Circuit Court for Frederick County
Case No. C-10-CR-21-000364

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 1064

September Term, 2022

JESSE COOK

v.

STATE OF MARYLAND

Beachley,
Shaw,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: September 7, 2023

A jury in the Circuit Court for Frederick County convicted the appellant, Jesse Cook, of first-degree assault and second-degree assault. For the first-degree assault, the court sentenced Cook to 25 years in prison, with all but 20 years suspended, to be followed by three years of probation. The court merged the second-degree assault conviction into the first-degree assault conviction.

Cook presents the following questions for our review:

1. Was Mr. Cook denied his right to be tried within 180 days pursuant to Section 6-103 of the Criminal Procedure Article and Maryland Rule 4-271?

2. Did the trial judge abuse discretion by accepting Pamela Holtzinger as an expert witness?

3. Did the court below err by allowing the prosecutor to elicit hearsay during the testimony of Deputies Testerman and Leif?

4. Did the trial judge abuse discretion by allowing improper closing argument by the prosecutor?

5. May the trial judge have based [a]ppellant's sentence on improper considerations?

6. Is the evidence legally insufficient to sustain Mr. Cook's convictions?

For the reasons set forth below, we affirm the judgment of the circuit court.

BACKGROUND

On the evening of June 16, 2021, Cook got into an argument with his "partner," Gladys Lemus, at his home in Frederick, Maryland, where they lived together. Lemus suspected that Cook was lying about "going out when [Lemus] was going to work[,]" and she believed that "[h]e was going out with his daughter's cousin." While Cook was in the

shower, Lemus checked Cook's phone. Lemus testified about what occurred next:

> He saw or found out that I was going through his phone and then he said something. He called me a liar and I said, no, you're the liar because I saw that you had plans to go out with your daughter's cousin and you told me you didn't.

Lemus told Cook that she was going to "leave" him and go back to her family in Fairfax, Virginia. Then, she demanded that he give her "money back," referring to $17,000 she had given Cook in March 2020 to invest for her.

According to Lemus, she had asked for her money back "many times" but "he did not want to give it back." Because Cook had not repaid her, Lemus took $5,000 she found stored "behind some books in the[ir] library." During their June 16, 2021 argument, Lemus told Cook: "I gave you 17, but I took 5,000 from the savings. So, now you only have to give me 12,000[.]" At that point, Cook "kept saying give me my [] money back and [Lemus] would say no, you owe me the [$]12[,000]."

Lemus testified that the following then occurred:

> [LEMUS]: Well, we were talking and then he said give me the money back and when I said no, he got very angry and then got on top of me and took me by the neck and I couldn't breathe anything [sic]. His face was right in front of mine saying give me the money back and I couldn't breathe. My throat, he was asphyxiating me. My throat was completely closed.
>
> [THE STATE]: When you say he took you by the neck, how did that happen?
>
> [LEMUS]: Well, we were laying in bed, I told him I'm not going to give him the money until he paid me. He got very angry, got on top of me, took me by the neck and then,

> and I don't know how much time passed, but I just thought this [is] it.

Lemus asserted that while Cook's "hands were around [her] neck[,]" she was unable to speak, saw "black lights[,]" and "thought [she] was going to die[.]"

In her efforts to escape, Lemus testified that she misled Cook by telling him that the money was in the basement. When Cook went to the basement, Lemus ran out of the house and locked herself in her car. Cook approached the car, told Lemus to open the door, hit the car window, and pulled the car door handle.[1]

Lemus called 911 from inside her car. Frederick County Sheriff's Deputies arrived, investigated, and placed Cook under arrest. Lemus was taken to a hospital, where she was treated for her injuries.

We shall include additional facts as relevant to our discussion.

DISCUSSION

I.

Cook's first claim of error concerns the court's denial of his motion to dismiss based on an alleged *Hicks* violation. The *Hicks* rule derives from three sources: Maryland Code (2001, 2018 Repl. Vol.), § 6-103 of the Criminal Procedure Article ("CRIM. PROC."); Maryland Rule 4-271(a); and *State v. Hicks*, 285 Md. 310 (1979). CRIM. PROC. § 6-103 provides:

[1] The State introduced into evidence a picture that showed that Lemus's car door handle had been partially detached from the door frame. Lemus testified that the car door handle had been functional before Cook tried to open the door on the evening of the assault.

(a)(1) The date for trial of a criminal matter in the circuit court shall be set within 30 days after the earlier of:

(i) the appearance of counsel; or

(ii) the first appearance of the defendant before the circuit court, as provided in the Maryland Rules.

(2) The trial date may not be later than 180 days after the earlier of those events.

(b)(1) For good cause shown, the county administrative judge or a designee of the judge may grant a change of the trial date in a circuit court:

(i) on motion of a party; or

(ii) on the initiative of the circuit court.

(2) If a circuit court trial date is changed under paragraph (1) of this subsection, any subsequent changes of the trial date may only be made by the county administrative judge or that judge's designee for good cause shown.

(c) The [Supreme Court of Maryland] may adopt additional rules to carry out this section.

Rule 4-271 mirrors CRIM. PROC. § 6-103 and provides in relevant part:

(a) Trial Date in Circuit Court.

(1) The date for trial in the circuit court shall be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213, and shall be not later than 180 days after the earlier of those events. . . . On motion of a party, or on the court's initiative, and for good cause shown, the county administrative judge or that judge's designee may grant a change of a circuit court trial date. If a circuit court trial date is changed, any subsequent changes of the trial date may be made only by the county administrative judge or that judge's designee for good cause shown.

Together, CRIM. PROC. § 6-103 and Rule 4-271 are known as the "*Hicks* rule."

Hicks held that noncompliance with the 180-day[2] deadline without a good cause finding requires dismissal of the criminal charges. *Hicks*, 285 Md. at 318.

Turning to the facts of this case, the 180-day period began on June 28, 2021, when defense counsel entered his appearance in circuit court. The 180th day fell on Saturday, December 25, 2021.[3] The *Hicks* date was thus the next business day: Monday, December 27, 2021. *See* Md. Rule 1-203(a)(1).

The first trial date was scheduled for December 1, 2021. On November 30, 2021, however, the State became aware that Lemus had an audio recording of the assault. To avoid violating the Maryland Wiretap Act (MD. CODE ANN. (1974, 2020 Repl. Vol.), § 10-401 of the Courts and Judicial Proceedings Article *et seq*.), Cook's defense counsel asked for a court order to allow defense counsel and Cook to listen to the recording. Because of technical issues related to the recording, the court initially postponed the trial date to a date that would comply with *Hicks*. The court asked "counsel to go down to the Assignment Office and find two days that we can try this case between now and then." The trial was then scheduled for December 22 and 23, 2021.

At a hearing on December 6, 2021, however, the court found good cause to postpone

[2] When *Hicks* was decided, the deadline was 120 days. "It was changed to 180 days in 1979." *Goins v. State*, 293 Md. 97, 100 n.3 (1982).

[3] In Cook's brief filed in this Court, Cook's appellate counsel miscalculated the 180th day from Cook's trial counsel's entry of appearance. Cook's appellate counsel states that Day 180 fell on Sunday, December 26, 2021. Day 180, however, fell on Saturday, December 25, 2021. Cook's miscalculation is immaterial because, even under Cook's calculation, the *Hicks* date was Monday, December 27, 2021, the next business day. *See* Md. Rule 1-203(a)(1).

the trial date past the *Hicks* date. Cook's counsel stated that Cook was not waiving *Hicks*. Because the court would be closed on December 24, Cook's counsel acknowledged that if the trial did not "start right at 9:00 on [December 23,] that could present a problem." Cook's counsel further stated, "that historically the Governor has closed dates around Christmas" and was uncertain if that could affect the December 23 trial date. The State confirmed that the parties "agree that this [trial] needs a full two days."

The court expressed its concerns about the December 22-23 trial date:

> [Q]uite frankly the [c]ourt's concern is not so much about [c]ourt availability but is getting a jury and having it set right before Christmas. And running the risk if the case doesn't end on the second day having to carry a jury over through the Christmas holidays over to that first day after Christmas which would be the 27th.

The court proceeded to find good cause for the postponement, stating:

> Because of that, noting that the defendant is incarcerated and has not waived *Hicks*, I still do find good cause to grant a postponement and to try to get this set in either at the end of January or the beginning of February.

On December 27, 2021, the Supreme Court of Maryland suspended jury trials, effective December 29, 2021, because of the Omicron variant of COVID-19. Interim Administrative Order of December 27, 2021 Restricting Statewide Judiciary Operations in Light of the Omicron Variant of the COVID-19 Emergency, at 2 § (a) (Dec. 27, 2021), available at https://mdcourts.gov/sites/default/files/admin-orders-archive/archivedin2022/20211227omicroninterimemergencyoperationsorder.pdf. Jury trials were not authorized to resume until March 7, 2022. Extension of Interim Administrative Order of December 27, 2021 Restricting Statewide Judiciary Operations in Light of the Omicron Variant of the COVID-19 Emergency, at 3 § (d) (Jan. 14, 2022), available at

https://mdcourts.gov/sites/default/files/admin-orders/20220114extensionofomicroninteri memergencyorder.pdf.

On March 18, 2022, Cook moved to dismiss the case based on an alleged *Hicks* violation. The court denied that motion on March 30, 2022. Cook's trial began on June 21, 2022. On the second day of trial, Cook's attorney unsuccessfully moved to dismiss the case again based on the alleged *Hicks* violation.

In *Timberlake v. State*, 257 Md. App. 129, 142-43 (2023), this Court described the standard of review for a good cause determination as follows:

> "An administrative judge's determination that there is good cause for a continuance [of a trial past the *Hicks* date] is 'a discretionary matter, rarely subject to reversal upon review.'" *Tunnell v. State*, 466 Md. 565, 589, 223 A.3d 122 (2020) (quoting *State v. Frazier*, 298 Md. 422, 451, 470 A.2d 1269 (1984)). "The defendant must show an abuse of discretion or a lack of good cause as a matter of law." *Id.* (citing *State v. Fisher*, 353 Md. 297, 307, 726 A.2d 231 (1999)). "The critical determination for appellate review is the postponement that extends the trial date beyond the *Hicks* date, whether or not the administrative judge was precisely aware of the relation of postponement to the *Hicks* date at the time that judge granted the continuance." *Id.* (citing *Fisher*, 353 Md. at 305-6, 726 A.2d 231; *Goins v. State*, 293 Md. 97, 111-12, 442 A.2d 550 (1982)).

(Alteration in original).

Here, the court appropriately recognized the impracticality of starting a two-day jury trial on Wednesday, December 22, two days before the court's closure on Friday, December 24 (Christmas Eve).[4] Indeed, the parties recognized the possibility that courts could be closed early on December 23 for the Christmas holiday.

[4] We note that although both the State and defense counsel stated that this trial would only require two days, closing arguments were made on the third day of trial.

The court was entitled to consider these potential issues with juror availability surrounding the holiday weekend. *See Morris v. State*, 153 Md. App. 480, 500 (2003) (When exercising discretion, courts are "entitled to consider the administrative or logistical interests of the local criminal justice system itself."). Moreover, the court's concerns about juror availability were pragmatic and sensible, given the implied risk of a mistrial if jurors did not return after the holiday weekend.[5] We hold that the court did not abuse its discretion by finding good cause to postpone the trial date beyond the *Hicks* date.

In a two-sentence argument in his brief, Cook avers "[a]s a separate matter, even if there was good cause for postponing the start of trial, there was an impermissible additional delay of several months in commencing trial after the good cause finding. Thus, this case stands in contrast to *Thompson v. State*, 229 Md. App. 385, 399 (2016), in which this Court ruled that a five week delay to await the results of a competency evaluation was reasonable."

"The issue of inordinate delay is . . . reviewed under an abuse of discretion standard[,]" and "[t]he defendant has the burden of demonstrating that a delay was excessive, in view of all the circumstances of the case." *Tunnell*, 466 Md. at 589 (first

[5] Cook argues that jury selection could have commenced on December 22, 2021, and the trial could have resumed on March 7, 2022, when the Supreme Court of Maryland authorized jury trials to resume. Cook's proposed solution would have required the jury to effectively be in recess for over three months before deliberating and returning a verdict. That proposed solution lacks practicality. *Cf. Tunnell*, 466 Md. at 588 ("[T]he speedy trial requirement of the Hicks rule . . . is a mandate that must be carried out in a common sense way.").

citing *State v. Brown*, 355 Md. 89, 98 (1999); then citing *Rosenbach v. State*, 314 Md. 473, 479 (1989)). The delay is measured from the scheduled trial date to the actual trial date. *Id*. at 589, *see also Brown*, 355 Md. at 109 (holding that "it is the length of the delay between the postponed trial date and the rescheduled date that is significant" "when deciding whether to dismiss a case for inordinate delay").

To be sure, Cook's trial date of June 21, 2022, was 202 days after the original trial date (December 1, 2021). However, the Supreme Court of Maryland suspended jury trials from December 29, 2021, through March 6, 2022, in response to the Omicron variant of COVID-19. Thus, the reason for the delay from December 29 through March 6 is not attributable to either party. Moreover, at a hearing on January 26, 2022, the court requested the courtroom clerk to "please have this matter sent to the Assignment Office to reach out to counsel to set in a three-day jury trial *as soon as possible."* (Emphasis added.) Trial was then scheduled to begin on June 21, 2022, which was 106 days after jury trials resumed on March 7. Considering "all the circumstances of the case[,]" Cook failed to meet his "burden of demonstrating that [the] delay was excessive[.]" *Tunnell*, 466 Md. at 589 (citing *Rosenbach*, 314 Md. at 479).

II.

Next, Cook contends that the trial court abused its discretion by accepting Dr. Pamela Holtzinger as an expert witness.[6] Dr. Holtzinger, who had a doctorate in nursing

[6] The State contends that this issue is unpreserved "because his counsel never argued that Dr. Holtzinger was required to specify how many times she had qualified as an expert." Although it is a close call, we deem the issue preserved and shall address it.

practice and was a registered nurse and forensic nurse examiner, testified that she had been qualified "several" times as an expert. She testified that she had been qualified as an expert in the area of forensic nursing and strangulation identification. According to Cook, the court abused its discretion because Dr. Holtzinger was unable to specify the number of times that she had been qualified as an expert witness.

Md. Rule 5-702 governs the admissibility of expert testimony:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine
>
> (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education,
>
> (2) the appropriateness of the expert testimony on the particular subject, and
>
> (3) whether a sufficient factual basis exists to support the expert testimony.

"We review the trial court's admission of expert testimony for abuse of discretion." *Covel v. State*, ___ Md. App. ___, ___, No. 1094, Sept. Term, 2021, slip op. at 16-17 (filed July 7, 2023) (citing *Morton v. State*, 200 Md. 529 (2011)). "The trial court is due significant deference to admit experts, and we will only reverse 'if founded on an error of law or some serious mistake, or if the trial court has clearly abused its discretion.'" *Id*. at ___, slip op. at 17 (quoting *Gutierrez v. State*, 423 Md. 476, 486 (2011)). "To qualify as an expert, one need only possess such skill, knowledge, or experience in that field or calling as to make it appear that [the] opinion or inference will probably aid the trier [of fact] in his search for the truth." *Donati v. State*, 215 Md. App. 686, 742 (2014) (alterations in original) (quoting

Morton, 200 Md. App. at 545).

Cook takes issue with the following portion of Dr. Holtzinger's testimony, which occurred before the State moved to admit Dr. Holtzinger as an expert in forensic nursing and nonfatal strangulation:

> [THE STATE]: Have you testified as an expert witness in the area of forensic nursing before?
>
> [DR. HOLTZINGER]: I have.
>
> [THE STATE]: Approximately how many times?
>
> [DR. HOLTZINGER]: Specific to -- I don't know specific to forensic nursing. I've been qualified in several different topics, so I don't know exactly how many. Several.
>
> [THE STATE]: Okay.
>
> [DR. HOLTZINGER]: That's about as close as I can get. I'm sorry. I don't mean to be argumentative or difficult.

Cook argues as follows: "Dr. Holtzinger's lack of specificity regarding the number of times she had been found qualified as an expert witness prior to this trial leaves uncertainty about the validity of her opinions." We disagree.

Dr. Holtzinger's 37-year medical career concentrated on "emergency and trauma nursing." She had "[t]housands of hours" of training on "every single topic related to forensic nursing." She testified that she had attended a four-week advanced training on the topic of strangulation. Dr. Holtzinger's curriculum vitae, admitted into evidence by the State without objection, notes that she attended "Strangulation Assessment Training" in 2014 and "Advanced Strangulation Prevention Training" in 2015. In her experience in the

emergency room setting and as a forensic nurse, Dr. Holtzinger treated patients who reported a strangulation "hundreds of times." She had "a certificate to teach nursing[,]" and she had "been a clinical supervisor and educator for many years in emergency nursing."

Although Dr. Holtzinger could not recall the exact number of times that she had testified as an expert in the relevant field, the trial court did not abuse its discretion in accepting her as an expert in this case. In short, we see no merit to Cook's argument that "Dr. Holtzinger's lack of specificity regarding the number of times she had been found qualified as an expert witness . . . leaves uncertainty about the validity of her opinions."

III.

Cook argues that the court erred by permitting the State to elicit inadmissible hearsay—as excited utterances—during the testimony of Deputies Testerman and Leif. Over defense counsel's objection, the trial court allowed Deputy Testerman to testify that Lemus "stated to me that Jesse had choked her." Similarly, over defense counsel's objection, the court allowed Deputy Leif to testify that Lemus "said that she was unable to speak for most of the incident because of how tightly she was being constricted around her neck."

Md. Rule 5-801(c) defines hearsay as "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." "Maryland Rule 5-802 prohibits the admission of hearsay, unless it is otherwise admissible under a constitutional provision, statute, or another evidentiary rule." *Wallace-Bey v. State*, 234 Md. App. 501, 536 (2017). "Whether evidence is hearsay

is an issue of law reviewed *de novo*." *Bernadyn v. State*, 390 Md. 1, 8 (2005). There are "aspects of a hearsay ruling," however, that are not "purely legal," such as a trial court's factual findings relative to the foundation that must be laid under the excited utterance exception. *Gordon v. State*, 431 Md. 527, 536 (2013). We review those findings for clear error. *Id*. at 538.

Md. Rule 5-803(b)(2) contains the excited utterance exception: "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" is not "excluded by the hearsay rule[.]" "The rationale behind the excited utterance exception is that the startling event suspends the declarant's process of reflective thought, thus reducing the likelihood of fabrication." *State v. Harrell*, 348 Md. 69, 77 (1997).

A statement is admissible as an excited utterance if "made at such a time and under such circumstances that the exciting influence of the occurrence clearly produced a spontaneous and instinctive reaction on the part of the declarant . . . [who is] still emotionally engulfed by the situation." *Id*. (alterations in original) (quoting *Harmony v. State*, 88 Md. App. 306, 319 (1991)). A trial court assessing whether this exception has been satisfied must examine the totality of the circumstances, including "the time between the startling event and the declarant's statement" and whether the "statement was made in response to an inquiry[.]" *Id*. A statement made closer in time to the startling event and spontaneously is more likely to be an excited utterance, but neither factor is dispositive. *Id*.

a. Deputy Testerman's testimony

When Deputy Testerman arrived on the scene, Lemus "was sitting in the driver's seat crying hysterically[.]" Deputy Testerman testified that Lemus was "afraid to get out" of the car:

> She looked at me and shook her head no, she didn't want to get out. I believe she didn't realize that I was a deputy at first, but then she finally realized that I was a deputy. I don't know if dispatch told her I was on the scene at that time. So then finally she did get out of the vehicle still crying hysterically as I walked her back to my patrol car. She was physically trembling.

Deputy Testerman further testified that he then asked Lemus what happened. The prosecutor asked the deputy about Lemus's response, and defense counsel objected. The court overruled the objection: "She has just alleged that she has been choked, although that has not been proven yet because the case is still going on, but she was, according to this deputy, hysterical, crying." Responding to the State's question, Deputy Testerman testified as follows: "She stated to me that Jesse had choked her."

Lemus's statement to Deputy Testerman was admissible because it was "made at such a time and under such circumstances that the exciting influence of the occurrence clearly produced a spontaneous and instinctive reaction on the part of the declarant . . . [who is] still emotionally engulfed by the situation." *Harrell*, 348 Md. at 77 (alterations in original) (quoting *Harmony*, 88 Md. App. at 319). Lemus's 911 call, which this Court listened to, confirms the court's finding that she was "hysterical, crying" as the officer approached Lemus's vehicle.

Lemus testified during the State's case-in-chief[7] before the deputies testified. Thus, Lemus's testimony during the State's case-in-chief—and the 911 call—provided context for Deputy Testerman's testimony about Lemus's excited utterance. During the 911 call, Lemus states: "He said he's going to kill me." When the 911 operator asked when the incident happened, Lemus replied: "Right now." Lemus testified that, while she was in the car, Cook "was trying to pull the handle . . . , and then with his hand he kept hitting the glass." When the prosecutor asked Lemus why she screamed during the 911 call, Lemus stated: "I thought he was going to open the car[.]" Lemus recounted that she saw an officer arrive when the 911 call ended. Around that time, Deputy Testerman took Lemus to his patrol car. At that point, Lemus's demeanor had not changed, and "she was still crying hysterically and trembling."

Given Lemus's demeanor and the temporal proximity to the startling events, the court did not err in determining that Lemus "was under the stress of excitement caused by the" startling events when she told Deputy Testerman, in his patrol car, that "Jesse had choked her." Md. Rule 5-803(b)(2). *Compare Marquardt v. State*, 164 Md. App. 95, 126 (2005) ("emotionally upset" and "hysterical" assault victim's statements to police officer, in a patrol car, minutes after the assault ended, were admissible as excited utterances) *with id*. at 128-29 (assault victim's statements to the same police officer, about thirty minutes after the assault, were not excited utterances because there was nothing to suggest that the

[7] Lemus also testified as a rebuttal witness for the State.

victim was reacting without deliberation at that time), *overruled in part on other grounds by Kazadi v. State*, 467 Md. 1 (2020).

b. Deputy Leif's testimony

When Deputy Leif arrived on the scene, Deputy Testerman was speaking to Lemus "in front of his car." Deputy Leif testified about his observations of Lemus's demeanor: "As I approached, [Lemus] was visibly crying. She was upset. Her hands and arms were shaking. She seemed pretty scared."

Deputy Leif approached Cook and spoke with him on the front porch of the home. Deputy Leif then reapproached Lemus, who was in the back of an ambulance. He testified about his observations of Lemus's demeanor at that point: "She was still upset. She wasn't crying any more, but she was still pretty scared. Her hands were still shaking. I immediately noticed that she had red marks around her neck and her eyes were pretty red with a few red spots in them." The prosecutor asked Deputy Leif about what Lemus said when she was in the ambulance, and defense counsel objected:

[THE STATE]:	Okay. When she's in the ambulance, what did she tell you happened?
[DEPUTY LEIF]:	She said that her and Mr. Jesse were upstairs in the bedroom and they were initially having a verbal argument about money. She stated --
[THE STATE]:	Okay, what did she say?
[DEPUTY LEIF]:	She stated that a few minutes went by of them just yelling back and forth about money. She stated that's when Mr. Jesse took both of his hands and placed them around her neck and squeezed tightly.

[THE STATE]:	Okay, what did she say next?
[DEPUTY LEIF]:	She stated that she went black. She --
[DEFENSE COUNSEL]:	Objection, Your Honor.
THE COURT:	Sustained.
[THE STATE]:	Did you ask her what she told the defendant?
[DEPUTY LEIF]:	Yes.
[THE STATE]:	While he was strangling her?
[DEPUTY LEIF]:	Yes.
[DEFENSE COUNSEL]:	Objection, Your Honor.
THE COURT:	Overruled.
[THE STATE]:	What did she say? Sorry.
[DEPUTY LEIF]:	She said that she was unable to speak for most of the incident because of how tightly she was being constricted around her neck.[8]

Lemus's statement to Deputy Leif does not qualify as an excited utterance. *Marquardt v. State*, 164 Md. App. 95, is instructive. In *Marquardt*, the appellant abducted and assaulted his wife. *Id*. at 113-14. Thirty minutes after the wife escaped, she gave a statement to a police officer at the hospital, where she was being treated for her injuries.

[8] The State argues that Cook's argument as to Deputy Leif's testimony on this point is unpreserved because Cook failed to object when Deputy Leif stated, "[s]he stated that's when Mr. Jesse took both of his hands and placed them around her neck and squeezed tightly." Therefore, according to the State, "Cook waived the right to appeal to the admission of the similar, objected-to testimony thereafter." Again, this preservation issue is an exceedingly close call, but we shall exercise our discretion to consider it.

Id. This Court held that although the wife was "still a little upset" and "crying," "there [was] nothing in [the officer's] description of [the wife's] mental or emotional state to suggest that she was reacting without deliberation." *Id*. at 128.

Similarly, although Lemus was still upset, she was no longer crying when she spoke to Deputy Leif. Moreover, some time had passed because Lemus's statement to Deputy Leif occurred after Deputy Leif had spoken to Cook and after Lemus had been moved to the back of an ambulance. The totality of the circumstances does not support the conclusion that Lemus was incapable of reflective thought at the time of her statement to Deputy Leif. *See Harrell*, 348 Md. at 77 ("In determining whether a statement falls within the excited utterance exception, we examine the totality of the circumstances."), *see also Marquardt*, 164 Md. App. at 128 (quoting *Parker v. State*, 365 Md. 299, 313 (2001) (noting that "the essence of the excited utterance exception is the inability of the declarant to have reflected on the events about which the statement is concerned"). For these reasons, the court erred in admitting Lemus's statement to Deputy Leif.

Even though the trial court erred, harmless error is not reversible. To prevail under a harmless error analysis, the State must convince the appellate court "that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict." *Dorsey v. State*, 276 Md. 638, 659 (1976). "'In order for the error to be harmless, we must be convinced, beyond a reasonable doubt, that the error in no way influenced the verdict.'" *Marquardt*, 164 Md. App. at 129 (quoting *Weitzel v. State*, 384 Md. 451, 461 (2004)). In reviewing

the record, we weigh "the importance of the tainted evidence; whether the evidence was cumulative or unique; the presence or absence of corroborating evidence; the extent of the error; and the overall strength of the State's case." *Rosenberg v. State*, 129 Md. App. 221, 254 (1999) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

For the following reasons, the inadmissible statement was cumulative and corroborated by ample, similar evidence, the error was not extensive, and the State's case was strong:

- The State's first witness, EMT Edward Skabisky, testified—without objection—as follows: Lemus told EMT Skabisky that Cook "had strangled her, and she said during that time, she had started to see black spots." EMT Skabisky noticed that Lemus had "a small amount of bruising" around her neck.
- Nurse Anne Palmer testified that Lemus told her that Cook "was on the bed and he came at me and grabbed me around the neck and was on top of me."
- Dr. Holtzinger opined that Lemus "experienced a sever[e] nonfatal strangulation event, as evidenced by the trauma, all the trauma that I had identified, and her neurological symptoms that were consistent with anoxia to the brain." Dr. Holtzinger testified about the meaning of anoxia: "Anoxia means no oxygen. It's basically the lack of oxygen. So there is hypo -- hypoxia, which is low oxygen levels. But when you get to the point of anoxia, that's when you start to experience some of those other things, like

the blacking out and not being able to see, and those other neurological symptoms."

- The State introduced photos of the injury on Lemus's neck.
- The State introduced Lemus's 911 call. During the call, Lemus sounds distressed, and she told the 911 operator that Cook had "choked [her]."
- Deputy Chad Smith, who accompanied Lemus to the hospital, testified as follows: "[Lemus] was constantly checking herself, meaning doing, you know, personal checks of her neck region. She would look like she was struggling to swallow, like gulp." Deputy Smith also testified that Lemus had "red marks around her neck."

In light of this evidence, we fail to see how the improperly admitted statement contributed in any way to the jury's verdict. For all these reasons, we are satisfied that the error in admitting Lemus's hearsay statement to Deputy Leif was harmless beyond a reasonable doubt.

IV.

Cook claims that the court abused its discretion by allowing the State to give an improper closing argument. On appeal, Cook challenges two parts of the State's closing argument.

First, Cook's counsel objected when the prosecutor claimed that Lemus's testimony was consistent because the car "door handle was completely ripped off." Cook's counsel stated: "Objection, Your Honor. The picture doesn't even show that." The court

responded: "You'll be allowed to address those issues in your closing argument. Objection overruled."

Second, Cook's counsel asked to approach the bench because counsel was uncertain about the accuracy of the prosecutor's rebuttal argument. That rebuttal argument was spurred by Cook's counsel's attribution of a quote — in Deputy Leif's report — to Lemus. The State argued that Cook, not Lemus, was the source of that quote.

Parties have great latitude in their presentation of closing arguments. *Ingram v. State*, 427 Md. 717, 727 (2012). Regulation of closing argument is within the sound discretion of the trial court. *Degren v. State*, 352 Md. 400, 431 (1999). The exercise of that discretion should not be disturbed "unless there is a clear abuse of discretion that likely injured a party." *Ingram*, 427 Md. at 726 (citing *Grandison v. State*, 341 Md. 175, 225 (1995)). Nevertheless, it is improper for counsel to "comment upon facts not in evidence or . . . state what he or she would have proven." *Mitchell v. State*, 408 Md. 368, 381 (2009) (alteration in original) (quoting *Smith v. State*, 388 Md. 468, 488 (2005)).

As to Cook's first objection, the prosecutor's statement that the car door handle was "completely ripped off" was a proper comment on the evidence that Cook broke the car door handle when he tried to enter the car where Lemus was sheltering. Lemus testified that Cook "kept trying to open the door[,]" and "[h]e was trying to pull the handle" while she was in the car. Lemus also testified that the handle was unbroken before Cook tried to enter the car on the night of the assault. Furthermore, after defense counsel's objection,

the prosecutor rephrased the argument: "The door handle was ripped to the point it was unusable, right?"

During closing arguments, the prosecution is allowed liberal freedom of speech and may comment on the evidence and advance inferences that can reasonably be drawn from the evidence. *Lee v. State*, 405 Md. 148, 163 (2008) (citing *Degren*, 352 Md. at 429-30). The State introduced a picture of the broken car door handle into evidence. That picture showed that one side of the handle was detached from the car frame. Because the picture was available to the jury, the jurors could assess the extent of the door handle damage and decide whether the State's characterization of that damage was a literal description or an oratorical flourish. *See Miller v. State*, 151 Md. App. 235, 250-51 (2003) ("There are no hard-and-fast limitations within which the argument of earnest counsel must be confined—no well-defined bounds beyond which the eloquence of an advocate shall not soar. . . . He [or she] may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions." (quoting *Wilhelm v. State,* 272 Md. 404, 413 (1974), *abrogated on other grounds by Simpson v. State*, 442 Md. 446 (2015))). The court did not abuse its discretion by overruling Cook's objection to the State's characterization of the door handle damage.

As for Cook's second challenge to the State's closing argument, some background information is required. This challenge centers on whether Deputy Leif's report stated that Cook or Lemus reported that Lemus ran outside and screamed for help. During the State's direct examination, Deputy Leif testified that Cook had told him that Lemus ran outside "yelling and screaming for help." On cross-examination, the following exchange occurred:

[COOK'S COUNSEL]: Okay, you attribute a statement to Ms. Lemus that when she ran out the front door she was screaming for help.

[DEPUTY LEIF]: Yes.

On redirect examination, the State, without objection, elicited the following testimony:

[THE STATE]: The Defense also brought up that he mentioned that it was attributed to her that she was screaming for help, but actually in your report your [sic] attributing that statement to [Cook], correct?

[DEPUTY LEIF]: Yes.

[THE STATE]: The defendant told you that [Lemus] ran out of the house screaming and he had no idea why.

[DEPUTY LEIF]: Yes.

[THE STATE]: Screaming for help.

[DEPUTY LEIF]: Yes.

In her closing argument, the prosecutor told the jury: "Defense said they were arguing about money, they were walking down the stairs to the basement, she ran out of the front door screaming for help and he had no idea why that happened and why she ran out the front door."

During his closing argument, Cook's attorney claimed that Deputy Leif's report attributed this quote to Lemus:

[COOK'S COUNSEL]: I asked Deputy Leif concerning the comment, ran outside screaming for help. The State came back with, that was [what] Mr. Cook said. The report does not say that. The report attributes that comment to Ms. Lemus.

[THE STATE]: Objection.

THE COURT: Overruled.

During the prosecutor's rebuttal closing, she attributed this quote to Cook, contending that Deputy Leif's report stated that Cook had said that Lemus ran outside screaming for help:

> [THE STATE]: [Defense counsel] brought up Deputy Leif's report and I quote, [Cook] advised that after a few moments of yelling at each other, [Lemus] advised that the money is in the basement. [Cook] advised that upon walking down the stairs and got to the bedroom, [Lemus] then ran out the front door screaming for help. That's attributed to [Cook], so that was incorrect.

Cook's counsel did not object to that argument. Rather, Cook's counsel requested a bench conference at the end of the State's closing argument, about three transcript pages after the State made the argument that Cook challenges on appeal. At that bench conference, the following colloquy occurred:

[DEFENSE COUNSEL]: Your Honor, can we approach.

(Bench conference follows:)

> [DEFENSE COUNSEL]: Maybe this is stupid, but I don't want [the prosecutor] to think I'm a jerk. If you could please read that highlighted area and tell me that that doesn't say, that's when [Lemus] said she ran out screaming, blah, blah. Not that, that [Cook] --

[THE STATE]: They both said that.

> [DEFENSE COUNSEL]: It may be, we may be referring to different paragraphs. And I don't know if it's necessary

to instruct the jury on it or not. I don't want to be --

THE COURT: They [are] all going to have their own recollection on what happened.

[DEFENSE COUNSEL]: I know.

[THE STATE]: This is what I'm reading.

[DEFENSE COUNSEL]: See, I'm reading down in this paragraph.

THE COURT: Okay.

[DEFENSE COUNSEL]: And that's all [Lemus].

[THE STATE]: Okay, we'll [sic] they both said the same.

THE COURT: Well, they're going to have to decide based on the evidence and testimony.

[DEFENSE COUNSEL]: Okay, I understand.

THE COURT: Got it.

(Bench conference concluded.)

Md. Rule 8-131(a) provides in relevant part: "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[.]" Although Cook's counsel asked for a bench conference, he did not object to the State's argument that Cook challenges on appeal. Moreover, Cook's counsel did not ask for a remedy and did not "know if it's necessary to instruct the jury on it[.]" "Merely alluding to a complicated subject that may call for further exploration is not the express lodging of a loud and clear objection necessary to preserve an objection for appellate review." *Gantt v. State*, 241 Md. App. 276, 302 (2019).

In any event, even if this issue were preserved, Cook's argument is unavailing. On redirect examination, Deputy Leif testified that his report stated that Cook told him that Lemus had run outside and screamed for help. Thus, the State's closing argument was based on admitted testimony. *See Whack v. State*, 433 Md. 728, 748 (2013) (holding that closing arguments "must be grounded in the evidence or reasonable inferences drawn from the evidence"). Nevertheless, defense counsel argued that Deputy Leif attributed the quote to Lemus, not Cook.[9] In rebuttal, the State properly responded to the issue that defense counsel raised during closing argument. *Degren*, 352 Md. at 431. We perceive no error or abuse of discretion.

V.

Next, Cook contends that the court "may have based [Cook's] sentence on improper considerations." At a pretrial hearing in December 2021, Cook's trial counsel advised him that the guidelines range was "10 to 20" years. At the sentencing hearing, the State represented that Cook's guidelines were "10 to 20" years, and the State "ask[ed] for executed time of 20" years. At that point, Cook's attorney argued that the guidelines were a "6 to 12 year range[.]" Cook's attorney represented that Cook was not on probation and disputed the State's ability to prove Cook's out-of-state convictions. As noted, the court imposed an executed sentence of 20 years.

This Court has explained the standard of review for sentencing considerations:

[9] As suggested by the bench conference colloquy, it appears that the report attributed the quote at issue to Lemus *and* Cook, as the parties were referencing different parts of Deputy Leif's report.

> In Maryland, a sentencing judge is vested with almost boundless discretion. *Jennings v. State*, 339 Md. 675, 664 A.2d 903 (1995); *State v. Dopkowski*, 325 Md. 671, 602 A.2d 1185 (1992); *Logan v. State*, 289 Md. 460, 425 A.2d 632 (1981); *Johnson v. State*, 274 Md. 536, 336 A.2d 113 (1975). A defendant's sentence should be individualized "to fit 'the offender and not merely the crime.'" *Smith v. State*, 308 Md. 162, 167, 517 A.2d 1081 (1986) (quoting *Williams v. New York*, 337 U.S. 241, 247, 69 S. Ct. 1079, 1083, 93 L.Ed. 1337 (1949)). Consequently, the defendant's sentence "should be premised upon both the facts and circumstances of the crime itself and the background of the individual convicted of committing the crime." *Jennings*, 339 Md. at 683, 664 A.2d 903; *Dopkowski*, 325 Md. at 679, 602 A.2d 1185 (1992).
>
> The trial court is not limited to a consideration of prior convictions. "To aid the sentencing judge in fairly and intelligently exercising the discretion vested in him, the procedural policy of the State encourages him to consider information concerning the convicted person's reputation, past offenses, health, habits, mental and moral propensities, social background and any other matters that a judge ought to have before him in determining the sentence that should be imposed." *Smith*, 308 Md. at 169, 517 A.2d 1081 (quoting *Bartholomey v. State*, 267 Md. 175, 193, 297 A.2d 696 (1972)). A trial court may consider uncharged or untried offenses, or even circumstances surrounding an acquittal. *Smith*, 308 Md. at 172, 517 A.2d 1081.
>
> The sentencing court's broad discretion does not permit, however, imposition of sentences that are cruel and unusual; violative of constitutional requirements; motivated by ill-will, prejudice, or other impermissible considerations; or that exceed statutory limitations. *Jennings*, 339 Md. at 683, 664 A.2d 903.

Anthony v. State, 117 Md. App. 119, 130-31 (1997). On appeal, Cook advances four contentions as to why he believes that the court was motivated by impermissible considerations during sentencing.

First, Cook argues that he was advised by his parole officer that his supervision would be "close[d] . . . out in a satisfactory status." At sentencing, however, the court

apparently had a letter from the Department of Corrections stating that Cook was on parole at the time of the offense.

Second, Cook challenged the State's documentation relating to Cook's criminal history in Florida and Virginia. But the court stated that even if the State's proposed guidelines worksheet had been incorrect, "the [c]ourt can go above the guidelines in these cases as long as it gives a reason." Indeed, the court emphasized that a sentence above the guidelines would be appropriate here, even if the State's guidelines calculation had been incorrect: "The [c]ourt believes that sentence is within [t]he top end of the guidelines; however, if it is not, the [c]ourt still has gone above the guidelines based on the recommendations of the State's Attorney's Office and the particular facts of this case and the [c]ourt's belief in the dangerousness of the defendant."

Third, Cook argues that the prosecutor's proposed sentencing guidelines erroneously included a point for injury to Lemus. The Maryland Sentencing Guidelines Manual provides: "Victim injury means physical or psychological injury to the crime victim, the cause of which is directly linked to the conduct of the defendant in the commission of the convicted offense[,]" and "[v]ictim injury, whether physical or psychological, shall be based on *reasonable proof*." Maryland State Commission on Criminal Sentencing Policy, *Maryland Sentencing Guidelines Manual*, ch. 6.1, at 21 (July 1, 2022), available at https://msccsp.org/Files/Guidelines/MSGM/Version_14.0.pdf (emphasis added). Under such circumstances, to calculate the offense score, the addition of one point is appropriate when the victim suffers a non-permanent injury. *Id*. at 22. Here,

the prosecutor assigned one point on the guidelines worksheet for Lemus's non-permanent injury. At trial, the State adduced reasonable proof that Lemus sustained medical injury to her neck because Cook strangled her. Thus, the court was not misled by the State's contention as to Lemus's non-permanent injury.

Fourth, Cook contends that "the prosecutor made reference to an entirely separate case involving unproven allegations against Mr. Cook." The State told the court at sentencing:

> [Cook] is facing a very serious case as Your Honor has heard from Ms. Carpenter and Ms. Leache in the spring and the allegations there involve the death of Ms. Glimia's son with the defendant. So, he is still facing that and will remain in our detention center until that's adjudicated.

Preliminarily, we note that the court did not expressly rely on this representation by the State. But even if the court relied on that representation, "[a] trial court may consider . . . untried offenses" at sentencing. *Anthony*, 117 Md. App. at 131 (citing *Smith*, 308 Md. at 172).

For all these reasons, the court did not base its sentence on improper considerations.

VI.

Lastly, Cook claims that the evidence is legally insufficient to sustain his conviction. When reviewing the sufficiency of the evidence supporting a criminal conviction, we ask "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." *McClurkin v. State*, 222 Md. App. 461, 486 (2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "In applying that standard,

we give 'due regard to the [fact-finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Id.* (alteration in original) (quoting *Harrison v. State*, 382 Md. 477, 488 (2004)). We will not "retry the case" or "re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. 174, 185 (2010).

First-degree assault is prohibited under MD. CODE ANN. (2002, 2021 Repl. Vol.), § 3-202 of the Criminal Law Article ("CRIM. LAW"). CRIM. LAW § 3-202(b)(1) provides that "[a] person may not intentionally cause or attempt to cause serious physical injury to another." CRIM. LAW § 3-201(d) defines "[s]erious physical injury" as a "physical injury that: (1) creates a substantial risk of death; or (2) causes permanent or protracted serious: (i) disfigurement; (ii) loss of the function of any bodily member or organ; or (iii) impairment of the function of any bodily member or organ."

Effective October 1, 2020, CRIM. LAW § 3-202 expressly identifies strangulation as a modality of first-degree assault. Indeed, CRIM. LAW § 3-202(b)(3) states that "[a] person may not commit an assault by intentionally strangling another." CRIM. LAW § 3-202(a) provides the following definition: "In this section, 'strangling' means impeding the normal breathing or blood circulation of another person by applying pressure to the other person's throat or neck."

Cook acknowledges that Lemus testified that Cook "took [her] by the neck" to the point that she "couldn't breathe" and her "throat was completely closed." But Cook argues that "other evidence cast doubt on this account." For example, Cook notes that Lemus's

blood pressure was within normal limits, she was able to walk upstairs and retrieve her shoes, and a CT scan showed no signs of acute injury. Cook further claims that Lemus's testimony was not credible because she "told Nurse Palmer that she had been strangled by one hand, while she told the law enforcement officers and emergency personnel that Mr. Cook had held her using two hands." In addition, Lemus testified that she was not wearing a necklace, but "photographs introduced into evidence showed a necklace." Cook also claims that the police investigation fell short. Cook's argument, however, casts aside the role of the jury and fails to recognize our role as an appellate court: "We do not second-guess the jury's determination where there are competing rational inferences available." *Smith*, 415 Md. at 183. Indeed, as Cook concedes, "the testimony of a single eyewitness, if believed by the factfinder, is sufficient to convict."

At any rate, the State presented ample evidence beyond the testimony of a single eyewitness. As outlined in Section III.b. of this opinion, Lemus's testimony was corroborated by photos of the injury on her neck, an EMT's observation of bruising around Lemus's neck, Lemus's 911 call, and an expert opinion that Lemus "experienced a sever[e] nonfatal strangulation event, . . . and her neurological symptoms . . . were consistent with anoxia to the brain." The evidence was sufficient to convict Cook of first-degree assault.

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