has the play button on it, I'm objecting to." Accordingly, to the extent that Appellant now challenges the authenticity of the intimate images in Exhibits 1-9, we will not take up Appellant's argument.

With regard to what remains of Appellant's authenticity challenge to the admissibility of Exhibits 1-9, Appellant argues that because these exhibits are purportedly printouts[16] from social media pages, authentication was required using one or more of the methods outlined at *Sublet v. State*, 442 Md. 632, 663 (2015).[17] Specifically, says

[16] The parties use "screenshots" and "printouts" interchangeably to describe Exhibits 1-9.

[17] In *Sublet v. State*, our Supreme Court treated three criminal cases, all posing questions about how to authenticate (and attribute) messages on various social networking sites to a witness or a criminal defendant. 442 Md. at 645, 651-52, 655. In examining what kind of evidence would be adequate to authenticate a webpage, the Supreme Court, "embrac[ing]" the approach of the United States Court of Appeals for the Second Circuit in *United States v. Vayner*, 769 F.3d 125, 133 (2d Cir. 2014), declined to describe a specific collection of facts that would make for "authentic" evidence. *Id.* at 670. Instead, our Supreme Court held "'[w]e express no view on what kind of evidence *would* have been sufficient to authenticate the [web]page and warrant its consideration by the jury. Evidence may be authenticated in many ways, and as with any piece of evidence whose authenticity is in question, the "type and quantum" of evidence necessary to authenticate a [webpage] will always depend on context.'" *Id.* at 670 (quoting *Vayner*, 769 F.3d at 133).

Appellant, the State should have (but did not) introduce evidence showing 1) that the Escort Babylon website existed as a website; 2) the profile name or picture of the person who posted Victim's intimate images on the website; 3) how Victim was involved (if at all) in creating Exhibits 1-9; 4) that Victim's and Appellant's phones or computers (or those of others) had been examined; and 5) that Escort Babylon had been contacted for information to link the poster of the images to the images themselves. This argument misses the mark.

Authentication of evidence is a matter over which the trial court serves as a gatekeeper. As to an offered item of evidence, the trial court assesses, as a preliminary matter, whether evidence of the item's authenticity is sufficient to permit the jury to determine that the item is indeed authentic. *Sublet*, 442 Md. at 671 ("'[i]mportantly, the burden to authenticate under Rule 901 is not high . . . a district court's role is to serve as gatekeeper in assessing whether the proponent has offered a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.'" (quoting *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014)).

To authenticate an item, the proponent must introduce "evidence sufficient to support a finding that the matter in question is what its proponent claims." Md. Rule 5-901(a). This burden is "slight." *Jackson v. State*, 460 Md. 107, 116 (2018), and is satisfied with evidence that it is "more likely than not" that the item is what the proponent claims it is. *State v. Sample*, 468 Md. 560, 598-99 (2020). We review a trial court's ruling that evidence has been sufficiently authenticated for abuse of discretion. 468 Md. at 588.

Here, because Victim recognized the contents of State's Exhibits 1-9[18] from her personal knowledge, evidence of the kind Appellant posits was not necessary for authentication. One, though not the only, way to authenticate evidence is with "testimony of a witness with knowledge that the offered evidence is what it is claimed to be." Md. Rule 5-901(b)(1). Victim provided such testimony. Specifically, Victim testified that she clicked on the link provided her, visited the website to which the link took her (a website Victim described as an "adult website") and there saw what was depicted in Exhibits 1–9. Moreover, Victim recognized herself in the images. This testimony was sufficient to meet Rule 5-901(a)'s low burden. *Clark v. Clark*, 867 S.E.2d 743, 755 (N.C. Ct. App. 2021) (plaintiff authenticated "electronic postings through her own testimony . . . that she personally saw [the posting], recognized it to be about her, and made a copy of the [posting]."). Accordingly, we see no abuse of discretion in the trial court's finding that Exhibits 1-9 were authentic.

Appellant's reliance on *Sublet v. State* does not change this result because as the *Sublet* court itself warned, the context of those cases was different. In *Sublet*, because the offered evidence (in all three cases) was a statement or statements that the proponent wished to attribute to a witness or the defendant, it was critical to know who purportedly posted, i.e. made, each statement on the social media page at issue. Here, by contrast,

[18] Exhibits 1-9 appear to be screenshots of website pages. Depicted on the pages are a website banner, photographs, words (street address and age), phone numbers, dates, and hyperlinks.

authenticity of the images in Exhibits 1-9 did not turn on who posted them to the internet. Instead, Victim testified that Exhibits 1-9 "fairly and accurately" represented what she saw on the internet when she clicked on the link she received. Her testimony was based on her personal knowledge and was no less effective in proving authenticity (preliminarily) than if she had seen the images in a magazine.

Turning to Appellant's claim that the "language and symbols" on Exhibits 1-9 were hearsay, we disagree that the website name, Escort Babylon, was hearsay.[19] Once again, a "declarant is a person who makes a statement." Md. Rule 5-801(b). In turn, a "statement" is an oral assertion or nonverbal conduct "if it is intended by the person as an assertion." Md. Rule 5-801(a). Here, the website name was not hearsay because it was not a "statement" made by a "declarant." *See State v. Padgette*, 152 N.E. 3d 504, 509 (Ohio Ct. App. 2020) (citations omitted) ("[t]here is no 'statement' for hearsay purposes where a witness does not testify about 'what someone else said, wrote, or did.'").

Appellant's reliance on *Bernadyn v. State*, 390 Md. 1 (2005) does not persuade us otherwise. *Bernadyn* involved a medical bill addressed to the defendant and found at an address where narcotics were discovered. *Id.* at 3-4. The State introduced the bill to show that the defendant lived at the address, arguing that the medical provider's need to get paid would have incentivized the medical provider to get the address correct. *Id.* at 5. The

[19] To the extent Appellant here challenges any of the other "language and symbols" on Exhibits 1-9, it is a challenge we address no further due to its lack of specificity. *See* Md. Rules 8-504(a)(4) and (6).

bill was hearsay, our Supreme Court concluded, because it was offered for the truth of the matter it asserted, i.e. that the defendant lived at the address on the bill, and because it was not subject to any hearsay exception, its admission was error. *Id.* at 23.

Here, by contrast, Exhibits 1-9 (and their depiction of the website name) were offered to prove what the website looked like when Victim discovered it and that the images had, in fact, been distributed. In other words, because the images were available somewhere on the internet, the fact of their availability suggested that they had been distributed. *See State v. Poupart*, 88 So. 3d 1132, 1142-43 (La. Ct. App. 5th Cir. 2012) (concluding that "*The Dirty.com* website information attached to the pictures" was not hearsay where "[t]hese exhibits were only introduced to show that the pictures in question were in fact posted on the internet."); *Momah v. Bharti*, 182 P.3d 455, 466 (Wash. Ct. App. 2008) (finding that printouts of articles maintained on a website "are not excludable as hearsay" where they "were offered for the purpose of showing republication and not to prove the truth of the contents"). Under these circumstances, it was not error to admit Exhibits 1-9.

Appellant's Prior Threats Toward Victim and Her Unborn Child

Appellant contends the trial court abused its discretion by allowing Victim to testify that after they broke up, Appellant threatened her and her unborn child with physical violence. Appellant argues that as "prior bad acts," evidence of Appellant's prior threats was presumptively inadmissible. Appellant adds that the trial court failed to

conduct the three-part analysis required by *State v. Faulkner*.[20] As a result, the trial court did not determine that the prior threats were "specially relevant," or that Appellant, by clear and convincing evidence, threatened Victim, or that the probative value of the threats substantially outweighed the danger of unfair prejudice from admitting them. We disagree.

We start from the basic observation that relevant evidence is admissible, unless it is not, and evidence that is not relevant is not admissible. Md. Rule 5-402. One category of relevant, but nonetheless inadmissible, evidence is that of "other crimes" or "wrongs," also known as "bad acts," when used "to prove the character of a person in order to show action in the conformity therewith." Md. Rule 5-404(b). Generally, "a bad act is an activity or conduct, not necessarily criminal, that tends to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit." *Klauenberg v. State*, 355 Md. 528, 549 (1999).[21] Such evidence is "presumptively" inadmissible, the concern being that jurors hearing such evidence will convict defendant because he or she is a "bad person" deserving of punishment even if the evidence to support the conviction is weak. *Hurst v. State*, 400 Md. 397, 407 (2007). But, other crimes evidence "may be admissible for other purposes, such as proof of motive,

[20] 314 Md. 630, 634 (1989).

[21] Not every incident that happens beyond the crime scene amounts to "other crimes" evidence, however. *Odum v. State*, 412 Md. 593, 611 (2010).

opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident, or in conformity with Rule 5-413." Md. Rule 5-404(b).

To determine whether other crimes evidence is admissible, the trial court ordinarily engages in the three-step analysis of *State v. Faulkner*. Thus, before admitting "other crimes" evidence under Rule 5-404(b), the trial court must determine: (1) whether the evidence fits within one or more of the Rule 5-404(b) exceptions; (2) whether the accused's involvement in the "other bad act" is established by clear and convincing evidence; and (3) whether the probative value of the "other bad act" evidence is substantially outweighed by the potential for unfair prejudice likely to result from its admission. *Snyder v. State*, 210 Md. App. 370, 393 (2013) (citing *State v. Faulkner*, 314 Md. 630, 634 (1989) and other cases).

Appellate review of the trial court's decision to admit "other crimes" evidence normally entails several standards of review. We review without deference the determination that a Rule 5-404(b) "exception" applies. *Stevenson v. State*, 222 Md. App. 118, 149 (2015). The second step of the analysis – the trial court's "clear and convincing evidence" finding – is reviewed only for sufficiency. We consider "only [] the legal question of whether there was some competent evidence which, if believed, could persuade the fact finder as to the existence of the fact in issue." *Emory v. State*, 101 Md. App. 585, 622 (1994). We review the third step – the trial court's weighing of probative value versus the potential for unfair prejudice – for abuse of discretion. *Faulkner*, 314 Md. at 635.

"Motive" is one of the Rule 5-404(b) exceptions. "Motive" is "the catalyst that provides the reason for a person to engage in criminal activity." *Jackson v. State*, 230 Md. App. 450, 459 (2016) (cleaned up). *See also Vaise v. State*, 246 Md. App. 188, 211 (2020) (citing cases and a treatise). "Evidence of previous quarrels and difficulties between a victim and a defendant is generally admissible to show motive." *Snyder v. State*, 361 Md. 580, 605 (2000). To be admissible, though, "the prior conduct must be committed within such time, or show such relationship to the main charge, as to make the connection obvious, . . . that is to say they are so linked in point of time or circumstance as to show intent or motive." *Id.* (cleaned up).

We see no error in the trial court's conclusions, implicit as they were, that Appellant's prior threats to Victim and her unborn child had "special relevance" under Rule 5-404(b) (*Faulkner's* first step) and were supported by sufficient evidence (*Faulkner's* second step). Appellant's prior threats tended to show that Appellant was indeed the one that posted the images—not because Appellant was a "bad person" generally or because he had a criminal propensity, but because the threats tended to show that Appellant wanted to harm Victim. Thus, the threats fell under Rule 5-404(b)'s "motive" exception. *See Wilder v. State*, 191 Md. App. 319, 344 (2010) (admitting testimony that prior threats were not error because they identified the shooter and showed motive for revenge). And Victim's testimony, if believed, sufficed to prove Appellant's prior threats.

The circuit court also did not abuse its discretion in determining that the probative

value of the threats outweighed their potential to unfairly prejudice Appellant (*Faulkner*'s third step). Here, the probative value of the prior threats was obvious. In the face of Appellant's denial that he was the one that posted Victim's intimate images on Escort Babylon, Appellant's prior threats of harm suggested that as between the two people that had the images (Victim and Appellant), it was Appellant, as someone who was motivated to harm Victim, that posted the images. Thus, while Appellant's prior threats may have been prejudicial to Appellant, they were not unfairly so, and it was not an abuse of discretion to admit them into evidence.[22]

Sufficiency of Evidence

Appellant next contends that the circuit court erred in denying his motion for judgment of acquittal because the evidence was insufficient to convict him. Specifically, Appellant argues that the Revenge Porn statute requires proof of "distribution," and it was the State's theory that Appellant used the internet to distribute the images. Thus, Appellant argues that the State was required to introduce direct digital forensic evidence to show that the images came from Appellant's electronic device. We disagree.

[22] Nor do we see any error in the trial court's failure to specifically detail the reasons behind its determination:

> In weighing the probative value of other crimes evidence against the prejudicial effects of such evidence, a trial court is not required to spell out in words every thought and step of logic in weighing its considerations. . . . We presume that trial judges know and properly apply the law.

Ridgeway v. State, 140 Md. App. 49, 69 (2001), *aff'd*, 369 Md. 165 (2002) (citing *Streater v. State*, 352 Md. 800, 821 (1999) and *Davis v. State*, 344 Md. 331, 339 (1996)).

In criminal cases, we review claims of evidentiary insufficiency by asking "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Smith*, 374 Md. 527, 533 (2003). In other words, we view the evidence in the light most favorable to the verdict, giving "due regard to the jury's findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *Id.* at 534 (cleaned up). We only "'determine whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.'" *Id.* (quoting *White v. State*, 363 Md. 150, 162 (2001)).

Given that the Revenge Porn statute does not require proof of the method by which a defendant "distributed" an intimate photograph, the lack of direct digital forensic evidence does not undermine Appellant's conviction. As to the acts prohibited, § 3-809(c) makes it a misdemeanor to "knowingly distribute" an intimate image of another person where that person reasonably expects that the image would remain private.[23] In turn, "distribute" is not limited to a particular method of distribution. Instead, "distribute" is defined broadly to mean "to give, sell, transfer, disseminate, publish, upload, circulate,

[23] The statute also requires proof of several mental states. Thus, the distributor must intend to "harm, harass, intimidate, threaten or coerce the [depicted] person." And the defendant must know that the depicted person does not consent to the distribution, or act with reckless disregard as to whether the depicted person consented to it. CL § 3-809(c)(1)-(2).

broadcast, make available, allow access to, or engage *in any other form of transmission, electronic or otherwise*." CL § 3-809(a)(2) (emphasis added).

Here, when viewed in a light most favorable to the verdict, the State presented sufficient evidence from which a reasonable trier of fact could conclude that it was Appellant that distributed Victim's intimate images. *First*, Victim testified that she saw her intimate images on the internet, images that she and Appellant possessed during their relationship. *Second*, after breaking up with Victim, Appellant threatened harm to Victim and to post the images on a pornographic website. *Third*, Victim testified that she did not post the images herself. *Fourth*, Appellant admitted that he had the images on his phone and in his iCloud account. From this evidence, a reasonable trier of fact could conclude that because Victim saw the images on the internet, they had been "distributed." Further, as Appellant was the only other person who had access to the images, together with Victim's personal contact information, and was motivated to harm Victim, a reasonable trier of fact could conclude that it was Appellant that posted the images.[24]

State's Rebuttal Closing Argument

Appellant's final issue is a two-prong argument focused on the State's rebuttal

[24] Because the evidence introduced by the State was sufficient, the cases on which Appellant relies, *Fone v. State*, 233 Md. App. 88 (2017) and *McIntyre v. State*, 168 Md. App. 504 (2006), provide him little help. In both, we affirmed the sufficiency of circumstantial evidence, including digital forensic evidence, to identify the distributor (*Fone*) or the possessor (*McIntyre*) of digital images. Yet even though we considered digital forensic evidence in those cases in determining that the evidence in each was sufficient, we did not hold that direct digital forensic evidence (or any other specific type of evidence) was *required* to sustain a conviction for distributing digital images.

during closing arguments: *First*, Appellant contends the State made an improper "Golden Rule" argument to the jury, essentially asking the jury to put itself in Victim's shoes. *Second*, Appellant contends the State argued facts not in evidence when the prosecutor invited the jury to consider that the images of Victim would remain on the internet "forever more" but never presented evidence of that.

In closing argument, attorneys are afforded "'great leeway' in presenting closing arguments to the jury," and "may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Spain v. State*, 386 Md. 145, 152 (2005) (quoting *Degren v. State*, 352 Md. 400, 429-30 (1999)). A trial court's decision on whether a prosecutor's argument strayed beyond the bounds is one we review for abuse of discretion. *Mitchell v. State*, 408 Md. 368, 380-81 (2009). Upon finding that the State made an improper comment during closing argument, we embark on an independent review of the record to determine whether we can "'declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.'" *Donaldson v. State*, 416 Md. 467, 496-97 (2010) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). Even if a prosecutor's remarks are improper, reversal is warranted only where the State's comments "actually misled or were likely to have misled the jury to the defendant's prejudice," or "trespass[ed] upon a defendant's Constitutional rights." *Wise v. State*, 132 Md. App. 127, 142 (2000).

To the extent that Appellant challenges the State's invitation to the jury that it imagine Googling their names without knowing what would come up, we agree that this

phrase was an improper "Golden Rule" argument.[25] A "Golden Rule" argument is one "in which a litigant asks the jury to place themselves in the shoes of the victim, or in which an attorney appeals to the jury's own interests[.]" *Beckwitt v. State*, 249 Md. App. 333, 385 (2022), *aff'd*, 477 Md. 398 (2022), *reconsideration denied* (Mar. 25, 2022), *cert. denied*, 143 S. Ct. 216 (2022), *reh'g denied*, 143 S. Ct. 475 (2022) (cleaned up). By suggesting that the jurors imagine having to Google their own names and worry about what images may appear, the State appealed to the jurors' fears for themselves and thereby urged them to abandon their neutral position.

Nevertheless, and although we do not condone comments of the kind made by the State, we see no basis for reversal after having reviewed the record. As a one-time event that spanned only a single sentence, the State's comment did not permeate the entirety of the closing argument. Indeed, the State attempted to remedy its own misstep even before Appellant objected, refocusing the jurors on what *Victim* would experience, and on what the jurors "saw on the stand from both [Victim] and the Defendant[.]" The State also did not repeat its mistake, instead asking the jurors to "use [their] common sense and look at those images" that only two people had access to: "one is [Victim], the other is the

[25] We disagree with the State that Appellant's "Golden Rule" argument is unpreserved. "Ordinarily, an appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). To be sure, Appellant did not object until after the State said, "[i]magine 5 years from now when she's in her job market." Nonetheless, because we read this phrase to be part of the prior "[i]maging [sic] having to Google your name and never know what's going to come[,]" we deem Appellant's objection to go to (and preserve objection to) both phrases of the comment.

Defendant."[26] Finally, in that Appellant had access to the images and Victim's contact information and was motivated to harm her, the evidence against him was strong. Under these circumstances, we are persuaded beyond a reasonable doubt that the State's comment did not mislead or influence the jury to the prejudice of Appellant.

Appellant's second challenge to the State's rebuttal closing – that the State argued facts not in evidence – also fails. Here, the circumstantial evidence, including the State's authenticated exhibits, as well as the evidence presented through Victim's testimony regarding the text message solicitations, established that Victim's intimate images had been posted on the internet and viewed by many people that Victim did not know. From this, it was not unreasonable for the State to suggest that the intimate photos and video would be on the internet "forever more."

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

[26] Because of the State's quick correction, its effort to refocus the jury, and its care not to repeat its mistake, we do not hold that a curative instruction from the circuit court was required to avoid a likelihood that the jury here would be misled by the improper remark. To be sure, the lack of a curative instruction may generally "suggest[]" that improper statements were prejudicial. *See Donaldson*, 416 Md. at 499. But even so, our analysis is broader and looks to all of "the measures taken to cure any potential prejudice[,]" as well as other considerations including the nature and extent of the improper remarks and the weight of the evidence. *Id.* at 497-500.

The correction notice(s) for this opinion(s) can be found here:

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