

Circuit Court for Montgomery County  
Case No. 134907C

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 368

September Term, 2019

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DARRYL A. GUPTA

v.

STATE OF MARYLAND,

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Meredith,  
Nazarian,  
Wells,

JJ.

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Opinion by Nazarian, J.

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Filed: June 5, 2020

\* 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.

Darryl Gupta was convicted in the Circuit Court of Montgomery County of one count, and acquitted of another count, of second-degree assault of his ex-girlfriend, Kathy Clark Jackson. His conviction stemmed from two assaults that took place at Ms. Clark Jackson's home on August 11, 2018, one in the morning and one in the afternoon. Police were called to the house after both incidents. Mr. Gupta was arrested on an unrelated civil warrant after the incident in the morning and released, after which he went back to Ms. Clark Jackson's home.

On appeal, Mr. Gupta argues that the circuit court erred in denying his motion to sever the two counts of assault, that the court abused its discretion in admitting evidence that was unfairly prejudicial, and that the court abused its discretion when it instructed the jury on the intent to frighten modality of second-degree assault but not defense of property. We find no error and affirm.

## **I. BACKGROUND**

Mr. Gupta was charged with assaulting Ms. Clark Jackson on two occasions on August 11, 2018, once in the morning and once in the evening. In the morning of August 11, Ms. Clark Jackson and Mr. Gupta were arguing in her home. She called the police after Mr. Gupta started gathering his things to leave. On the 911 call, Ms. Clark Jackson told the dispatcher that Mr. Gupta had threatened to kill her. She later recanted that statement. When police arrived at the home, Ms. Clark Jackson had visible injuries, but she told police she didn't want to press charges. Then an officer ran a routine warrant check on Mr. Gupta and found an outstanding civil contempt warrant, so the police arrested

him. He was processed and released from the Central Processing Unit that afternoon.

Mr. Gupta returned to Ms. Clark Jackson's home after he was released. Ms. Clark Jackson was sleeping and awoke to Mr. Gupta standing over her in bed and strangling her with two hands around her neck. Ms. Clark Jackson and Mr. Gupta had another argument that escalated, and Mr. Gupta threw a fan at Ms. Clark Jackson and attempted to strangle her again. Over the course of the argument, Ms. Clark Jackson and Mr. Gupta broke multiple doors. Mr. Gupta took the ashes of Ms. Clark Jackson's late mother and dumped them out on the floor. He then took Ms. Clark Jackson's keys, a laptop, and personal documents and attempted to leave. Ms. Clark Jackson tried to stop Mr. Gupta from leaving and used a piece of wood to smash the back window of his car. Ms. Clark Jackson's teenage daughter called 911. Police body camera footage shows Ms. Clark had visible injuries to her nose and face, and red marks on her neck.

On March 11, 2019, a week before trial, Mr. Gupta's trial counsel filed a motion requesting separate trials for the two offenses. He had not previously filed a motion to sever. The trial judge considered the severance issue on the morning of trial on March 19, 2019 and denied the motion, finding that it was filed too late and that severance would have been prejudicial to the prosecution, which was not on notice about the motion and did not have an opportunity to respond. With all parties present for trial, the case proceeded and a jury was selected.

On March 19, 2019, a jury returned a guilty verdict, and the court sentenced Mr. Gupta to eight years in prison with all but thirty months suspended. Mr. Gupta appeals.

We include additional facts below as appropriate.

## II. DISCUSSION

Mr. Gupta raises four issues on appeal that we rephrase.<sup>1</sup> *First*, he argues that the circuit court erred in denying his motion to sever the assault count for the morning incident from the assault count for the afternoon incident. *Second*, he argues that the admission of evidence about Ms. Clark Jackson’s mother’s ashes was unfairly prejudicial. *Third*, he argues the circuit court abused its discretion in instructing the jury on the intent to frighten modality of second-degree assault. *Fourth*, he argues the circuit court abused its discretion in failing to instruct the jury on defense of property.

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<sup>1</sup> Mr. Gupta phrased the Questions Presented in his brief as follows:

1. Did the circuit court err in denying appellant’s motion to sever the counts?
2. Did the circuit court abuse its discretion in admitting unfairly prejudicial evidence?
3. Did the circuit court abuse its discretion in instructing the jury on the intent to frighten modality of second degree assault?
4. Did the circuit court err or abuse its discretion in failing to instruct the jury on defense of property?

The State rephrased the Questions Presented in its brief as follows:

1. If not waived, did the trial court properly deny Gupta’s motion to sever the offenses?
2. Did the trial court properly exercise its discretion in admitting certain evidence?
3. If preserved, did the trial court properly exercise its discretion in instructing the jury on the “intent to frighten” modality of second degree assault?
4. If preserved, did the trial court properly deny Gupta’s request for a defense of property jury instruction?

**A. Mr. Gupta’s Motion To Sever Was Untimely.**

*First*, Mr. Gupta argues that the offenses should have been severed for separate trials because evidence from the two alleged assaults was not mutually admissible. He admits that evidence of the first assault was admissible to show motive and intent to commit the second assault, but disputes that evidence from the second assault was admissible to prove the first. And he admits that the motion to sever the offenses was filed late, but argues that the trial court should have exercised its discretion to sever the offenses on its own. We disagree.

Under Maryland Rule 4-252(a)(5), a request for joint or separate trial of offenses shall be raised by motion and is waived if no such motion is filed. And importantly, the motion must be filed within thirty days of the defendant’s first appearance before the court. Md. Rule 4-252(b).<sup>2</sup> Both parties agree that Mr. Gupta’s counsel entered his appearance on December 28, 2018, but did not file his motion to sever the counts until March 11, 2019, more than forty days after his initial appearance and a week before trial. Under Rule 4-252(a)(5), then, Mr. Gupta waived his right to request a severance.

And although the trial court had the authority to sever the counts to avoid prejudice, it did not err in declining to do so here. A review of the merits confirms this conclusion. If either party “will be prejudiced by the joinder for trial of counts, [ ] the court may, on its own initiative or on motion of any party, order separate trials of counts . . . .” Md. Rule 4-

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<sup>2</sup> There is one exception to the thirty-day rule: “when discovery discloses the basis for a motion, the motion [to sever] may be filed within five days after the discovery is furnished.” Md. Rule 4-252(b). That exception does not apply in this case.

253(c). When determining whether counts can be fairly heard together, a trial court undertakes a three-part analysis. *State v. Hines*, 450 Md. 352, 369 (2016). *First*, the court examines whether “evidence concerning the offenses or defendants is mutually admissible.” *Conyers v. State*, 345 Md. 525, 553 (1997). *Second*, the court determines whether “the interest in judicial economy outweigh[s] any other arguments favoring severance[.]” *Id.* *Third*, if the answer to both questions is yes, joinder of offenses is appropriate. *Id.* This case fails at the first of these steps.

Assessing mutual admissibility itself involves a separate three-part analysis. The court must determine *first* whether the evidence overcomes the presumption that evidence of prior bad acts is inadmissible. *Id.* at 550. To come in, the evidence must be “substantially relevant to some contested issue in the case and [] not offered to prove the defendant’s guilt based on propensity to commit crime or [the defendant’s] character as a criminal.” *State v. Faulkner*, 314 Md. 630, 634 (1989). *Second*, the court must determine if there is “clear and convincing evidence” that the accused was involved in the prior crime. *Conyers*, 345 Md. at 550. And *third*, the court weighs whether the probative value of the evidence outweighs the prejudice against the accused. *Id.*

The State argued before the trial court that evidence from the two assaults was mutually admissible to show Mr. Gupta’s motive and intent in returning to Ms. Clark Jackson’s home later that day. Trying the morning and afternoon assaults in a single proceeding also showed the escalation of domestic violence between the two (and there is no dispute that Mr. Gupta was involved in both incidents). Both incidents were closely

connected in time (within a few hours of each other), occurred in the same place, and involved the same people. Because the incidents, although separated by time and Mr. Gupta's initial detention, were part of an ongoing dispute between this couple, we agree with the trial court that evidence from the two assaults was mutually admissible.

That ends the inquiry. With mutually admissible evidence from both incidents lying at the heart of both cases, the judicial economy gained by trying the counts together is obvious, and had we reached the merits, we would see no abuse of discretion in the court's decision not to grant Mr. Gupta's morning-of-trial motion to sever.

**B. The Trial Court Did Not Abuse Its Discretion In Admitting Testimony About Ms. Clark Jackson's Mother's Ashes.**

*Second*, Mr. Gupta objected at trial when the State sought to play a portion of the police body camera footage in which Ms. Clark Jackson's daughter, A.N., is heard talking about Mr. Gupta knocking over Ms. Clark Jackson's mother's ashes. He contends that this testimony was unfairly prejudicial. The trial judge disagreed and found that the evidence was relevant because it spoke to Mr. Gupta's state of mind. At trial, A.N. testified that nothing happened to her grandmother's ashes before the police arrived after the afternoon assault.

The trial court has discretion to determine the admissibility of evidence. *Brooks v. State*, 439 Md. 698, 708 (2014). We uphold a trial court's determination of relevance absent

a clear abuse of discretion.<sup>3</sup> *Id.* Similarly, the “decision to admit relevant evidence over an objection that the evidence is unfairly prejudicial will not be reversed absent an abuse of discretion.”<sup>4</sup> *Williams v. State*, 457 Md. 551, 569 (2018) (quoting *Merzbacher v. State*, 346 Md. 391, 405 (1997)). A court abuses its discretion “where no reasonable person would take the view adopted by the trial court or when the court acts without reference to any guiding rules or principles.” *Jackson v. State*, 230 Md. App. 450, 461 (2016) (cleaned up).

Although A.N.’s testimony leaves unclear what happened to the ashes and Mr. Gupta’s role in whatever did happen, it was not unreasonable for the trial court to find that portion of the police body camera footage relevant to Mr. Gupta’s state of mind during the afternoon incident. This was not separate evidence about the ashes, but an incidental statement in the course of a longer recording taken by a police camera from that incident. The marginal potential prejudice also is far from obvious—even if we were to assume that the jury would see malice in his actions, the assaults arose from an ongoing domestic dispute that, at least indirectly, caused Mr. Gupta to be arrested earlier in the day. On this record, we see no abuse of the trial court’s discretion in admitting that portion of the recording into evidence.

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<sup>3</sup> “Relevant evidence” means “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Md. Rule 5-401.

<sup>4</sup> “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Md. Rule 5-403.



**C. The Trial Court Did Not Abuse Its Discretion When It Instructed The Jury On The “Intent To Frighten” Modality Of Second Degree Assault.**

*Third*, Mr. Gupta claims that the trial court should not have instructed the jury on the “intent to frighten” modality of second-degree assault because the evidence in this case did not generate that instruction. The State argues that the jury instructions were given properly because “[f]rom the evidence presented—the 911 call, the video from the police body camera, and the testimony of the police officers who encountered Ms. [Clark] Jackson that morning of August 11, one can reasonably infer that [Mr.] Gupta had the apparent ability, at the time, to physically harm Ms. [Clark] Jackson, that she reasonably feared for her safety, and that Gupta’s actions were not justified.” We agree.

At the threshold, the State argues that Mr. Gupta waived this argument because his counsel “failed to object promptly to the court’s instructions, thereby denying the court the opportunity to correct its instructions before the court released the jury to deliberate.” Under Rule 4-325(e), “[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury[]” and “[u]pon request of any party, the court shall receive objections out of the hearing of the jury.” Failure to object to a jury instruction at trial waives any defects in that instruction and precludes further review. *Grandison v. State*, 425 Md. 34, 69 (2012); *see State v. Hutchinson*, 287 Md. 198, 202 (1980) (“[A]ppellate review of jury instructions [will not] ordinarily be permitted under our rules unless the complaining party has objected seasonably so as to allow the trial judge an opportunity to correct the deficiency before the

jury retires to deliberate.”).

Mr. Gupta’s counsel, although imperfectly, preserved this issue for our review. He objected to including the “intent to frighten” modality in the jury instructions and the following exchange ensued between defense counsel and the trial judge prior to the instructions being given:

[DEFENSE COUNSEL]: If the Court will –

THE COURT: – I’m going to –

[DEFENSE COUNSEL]: I’m sorry, note my objection to that instruction?

THE COURT: Yes, it’s [] noted here, but you’ll have to note it again after the instructions are given if you want to preserve that for the appeal. And that’s State, you want to give them an argument in Annapolis then you can give it to them [] . . . .

And he renewed his objection right after jury instructions were given:

[DEFENSE COUNSEL]: On the jury instructions, I just wish to renew my, because I wasn’t given an opportunity when you finished them. I didn’t know if you expected me to do it now but it didn’t seem then that it was the proper time, so

THE COURT: You can always ask to approach, so. But –

[DEFENSE COUNSEL]: Okay. Well, I’m just renewing my objection to the failure to give the defense of property and objecting to giving the intent to frighten on the second degree assault. Okay?

THE COURT: All right. Anything else?

[DEFENSE COUNSEL]: No, Your Honor.

[THE STATE]: No, thank you.

THE COURT: Okay. All right.

The State argues that Mr. Gupta waived this argument because his counsel objected after the jury retired to deliberate. But the Rule doesn’t require an objection before the jury

retires to deliberate; it only requires a prompt objection. And as defense counsel stated, he wasn't given an opportunity to object immediately after the court finished reading its instructions, but objected at the first available opportunity, satisfying the requirements of the Rule.

Moving on to the merits, we find no abuse in the trial court's discretion in its decision to give this instruction. *Malaska v. State*, 216 Md. App. 492, 517 (2014). In applying the abuse of discretion standard, we “must determine whether the requested instruction was a correct statement of the law; whether it was applicable under the facts of the case [*i.e.*, whether the evidence was sufficient to generate the desired instruction]; and whether it was fairly covered in the instructions actually given.” *Abbott v. State*, 190 Md. App. 595, 642 (2010) (*quoting Janey v. State*, 166 Md. App. 645, 654 (2006)). “[T]he standard of review for jury instructions is that so long as the law is fairly covered by the jury instructions, reviewing courts should not disturb them.” *Id.*

Mr. Gupta claims that there can be either a battery or an intent to frighten instruction, but not both. He's wrong. Maryland Code (2002, 2012 Repl. Vol.), § 3-201(b) of the Criminal Law Article defines assault as “the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings.” The three modalities of assault each constitute second-degree assault, and a jury does not need to be unanimous on the modality of assault the defendant committed. *Watts v. State*, 457 Md. 419, 429 (2018).

Here, the jury was asked to consider evidence of two assaults that occurred on the same day. The State asked for jury instructions on the battery and intent to frighten

modalities of assault because the jury heard Ms. Clark Jackson’s 911 call, in which she said “[Mr. Gupta] said he was going to kill me.” In addition, she testified that in the afternoon assault, Mr. Gupta was standing over her, looming when she was sleeping. At the very least, the jury was presented with evidence of physical contact in both the morning and afternoon incidents, and all it had to find under *Watts* was that a modality of assault was committed. *Id.* The trial judge did not err in including the intent to frighten modality of assault in the jury instructions.

**D. The Trial Court Did Not Abuse Its Discretion When It Instructed The Jury On The Defense Of Property.**

*Finally*, Mr. Gupta asked the trial court to include a defense of property jury instruction and that request was denied on the ground that there wasn’t sufficient evidence to support it. In response, the State argues that the property at issue belonged to both Mr. Gupta and Ms. Clark Jackson, and therefore the defense of property jury instruction was not warranted. We agree. The State also argues that this issue was not preserved, but as stated above, defense counsel properly renewed his objection to the jury instructions after they were read to the jury.

The trial court did not abuse its discretion in refusing Mr. Gupta’s request for a defense of property jury instruction. As discussed in the prior section, the trial court’s decision is reviewed for abuse of discretion. *Malaska*, 216 Md. App. at 517. Mr. Gupta argues that there was sufficient evidence to support the jury question, because, he said, he was trying during the afternoon incident to leave with a laptop he claimed belonged to him, and Ms. Clark Jackson wouldn’t let him leave. But there was no physical contact between

Mr. Gupta and Ms. Clark Jackson relating to the laptop. He was not trying to take the laptop out of Ms. Clark Jackson's hand or physically keeping Ms. Clark Jackson from grabbing the laptop. In addition, the evidence at trial suggested the laptop belonged to both of them. Even if Ms. Clark Jackson had engaged in physical contact with Mr. Gupta to get the laptop back, she would not have been interfering with Mr. Gupta's property. The court did not abuse its discretion in declining to give a defense of property jury instruction.

**JUDGMENT OF THE CIRCUIT COURT  
FOR MONTGOMERY COUNTY  
AFFIRMED. APPELLANT TO PAY  
COSTS.**